

Reason Papers

A Journal of Interdisciplinary Normative Studies

Special Lomasky Symposium Issue

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Ayn Rand's Critique of Ideology Chris M. Sciabarra

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**ANARCHICAL SNARES:
A READING OF LOCKE'S
SECOND TREATISE**

STUART D. WARNER
Roosevelt University

If Mr. Locke's maxims were to be executed according to the letter... they would necessarily unhinge, and destroy every government on earth.

Josiah Tucker, *A Letter to Edmund Burke*, 1775

By the practice of governments themselves, [Locke] argues, 'as well as by the law of right reason, a child is born a subject of no country or government.' Here we seem to be led straight to anarchy.

Leslie Stephen, *History of English Thought in the Eighteenth Century*, Vol. II, 1881

In fact, as Mr. Laslett has so ably shown, neither of these two major opponents [Sidney and Locke] seems to have really understood or answered Filmer's main case or his attack on the libertarianism and the contract theory of the school of thought to which they belonged.

W. H. Greenleaf, *Order, Empricism and Politics*, 1964

Introduction

R.G. Collingwood was certainly correct when he wrote in his *An Autobiography*,

You cannot find out what a man means by simply studying his spoken or written statements, even though he has spoken or written with perfect command of language and perfectly truthful intention. In order to find out his meaning you must know what the question was (a question in his own mind, and presumed by him to be in yours) to which the thing he has said or written was meant as an answer.¹

I think that this is especially true in the case of John Locke's *Second Treatise of Government*, a work that is, despite its clarity of language, notoriously difficult to understand.

Although early twentieth-century scholars cast this work as being a response to Hobbes,² the scholarly tide has turned in favor of viewing the *Second Treatise*, like the *First*, as principally constituting a rejoinder to the seventeenth century Divine Right of Kings theorist Sir Robert Filmer, and more specifically, as a counter to Filmer's Patriarchalism.³

My sentiments lie with this revisionary movement: I too read the *Second Treatise* as being in large measure a response to Filmer. In this essay, I shall attempt to make a contribution to this way of reading Locke. However, the focus will not be on Locke's concern with the patriarchal views of Filmer; rather, it will be on Locke's attempt to answer Filmer's polemics against the doctrine of natural rights or freedom. For Filmer, the logic of the doctrine of natural rights inexorably requires the embracing of a theory of anarchism and, as such, entails the impossibility of justifying the existence of any form of government. And to Filmer, this constituted a *reductio ad absurdum* of any natural rights philosophy. Locke's *Second Treatise* can illuminatingly be seen as being animated, at least in part, by the desire to undercut Filmer's contention. Thus, to return to our Collingwoodian beginning, I shall show, in sections I-VIII, that we can make a great deal of sense of the *Second Treatise* if we view Locke as attempting to answer the question of how a natural rights political philosophy can be reconciled with the advocacy of government and, in particular, a limited government.

That we can view the *Second Treatise* in this way says nothing, of course, about Locke's intentions. Although it is impossible to give anything approaching a conclusive proof for this, I do believe that Locke did set out to answer Filmer's attack on the natural rights

philosophy in a comprehensive manner. I offer some reasons for this in the conclusion of this essay.

I

Filmer is best known, and most frequently read, for his patriarchal political philosophy. For Filmer, political power, *legitimate* political power, is essentially a specific type of paternal power. God created the first political community, Adam's family, with Adam as supreme authority. All further political communities are merely extensions thereof; as such, all political authority must emanate from Adam, and therefore the right to rule has to be traced back to Adam.

Everything else notwithstanding, Filmer's greatest theoretical difficulty was to offer a plausible theory of succession that would allow him to justifiably determine who should rule. In trying to solve this problem, Filmer appealed directly to heredity, and although he was not particularly explicit about it, there are hints that he was willing to rest his case on primogeniture. As Filmer's critics were quick to notice, the epistemological difficulties of tracing the right to rule of James I, for example, to Adam and his first son, as Filmer desired to do, were overwhelming.

Much of Filmer's defense of hereditary absolute monarchy was polemical: it was designed to demonstrate that those arguments that attempt to found political legitimacy on the consent of the governed must fail. And insofar as these arguments were typically predicated upon an appeal to man's natural freedom or natural rights, this appeal too fell under the barrage of Filmer's polemics.

Filmer's critique of the consent argument and the theory of natural rights (or freedom) is ubiquitous throughout the corpus of his political writings;⁴ however, its most systematic presentation is to be found in his 1648 tract *The Anarchy of a Limited or Mixed Monarchy*,⁵ a work aimed at the "parliamentary publicist"⁶ Philip Hunton. In this work, Filmer argues that the doctrine of natural rights or freedom, and the consent theory of political legitimacy derived therefrom, inexorably lead, both in theory and practice, to anarchism. Since upholding anarchism is, Filmer maintains, an absurdity, so too the theories of natural rights and consent must be absurdities.

II

Filmer's phillipic in *The Anarchy of a Limited or Mixed Monarchy* is put forward in a series of six arguments. I shall consider each in turn, liberally quoting Filmer as I proceed.

The first argument.

If they understand that the entire multitude or whole people have originally by nature power to choose a King, they must remember that by their own principles and rules, by nature all mankind in the world makes but one people, who they suppose to be born alike to an equal freedom from subjection; and where such freedom is, there all things must of necessity be common: and therefore without a joint consent of the whole people of the world, no one thing can be made proper to any one man, but it will be an injury, and a usurpation upon the common right of all others. From whence it follows that natural freedom being once granted, there cannot be any one man chosen a King without the universal consent of all the people of the world at one instance, *nemine contradicente*. (*Anarchy*, p.285)

As is the case with the other five arguments to be considered, this argument is a *reductio ad absurdum*. Filmer is attempting to show the absurdities to which a natural rights philosophy leads. In this first instance, the conclusion is suppressed; however, before making it explicit, I shall first lay down the premises that yield it.

Here Filmer considers the possibility that when natural rights theorists write of legitimate political power being predicated upon the consent of the governed, the latter refers to the consent of *all* of mankind⁷ as opposed to some part of it. Given the equal freedom or rights of all mankind, any legitimate King, then, must be chosen by the joint consent of all of mankind. For to be governed by a King of whom one does not approve would be a violation of one's freedom: one would be made to suffer a King by force. All of this is highly problematic, according to Filmer. For, and this is the suppressed conclusion, *universal* consent at *one time* is impossible. And if it is impossible, then as Filmer sees the matter, on this reading of a natural rights philosophy, government by its very nature is illegitimate. Yet, Filmer believes, this is absurd.

The second argument.

This argument is part of the same paragraph as what I call the first argument, and since Filmer never explicitly set forth a conclusion to that argument, it would be easy to surmise that this second argument is really part of the first. I think this is mistaken; however, the reasons why can be made clear only after a consideration of the third argument.

To turn to this second argument, Filmer writes:

Nay, if it be true that nature hath made all men free; though all mankind should concur in one vote, yet it cannot seem reasonable, that they should have power to alter the law of nature; for if no man have power to take away his own life without the guilt of being a murderer of himself, how can any people confer such a power as they have not themselves upon any one man, without being accessories to their own deaths, and every particular man become guilty of being *felo de se*? (*Anarchy*, p.285)

Filmer begins the argument by supposing that the problem of the previous argument has been overcome, and that we can achieve the requisite universal consent. Nevertheless, Filmer wants to argue that the natural rights position still leads to an absurdity. Filmer's second argument demands that one ask, To what is being consented? The answer must be that individuals are consenting to *alienate* some of their freedom or rights to the King. Filmer believes that this is inconsistent with the natural rights position. To see why, we must turn to Filmer's conception of the theory of natural rights.

For Filmer, the natural rights philosophy is one that holds, among other things, that certain freedoms or rights are in-defeasible, that is, they cannot be taken away or voided by others, and, most importantly in this context, are inalienable, that is, cannot be waived or relinquished by the agent himself.⁸ The natural rights tradition is not as uniform as perhaps Filmer suspects; however, there are certainly important strains in the tradition that hold especially to the inalienability of certain rights. It was not unusual, for example, to find natural rights theorists arguing that the rights to life and liberty are inalienable, and thus one does not have the right to commit suicide or to sell one's self into slavery,⁹ for that would alienate one's right to life.

Now turning back to the second argument, Filmer is claiming that since the rights to life and liberty are inalienable, on his conception of the natural rights position, then these rights cannot be alienated by relinquishing them to a King. Legitimate political power demands, however, as Filmer conceives of it, that the King have the power over a person's liberty and life; indeed Filmer believes that under the natural rights position, every law constitutes an infringement of liberty.¹⁰ Thus, the natural rights position is again shown to be incompatible with the establishment of government, and finds itself inescapably led to embrace anarchism.

The third argument.

Suppose, Filmer writes, that by "the people," Hunton and other natural rights theorists mean "the people of particular regions or countries," (*Anarchy*, p.286) and not all of mankind; and that it is this smaller group which will be the body consenting to a government. Can this extricate the natural rights position from its problems? Filmer asks us to observe the following consequences.

Since nature hath not distinguished the habitable world into kingdoms, nor determined what part of a people shall belong to one kingdom, and what to another, it follows that the original freedom of mankind being supposed, every man is at liberty to be of what kingdom he please, and so every petty company hath a right to make a kingdom by itself; and not only every city, but every village, and every family, nay, and every particular man, a liberty to choose himself to be his own King if he please; and he were a madman that being by nature free, would choose any man but himself to be his own governor. Thus to avoid the having of one King of the whole world, we shall run into a liberty of having as many Kings as there be men in the world, which upon the matter, is to have no King at all, but to leave all men to their natural liberty, which is the mischief the pleaders for natural liberty do pretend they would most avoid. (*Anarchy*, p.286)

In considering this argument, we should begin with the concept of "kingdom" which makes its way into the early lines of this passage. Filmer seems to understand "kingdom" as referring both to a political entity *and* to a determinate geographical area. If nature had "distinguished the habitable world into kingdoms," then we would be in a position to distinguish various peoples, and therefore determine who belonged to which kingdom, and as such, whose consent mattered. But we are not so fortunate as to be able to distinguish various peoples, Filmer points out, for nature does not divide itself into distinct geo-political entities. Indeed, this must be granted by the natural rights theorists, Filmer would claim, since *ex hypothesi* it is only by consent that political bodies are formed. Therefore, Filmer is arguing that the attempt to avoid the difficult straits laid down by the first argument by a different meaning being attributed to "the people" must fail, as there seems to be no way by which to separate mankind into these peoples. But, Filmer contends, things get worse for the natural rights position.

Granted that there are no "natural" kingdoms, and that men possess an "original freedom," for example, the rights to life and liberty, every man and every group of men can choose to be part of whatever kingdom he or they like. To this, Filmer adds the psychological premise that only a madman would choose someone other than himself as King. Filmer thus believes that the natural rights position entails in theory and will lead in practice to there being as many Kings as there are men. This, however, is tantamount to there being no government whatever. Filmer's claim is that, although natural rights theorists recognize the necessity for government, the logic of their position, including the theory of the consent of the governed, precludes there being any justification for such an institution.

Earlier I suggested that what I call Filmer's first and second arguments are different, and that my reasoning for this was based in part on the third argument. I am now in a position to note the basis for my claim. Filmer is quite explicit in this third argument that he is attempting to give the natural rights theorists a "way out" through a more relaxed conception of "the people." He would not do so unless he had already argued that a more stringent notion of "the people" failed the natural rights position. Since what I call the first argument certainly leads to this conclusion, I believe I am justified in assuming that it is there that Filmer is making the more stringent claim, and that the conclusion is simply suppressed.

The fourth argument.

Here Filmer briefly argues that even if some partition of the world into kingdoms could justifiably be made, and some people did attempt to elect a King, on the natural rights position only those who consented to be subjected would be so bound. But, Filmer asks rhetorically, who would so submit?

The fifth argument.

Filmer writes,

Yet, for the present to gratify them so far as to admit that either by nature, or by a general consent of all mankind, the world at first was divided into particular kingdoms, and the major part of the people of each kingdom assembled, allowed to choose their King: yet it cannot truly be said that ever the whole people, or the major part, or any considerable part of the whole people of any nation ever assembled to any such purpose. For except by some secret miraculous instinct they should all meet at one time, and place, what one man,

or company of men less than the whole people hath power to appoint either time or place of elections, where all be alike free by nature? and without a lawful summons, it is most unjust to bind those that be absent. The whole people cannot summon itself; one man is sick, another is lame, a third is aged, and a fourth is under age of discretion: all these at some time or other, might be able to meet, if they might choose their own time and place, as men naturally free should. (*Anarchy*, pp.286-287)

This argument assumes, like the preceding one, that a partition into kingdoms is possible without violating the principles of the natural rights philosophy, and has been made. Nevertheless, there is a difficulty that Filmer does not believe that the natural rights philosophy can answer: there is no basis for anyone's having the legitimate authority to call for an election at a particular time and place, for after all, we are theorizing about the origins of government; and to make such a call would violate the natural freedom of someone who either could not attend or who did not want to attend at that time or place. Furthermore, Filmer makes the historical claim that there has never been such an assemblage of either a whole people or most of a people.

Although it is left implicit in this argument, it is worth stressing that on Filmer's reading of the theory of natural rights, legitimate political power can only be established by contemporaneous, universal consent. Thus, Filmer believes that the natural rights position does not sanction majority rule and, as such, that one can be a political representative for another only with that person's direct consent.

The sixth argument.

Here Filmer argues that mankind is not invariable: it is constantly changing as new individuals are born. On the natural rights philosophy, Filmer asks, Why should these newborns fall under the authority of a King to whom they have never consented? Filmer suggests that one way around this problem is to maintain that "infants and children may be concluded by the votes of their parents." (*Anarchy*, p.287) To this Filmer responds as follows:

This remedy may cure some part of the mischief, but it destroys the whole cause, and at last stumbles upon the true original of government. For if it be allowed, that the acts of parents bind the children, then farewell the doctrine of the natural freedom of mankind; where subjection of children

to parents is natural, there can be no natural freedom. If any reply, that not all children shall be bound by their parents' consent, but only those who are under age: it must be considered, that in nature there is no *nonage*; if a man be not born free, she doth not assign him any other time when he shall attain his freedom[.]... (*Anarchy*, p.287)

In this argument, Filmer is inquiring into the question of why infants and children are subject to the constraints of government. He poses the natural rights philosophy with the following alternatives as to why they are so subject: either 1)infants and children have consented to be governed; or 2)the consent of parents binds their infants and children. Of course, the first alternative can be eliminated as being obviously untrue and impossible of being true on any intelligible sense of "consent."

The second is the more interesting alternative; nevertheless, it must fail as well. And the reason for its failure is not hard to find, for it eliminates consent as the principal ground for the exercise of political power. Nor can this alternative be salvaged, Filmer suggests, by the qualification that it is only infants or children of a certain age that can be concluded by their parents, since if a child is not born free (and hence can be bound by his parents), there does not appear to be any basis for his becoming free at a certain age. The qualification, Filmer believes, would be entirely arbitrary.

It should be added that Filmer's argument does allow the natural rights position yet another alternative, *viz.*, that the consent of neither child nor parents is pertinent to the issue of political legitimacy. However, this would completely undermine the whole philosophy. And thus, Filmer believes that he has impaled his opponents on the horns of a trilemma.

In this sixth argument, as in the prior five, we find Filmer attempting to press home his case against a natural rights political philosophy and its attendant theory of consent. What we once again find is Filmer's insistence that these theories lead directly to anarchism.

For Filmer, the implications of this sixth argument are quite profound, because even if the problems of the previous five arguments could be overcome by the philosophers of natural rights, political power could not legitimately be exercised over the up and coming population of the kingdom. And therefore, within the kingdom, there would not be contemporaneous, universal consent any longer, and the political power would no longer be legitimate. To put this same point somewhat differently, even if we had a legitimate government, it would begin to dissolve before our very eyes.

In examining all six of Filmer's arguments, there is one feature that pervades all of them, namely, his claim that the kind of consent required to establish a legitimate political authority while remaining faithful to a person's natural freedoms is impossible to find. If Filmer's arguments are at all plausible, then it would certainly behoove the natural rights philosophy to show that the kind of consent at issue is possible.

III

John Locke's *Two Treatises of Government* has as its general theme the issue of political power. The overwhelming importance of this issue to Locke is manifest in his remark in the *First Treatise* that:

The great Question which in all Ages has disturbed Mankind, and brought on them the greatest part of those Mischiefs which have ruin'd Cities, depopulated Countries, and disordered the Peace of the World, has been, Not whether there be Power in the World, nor whence it came, but who should have it.¹¹

The *First Treatise* canvassed and criticized, in extraordinary detail, the patriarchal conception of Filmer, the man whom Locke called "the great Champion of absolute Power[.]" (I, 2, p.159) Locke believed that in his *First Treatise* he had successfully made out the case for the position that "it is impossible that the Rulers now on Earth, should make any benefit, or derive any the least shadow of Authority from that, which is held to be the Fountain of all Power, Adam's Private Dominion and Paternal Jurisdiction[.]" (II, 4, p.285) In making out this case, Locke exhibited the most intimate familiarity with Filmer's political writings, a familiarity that included *The Anarchy of a Limited or Mixed Monarchy*, a work that although it is mentioned only once by name in the *First Treatise*, is cited by Locke no fewer than two dozen times.¹²

In the *First Treatise*, Locke recognized quite clearly that Filmer had both a positive and negative (or polemical) program. Locke's summary comment that, "Here we have the Sum of all his Arguments, for Adam's Sovereignty, and against Natural Freedom, which I find up and down in his...Treatises[.]" (I, 14, pp.168-169) is but one of many comments that is indicative of this. Furthermore, Locke recognized just as clearly the kind of arguments that Filmer brought to bear against the doctrine of natural freedom: "[T]he way [Filmer] proposes to remove the Absurdities and Inconveniences of the Doctrine of Natural Freedom, is, to maintain the Natural and

Private Dominion of Adam." (I, 73, p.213) Locke saw, that is, that Filmer's arguments against "natural freedom" took the form of a *reductio ad absurdum*.

Believing himself to have shown numerous errors in Filmer's positive program, Locke announces at the beginning of his *Second Treatise* that we "must of necessity find out another rise of Government, another Original of Political Power, and another way of designing and knowing the Persons that have it, than what Sir Robert F. hath taught us." (II, 1, p.286) Locke's "new way," of course, will be to rest legitimate political power upon man's natural freedom and, by implication, the consent of the governed. In so doing, Locke is taking up what is at least in broadest essence the position that is the object of Filmer's negative program; moreover, it cannot be denied that Locke must have been aware that this was what he was doing.

Given the analysis of this section so far, one would have expected Locke in the *Second Treatise* to tackle Filmer's negative program head on; and yet, there is no direct and systematic critique of Filmer to be found in that work.¹³ However, this should not deter us from attempting to find a criticism of Filmer's polemics lurking within the *Second Treatise*, since we do have good reasons for expecting such an attack. And, indeed, I believe such a criticism of Filmer can be reconstructed out of some of the major elements of that work.

IV

If we are to find in Locke's *Second Treatise* a response to Filmer's polemics against a natural rights philosophy, then the place we should begin our search is with the role of consent in that work. As such, we must focus (albeit briefly) on the character of the two types of consent that Locke discusses there, namely, express and tacit.

Locke first broaches the distinction in section 119 of the *Second Treatise*. However, discussions of consent, without any qualifying adjective, are ubiquitous throughout the earlier sections of the work. This should provide no confusion since it is fairly clear that these prior discussions are all discussions of express consent. What this suggests, though, is that the notion of tacit consent is invoked to solve a different problem from that of express consent. To see that indeed this is the case, it will be helpful here to quote Locke's statement of the distinction between express and tacit consent.

Every Man being, as has been shewed, naturally free, and nothing being able to put him into subjection to any Earthly

Power, but only his own Consent; it it to be considered, what shall be understood to be a sufficient Declaration of a Mans Consent to make him subject to the Laws of any Government. There is a common distinction of an express and a tacit consent, which will concern our present Case. No body doubts but an express Consent, of any Man, entring into any Society, makes him a perfect Member of that Society, a Subject of that Government. The difficulty is, what ought to be look'd upon as a tacit consent, and how far it binds, i.e. how far any one shall be looked on to have consented, and thereby submitted to any government, where he has made no Expressions of it at all. And to this I say, that every Man, that hath any Possession, or Enjoyment, of any part of the Dominions of any Government, doth thereby give his tacit consent, and is as far forth obliged to Obedience to the Laws of that Government, during such Enjoyment, as any one under it; whether this his Possession be of Land, to him and his Heirs for ever, or a Lodging only for a Week; or whether it be barely travelling freely on the Highway; and in Effect, it reaches as far as the very being of any one within the Territories of that Government. (II, 119, pp.365-366)

The central issue of this quotation is to be found in the opening sentence: Under what circumstances is a man subject, that is, obligated, to the laws of a particular government? In turning to express consent as a source of such obligation, Locke remarks that such consent makes one a subject of that government and, therefore, obligated to its laws.¹⁴ Locke, then, is perfectly clear that the difficulty is in ascertaining why and to what extent tacit consent binds.

Both express and tacit consent are thus vehicles of political obligation. However, express consent has another function of paramount importance, namely, it is the basis for political legitimacy.¹⁵ Here, then, Locke is rather self-consciously differentiating between two problems of political thought: political legitimacy and political obligation. What we can see is that the real difficulty to which Locke is facing up is that of how a person can be obligated to a Government in which he is not a subject (in the sense of having expressly consented to that government). It is this problem that Locke hopes to solve with his appeal to tacit consent.

It is instructive to probe further into Locke's invocation of the notion of tacit consent and to consider what role it might have to play in answering Filmer's criticisms of natural rights theory. For it is the case, I believe, that the appeal to tacit consent by Locke is an important part of the attempt to remove some of the

sting from Filmer's critique.

This further probing must begin exactly where the lengthy quotation from Section 119 left off. In continuing his account of tacit consent, Locke remarks:

To understand this better, it is fit to consider, that every Man, when he, at first, incorporates himself into any Commonwealth, he, by his uniting himself thereunto, annexed also, and submits to the Community those Possessions, which he has, or shall acquire, that do not already belong to any other Government. For it would be a direct Contradiction, for any one, to enter into Society with others for the securing and regulating of Property: And yet to suppose his Land, whose Property is to be regulated by the Laws of the Society, should be exempt from the Jurisdiction of that Government, to which he himself the Proprietor of the Land, is a Subject. By the same Act therefore, whereby any one unites his person, which was before free, to any Commonwealth; by the same he unites his Possessions, which were before free, to it also; and they become, both of them, Person and Possession, subject to the Government and Dominion of that Commonwealth, as long as it hath a being. Whoever therefore, from thenceforth, by inheritance, Purchase, Permission, or otherways enjoys any part of the Land, so annexed to, and under the Government of that Commonwealth, must take it with the Condition it is under; that is, of submitting to the government of the Commonwealth, under whose Jurisdiction it is, as far forth, as any subject of it. (II, 120, p.366)

In addition to attempting to further explain tacit consent, this passage takes us some distance in understanding how Government can have any territories at all. And we must comprehend this latter point in order to grasp the former.

In sections 73, 117, and 119, Locke writes of the territories of government; yet prior to this section (120), it was far from clear how this could possibly come about. After all, individuals owned land, and the purpose of government, at least in part, was to protect it. From where did government territory come? Put somewhat differently, the question is this: there is no difficulty in understanding how government could be a political enterprise, but how can it be

a *geo-political* enterprise?

In this quotation, Locke puts forth an answer to this question—and it is an answer that is somewhat strange. Its beginnings are not at all perplexing: if one is to enter into a political society for the purposes of protecting one's property, then one must be subject to the means of that protection, namely, the government and its laws. Anything other than this, Locke writes, would involve some kind of contradiction. However, from this Locke leaps to conclude, without marshalling any additional support, that this land must always be subject to that government's jurisdiction, regardless of who its future owners will be. Land thus made a part of a political society, must always remain a part, as long as that society remains extant, and is therefore a territory of the government. Furthermore, Locke certainly assumes that those who join into a political society with one another will be living on land that is contiguous.

In trying to understand tacit consent better, Locke's appeal is to government territories. Indeed, on Locke's analysis, the foothold for tacit consent is to be found in the control that governments have over their territory, a control granted to them by members of that political society. As such, the government acquires certain rights and privileges in relation to property, that is, government acquires a certain kind of property rights. Just as when a person enters the home of another, he "tacitly" consents to certain dictates of the owner, so too when one enters the territory of a political society, there are certain requirements to which he must agree.

V

Having set out in detail sufficient for our purposes those features of Locke's position on express and tacit consent, and his account of governmental property into which tacit consent is inextricably woven, in the previous section of this paper, this section is devoted to seeing how these three notions serve as a foil against some of Filmer's attacks against a natural rights philosophy.

Although Filmer does not explicitly distinguish between the problems of political legitimacy and obligation, his arguments seem to suggest a concern with both problems. Certainly he could not understand how, on a natural rights philosophy, government could be rendered legitimate. Yet there is also a faint hint of a specific problem of obligation: even if a group of individuals "belonged" to a legitimate government, what of those who did not "belong"? Could they properly be held to be obligated to or liable to the same governmental dictates as those who did? Bearing this in mind, let

us turn to Locke's response to the problem of legitimacy as found in Filmer's first argument and parts of the third.

It is Locke's contention, *pace* Filmer, that it is not necessary for *all* of mankind to decide upon a single government; that is, there is nothing intrinsic to a natural rights philosophy that requires this. Unanimity of all of mankind would be necessary if anything but unanimity would diminish the freedom of another; however, according to Locke, such is not the case: "Any number of Men may...unite into a Community...because it injures not the Freedom of the rest; they are left as they were in the Liberty of the State of Nature. When any number of Men have...[expressly] consented to make one Community or Government, they...make one Body Politick[.]" (II, 96, p.349) Thus, the intractable difficulties of getting all men together at the same time loses its point. Furthermore, with an eye on part of Filmer's third argument, it is not necessary, on Locke's view, that nature divide itself into kingdoms prior to the consent of a particular group of individuals; for if these individuals live spatially contiguous with one another, their consent itself divides nature into kingdoms. The postulate that drives Locke's argument here, of course, is that individuals have a right to property in the state of nature.

There is an important "Filmerian" counter to this last point, namely, has not Locke made a category mistake? Is he not confusing private property with the territory of a government?

Locke's answer to this, however, seems clear. For certainly his appeal is going to be that the private land of individuals acquires the characteristic of being governmental territory when these individuals engage in the kind of consensual arrangement necessary to produce a political society. It is ultimately, then, the appeal to the consensual manner by which governmental territory is formed that allows Locke to arrive at the notion of a *geo-political* society without violating, or so he believes, the rights of any individual.

This appeal to the nature of the formation of governmental territory has even greater significance for Locke. As is somewhat clear in Filmer's sixth argument, Filmer is concerned that even if a legitimate government is formed at a given point in time, nothing will prevent it from dissolving, and hence leading to anarchy. Locke's analysis of governmental property aims at cutting the ground out from under this argument. What is of capital importance here is that once a political society is legitimately established, and a geographical unity exists, dissolution ceases to be problematic, for future owners cannot remove their land from the domain of the government to which it belonged prior to their acquisition. It is the case that a government can fail to fulfill its

trusteeship, and revolution might be justified, but this is a problem of an entirely different sort.

As I suggested earlier in this section, Filmer seems to be concerned with a very specific problem of political obligation. If a natural rights philosophy could ground legitimate government, then, for Filmer, there would be no difficulty in seeing how those who join such a government are obligated to its laws. However, what of those who do not join any government? Are they not subject to any positive law? On Filmer's account, the advocates of a natural rights philosophy must reject the position that an individual can be subject to the positive laws of a government that he did not join. Since, for Filmer, very few people, if any, would become subjects of a government by their own consent, it follows that few people would actually have any legal obligations. And thus most of the world would be *de facto* in anarchy.

It is here that Locke invokes the notion of tacit consent. For it is this notion that is intended to explain how a free man who has not given his express consent to a political authority, can yet be obligated, in certain circumstances, to its laws: without consenting to become a subject of a government, one still consents to be subject to its laws. It is this appeal that allows Locke to say that simply because an individual is not subject to a government does not mean that he has no legal obligations when in the province of that government.

I have been arguing as if the the distinction between tacit and express consent, and the notion of tacit consent, are clearcut in Locke. If this were true, there would not be the scholarly debate that exists over exactly where the distinction cuts and the character of tacit consent.¹⁶ Indeed, John Simmons, for example, has called into question whether Locke's account of tacit consent is really an account of a form of consent at all. I have no desire to jump into this quagmire here since the point of my essay is to show that major parts of the *Second Treatise* can be seen as constituting a rejoinder to Filmer, even if we are somewhat unclear as to exactly what Locke meant in certain pieces of text. One can do "philosophical geography" without doing "philosophical geology."

VI

The thrust of Filmer's critique is that the kind of consent required by a natural rights philosophy in order to ground legitimate government is prohibited to that view. One of Filmer's principal arguments is his second wherein he argues that since, on the natural rights position, rights are inalienable, they cannot be ceded to a sovereign body in order to establish a government. More

specifically, since it would be logically incoherent on natural rights grounds to speak of a man's having the right¹⁷ to take his own life, so too is it incoherent to speak of a person giving that right to another, in this case a sovereign.

The key to seeing Locke's answer to Filmer can best be approached by examining a distinction which he draws between two ways in which one's rights can be lost. In the first instance, one can *forfeit* one's rights. When one forfeits one's rights one does not cede them voluntarily, but rather cedes them through one's wrongdoing. Thus, while Locke agrees with Filmer that a man cannot voluntarily give away the right to his own life, he can still lose that right by forfeiture.

For a Man, not having the Power of his own Life, cannot, by Compact, or his own Consent, enslave himself to any one, nor put himself under the Absolute, Arbitrary Power of another to take away his Life, when he pleases. No body can give more Power than he has himself; and he cannot take away his own Life, cannot give another power over it. Indeed having, by his fault, forfeited his own Life, by some Act that deserves Death; he, to whom he has forfeited it may...delay to take it, and make use of him to his own Service, and he does him no injury by it. (II, 23, p.302)

Of course, this passage not only highlights one manner in which a right may be lost, but also indicates a manner in which a particular right cannot be lost, that is, through one's consent. Therefore, if one takes an *inalienable* right to be one that, at the very least, one cannot give away at will, then Locke is certainly maintaining, in agreement with Filmer, that the right to life is inalienable.

In the second instance, one can lose a right by *divesting* oneself of it or, in other words, *alienating* oneself from it. As Locke makes clear, it is by a certain act of divestiture that one becomes a subject of a political society.

The only way whereby any one de vests himself of his Natural Liberty, and puts on the bonds of Civil Society is by agreeing with other Men to joyn and unite into a Community, for their comfortable, safe, and peaceable living one amongst another, in a secure Enjoyment of their properties, and a greater Security against any that are not of it. (II, 95, pp.348-349)

For Locke, to be in a state of natural liberty means being "free from any Superior Power on Earth, and not to be under the Will or Legislative Authority of Man, but to have only the Law of Nature for his rule." (II, 22, p.301) In alienating one's natural liberty, there

are two principal results. First, one gives up the executive power to judge and punish that one possessed in the state of nature; second, one is made subject to the legislative power of government. In a legitimate government, one is still free; Locke calls it "Freedom of Men under Government," (II, 22, p.302) for one is under the rule of law and not subject to the arbitrary will of another.¹⁸

Critical for our purposes is that whereas an individual does not have the power to divest or alienate himself of the right to life, he does have the power to divest or alienate his natural liberty. As I have already stated, Locke concurs with Filmer's judgment that one's right to life does not give one the power to undermine that right, including transferring it to a sovereign body. However, on Locke's analysis, such is not required in order to become a political subject. The very purpose of government for Locke, the protection of a person's property in life, liberty, and estate, requires only that one divest oneself of one's natural liberty, and in so doing grant to others executive and legislative powers over oneself. The formation and maintenance of government does not necessitate (nor could it) that one grant to government the right over one's life.

If what Filmer demanded of the natural rights philosophy were required for it to build a legitimate government, then, for this philosophy, such an edifice would not be possible. However, it is just such a demand that Locke is challenging: a government erected on the consent of free men does not require that they give up their right to life.

There is an important qualification that needs to be made here, a qualification that might be thought to bear against Locke's case. It is Locke's position that, in certain situations, through forfeiture, government has the right to take a person's life. Does this not show that an individual has given to government a right that he does not have the power to give? The answer here, which I hope is clear, is that it is, for Locke, within a person's power to forfeit a right through his wrongdoing. The case is really no different in the state of nature or outside of it, for in the former one can forfeit one's life. And although in a political society, government has a privileged status in being the agency charged with the responsibility of capital punishment, individuals within a political society still maintain a right of self-defense which would allow them to take the life of another, a life which the other has forfeited.¹⁹

In the discussion of this section so far, we have been skirting the periphery of another of Filmer's criticisms and Locke's response to it. Filmer claims in both his third and fourth arguments that, if given a choice, only a madman would choose someone other than himself to rule. Locke's counter to this is clear and well known: the

gain in security and social order from living within a political society far outweighs the loss of executive and legislative power. For Locke, "Man Goes Mad"²⁰ is not the title of the story of those who choose to be subjects of political society.

VII

After quoting Locke's remark that "a child is born a subject of no country or government," Leslie Stephen remarks that, "Here we seem to be led straight to anarchy."²¹ Certainly this echoes Filmer's sixth argument. Therein Filmer attacked the natural rights theory on the grounds that it could not account for why infants and children are subject to the constraints of government, and indeed even more broadly, it could not account for how infants and children could be bound by their parents. Any kind of subjection of infants and children is, Filmer claims, anathema to their natural freedom.

Ultimately, Locke's response to this problem is to be found in his theory of freedom. In chapter four of the *Second Treatise*, Locke tells us that, "Freedom then is not what Sir R.F. tells us, 'A liberty for every one to do what he lists, to live as he pleases, and not to be tyed by any Laws.'" (II, 22, pp.301-302) Freedom,²² for Locke, is not license, regardless of whether one is in a state of nature or under government. If freedom is not license, then there must be some principle of restraint, some principle of governance. For reasons that will become clear shortly, our concern is with the restraint or governance that one is under in a state of nature, that is, our concern is with natural liberty.

In a comment that should serve as a warning, if one were needed, that Locke is very much part of the natural law tradition, Locke tells us that, "The State of Nature has a Law of Nature to govern it, which obliges everyone: And Reason...is that Law." (II, 6, p.289) Furthermore, Locke writes that, "Law, in its true Notion, is not so much the Limitation as the direction of a free and intelligent Agent to his proper Interest, and prescribes no farther than is for the general Good of those under that Law." (II, 57, p.323) In a state of nature, then, the principle of governance is an internal principle, namely, reason. Thus one has natural freedom only when one has a developed faculty of reason.

In chapter six of the *Second Treatise*, "Of Paternal Power," Locke brings this account of natural freedom to bear upon infants and children. Earlier in the *Second Treatise*, Locke had claimed that "all men by nature are equal"; however, here in the sixth chapter Locke "confesses" that "Children...are not born in this full state of Equality, though they are born to it." The principal inequality

becomes clear when Locke continues by writing, "Age and reason...grow up together." (II, 55, p.322) Locke's point here is that children, and a fortiori infants, do not have a developed faculty of reason: adults and children are unequal in this respect. At birth, therefore, children are not under the law of nature, that is, they are not under the law of reason. The upshot of this is that for some period of time children do not have natural freedom: "where there is no law, there is no freedom." (II, 57, p.324) This leads Locke to state that parents have a power over children "till Reason shall take its place." (II, 58, p.324) Therefore, Locke's response to Filmer is that neither government nor parents violate the natural freedom of children and infants because children and infants are not naturally free.²³ When reason does take its place, when a human being reaches a state of maturity, then although that person is not a subject of a political society until he expressly consents to it, because of tacit consent, he is obligated to the political society in which he resides.

VIII

In section V, we took up Locke's response to Filmer's position that a philosophy of natural rights requires universal consent for the formation of a legitimate government. We examined those arguments in the *Second Treatise* that aimed at showing why such consent was not necessary, and how, in Locke's judgment, a *geo-political* community encompassing less than all of mankind could legitimately form. In this section I would like to briefly turn to a closely allied issue, namely, Locke's response to Filmer's contention in his fifth argument that majority rule is antithetical to government by consent.

On one important point, Filmer and Locke are in complete accord: on a natural rights philosophy, one group of individuals, the majority, cannot by *their* will, render another group of individuals, the minority, subjects of a political society. However, for Locke, the function of majority rule is not to form government, but to run it.

For when any number of Men have, by the consent of every individual, made a Community, they have thereby made that Community one Body, with a Power to Act as one Body, which is only the will and determination of the majority. (II, 96, p.349)

Majority rule, or rule by less than the whole, is necessary for the operations of government, since a consent of all members of a political society cannot be had.

Such consent is next impossible ever to be had, if we con-

sider the Infirmities of Health, and Avocations of Business, which in a number, though much less than that of a Commonwealth, will necessarily keep many away from the publick Assembly. (II, 98, p.350)

Locke's position is that in consenting to be a subject of a political society, one consents to certain institutional or procedural features necessary to such a society, and majority rule, or some similar process, is so necessary. Thus, there is nothing incompatible in Locke's view with a philosophy of natural rights and majority rule.

One further difficulty with the natural rights philosophy that Filmer raises in his fifth argument is that no country was ever formed by the consent of its people. Locke elicits just this objection to his own position in section 100 of the *Second Treatise*: "There are no instances to be found in Story of a Company of Men independent and equal one amongst another, that met together, and in this way began to set up a Government." (p.351) In the following twelve sections, Locke attempts to show that indeed history does show such examples, with the principal ones being Rome and Venice. Whatever the value of Locke's history, what is important for our purposes is the attempt to show the error of Filmer's critique.

Conclusion

In the prior sections of this essay, I have attempted to show that contained within Locke's *Second Treatise* are responses to a set of arguments that Filmer brought forth against the natural rights philosophy. That Locke *intended* the parts of the *Second Treatise* that I have elucidated to answer Filmer's critique, a stronger thesis than the aforementioned one, and to do so in a comprehensive manner, has not been conclusively demonstrated here. And, indeed, given Locke's reluctance to name his opponents,²⁴ how could such a demonstration be given? Yet, if the reconstruction contained in this essay has been successful, then this would certainly constitute some evidence for the stronger claim.

More can be said, however. Many of the pertinent arguments in the *Second Treatise*, echo the vernacular of the arguments of Filmer that we have canvassed, such that if Locke did not have Filmer directly in mind it would be rather uncanny. There are four instances that stand out.

Consider first Filmer's claim that for the natural rights philosophy, "all mankind" must consent if government is to be

legitimate. In developing the argument in the *Second Treatise* that the formation of a legitimate government rests upon express consent, Locke remarks no fewer than three times in the space of seven lines that “any number of men” (II, 95-96, p.349) may come together to make up a political society.

Secondly, in chapter IV, “Of Slavery,” Locke explicitly puts forward his own analysis of freedom in contradistinction to Filmer’s. Locke expands upon this analysis in chapter VI, “Paternal Power,” especially as regards children. Again in this chapter, Locke explicitly refers to Filmer as the opposing side. (II, 61, p.326) And the central position that develops out of the analysis of freedom is how it is that “natural Freedom and Subjection to Parents may consist together,” (Ibid) a position directly aimed at Filmer’s sixth argument.

Thirdly, Locke’s account of the role of majority rule in sections 95-99 in the chapter on “Of the Beginning of Political Societies,” an account that strikes at Filmer’s fifth argument, paraphrases Filmer’s own words to attempt to show why majority rule is necessary.²⁵

Finally, in the aforementioned chapter, Locke again paraphrases Filmer, raising the question whether history shows us any examples of a consensual government. In trying to answer this challenge, two of Locke’s principal examples, Rome and Venice, are two examples whose history Filmer also discusses, in his *Observations Upon Aristotle’s Politiques Touching Forms of Government*. (pp.206-222)

When one adds these four instances to the reasons Locke adumbrates for why someone in a state of nature would want to join a political society, the relationship between tacit consent and legal obligation, and the queer account of the formation of governmental territory, an account which is necessary to fend off problems about the dissolution of government, then I believe a very good case is made that in setting out the *Second Treatise*, Locke had in mind Filmer’s arguments that a philosophy of natural rights leads to anarchy.

I would like to thank Nicholas Capaldi, Gilbert Goldman, Rhoda Kotzin, and Kenneth Winston for helpful comments on an earlier draft of this essay.

1. R.G. Collingwood, *An Autobiography* (Oxford: Clarendon Press, 1939), p.31.
2. Cf., for example, the remarks of C.E. Vaughn, *Studies in the History of Political Philosophy* (Manchester: University of Manchester Press, 1925), Vol. I, pp.130-131: “Locke’s *Treatise* is a gun with two barrels: the one directed against Filmer and Divine Right, the other against Hobbes....[In] the second part of the *Treatise*...he writes throughout with his eye on Hobbes[.]”

3. Cf. the brief discussion of twentieth-century Locke scholarship by Richard Ashcraft in his *Locke's Two Treatises of Government* (London: Allen and Unwin, 1987), pp.298-305.
4. See, for example, *Patriarcha, or the Natural Rights of Kings*, pp.53-55, 57-58, 63-73; *Observations upon Aristotle's Politiques Touching Forms of Government*, pp.211, 217-218, 225-226; and *Observations on Mr. Milton Against Salmasius*, p.256. These three works are to be found in: *Patriarcha and Other Political Works of Sir Robert Filmer*, edited by Peter Laslett (Oxford: Basil Blackwell, 1949). All references to Filmer will be to this edition.
5. This work is also to be found in the Laslett volume cited in n. 4. Perhaps I should note the full title of this work: *The Anarchy of a Limited or Mixed Monarchy or A succinct Examination of the Fundamentals of Monarchy*, both in this and other Kingdoms, as well about the Right of Power in Kings, as of the Originall or Naturall Liberty of the People. A Question never yet disputed, though most necessary in these Times.
- 6 On this notion, see: Julian Franklin, *John Locke and the Theory of Sovereignty* (Cambridge: Cambridge University Press, 1978), pp.22-52.
7. It is far from clear whether we should take the prefix 'man' generically or specifically. I suspect the latter.
8. For an excellent discussion of various kinds of rights see, Joel Feinberg, "Voluntary Euthanasia and the Inalienable Right to Life," in *Rights, Justice, and the Bounds of Liberty* (Princeton: Princeton University Press, 1980), pp.221-251.
9. See generally, Richard Tuck, *Natural Rights Theories: Their Origin and Development* (Cambridge: Cambridge University Press, 1979). I should mention that two major exceptions to this view were John Selden and Luis de Molina. On the former see, Tuck, pp.82-100; on the latter see, F.B. Costello, *The Political Philosophy of Luis de Molina, S.J. (1535-1600)* (Gonzaga University Press, 1974), pp.163-198. Also, on the interesting history that the role of indentured slaves played in the development of the United States see, Bernard Bailyn, *Voyagers to the West* (New York: Alfred A. Knopf, 1986), pp.241-352.
10. See *Observations Upon Aristotle's Politiques Touching Forms of Government*, p.217: "it is no law except it restrain liberty."
11. *First Treatise*, section 106, pp.236-237, in *Two Treatises of Government*, a critical edition with an introduction and apparatus criticus by Peter Laslett (Cambridge: At the University Press, 1960). All further references to either of the two treatises will be cited parenthetically following the quotation by book number, section number, and the page number of this edition. I have followed Laslett's text in terms of punctuation and capitalization, however, I have omitted the italics which are prevalent in the text.
12. This work is cited by name only once. However, the edition of Filmer's *Observations Concerning the Originall of Government upon Mr. Hobs, Mr. Milton, and H. Grotius* that Locke used had this work on anarchy bound into it. Therefore, many of Locke's citations to *Observations on Hobbs, Milton, etc.* are to this work. On this see Laslett's editorial preface to *Observations* in his

edition of Filmer's political writings, cited at n. 4 *supra*, p.238. Locke also makes several references to *Anarchy* in his 1667 "Notebook," and in his 1681-82 "Lemmata Ethica." On this see Laslett's introduction to his edition of Locke's *Two Treatises*, cited at n. 11 *supra*, pp.130-137.

13. By a "direct attack" I mean a criticism in which one first names either the person and/or the doctrine being criticized.

14. Here I am intentionally skirting problems having to do with civil disobedience, especially in the context of an illegitimate government.

15. "And thus that, which begins and actually constitutes any Political Society, is nothing but the [express] consent of any number of Freemen capable of a majority to unite and incorporate into such a Society. And this is that, and that only, which did, or could give beginning to any lawful Government in the World." (II, 99, p.351)

16. Cf., for example: John Dunn, *The Political Thought of John Locke* (Cambridge: At the University Press, 1969), pp.131-147; Hanna Pitkin, "Obligation and Consent—I and II," *American Political Science Review* (December 1965), pp.990-999, and (March 1966) pp.39-52; John Plamenatz, *Man and Society*, two volumes (London: Longmans and Green, 1963), vol. I, pp.220-241); and A. John Simmons, *Moral Principles and Political Obligations* (Princeton: Princeton University Press, 1979), pp.75-100.

17. It is important to note that Filmer speaks of "power" rather than "right." For in the quotation from Locke that I shall proceed to give in the next paragraph, Locke too speaks of "power."

18. For a detailed, although ultimately unsatisfactory, account of what it means to be subject to the arbitrary will of another, see F.A. Hayek, *The Constitution of Liberty* (Chicago: University of Chicago Press, 1960), pp.133-47.

19. Perhaps Filmer is making a deeper challenge, namely, how can any natural right, for example, the right to "natural liberty," be alienable? Any attempt to construct Locke's answer to this question must go to the very foundations of his moral theory and, as such, go beyond the scope of this work.

20. The title of an unpublished essay by R.G. Collingwood.

21. Leslie Stephen, *History of English Thought in the Eighteenth Century*, 2nd ed., two vols. (London: Smith, Elder, & Co., 1881), vol. II, p.140; citing II, 118, p.365.

22. Locke uses the terms 'freedom' and 'liberty' interchangeably.

23. This does not mean that parents and the government do not have any obligations to children—they do.

24. Can anyone be so foolish and monomaniacal to believe there was only one?

25. Cf. Laslett's notes on this chapter in his edition of Locke's *Two Treatises* cited at n. 11.

RADICAL SOCIAL CRITICISM

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This paper discusses the concept of radical social criticism by sketching the burdens of proof a radical critic must shoulder. It provides guidelines for both radical critics of existing society (e.g., Marxists, feminists, and libertarians) and suggests lines of criticism that their more moderate opponents might pursue.

Nearly any reflective person has grounds for dissatisfaction with the social system in which he finds himself. Most of us are social critics of some sort, though some of us are more severe than others. A rough distinction can be drawn between the moderate or reformist critic and the radical critic: The former believes that the system is fundamentally sound, and/or his society is basically a good society. Any society falls short of its ideals and given that we are all sinners, it is not surprising that things don't go as well as they might. The moderate critic believes that existing institutions can and should be modified or augmented in various ways to permit or encourage society to approach more closely the appropriate ideals. The fact that most reflective people are at least moderate critics is not surprising. They usually have enough imagination to conceive of ways in which society might be better. Few thoughtful people believe that this is, at the level of social institutions, the best of all possible worlds.

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On the other hand, radical critics believe that existing social institutions are fundamentally unjust, immoral or otherwise objectionable. Feminists, Marxists, and libertarians all count as radical critics in this sense. It is a philosophically interesting question to ask what sort of challenge the radical critic offers. The main purpose of this discussion is to explicate the concept of radical social criticism, or radical critique as I call it, by outlining in a general way the burdens of proof a radical critic must shoulder. In doing this, I hope to provide a road map for evaluating any radical critique of existing society. In passing and by way of illustration, I shall make reference to Marx's radical critique of capitalist society.¹

To understand what radical social criticism involves, let us begin with a suggestive parallel in epistemology. Most epistemologists believe that they and others really do know something about the world. One of the most fundamental questions in epistemology is whether or not this is true. Because this question is so fundamental and because (good) philosophers like a good fight, the skeptical challenge to all or most of our knowledge claims is sometimes regarded as the main problem in epistemology. Skeptical arguments, such as those found in Descartes' first two meditations, seek to call into question whole categories of belief. Comprehensive skeptical arguments are supposed to show that most of the things we think we know are not really known at all. All belief is mere opinion.

The radical social critic aims at a parallel result. He believes that, contrary to popular opinion, the basic social institutions are unjust, immoral or otherwise objectionable. Just as the skeptic challenges the ordinary claims to knowledge that we make, the radical social critic challenges widely accepted pre-theoretical judgments about the justice or goodness of our basic social institutions.

The skeptic's opponents have often argued that the skeptic has set impossibly or unreasonably high standards for what counts as knowledge. Consequently, even if his arguments succeed, they only show that knowledge is unachievable in some non-standard sense of 'knowledge'. Whether or not this objection is well-taken, it points to an absolutely central question in the dispute between the skeptic and his opponents, *viz.*, 'What must the skeptic show in order for his position to be sustained?' An answer to this question will in part define skepticism itself. It also makes clear that the skeptic bears a burden of proof. He cannot simply assert that everything we believe about the world might be false or not known to be true; arguments have to be produced to show that genuine knowledge cannot be achieved.

A parallel question arises in the dispute between the radical

social critic and his more moderate adversaries: 'What must the radical critic show for his critique to be successful?' Put another way, 'What are the presuppositions of a (successful) radical critique of a society?' The radical critic, like the skeptic, bears a burden of proof. In what does that burden consist? The following are necessary conditions that a successful radical critique of a society must satisfy. All of them have a certain amount of intuitive appeal, but each will require some discussion and argumentation.

The first such condition I call 'the Critical Explanations Requirement.' A radical critic must identify social ills or injustices characteristic of existing society, and it must be shown that these ills or injustices are both pervasive and rooted in the society's basic institutions. For example, the Marxist charges that the structure of ownership relations which defines the capitalist economic system is responsible for the systematic exploitation of the worker by the capitalist. A libertarian might charge that the modern welfare state by its very nature systematically violates people's rights.

Failure to show that these ills or injustices are rooted in society's basic institutions would leave the radical critic open to the moderate reformer's contention that these problems can be significantly ameliorated without fundamentally changing the basic institutions of the society. Forestalling the moderate's challenge may require a fairly substantial theory to explain how the relevant social ills arise from the basic institutions of the society. For Marx, the defects of capitalist society fall under the headings of exploitation and alienation. Both exploitation and alienation are explained by appeal to fundamental structural and/or operational features of the capitalist economic system.

The second condition for a successful radical critique I call the 'Normative Theory Requirement.' The radical critic needs a normative theory to explain, or an argument to justify, the negative judgments referred to in the various critical explanations. For Marx, this requires answers to such questions as, 'What is wrong with exploitation?' and 'Why is alienation a bad thing?' A full-scale ethical theory would be sufficient to meet this condition, but it is unclear that it is necessary as well. This is so for two reasons: First, it may be that only part of a theory is needed to substantiate the relevant claims; secondly, and perhaps more importantly, it may be that a non-ethical theory of value and/or obligation would suffice. This latter point warrants a brief digression.

A normative theory need not be an ethical theory. The former is broader than the latter. What I mean by 'normative theory' is, roughly, any systematic attempt to identify fundamental values,

behavioral dispositions ("virtues") and/or action-guiding principles. How to distinguish moral from non-moral values, virtues, or imperatives are controversial questions. However, it is clear that social institutions and individual actions can be evaluated along a number of different dimensions, and some of these evaluations may issue in imperatives that agents believe are in conflict with, and even override, the demands of morality. Radical critics have characteristically shown a curious ambivalence about morality; many of them condemn existing societies as immoral and yet reserve the right to violate the dictates of (at least conventional) morality in pursuit of their ends. Whether or not this attitude is consistent is an interesting question which cannot be pursued here.

A third requirement for a successful radical critique of the existing order is what I call the Alternative Institutions Requirement. The radical critic needs to specify a set of alternative social institutions which he believes should and/or will replace the existing ones. This specification of alternatives must in turn meet the following conditions:

- a) These institutions meet the conditions for a good or just society insofar as the latter are specified by the relevant normative theory. Or, more weakly, it must be shown that these alternative institutions at least do not reproduce the problems of existing institutions.
- b) A plausible description/explanation of how the institutions will function can be given.
- c) These institutions can persist as stable social forms. Or, more weakly, there is some reason to believe that they are stable.

The rationale for this requirement and the detailed sub-requirements will be discussed shortly.

A fourth condition for a successful radical critique is that the radical critic must be able to tell a plausible story about how existing institutions can be destroyed or set on a course of fundamental change. Let us call this the Transition Requirement. All social systems that endure have mechanisms that tend to preserve their basic institutions. It seems at least possible that these mechanisms are powerful enough to prevent radical social change indefinitely far into the future. A radical critique presupposes that this is not the case. Looked at from another perspective, if the destruction of the existing order or the inauguration of the new society presupposes processes that are unlikely to occur, given

existing and foreseeable conditions, the radical vision of what society could and should be like can be justly labeled "utopian"; it has lost its significance for radical social change, and the radical critique must be judged a failure.

To sum up, the radical critic must meet four requirements for his or her radical critique to be a success: the Critical Explanations Requirement, the Normative Theory Requirement, the Alternative Institutions Requirement, and the Transition Requirement. The rationale or justification for each of these requirements is to be found in the ultimate purposes of a radical critique: To know the truth about the defects of the existing order and to lay the intellectual foundations for radical social change. In the case of the Critical Explanations Requirement, the Normative Theory Requirement, and the Transition Requirement, this is fairly obvious.

It is less obvious in the case of the Alternative Institutions Requirement. Why must a radical critic have alternative institutions in view to criticize successfully the existing order? This objection might be filled out in one of two ways: First, it might be said that getting rid of the old order for some people is simply a matter of pulling out. There is a long tradition, in both the East and the West, of withdrawal from the world in the face of human and natural evil. This withdrawal may be solitary or in artificially small groups (e.g., monasteries). These "rejectionists," as they might be called, usually locate social problems in human nature or at least the human condition, neither of which can be changed. However, it is doubtful that these rejectionists ought to be called 'radical social critics.' It would perhaps be more appropriate to refer to them as 'misanthropes' or even 'whiners'. (Whiners are people who merely complain about undesirable yet ineradicable features of the human condition, such as having to mow the lawn.)

A second objection to the Alternative Institutions Requirement stems from the observation that throughout history, successful (as well as unsuccessful) revolutionaries have usually had only the haziest idea, if any at all, about the institutions that ought to replace the ones they are intent on tearing down. It might be objected that a radical critic need provide no sketch of alternative social institutions, or at least he need not spell out in detail what these institutions will be. In short, isn't it enough to point out the defects of the existing society?

Two points can be made in response. First, radical criticism is essentially a cognitive enterprise. Radical action, i.e., revolution, might be successful even if the "theory" behind it is not. The requirements for a successful radical critique should not be con-

fused with the requirements for successful radical action, or more generally, for being a successful radical person.

Perhaps the most compelling reason why a successful radical critique requires a sketch of alternative institutional arrangements is to be found in the positions subscribed to by the radical critic's most formidable opponent: the moderate social critic. There are two lines of approach to social problems open to moderate critics. One kind of critic, whom we might call 'the liberal,' believes that the social evils identified by the radical can be eliminated, or virtually eliminated, by non-radical adjustments in existing institutions. By contrast, the conservative critic, as he might be called, maintains that the social ills identified by his radical counterpart are, in one way or another, part of the human condition (or perhaps post-feudal society). At most, they can be ameliorated, but their elimination is a purely utopian ideal that cannot be realized, or cannot be realized without regressing to a form of social organization which is impossible in the modern world. In addition, conservatives are inclined to argue that serious and systematic attempts to wipe out these social evils are likely to make matters worse. None of this may be true, and the liberal's optimism may be ill-founded, but the radical critic has to prove both of these points—and the only way to do this is to address the Alternative Institutions Requirement.

Moreover, radical social criticism is intended to have action-guiding significance on a society-wide scale. Whether the radical critic favors quick revolutionary destruction of the existing order or the gradual metamorphosis of the offending institutions, rationality requires that he have some idea of where he is going. Given that radical criticism is directed at the basic social institutions of the society, this guiding vision has to be articulated at the level of social institutions. Besides, no revolution results in the mere destruction of social institutions; new institutions always arise to take the place of the old ones. Finally, if social change unleashes dystopian forces, not only will the radical have failed to achieve his purpose, the results will provide some evidence for the conservative view that significant social change is a nearly always a change for the worse.

These considerations also support the detailed requirements spelled out above. That the alternative institutions must at least not face the same problems that face existing institutions is obvious. Regarding the second and third sub-requirements, if the radical critic has no idea of how alternative institutions might function or if he has no good reason to believe that they can persist as stable social forms, then, for all he knows, conservatives might

be right in their pessimistic assessment of the prospects for social change that is both fundamental and beneficial.

The burdens imposed by the Alternative Institutions requirement put considerable strain on the social sciences, notably, economics and sociology. The radical critic must describe institutional structures (such as an economic system) that do not as yet exist and explain how these structures prevent or preclude the recurrence of the social ills characteristic of the existing order. But these burdens are not unreasonable; after all, the radical critic claims to be able to explain existing social evils by appeal to structural or institutional features of existing society. So, for example, if Marx is to claim that the capitalist economic system is inherently alienating, then he ought to be able to explain how or why a socialist or communist economic system is not.

These considerations suggest a number of possible avenues of criticism that a radical critic's opponent might pursue: One powerful objection would be to substantiate the liberal's claim that the identified evils can be virtually eliminated by institutional tinkering. An equally powerful objection would be to substantiate the conservative claim that the social evils in question are ineradicable features of the human condition. Needless to say, making either of these cases would be very hard to do. A more modest, but more promising, approach would be to show that the alternative institutions envisioned by the radical critic would reproduce the social ills (at non-trivial levels) characteristic of the existing order. The historical evidence of what has actually happened in the aftermath of revolutionary institutional change suggests that this strategy might prove fruitful. If this is right, it provides some comfort for the conservative but by no means proves his position.

The upshot of all this is that the radical social critic must shoulder a substantial burden of proof, if he is to offer a successful radical critique of existing society. Unfortunately, the list of radical critics who have made a serious effort to shoulder these burdens is exceedingly short. It's not that defenders of the existing order have it any easier, but that is another story for another time.

1. In my forthcoming book, I reconstruct and critically evaluate Marx's radical critique of capitalist society as it pertains to the first and third requirements identified below. See N. Scott Arnold, *Marx's Radical Critique of Capitalist Society*, Oxford University Press, forthcoming, Fall, 1989.

AYN RAND'S CRITIQUE OF IDEOLOGY

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Ayn Rand has gained fame—and infamy—for her defense of rational selfishness and laissez-faire capitalism. But the Randian philosophy is much broader in its scope. In this article, I begin the task of reconstructing Rand's analysis of the "anti-conceptual mentality." This Randian construct is presented as the rudimentary foundation for a non-Marxist, radical critique of "ideology," and should be reconsidered as one of Rand's fundamental contributions to 20th century radical theory.

While Rand never formally constructed a theory of "ideology" in the Marxian sense, it is clear that her critique of anti-conceptual thinking shares much in common with the Marxian view. Hence, when I refer to the concept of "ideology," I am using a Marxian notion of ideology to understand the Randian contribution. Ironically, our understanding of Rand's project can be enriched by a broader grasp of the Marxian structure of analysis. Our exposition will enable us to make some rather provocative comparisons between Rand and Marx.¹

Ayn Rand presents a conception of ideology which is as profoundly radical as the Marxian alternative. Yet, where Marx's construct is specifically social and class-based, Rand's is primarily

epistemological. Her critique emerges through her analysis of the "anti-conceptual mentality," a mode of ideological thinking which subverts conceptual awareness because it ignores contextuality, and the distinction between the metaphysical and the man-made. Rand's critique is a direct outgrowth of her objectivist epistemological presuppositions. Hence, a brief discussion of the principles of objectivist epistemology is crucial.

For Ayn Rand, consciousness is an attribute of certain living organisms, including man. It is defined as the faculty of perceiving that which exists. It is constituted by an active process which identifies, differentiates, and integrates the material provided by man's senses. Man's reason is a constituent element of consciousness, allowing him to rise above the perceptual level of awareness to the level of the conceptual.

The first stage of human awareness is the perception of things and objects. Implicitly, this awareness of things differentiates into an awareness of their identities. On the conceptual level, it is the relational concept of "unit" that is the building block of man's knowledge. It is man's ability to regard entities as units that constitutes his distinctive mode of cognition.²

For Rand, "a *concept* is a mental integration of two or more units which are isolated according to a specific characteristic(s) and united by a specific definition."³ A process of abstraction is necessary to concept-formation because it makes possible a selective mental focus that isolates a certain aspect of reality from all others on the basis of essential characteristics. Man's definitions describe the essential characteristics of concepts based upon a selective observation of the existents within the field of his awareness. By identifying relationships, man expands the intensive and extensive range of his consciousness.

It is clear that human interests and concerns play a role in both perception and the conceptual classificatory process.⁴ David Kelley, writing in the Randian tradition, argues that a theory of perception must take into account the principle that "the object appears in a way that is relative to the means by which we perceive it." Kelley critiques the "Cartesian quest for an infallible type of knowledge" as a theory of immaculate perception which abstracts from the human subject the enormous context within which perception functions. This context includes the subject's cognitive history and the particular interests that guide the subject's awareness. The subject constitutes a perceptual system whose basis is a relational interaction with objects in the world around it.⁵

Just as perception is contextual, so too is concept-formation.

Rand writes that "the essence of a concept is determined contextually and may be altered with the growth of man's knowledge."⁶ Thus, conceptual awareness incorporates a temporal dimension. For Rand, only conceptual awareness is "capable of integrating past, present and future." It is through his concepts that man grasps the totality of experience, the continuity of existence and, introspectively, the continuity of consciousness.⁷ Robert Hollinger argues persuasively, that in Rand's philosophy, "knowledge is rooted in praxis, knowledge is contextual, and not to be judged by reference to a context-free absolute standard."⁸

Nevertheless, Rand argues that human knowledge is acquired within an existential context of objectivity. For Rand, the basis of objectivity is the axiomatic concept of existence. "Existence exists," that is, reality is what it is independent of what human beings think or feel, and must be accepted as metaphysically given. Human action is efficacious to the extent that it follows the scientific laws by which nature operates. But the products of human action "must never be accepted uncritically." The man-made "must be judged, then accepted or rejected and changed when necessary."⁹

The anti-conceptual mentality ignores this distinction between the metaphysical and the man-made. In addition, it disregards the contextuality of concepts. It achieves these epistemological distortions because it relies upon a faulty mode of awareness. Rand's critique goes beyond mere epistemology; it asks fundamental questions about the methods by which human beings think, and is thus, profoundly psycho-epistemological in its orientation. Hence, our discussion of the Randian critique cannot proceed without a greater comprehension of Rand's approach to "psycho-epistemology," that branch of philosophy which deals with the methods of human cognitive awareness.

Man's ability to alter his environment emerges from his capacity to initiate goal-directed action. This is an outgrowth of his volitional consciousness. A man's ability to think, his ability to engage in a process of abstraction, is one that must be initiated, directed and sustained volitionally, under the guidance of an active mind. The quality of a man's mind is a product of his "method of awareness" or "psycho-epistemology." Human knowledge evolves through the interaction of the content and the method of a man's consciousness. Rand maintains that a certain reciprocity is achieved in which "the method of acquiring knowledge affects the content which affects the further development of the method, and so on."¹⁰

The efficiency of a man's mental operations depends upon the kind of context a man's subconscious has automatized.¹¹ The learn-

ing process is not merely psycho-epistemological; it is *social*, and as such, it is deeply affected by the social character of learning. Rand violently opposed the "tribal irrationality" of contemporary education which, she believed, seriously stunted the development of a child's rational psycho-epistemology. Furthermore, Rand believed that the educational institutions were organically expressive of a social system which needed irrationality to survive. Where Marx identifies this social system as "capitalism," the known, historical reality, Rand argues that capitalism is still an "unknown ideal."¹² She seeks to liberate modern society from oppressive, collectivist statism.

This brief discussion of the principles of objectivist epistemology enables us to better comprehend the multi-dimensional character of the Randian critique. Rand's analysis of the "anti-conceptual mentality" suggests that her revolutionary proposals for social and political change cannot be actualized in the absence of a more profound psycho-epistemological achievement.

In essence, the "anti-conceptual mentality" is based upon a fundamentally distorted mode of cognition. In a remarkable characterization of this faulty method of awareness, Rand expresses a distrust of anti-conceptual thinking that shares much in common with the Marxian view of ideology. Rand writes,

The anti-conceptual mentality takes most things as irreducible primaries and regards them as 'self-evident.' It treats concepts as if they were (memorized) percepts; it treats abstractions as if they were *perceptual* concretes. To such a mentality, everything is the given: the passage of time, the four seasons, the institution of marriage, the weather, the breeding of children, a flood, a fire, an earthquake, a revolution, a book are phenomena of the same order. The distinction between the metaphysical and the man-made is not merely unknown to this mentality; it is incommunicable.¹³

Rand would agree with Marx, who ridiculed the classical economists for their belief that the laws of political economy were both "natural" and "self-evident." Capitalism, for Rand, as for Marx, depends upon a huge philosophical, social, cultural and historical context. The anti-conceptual mentality abstracts concepts from their contextual setting, reducing them to ahistorical, floating abstractions which "can mean anything to anyone."¹⁴ Limited to the present and the perceptual level of awareness, the anti-conceptual mentality eliminates any sense of a concept's past or future. This promotes a tacit approval of the status quo, and tends to thwart progressive social change.

By tearing an idea from its context, and treating it as "a self-sufficient, independent item," the anti-conceptual mentality commits a profound psycho-epistemological error. Rand's associate, Leonard Peikoff, argues that "in fact, everything is interconnected. That one element involves a whole context, and to assess a change in one element, you must see what it means in the whole context."¹⁵ Thus, by fracturing the connection between concept and context, the anti-conceptual mentality reproduces what Marxists have called a "one-dimensional" view of social reality. In this regard, Rand's critique shares much in common with the Marxian framework.

Ayn Rand maintains that the anti-conceptual mentality is an expression of "passivity in regard to the process of conceptualization and therefore, in regard to fundamental principles."¹⁶ Thinking in terms of fundamental principles is a prerequisite for radical change. It was the young Karl Marx who wrote that, "To be radical, is to grasp things by the root. But for man the root is man himself."¹⁷ This man-centered, secular vision of the radical project is basic to both Marxian and Randian philosophy. The parallels between Marx and Rand are truly provocative. Indeed, the critique of anti-conceptualism is, in many ways, a Randian version of Marx's theory of ideology.

Ideology, for Marx, is class-based; it tends to represent the view of a particularly dominant group in society which attempts to universalize its perceptions as a means of consolidating its rule. In capitalism, the bourgeoisie embraces a one-dimensional view of social reality. Bourgeois "individualism" reflects and perpetuates social dualism and separateness while purporting to constitute a self-sufficient whole. Throughout Marx's writings, there is a persistent denigration of those liberal thinkers who view the capitalist system as a logical derivative of the "eternal laws of nature and of reason."¹⁸ The "Robinsonades," as Marx calls them, dissolve society "into a world of atomistic, mutually hostile individuals," who are self-interested and isolated from one another.¹⁹ For Marx, the liberal vision of civil society as "natural" and "normal" was typical of each epoch in its quest for trans-historical legitimacy.²⁰

The bourgeois attempt to universalize its historically specific ideological and social relations was, according to Marx, a product of abstraction. The Marxist scholar, Bertell Ollman, observes that "an abstraction' is a part of the whole whose ties with the rest are not apparent; it is a part which *appears* to be a whole in itself."²¹ Thus, the bourgeois economists abstract from the capitalist system the apparent reciprocity of exchange relations, failing to grasp the essential exploitative character of capitalist production. This emphasis on abstract equality-in-exchange, masks the capitalist's

extraction of surplus value from the labor process. By focusing on the principle of equality, the bourgeois mistake the part for the whole, reifying the exchange relation as the animating principle for all aspects of the capitalist system.

Marx describes this as a distinction between appearance and essence. The hallmark of liberal ideology is the one-dimensional emphasis on appearance. Liberalism sanctions the form of social liberation, embodied in free human choice, by abstracting it from the social context within which choices are made. Thus, bourgeois "freedom of conscience" merely tolerates religion, rather than liberating the human soul "from the witchery of religion."²² While man creates religion as the "heart of a heartless world," he will not transcend mysticism until he abandons the social conditions which require illusions.²³ Thus, in civil society, "man was not freed from religion; he received religious freedom. He was not freed from property. He received freedom of property. He was not freed from the egoism of trade, but received freedom to trade."²⁴

One does not have to agree with the Marxian assessment of capitalism in order to appreciate Marx's insights into the usefulness of ideology as a means of consolidating social domination. The power of Marx's structure of analysis lies in his ability to trace the organic links between and among the constituent elements of a social totality. An organic relationship is one that is characterized by a systemic structure, forming a totality which is both constituted by the parts and expressed in each constituent element. Marx identifies those political, economic, philosophical, religious, racial, literary, artistic, legal and other factors that are each expressive of the historically constituted capitalist mode of production.

Thus, for Marx, ideology is more than mere "false consciousness." Ideology abstracts an aspect of social reality from its wider context and as such, distorts our vision of the totality. It perpetuates and is perpetuated by the system itself, serving the interests of the privileged and masking those internal contradictions which propel the system toward its ultimate transcendence.

Ayn Rand's critique of the "anti-conceptual mentality" exhibits a similar tendency toward structural analysis of organic relationships. Indeed, the Randian critique is but one vantage point from which to view her thoroughly integrated, multi-dimensional philosophical schema. Rand's opposition to anti-conceptual thinking is a simultaneous recognition of the fact that true radical social change cannot be realized without a profound transformation in the faulty methods by which so many human beings think. *This is crucial to our understanding of the Randian project.* It underscores

the organic link between an individual's distorted psycho-epistemology and the irrational social system within which it is both expressed and perpetuated.

For Rand, the anti-conceptual mentality is in an organic relationship with a cultural and social system that thrives on cognitive subversion. Rand may view anti-conceptual thinking as pure folly, but she implores us, "don't bother to examine a folly—ask yourself only what it accomplishes..."²⁵ While Rand focuses important attention on the individual, and the debilitating psychological, cognitive and ethical consequences of anti-conceptual thinking, she does not ignore the broader, systemic implications. *Rand maintains that anti-concepts are crucially important precisely because they are ideological products of the "mixed economy," and hence, a means of social oppression.* This aspect of Rand's thought cannot be divorced from her view of power relationships. It is therefore, necessary to briefly examine the Randian conception of power, which is integral to her ethical and psycho-epistemological theories.

Rand argues that existentially, man needs a code of values to guide his actions. Reason, purpose and self-esteem are essential attributes of a "rational" morality because they are crucial to man's survival qua man. When Rand views man's life as the standard of moral values, she is positing life as both the standard, and the context, of human valuation. Hence, any "moral" code which seeks to deny the centrality of human reason negates the very means by which *human* life is made possible. For Rand, the concept of "natural rights" is the social means of morally legitimating the ontological fact of human free will. It sanctions freedom of consciousness and action in a social context.

Rand argues that a distinction between the personal and the political is self-defeating.²⁶ She claims that the achievement of a truly free society is the outgrowth of a specific code of moral action, one which does not sever reason from ethics, or freely-chosen ethics from a rational, social existence. While Rand defends the individual's right to lead his own life according to his own values, it is clear that she opposes certain value systems (e.g., altruism) because they debilitate the individual and legitimate oppression.

According to Rand, such oppression is not simply a by-product of the initiation of physical force. Oppression is legitimated by the "sanction of the victim." The most subversive political implication of Rand's magnum opus, *Atlas Shrugged*, is that individual freedom is possible only to those who are strong enough, psychologically and morally, to withdraw their sanction from any social system which coercively thrives off their productive energies.²⁷ This concept of the

“sanction of the victim” is illustrative of Rand’s crucially important insights into the psycho-epistemological dimensions of power relationships.

Rand recognizes that man’s cognitive processes must be studied in terms of “the interaction between the conscious mind and the automatic functions of the subconscious.”²⁸ As a man’s psycho-epistemology is automatized, his ability to think can be fundamentally distorted by a faulty method of awareness. Rand argues that “no mind is better than the precision of its concepts.”²⁹ The anti-conceptual mentality integrates and automatizes a series of invalid concepts, or “anti-concepts,” into the cognitive process, introducing an element of imprecision into man’s consciousness. This obliterates legitimate concepts since it fails to recognize the contextual parameters of concept-formation.³⁰

In her essay, “Causality Versus Duty,” Rand analyzes one such “anti-concept.” She identifies “duty” as “one of the most destructive anti-concepts in the history of moral philosophy.” This anti-concept, according to Rand, has profound implications for metaphysics, epistemology and psychology. The notion of “duty” destroys legitimate concepts of morality. It sanctions obedience to authority and in the process, it subverts reason, values, and self-esteem. A man who obeys a higher (mystical or secular) authority supersedes his own knowledge and judgment. He severs the link between values and choice and cripples his own ability for self-directed moral action. Rand writes that “duty” destroys a man’s self-esteem; “it leaves no self to be esteemed.”³¹

Thus, Rand views obedience and authority as two sides of the same psycho-epistemological coin. Obedience is based upon the passivity of anti-conceptual thinking. This is the essence of Rand’s notion of the “sanction of the victim.” Likewise, Rand argues that the use and manipulation of various “anti-concepts” provide those in power with a means of legitimating their authority. This systemic rationalization of power helps us to understand the underlying significance of Rand’s assertion that “power-lust is a psycho-epistemological matter.”³²

Fundamentally, Rand views the systemic irrationality of coercive statism as an outgrowth of the anti-conceptual mentality. But this is not a simple matter of one-way causation. Rand’s perspective suggests that statism and anti-conceptualism are organically conjoined, that is, the relationship between statism and the anti-conceptual mentality is reciprocal and mutually reinforcing. Statism thrives on anti-conceptual thinking to sustain itself, while the anti-conceptual mentality makes statism inevitable.

The modern-day "mixed" economy is a concretized expression of this inter-relationship. Rand writes that the "mixed economy is rule by pressure groups... an amoral, institutionalized civil war of special interests and lobbies, all fighting to seize a momentary control of the legislative machinery, to extort some special privilege at one another's expense by an act of government—i.e., by force."³³ In the mixed economy, each pressure group makes use of "anti-concepts" in its quest for political power. For Rand, "*any ideological product of the mixed economy... is a vague, indefinable, approximation and, therefore an instrument of pressure group warfare.*"³⁴ [Emphasis added] Rand maintains that the internecine struggle among the rival groups of the mixed economy leads to contemporary tribalism, where "loyalty to the group" takes precedence over any other social rules. These groups are not exclusively economic. Racist, xenophobic, and socio-economic castes perpetuate different forms of group loyalty; each is a manifestation of the anti-conceptual mentality.³⁵

Thus, Rand makes the formal connection between psycho-epistemology and the domain of politics. But the Randian schema goes beyond mere politics. Rand recognizes that there are broadly operative hegemonic principles in social reality. She identifies those "altruist-collectivist-mysticist" premises that underlie each aspect of modern culture—including art, literature and music, family and sexual relations, political, religious and educational institutions. In her assessment of the "cultural bankruptcy of our age," the religious right, and the state of American education, Rand views each as a manifestation of anti-conceptualism. *The anti-conceptual mentality is the thread running through the fabric of statist society; it is expressed in culture and religion as well as politics and pedagogy.* In fact, Rand's evaluation of American education equally applies to her view of contemporary statism. She writes that "the system is self-perpetuating: it leads to many vicious circles."³⁶

Given this inter-locking hegemony of statist structures, institutions and processes, it is unfortunate that Rand failed to grasp the radical implications of her analysis. Indeed, Rand's resolution amounts to an endorsement of a quasi-philosophical determinism. Rand's emphasis on the primacy of ideas in shaping history is an outgrowth of her belief in the centrality of human reason. Rand argues that the battle for social change is primarily intellectual. She writes that "politics is the last consequence, the practical implementation, of the fundamental (metaphysical-epistemological-ethical) ideas that dominate a given nation's culture." Hence, if men are taught the right philosophy, "their own minds will do the rest."³⁷

Yet, the Randian perspective *in toto* suggests that radical social

change is far more complex. Rand's understanding of systemic inter-relationships indicates that the system itself perpetuates the anti-conceptual mentality upon which it is based. Ideology and power, culture and psycho-epistemology are inter-locked in a hegemonic bond that seems to thwart any profound social change. Given these organic inter-relationships, it is highly improbable that education alone will deliver us from evil. Indeed, revolutions *are* multi-dimensional. Struggle is *both* personal and political.

One of the political dimensions that Rand ignores is the nature of class struggle. The Randian perspective lacks any structured class analysis, and this is its chief weakness. Though class analysis is central to the Marxian approach, it is not an exclusive Marxian concern. Indeed, contemporary libertarians have reconstructed the class analyses pioneered by Marx's classical liberal predecessors. Writers, such as Murray Rothbard, have begun to develop the rudiments of a non-Marxist class analysis which draws upon the insights of Austrian economics and revisionist history. Libertarians identify those structural mechanisms which enrich certain groups (or "castes," or "classes") more than others. The boom-bust cycle perpetuated by government manipulation of the money supply is one such mechanism. Militarization of the economy is another. Each of these institutional devices provides an avenue of expropriation which is bolstered by the power of the state.³⁸

Rand was not entirely ignorant of this structural bias. She believed that the mixed economy was a new form of fascism. But Rand was not entirely consistent in her condemnation of American statism. There may be important reasons for this lack of consistency. It must not be forgotten that Rand was among the first Russian dissidents. Her virulent anti-communism may have led her to a glorification of the American state in its efforts to contain Soviet expansion. In addition, her romantic visions of American business often prevented her from embracing a more radical political assessment of the business community's historic role in the rise of contemporary statism.

These weaknesses in Rand's perspective do not constitute an indictment of the critique of ideology which I have attempted to reconstruct in this article. It may be possible to link the Randian critique to a more fully developed framework for class analysis, but this theoretical endeavor would take me well beyond the scope of the present essay.

Nevertheless, in its essentials, the Randian framework *is* radical. If it does not provide all of the answers, it compels us to ask the fundamental questions. On this basis, Rand has made an important contribution to contemporary radical social thought.

1. It is my conviction that there is an important intellectual link between Karl Marx and Ayn Rand but this would take me well beyond the scope of the present paper. Rand was educated in the Soviet Union and her works exhibit some remarkably dialectical philosophical formulations. Considering that Marx and Rand have both accredited Aristotle as their philosophical forefather, the relationship that I am proposing in this note is not entirely speculative. I hope to devote a future article to this provocative topic. On the Aristotelian elements in Marxism, see Scott Meikle's *Essentialism in the Thought of Karl Marx* (La Salle, Ill.: Open Court, 1985). Also see note 15, below.
2. Ayn Rand, *Introduction to Objectivist Epistemology*, (New York: New American Library, [1966] 1979), p.7.
3. *Ibid.*, p.11.
4. Douglas Den Uyl and Douglas Rasmussen, "Ayn Rand's Realism," in *The Philosophic Thought of Ayn Rand*, (Chicago: University of Illinois Press, 1984), p.17.
5. David Kelley, *The Evidence of the Senses*, (Baton Rouge: Louisiana State University Press, 1984), p.17. None of this should be interpreted as a conflation of the mode of awareness and the object of awareness. Rand believes that awareness is inherently relational, i.e., that consciousness is consciousness of objects that exist independently of the means by which man acquires knowledge. See Douglas Rasmussen, "Ideology, Objectivity, and Political Theory," in *Ideology and American Experience: Essays on Theory and Practice in the United States*, ed. by John K. Roth and Robert C. Whittemore, (Washington, D.C.: Washington Institute Press, 1986), especially pp.58-66. However, there is a profound link between a man's method of awareness and the content of his consciousness. I explore this aspect of "psycho-epistemology" below, as it relates to Rand's critique of the "anti-conceptual mentality."
6. Rand, *Introduction to Objectivist Epistemology*, p.69.
7. *Ibid.*, p.75-76.
8. Robert Hollinger, "Ayn Rand's Epistemology in Historical Perspective," in Den Uyl and Rasmussen, 1984, p.55.
9. Rand, *Philosophy: Who Needs It*, (New York: Bobbs-Merrill Company, 1982), p.33.
10. Rand, *The New Left: The Anti-Industrial Revolution*, (New York: New American Library, [1971] 1975), pp.193-194.
11. *Ibid.*, p.193.
12. *Ibid.*, pp.187-239. See also, Rand, *Capitalism: The Unknown Ideal*, (New York: New American Library, 1967), p.46.
13. Rand, *Philosophy: Who Needs It*, p.46.
14. Rand, *Introduction to Objectivist Epistemology*, p.65. See also Rand, *The New Left*, p.218. Rand's essay on "The Comprachicos" is an indictment of American education which, in her opinion, fosters this type of "anti-con-

ceptual mentality.”

15. Leonard Peikoff, “Context-Dropping,” *The Ayn Rand Lexicon: Objectivism from A to Z*, ed. by Harry Binswanger, (New York: New American Library, 1986), p.105. This quote from Peikoff is taken from his lecture series on “The Philosophy of Objectivism” (1976), lecture 5. It should be noted that in this passage, Peikoff is expressing a basic agreement with the philosophy of internal relations, a crucial foundation for dialectical methodology. Rand and Peikoff have never explicitly defended the philosophy of internal relations, but their emphasis on the need for contextuality suggests a strong affinity with this doctrine, albeit in non-idealist terms. A discussion of this topic would take me well beyond the scope of this paper. On the philosophy of internal relations, see Brand Blanshard, *Reason and Analysis*, (LaSalle, Ill.: Open Court, 1962), pp.475-477, and Bertell Ollman, *Alienation: Marx’s Conception of Man in Capitalist Society*, 2d. ed., (Cambridge: Cambridge University Press, 1976), especially pp.26-40, and pp.256-276. Kevin Brien suggests in his book, *Marx, Reason, and the Art of Freedom*, (Philadelphia: Temple University Press, 1987) that Blanshard’s idealist interpretation can be appropriated by Marxists in their efforts to define and reconstruct a non-idealist dialectical method. The chief problem with Blanshard’s idealism is that it seems dependent upon an omniscient grasp of all the relational ties between and among the constituent elements of a totality. See my review of Brien’s book, “Marx on the Precipice of Utopia,” *Critical Review* 2, no. 4 (Fall 1988), pp.82-90.

16. Rand, *Philosophy: Who Needs It*, p.45.

17. Karl Marx, “The Critique of Hegel’s Philosophy of Right,” *Early Writings*, translated and edited by T.B. Bottomore. Foreward by Erich Fromm, (New York: McGraw-Hill, [1843] 1963), p.52.

18. Karl Marx and Frederick Engels, “The Manifesto of the Communist Party,” *Selected Works*, (New York: International Publishers, [1848] 1968), p.49.

19. Marx, “On the Jewish Question,” *Writings of the Young Marx on Philosophy and Society*, ed. and translated by Loyd D. Easton and Kurt H. Guddat, (Garden City, N.Y.: Anchor Books, Doubleday, [1843-44] 1967), p.247.

20. Marx, *Grundrisse: Introduction to the Critique of Political Economy*, ed. with an introduction by Maurice Dobb, (New York: International Publishers, [1857-58] 1973), p.83.

21. Bertell Ollman, *Alienation: Marx’s Conception of Man in Capitalist Society*, p.61.

22. Marx, “Critique of the Gotha Programme,” in Marx and Engles, 1968, p.333-334.

23. Marx, “The Critique of Hegel’s Philosophy of Right,” p.44.

24. Marx, “On the Jewish Question,” p.240.

25. Rand, *Capitalism: The Unknown Ideal*, p.178.

26. Rand’s philosophy aims to transcend most conventional dichotomies,

e.g., the personal and the political, theory and practice, facts and values. This offers yet another obvious comparison with the Marxian schema. However, an investigation of this theoretical parallel would necessitate a closer examination of Marx's analysis. This would take me well beyond the scope of the present article. Marx viewed most dichotomies as by-products of history. His dialectical theory posits the transcendence of all dualistic distinctions in communism.

27. Rand, *Atlas Shrugged*, (New York: Random House, 1957). It should be noted that in ethics, Rand reacts against the reification of moral systems as if they were given historical "facts." The tacit acceptance of such systems of morality is another example of anti-conceptual thinking. See Rand, *The Virtue of Selfishness: A New Concept of Egoism*, (New York: New American Library, 1964).

28. Rand, *The Romantic Manifesto: A Philosophy of Literature*, 2d. rev. ed., (New York: New American Library, 1975), p.18.

29. Rand, *Capitalism: The Unknown Ideal*, p.177.

30. Rand, "Credibility and Polarization," *The Ayn Rand Letter*, vol. 1, no. 1 (October 11, 1971), p.1. See also, *Capitalism: The Unknown Ideal*, p.176. Rand identifies a number of "fallacies" that are related, directly or indirectly, to the anti-conceptual mentality. These include: package-dealing, context-dropping, frozen abstractions, and stolen concepts. For brief explanations of each of the "fallacies," see *The Ayn Rand Lexicon*.

31. Rand, *Philosophy: Who Needs It*, p.116.

32. Rand, *The New Left*, p.227.

33. Rand, *Capitalism: The Unknown Ideal*, p.207.

34. Rand, *Philosophy: Who Needs It*, p.231. Rand's works offer many analyses of specific "anti-concepts" that have been used by groups in the political arena. Some of these include: "isolationism," "meritocracy," "xenophobia," "cold war," "mixed economy," "polarization," "fairness doctrine," and concepts of mysticism, among others. For brief explanations of each of these "anti-concepts," see *The Ayn Rand Lexicon*.

35. Rand, *Philosophy: Who Needs It*, pp.50-51.

36. Rand, *The New Left*, p.228.

37. Rand, *Philosophy: Who Needs It*, pp.245-246.

38. For an introduction to Rothbard's thought, see his *For a New Liberty: The Libertarian Manifesto*, rev. ed., (New York: Collier Books, 1978). The libertarian perspective is not without its theoretical problems. For a brief analysis of its questionable methodological foundations, see my article, "The Crisis of Libertarian Dualism," *Critical Review*, 1, no. 4 (Fall 1987), pp.86-99.

WILL PRESERVING AMERICAN WOMEN'S PROCREATIVE FREEDOM CONFLICT WITH ACHIEV- ING EQUALITY BETWEEN THE SEXES?

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Ln the essay, I explore a future conflict between what most American feminists hope to achieve and what they hope to preserve: full equality of opportunity in the long run between the sexes in America and freedom for American women to abort their fetuses in the early stages for any reason at all. The long-run equality I have in mind would afford equal chances for success to all American children regardless of sex. Some feminists will insist that American society must undergo a socialist transformation before such equality can be realized,¹ while others will concede that real equality is possible in capitalist society. The relevance of the dilemma I discuss, however, is unaffected by the resolution of this very large disagreement among feminists, since my point is of

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concern to all those who seek to remove the disadvantages women must bear due to disparate treatment they receive, especially the treatment accorded them prior to adulthood. One need not be a radical feminist to recognize that there cannot be sexual equality if girls are less likely than boys to develop the traits needed for rewarding careers² solely because of the position girls occupy in the family.

The Empirical Trends

I am not referring here to parental treatment of children after birth but to sex selection during gestation—a practice as I will show that affects not just the discarded fetuses but the laterborn children. Most if not all American feminists agree that a woman should be free to terminate her pregnancy (at least in the early stages) for any reason she chooses.³ In addition, feminists would agree that pregnant women have a right to know as much about their fetuses as can be disclosed to them—assuming the cost of acquiring such knowledge does not significantly burden society. My thesis is that the right to choose abortion for any reason (and acquire information about the fetus's sex) must be restricted if full equality of opportunity between the sexes in American society is to be achieved.

The most common technique for discovering the sex of the fetus, amniocentesis, is becoming more widely used and will become more affordable if this trend of widespread use continues. The available evidence indicates that, if American women and American couples could control the sex of their fetuses, there would at least be a preference for male firstborn child followed by a female second child, if not a preference for males regardless.⁴ The literature further suggests that firstborn children are more likely to be "achievers" than subsequently born siblings.⁵ Thus, if present trends continue, there will at least be wide fluctuations in the relative numbers of male to female births from one generation to the next. There is, alternatively, an appreciable risk that men will far outnumber women in every generation, with all the consequences that such an imbalance would entail, such as, more violent crime, more job discrimination, fewer career opportunities and diluted voting power for women.⁶ In any case, the continued availability of amniocentesis and abortion on demand certainly portends dimmer prospects for full equality of opportunity for American women in the subsequent generations.

The Question about Abortion for Sex Selection Which These Trends Raise

It is, of course, arguable whether the future will be as gloomy as I am predicting. But, even if some sociological studies suggest American couples would not now resort to abortion to preselect male firstborns, it is possible that, when the technology actually becomes widespread, attitudes will change. Nevertheless, for the sake of argument, at least, it is worthwhile for feminists to consider the following question: Would society be justified in depriving women of the knowledge of the sex of their fetuses, or, failing that, in prohibiting abortions sought solely for the purpose of controlling the sex of the subsequently born child?⁷ To be sure, taking this question seriously requires the reader to ignore the many objections one can pose to the dire predictions just discussed, but the question raises the fundamental problem that basic values—equality of opportunity and reproductive freedom—may collide. It is worth exploring this question, then, if only clarify our priority of basic social values. Some preliminary observations about this question are in order.

It should be noted, first, that there are two distinct issues that sex selection abortion raises: one is a question about a woman's right to information about the fetus's condition; the other concerns her right to act on the information. That is, the first question is whether women can be deprived of knowledge of the sex of the fetuses they carry (when that knowledge is unrelated to any sex-linked defect). I will focus on the second issue (of whether her freedom to act on her knowledge of fetal sex can be restricted), for a number of reasons, primary among which is the circumstance that without a justification for prohibiting sex selection abortion there can be no justification for denying the woman access to the information. Also, denial of access to information about her body raises other moral and constitutional questions I cannot fully explore here.

It should also be noted that there may be less draconian measures that would ensure equality of opportunity between the sexes, such as, public education campaigns along the lines of Roberta Steinbacher's suggestions that would make women more aware of the long-term consequences of aborting female fetuses.⁸ Although I do not deny the possibility that such campaigns will succeed, I nevertheless suppose it is not likely that they will. The sociological evidence shows that college women sympathetic with the "women's movement" would nevertheless prefer a firstborn son to a daughter by a two-to-one margin.⁹ My proposal might be viewed by those who believe such campaigns will succeed as a discussion about how American society

might justifiably interfere in women's abortion decisions if such public awareness campaigns do not succeed.

In this connection, the reader should note that banning sex selection abortion could take two forms: banning any abortion performed solely because the fetus is the "wrong" sex, or banning the abortion of any normal female fetus. The latter would be akin to a strict liability statute, because the motive a woman had would be irrelevant. The purpose of the statute would simply be the saving of as many female fetuses as possible. The statute would solve the narrow problem of an imbalance in male-to-female ratio and would be simpler to administer, since no examination of a woman's motives is needed. Nevertheless, because the first statute raises more interesting questions, I will address here the problems created by that solution. Admittedly, the statute is more sweeping than needed (since it would prevent imbalances of any kind in the population, not just imbalances of males), but it would also be equally as effective as the second statute in sparing future generations of women the suffering that preference for sons might otherwise cause. It also has the advantage of appealing to those feminists who believe sex selection abortion is grossly sexist, because it declares society's repugnance to the attitude that the value of potential human beings solely depends upon their sex.

A third preliminary question concerns the fairness of punishing only the women who choose to abort and not their male partners who may well have insisted on the abortion of the female fetuses. For the sake of simplicity I consider the cases of single women and married women who have come to the abortion decision on their own. This not only simplifies the discussion but it also is more firmly based in the available empirical data that consists largely of surveys of college women, most of whom are unmarried.¹⁰ Nevertheless, it is highly unlikely that sex selection abortions would occur without the approval of the husband or lover involved, if any. Therefore, any criminal punishment of women for seeking sex selection abortion should be coupled with criminal punishment of the husband or lover involved. This would accomplish several goals: it would punish men who insisted on or at least failed to object to the abortion; it would reveal society's strong disapproval of sex selection abortion; it would encourage men to take steps to prevent the abortion when they might otherwise not. The law could provide that a husband who has reason to know that his wife has decided to abort her female fetus and fails to object is equally as culpable as the wife. Procedurally, the law could provide that the fact that a wife has sought a sex selection abortion raises a rebuttable presumption that the husband did not object. The burden would then be on the husband to show that he had no reason

to know or that he did object or that his objection would have been futile. The reader should, therefore, bear in mind that I am really proposing punishment of couples, although I expressly discuss here only the special difficulties attendant to punishing women.

A fourth preliminary point is that the reader should not interpret my concern for women's equality as a concern for mere equality of numbers in future generations. My concern is equality of opportunity between the sexes—a state of affairs that American society has failed to achieve even when the numbers of the respective sexes are roughly equal. This goal will be even further out of reach, if not unattainable, should women be vastly outnumbered by men. Thus, the disproportionate numbers of women and men is merely symptomatic of the inequality of opportunity which is my real concern and which may well be incompatible with complete procreative freedom of couples and single women.

A fifth point here is that feminists must consider the consequences of restricting women's abortion rights, after the right to abortion has been so hard-won. Some feminists will refuse to restrict the freedom to avoid the slippery slope of the loss of the right in the long run. I do not resolve this difficult balancing problem. Instead, I say here only what can be said for restricting sex selection abortion.

A final preliminary point is that any prohibition on abortion for sex selection would not be based on any view that fetal life should take precedence over the woman's desire to terminate the pregnancy. Instead, the purpose of the prohibition would be the realization of sexual equality of opportunity in future generations. This does not imply that any fetuses saved by the prohibition were bearers of a serious right to life. Since society would restrict women's freedom for the sake of future equality, the crucial question is not whether the lives of individual fetuses are sacrosanct but whether such future equality is of sufficient social significance to justify interference with what are normally considered private decisions. It is instructive in this connection to reflect on the arguments presented by the participants in the Hart-Devlin debate of twenty-five years ago, since the issue there was the extent to which society can interfere with seemingly private decisions.

Three Morally Relevant Characteristics of Abortion for Sex Selection

One of the many arguments Devlin marshalled in his effort to convince his critics that private behavior is society's business concerned private drunkenness. He admits in his book that becoming drunk alone in one's own home seems to be a purely private matter,

but he proceeds to ask rhetorically what society would be like if half the population chose to do this every night.¹¹ Even Devlin's critics of a utilitarian persuasion would be forced to admit that society would be justified in prohibiting private drunkenness if large numbers of people were unable to resist the urge to drink alone to excess—with the resulting absenteeism from work and the decline in productivity that would inevitably result.

This hypothetical situation bears important similarities to abortion for sex selection: (1) both concern seemingly private decisions that in isolated cases have little impact on society but (2) have a seriously adverse impact if large numbers of people engage in the activity at issue, and (3) most importantly, the large numbers of prospective participants choose not to resist the temptation to engage in the activity at issue. A closer examination of each of these conditions shows how satisfying all of them provides a justification for society's interference in otherwise private decisions.

The first condition merely describes what Mill called self-regarding conduct: the individual decision to seek an abortion for sex selection or to become inebriated in solitude has little if any impact on society. The second condition is really the counterfactual claim about what would happen if large numbers of people became drunk alone or aborted fetuses of the "wrong" sex. Society is ultimately affected only when the third condition is satisfied. That is, if most people at home alone were simply unable to resist the temptation to drink to the extent that their performance at work the following day was adversely affected, the decision to become drunk alone would no longer be a merely private decision. Society would then be entitled on Millian grounds to intervene, because the decision is taken out of the purely private realm by the adverse effect on social productivity the decisions cause. To be sure, society could elect to bear the loss, but nondrinkers, who, unlike their drinking fellow workers, derive no benefit from the freedom to drink, would be under no obligation—of a Millian sort—to compensate for the poor performance of their fellow workers. Similarly, society could bear the enormous social cost of having wildly fluctuating proportions of the sexes in its population from one generation to the next or of a permanent imbalance in the proportion of males to females, but society is surely under no obligation to bear either burden.

Is Sexual Equality Similar to a Public Good?

In truth, society's attempt to prohibit abortion for sex selection is more aptly compared to the sacrifices society bears to enjoy a

public good than to the sacrifices it makes to eliminate social evils like excessive drinking. That is, women who seek abortions for sex selection are more appropriately viewed as free riders who prevent society from enjoying a public good than as individuals who cause social mischief. Whereas the drinking controversy pits the abstainers against the drinkers with each side disagreeing over the value of drinking and whether nondrinkers should compensate for the reduced productivity of drinkers, the controversy over abortion for sex selection might involve complete agreement on all sides over the value of equal opportunity between the sexes. In other words, childbearing couples would agree that women should not be disadvantaged in the competition for privileged positions and that women should not be free to have firstborn males exclusively. They would agree on the reasonableness of society's ban on abortion for sex selection, but, as with all public goods, each couple would secretly seek to make an exception for its own firstborn child. This is not to say the drinking controversy could not take the form of a free rider problem in which drinkers agreed with nondrinkers on a ban on private drunkenness but secretly sought exception in their own cases. However, the drinking controversy is more plausibly understood as arising from a fundamental disagreement between drinkers and nondrinkers over the respective values of worker productivity and the pleasure of drinking. Conversely, the sex selection controversy can be more plausibly depicted—to feminists at least—as a free rider problem in which all sides agree that long-run sexual equality takes precedence over short-run procreative freedom than as a fundamental disagreement among child-bearing couples over whether equality is more important than freedom.

One striking difference between the free rider problem and the sex selection abortion problem is that public goods are not designed to ease the burden of past discrimination. Justice might require some government provided programs, such as old age security or public health care, but they are not usually part of a program of compensatory justice, or, more exactly in the context of sex selection abortion, a way of reducing the pervasiveness of traditional forms of discrimination. Viewed this way a ban on sex selection abortion is unlike any other public good. In this respect, banning sex selection abortions is a variant of what constitutional scholars call "benign sex discrimination," i.e., legislation classifying people according to sex and restricting the opportunities of one sex to enlarge the opportunities for members of a traditionally discriminated

group. Usually, this entails reducing opportunities for males to benefit females; in this case we are restricting the reproductive freedom of the present generation of women to ease the burdens for future generations. Perhaps one last hypothetical scenario will more clearly show how banning sex selection abortions is a form of benign sex discrimination.

Suppose men could insure that all-or the vast majority of sperm they released during intercourse contained only *Y* chromosomes, thus guaranteeing—or greatly increasing the odds of—male offspring. We might imagine men could accomplish this by ingesting certain vitamins every few weeks. Few who profess concern for long-run equal opportunities for women would doubt the legitimacy of banning or at least restricting the sale of these vitamins. The reason would be clear: when men exercise their reproductive freedom this way, they create an atmosphere of greater oppression for women in subsequent generations. Moreover, banning the sale of the vitamins does not prevent men from reproducing entirely: instead, men can no longer control all aspects of their reproductive activity. Since men have no fundamental right to control this aspect of reproduction and since the effects of the attempts to control that aspect of reproduction impinges on women's fundamental rights to be free of discrimination, it is just to restrict men's freedom to control the sex of their offspring. If this justification will succeed in the case of men's attempts at sex selection, it will surely succeed in the case of women's attempts. Indeed, if future medical technology should develop a way for women to control the sex of their offspring using do, it-yourself devices at home prior to conception, the justification for banning the sale of such devices would take precisely this form.

Two Problems a Ban on Abortion for Sex Selection Raises

Whether prohibiting sex selection abortion is better viewed as benign sex discrimination or as an instance of society's pursuit of a public good, the long run goal of equality between the sexes requires that society restrict American women's procreative freedom. Because American women have enjoyed freedom to abort regardless of motive since *Roe v. Wade*,¹² certain practical and constitutional questions about banning abortions for sex selection arise. These are: (a) whether the courts can and should distinguish in specific cases between the women who abort for a permissible reason, such as, the financial burden, and those who abort to select the sex of

the firstborn; (b) whether *Roe v. Wade* allows the state to restrict a woman's choice to abort early in the pregnancy.

The Practical Difficulty

If a ban on abortion for sex selection were in effect, there would inevitably arise the case of the woman who knew her fetus was the "wrong" sex but chose to abort not to determine the child's sex but to avoid what she realized after conception was the onerous financial burden of childbirth and parenthood. It might seem irrational to excuse such a woman and to punish another woman who aborted under identical circumstances but honestly admitted that her motive was sex selection. Similarly, it might be said that it will be factually impossible to determine a woman's true motive whenever she claims her motive was permissible. Finally, it seems unprecedented for the state to punish people for conduct that is prohibited solely because it was actuated by a forbidden motive.

There are two responses to these questions. First, the courts could resolve close cases with a rule that the jury may infer an impermissible motive from an ambiguous situation alone. A permissive presumption like this can be justified on two grounds.

First, allowing the fact-finder this freedom would have the effect of encouraging women who know the sex of their fetuses to have "wrong" sex babies (rather than risk conviction of violation of the ban) thereby increasing the numbers of babies of the endangered sex, with the result, in turn, that imbalances in future generations become less likely to occur.

The second response to the objections above is that excusing women who abort a "wrong" sex fetus for permissible reasons is similar in relevant respects to the familiar good faith exemptions from liability in criminal law and the law of contracts. For example, a holder in due course, *H*, of a promissory note which, let us say, a purchaser, *P*, gave the seller, *S*, can recover what *P* owes on the note, even though *S* failed to perform—provided, among other things, that *H* acquired the note from *S* in good faith.¹³ In the criminal law, some courts will find an accused rapist innocent if he (or she) mistakenly believed the victim consented—even though the accused's belief was not reasonably held.¹⁴ Of course, the latter practice may have no justification, but the point is not that it is justified but that the courts have ordered fact-finders to make such subjective judgments. Admittedly, none of these determinations is easily made, but none is impossible.

Fundamental fairness requires that fact-finders make the distinctions between women who act from the right motives and those who do not, because we want to punish only those women with the

requisite mens rea and because, when the law denies an abortion to a woman with an unwanted pregnancy, the state imposes a far more oppressive burden on her than the burden it places on the woman who is willing to endure pregnancy, childbirth, and motherhood for the sake of a child with a certain sex. Moreover, the first woman has exercised the restraint the state demands, namely, refraining from abortion to determine the sex of the child, while the second woman has inexcusably contributed to sexual imbalance in the general population.

The Constitutional Problem

The constitutional difficulty is much more straightforward. A superficial reading of *Roe v. Wade* suggests that the Court insulated a woman's decision to abort during the early stages of pregnancy from all state interference.¹⁵ Some feminists, however, have concluded that *Roe* "may not provide a sturdy foundation upon which to erect a lattice of rules, regulations, and procedures sufficient to safeguard women in their desire to control fertility" in the face of the new reproductive technologies.¹⁶ Although the question of *Roe*'s application to the problem of banning sex selection abortion constitutes a topic of its own, a careful reading of the Court's opinion reveals that the state's interests in preserving fetal life and protecting maternal health were not deemed by the Court to be sufficiently compelling to warrant interference with the woman's decision to abort during early pregnancy.¹⁷ The Court did not consider how much more compelling (than the state's interest in protecting the fetus's life and the mother's health) is the state's interest in attaining sexual equality or preserving the present proportions of the sexes in the population. Moreover, the Court was presumably faced with the case of a woman who found the burden of pregnancy altogether unbearable. The Court noted that the woman and her physician would consider such factors as the stigma of unwed motherhood and the distress and psychological harm that the unwanted child would cause to the mother and the family.¹⁸ The Court was obviously not reaching any conclusions about the privacy right of a woman for whom the abortion decision involved the sole consideration of the sex of the offspring. As noted above, the burden of childbirth is far more onerous for a woman with an unwanted pregnancy than it is for a woman selecting the sex of her child. In constitutional terms, this means that forcing a woman to carry an unwanted fetus to term, as in *Roe*, is a far more intrusive invasion of her right to privacy than forcing a woman to carry to term a fetus of an undesired sex. It is at least plausible, then, to suppose that,

while the Court was not convinced that protection of fetal life and maternal health justified state interference with a woman's decision to avoid an unwanted pregnancy, the more important state interest in attaining women's equality might well provide a constitutional basis for restricting a woman's far less significant freedom to choose abortion solely to determine the child's sex.

It is even possible that a state could justifiably interfere in the early stages of pregnancy, for *Roe* did not entirely preclude a state from criminalizing abortion in the early stages. It said simply that Texas' statute violated the due process clause of the fourteenth amendment, because the statute proscribed abortion "without regard to pregnancy state and without recognition of the other interests involved."¹⁹ A statute that proscribed only sex selection abortion would take into account far weightier interests on the side of the state that were not present in the unwanted pregnancy case in *Roe*; nor would the woman's interests at stake be as serious as they were in *Roe*. It would, therefore, appear that a statute criminalizing only sex selection abortions would take into account the relevant interests involved in the way Texas's statute failed to do.²⁰

Thus, the constitutional difficulties *Roe v. Wade* may seem to have created for statutory bans on sex selection abortion are not as great as a casual reading of *Roe* would suggest. This does not show, however, that American women are likely in large numbers to seek sex selection abortions, since such a conclusion would presume that surveys showing couples prefer male children imply that women would ignore other factors, such as religious proscriptions or the probability (or improbability) of another pregnancy. The argument in this section merely shows that, should states choose to take preventative action (to avoid large numbers of sex selection abortions), the constitutional difficulties posed by *Roe* are not serious.

I owe the inspiration for the topic of this paper to Professor Richard Delgado of the University of California at Davis School of Law.

1. For a socialist view of women's liberation, see Reed, "Women: Caste, Class or Oppressed Sex?," in *Problems of Women's Liberation* (1970): 64-70.

2. Of course, socialist feminists could argue that there would be no careers that are inherently more rewarding than others in a truly liberated society, since work would be adjusted to needs. See V. Lenin, *The State and Revolution* (Foreign Languages Press, Peking ed., 1973), pp.109-22. This raises the difficult empirical question of the likelihood that such an

equalitarian society could ever come into existence. If it could, the question I raise would apply to the transitional society: between our present society and the truly liberated society, there must be a collective decision about the degree of procreative freedom society will permit women.

3. There is, of course, no universal agreement on this. Judith Thomson argued that resort to abortion can be "indecent," as when a woman in her seventh month aborts so as to avoid postponing a trip abroad. Thomson, "A Defense of Abortion," *Philosophy and Public Affairs* 1 (1971): 47, 65-66. Undoubtedly, there are Roman Catholics who consider themselves feminists, but who are nevertheless morally opposed to abortion on demand. Feminists of this sort are not confronted with the dilemma I present here.

4. Westoff and Rindfuss, "Sex Preselection in the United States: Some Implications," 184 *Science* 633, 636 (1974). American wives are much more likely to prefer giving birth to a son than to a daughter. Coombs, "Preferences for the Sex of Children among U.S. Couples," *Family Planning Perspective* 9 (1977): 259. Holmes and Hoskins argued in their paper, "Prenatal and Preconception Sex Choice Technologies: A Path to Femicide?" (presented at the Second International Interdisciplinary Congress on Women in Gronigen, Netherlands, April, 17-21, 1984) that couples will be more willing to limit family size if they can first satisfy their desire to have a firstborn son. Allowing couples this option would therefore diminish the female population, since couples would need no longer continue "trying" to have a son after the births of several daughters as they now do.

One study found that only about one-fourth of college men and women would use sex preselection techniques, but, of those who would, 81% of women and 94% of men prefer firstborn sons. Gilroy and Steinbacher, "Preselection of Child's Sex: Technological Utilization and Feminism," *Psychological Report* 53 (1983): 671, 675. Even college women who moderately or strongly supported the women's movement expressed a two-to-one preference for firstborn sons. *Ibid.*, p.674. Other researchers posed to college students of both sexes the specific question of whether abortion was an acceptable means of sex selection and found that acceptance ranged between 4.2% and 40.3%. Feil, Largey, and Miller, "Attitudes Toward Abortion as a Means of Sex Selection," *Journal of Psychology* 116 (1984): 269.

If there were more laterborn daughters, the female infant mortality rate would increase because studies show high risk laterborn infants receive less maternal stimulation than the firstborns. Conversely, the male infant mortality rate is likely to increase because high-risk male infants will more often be firstborn. See Bendersky and Lewis, "The Impact of Birth Order on Mother Infant Interactions in Preterm and Sick Infants," *Journal of Development & Behavior Pediatrics* 7 (1986): 242.

5. Westoff and Rindfuss, *supra* note 4 at 636.

6. Researchers who studied female infanticide and neglect of female children in India conclude the "any further reduction in the sex ratio in Northern India... would be unlikely, to offer any benefits to the women who

survive." Jeffrey, Jeffrey, and Lyon, "Female Infanticide and Amniocentesis" *Social Science and Medicine* 1191 (1984): 1207, 1211. The authors do not believe a scarcity of women will raise their value, but would be "symptomatic of their low value." *Ibid.*

Of course, Northern India is different from the United States (with which I am exclusively concerned here) in a number of respects, but the point is that a scarcity of women in the United States would be symptomatic of chauvinism, not a cause for women to rejoice. Moreover, any "advantages" American women would enjoy if their numbers are reduced are likely to be the paternalistic and protective ones of which feminists have been suspicious or resentful, since those "advantages" often serve to insulate women from the risks of, for example, pursuing a career or owning a business. The disadvantages women would suffer if sex selection abortion were unrestricted lie, first, in the reduction of their numbers, as the Gilroy and Steinbacher study suggested. See *supra* note 4. The practice need not become rampant for the reduction to occur. Even skeptics must concede a modest reduction in the female population. This will result in diluted voting power for women (unless one supposes American voters would grant multiple votes to women and single votes to men).

Second, crime will increase because more men are involved in violent crime (defined as forcible rape, robbery, murder, and aggravated assault) than women. Indeed, arrests of males in this category exceeded arrests of females by a factor of eight to one in 1985. See Federal Bureau of Investigation, "Uniform Crime Reports for the United States" (1985), p.181. The reader should note that my prediction of an increase in crime is not based on any sociobiological theory nor on any correlation between male aggressiveness and crime or male hormones and crime. I simply predict that the incidence of crime will increase because there will be more males in society relative to the number of females. Thus, my argument is not subject to the attack Mary Anne Warren launches against the more males-more violence arguments based on sociobiology, male hormones, and sexual stereotypes. See M. Warren, "Gendercide" (1985): 108-29.

The predictions of increased job discrimination and reduced career opportunities are based largely on new evidence about the importance of birth order in career opportunities. The studies in note 4 *supra* indicate that unrestricted use of sex selection abortion will increase the number of firstborn males and decrease the number of firstborn females. Despite Mary Anne Warren's dismissal of the theory of birth order as "empirically unsubstantiated or devoid of predictive power," *ibid.*, p.142, those who have defended birth order theories have found flaws in studies yielding the conclusion that birth order is unimportant. See Zajonc, "Validity the Confluence Model," *Psychological Bulletin* 93 (1983): 457, 463-64. Moreover, one study has found that firstborn males have the least favorable attitude toward women as managers. Beutell, "Correlates of Attitudes toward American Women as Managers," *Journal of Social Psychology* 124 (1984): 57. Assuming firstborn men will serve as hiring officers, job discrimination at least in managerial position is likely to increase.

There are, for similar reasons, likely to be more limited career opportunities, since fewer women can be expected to pursue academic careers. Among honors undergraduates, one study found firstborn women over-represented (relative to laterborn women). Finlay, "Birth Order, Sex, and Honor Student's Status in a State University," *Psychological Report* 49 (1981):1000. Fewer firstborn women would likely mean fewer women excelling at academics and therefore fewer career options for the women who do not distinguish themselves academically.

Warren's dismissal of the birth-order theory is surprising in view of these studies—none of which she discusses. They reveal the empirical support for the theory and illustrate its predictive power, which she found lacking.

7. Illinois has a statute forbidding physicians from performing an abortion in a case in which the physician knows the woman seeks the abortion solely because the fetus is the "wrong" sex, apart from any sex-linked genetic defect. *Illinois Revised Statutes (1987): chap. 38, para. 81-26(8)*.

8. Steinbacher, "Sex Preselection: From Here to Fraternity," in *Beyond Domination*, C. Gould, ed. (1983), 274, 279-80.

9. Gilroy and Steinbacher *supra* note 4.

10. See *supra* note 8.

11. P. Devlin, *The Enforcement of Morals* (1965), p.14.

12. 410 U.S. 113 (1977).

13. See U.C.C. 3-302 (b).

14. The House of Lords held that an accused is innocent of rape if he believed the victim consented, even though a reasonable person in the place of the defendant would have realized that the victim did not consent. *Regina v. Morgan*, 1976 A.C. 182. Considerable discussion followed this decision in the editorial pages of the *Times*. See *The Times* [London], May 5-8 and 12, 1975. Of course, the latter practice may have no justification, but the point is not that it is justified but that the courts have ordered factfinders to make such subjective judgements

15. In the view of John Fletcher, for example, *Roe* made "the conscience of the individual woman the sole arbiter of the reasons" for choosing abortion. Fletcher, "Ethics and Amniocentesis for Fetal Sex Identification," *New England Journal of Medicine* 301 550, 551 (1979): 550, 551.

16. Wikler, "Society's Response to the New Reproductive Technologies: The Feminist Perspective," *Southern California Law Review* 59 (1986): 1043, 1055.

17. See *Roe*, *supra* note 12 at 163-64.

18. *Ibid.*, p.153.

19. *Ibid.*, p.164.

20. The Constitutional arguments in this section of the paper are expanded in Part III of my paper "Benign Sex Discrimination Revisited: Constitutional and Moral Issues in Banning Sex Selection Abortion," *Pepperdine Law Review* 15 (1988): 295.

RESPONSIBILITY AND THE REQUIREMENT OF *MENS REA*

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O, now for ever
Farewell the tranquil mind! Farewell content!

Othello, Act III, scene 3

In his great tragedy *Othello* Shakespeare does a very penetrating phenomenological analysis of responsibility. When Othello utters the above words a turning point has been reached in the drama. Othello voluntarily and deliberately decides that he is going to entertain doubts about the fidelity of his beloved wife Desdemona. He also realizes full well, and adverts to the fact, that in so doing he is bidding farewell to all the happiness and glory he has known and deliberately decides to do it anyway, *coûte que coûte*. What is interesting about this in terms of the related problems of voluntariness, responsibility and *mens rea* is the conscious and deliberate way in which he takes responsibility for his acts. He sees the consequences of what he is doing clearly when he deliberately and voluntarily decides to harbor doubts about Desdemona, indeed he goes on in the long paragraph which follows, to enumerate in detail

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all of the things that he is forfeiting in so doing, and he decides to do it anyway. In short, he assumes the full responsibility for his acts.

The reason that this is so interesting is because it contrasts so markedly with the pervasive moral attitude of our society, a society in which the dominant tendency is a more or less total denial of responsibility for anything. That such a denial of responsibility should come about is not at all surprising and is indeed the logical consequence of the vision of man which sees him only in one-dimensional, materialistic terms. Since the overwhelming majority of psychologists see man as only a purely material being, they must consistently deny him freedom.¹ Purely material beings are obviously not free; they are determined to one mode of activity, the stone to fall, water to freeze at 0° C. Thus if man is only a material being he is not free, and if not free, not morally responsible for his acts. But while this approach to man has the seeming advantage of relieving him of the burden of responsibility for his acts, it is an advantage, if such it be, that has been bought at a very considerable price.

A system in which there is a more or less complete denial of moral responsibility will have some very definite, and indeed profound, repercussions in the legal and social orders. The reason for this is clear. Our legal system, that is the Anglo-American system, has always been very closely tied to the moral order and indeed based upon it.² Therefore it is easy to see that a breakdown in the moral realm in terms of responsibility will have a profound effect in the legal and social sphere.

Let me illustrate this point in this way. Let us take one city for example, New York City, an example which could be replicated in every major city in the United States and in most of the smaller ones as well. In 1980, for example, in New York City we see the following crime statistics: murders 1,814; rapes 3,711; robberies 100,550; assaults 43,476; burglaries 210,703; thefts 249,421; automobile thefts 100,478. This totals to 710,153 felonies *reported*. It is estimated that the clearance rate in New York City is 10%. This means that the figure of 710,153 felonies, staggering as it is in itself, is merely the tip of the iceberg, since this very likely only represents 1/10th of the actual crimes committed. Most rapes, for example, as is well known, simply go unreported.

Two other examples will help to illustrate how totally impotent the criminal justice system presently in place is to deal with the epidemic of crime. Manhattan District Attorney Morgenthau tells us that this year there will be 56,000 arrests of drug *pushers*—*pushers*, not just users, *pushers*. Of this 56,000 with existing judges and court facilities he will be able to try at most 280 cases. For

56,000 felonies of a most serious nature—the destruction of the youth of our country—280 people, less than 1/2 of 1% will ever come to trial.

One further example will help to illustrate the complete breakdown of social controls. In New York City, according to the above statistics, approximately 100,000 cars are stolen per year. Since the penalty for Grand Theft Auto in New York State is 3-5 years, that would mean that if there were a prisoner behind bars for each of these felonies, even with a minimum sentence of 3 years, we might expect to find about 300,000 persons in prison for these crimes. But, of course, we do not find 300,000 people in prison in New York State for auto theft, nor do we find 200,000 nor even 100,000. Nor indeed do we find 100. At the moment we have, not just for New York City, but for the entire state 19—19 people in prison for over 300,000 felonies!

At this juncture some people might react to such statistics with shocked outrage and demand that what is called for is a real “crackdown”. But it is just at this point that we reach the impasse in social controls that I alluded to above. The impasse is this—what would we do with these felons if we caught them all??? We obviously couldn’t house even a minuscule fraction of them with existing facilities. At the present rate it costs, in New York State, about \$100,000 for each new prison cell. Police Commissioner Benjamin Ward tells us that in New York City it costs \$95 a day to keep a prisoner at the Rikers Island House of Detention. This works out to about \$35,000 per year for each prisoner. With such figures in mind a “crackdown” would obviously be impossible, just in fiscal terms alone.

From these examples it seems perfectly clear that our current system of justice simply doesn’t work. Further, I should like to argue, the way in large part by which we have arrived at this point has been paved by philosophical theories. Starting with an inadequate metaphysics of man, a one-sided materialistic vision of man, empirical psychology has denied any spirituality to man and with that denial, freedom is the first casualty.³ And the logic of this position dictates that there be a corresponding denial of responsibility. The picture of life in our cities that emerges from the above statistics is not that of an ordered, civilized, that is *human*, life. It much more closely resembles the inhuman, brutal, bellicose life in the original position described so well by Hobbes in the *Leviathan*—“*homo homini lupus...bellum omnium contra omnes.*”

In seeking solutions to these very difficult problems let us turn our attention now to philosophy of law, for the constant and unvarying tradition in philosophy from Socrates onward has been that among the many tasks of law one of its most important functions

is pedagogic. Already in the *Apology* when the question is put to Meletus by Socrates "Who then are the improvers of men?", the answer is elicited by Socrates, "The laws, O Socrates." And one of the areas, I should like to argue, in which the teaching of the law has been faulty is the area of responsibility, and particularly in the area of the much discussed doctrine of *mens rea*.

Again, let us start with an example which proved quite shocking to many people, though of course it shouldn't have, since it was common practice. In this case, John Hinckley attempted to assassinate the President of the United States, critically wounding him and several others, leaving some of them, Press Secretary James Brady, for example, permanently crippled. Hinckley was found not guilty by reason of insanity because he lacked the *mens rea* required by the federal jurisdiction in which the case was tried. While people were generally outraged at this verdict to a crime which literally left the street running with blood, they were doubly stunned when they found that in less than two months, a bare 50 days, he could petition for release.⁴ How did the law get to this point?

The doctrine of *mens rea*, that is the subjective element in a crime, the "inner facts" as Oliver Wendell Holmes called them,⁵ has had a long history. Even in ancient Roman Law provision was made for the mentally incompetent or *non compos mentis*. They were variously designated as *furiosus* or *fanaticus*—what we would call madmen.⁶ In English law we can find seeds of the doctrine during the reign of Edward I in England in the thirteenth century. In the late 1700s Blackstone wrote in his *Commentaries*, "An unwarrantable act without a vicious will is no crime at all."⁷ A more important precedent is the Hadfield decision of 1800,⁸ but by far and away the most important case was that of Daniel M'Naughten in England in 1843. In this case, M'Naughten, who seemed to be suffering from delusional paranoia, fancied that the Tories were hatching plots aimed at his destruction. He decided to preempt them by killing the Prime Minister, Lord Robert Peel. He instead mistakenly killed his secretary, Edward Drummon, who was riding in Peel's coach. He was found not guilty because of his mental condition.⁹ This verdict caused such outrage that the House of Lords responded by adopting the rare measure of asking the judges to explain the law in this case. The explanation set forth by Lord Chief Justice Tyndal has come to be known as the M'Naughten Rules and has exercised an enormous influence not only in England, but in the United States and many other jurisdictions as well. But how could a person who knowingly and willfully shoots someone with the intention to kill be found not guilty?

Our Anglo-American legal codes grew out of a moral system that held a person responsible for his acts if, and only if, he did such acts voluntarily,¹⁰ by which is basically meant that the person knows what he is doing and freely chooses to do it. There must be in other words both a cognitive and volitional element which constitute the wrongful act. For the wrongful act to be morally imputable both of the elements were required, and here the legal order followed the moral quite closely.¹¹ Our legal codes require for guilt not merely the commission of an act which is *objectively* wrong—killing someone for example—but in addition to the objectively wrongful act, *subjective* fault is also required. This is expressed in the legal axiom, "*actus non est reus, nisi mens sit rea.*"¹² It is not the mere commission of a wrongful act which renders one guilty, but in addition to this an evil or wrongful intent, *mens rea*, is also required. Let us take an example, say of the destruction of a priceless artifact. A person who does not know that he is an epileptic, while browsing in a museum, suffers an epileptic seizure which causes a muscular spasm throwing his arm out which knocks a priceless Ming Dynasty vase to the floor smashing it. We do not think the person morally or legally guilty of smashing the artifact because it was not a voluntary act and hence he is not morally (or legally) responsible for it. We view as altogether different the following case. Some years ago a man with a hammer concealed beneath his coat went into St. Peter's Basilica and after successfully eluding the guards leaped over the rail guarding Michelangelo's *Pietà* and deliberately smashed its face to powder. We judge these two acts, both of which *objectively* involve the same thing, i.e., the destruction of an artifact, to be morally quite different, and the difference is that in the first case the *subjective* element, the *mens rea*, is lacking and such lack we think exculpatory.

One of the problems confronting philosophy of law, influenced as it is by the social sciences, especially psychology and sociology, is an ever expanding interpretation of what militates against freedom and responsibility. The M'Naughten Rules, mentioned above, were relatively restrictive, at least by comparison to present day standards. They state, "...to establish a defense on the ground of insanity, it must be clearly proved that at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of mind, as not to know the nature and quality of the act he was doing; or if he did know it, that he did not know what he was doing was wrong."¹³ This is, in several ways, quite restrictive. First, the only exculpatory claims that can be sustained are in the *cognitive* order, not volitional. Secondly, the

commentators in giving ostensive definitions as to who would qualify under these rules noted as examples someone who could not count out 20 pence, or could not recognize his mother or father. And a third, and most important qualification, was that the burden of proof of insanity was always on the defendant who claimed it. Thus judge Tyndal continues in his opinion, "...the jurors ought to be told in all cases that every man is to be presumed sane, and to possess a sufficient degree of reason to be responsible for his crimes until the contrary be proved to their satisfaction..."¹⁴

These were the rules then that obtained until 1954 in the United States, (the first successful defense of not guilty by reason of insanity being the Sickles decision 1859, Washington, D.C.). In 1954 the Durham decision had the effect of extending vastly the areas in which one might attempt to plead not guilty by reason of insanity. As we noted, the M'Naughten decision affected only the cognitive element of the voluntary act. Durham now extended to the volitional component ways in which *mens rea could be vitiated*. Now if a person suffered an "irresistible impulse,"¹⁵ as it became popularly known, though this wording is not found in the decision itself, this could also render the person immune from responsibility.

The Durham decision also had another very important consequence—the shift of evidentiary burdens from the defense to the prosecution. As we just noted, the M'Naughten Rules clearly stipulated that if a defendant claimed to be suffering from mental disease sufficient to render him insane under its provisions, the burden of proving such a claim was clearly on him. With Durham this changed one hundred and eighty degrees. Thus Judge David Bazelon wrote in his charge to the jury, "Unless you believe beyond a reasonable doubt either that he was not suffering from a diseased or defective condition, or that the act was not the product of such abnormality, you must find the accused not guilty by reason of insanity."¹⁶ (my emphasis) It is interesting to note that John Hinckley was tried in Washington, D.C. in the Federal jurisdiction where this was the precedent. Thus the only thing that his lawyers had to do was merely raise the *probability* of insanity through expert testimony, and then it became incumbent on the prosecution to show that he was sane. But how do you do that? Aren't we all a little quirky? Just how much quirkiness would be required to be judged legally insane and not responsible for one's acts? That, it would seem, is a very difficult line to draw.

The philosophic theories which have been the underpinning upon which such legal decisions have been based have been suffering from the same sort of inadequate understanding of respon-

sibility that we have noted in the areas of philosophy of man and moral philosophy. We have arrived finally at a total and complete denial of anything like either moral or legal responsibility. There is a complete blurring of the distinction between mental disorder and moral/legal fault, until finally we have arrived at the point where jurists, and highly regarded ones at that, baldly state that all criminal acts are mental disease. Thus Edward Hoedmaker writes, "Modern psychiatry...regards all criminal acts as products of abnormal personality structure and development.... It is hoped that the day will come when *all offenders will be regarded as sick and treated as such.*"¹⁷ (my emphasis)

This tendency to eliminate the question of responsibility altogether from the law can be seen with special clarity in the writing of the noted, and highly regarded Lady Barbara Wooton. Concerning this desired conflation of legal fault and mental disease she writes:

Here, I think, one of the most important consequences must be to obscure the present rigid distinction between the penal and the medical institution...the formal distinction between prison and hospital will become blurred, and, one may reasonably expect, eventually obliterated altogether. Both will simply be "places of safety" in which offenders receive the treatment which experience suggests is most likely to evoke the desired response. Does this mean that the distinction between doctors and prison officers must become blurred? Up to a point it clearly does.¹⁸

This position, she hopes, will lead to the elimination of the useless and obstructive notion of responsibility. Thus she writes:

...any attempt to distinguish between wickedness and mental abnormality was doomed to failure; and the only solution for the future was to allow the concept of responsibility to "wither away"....¹⁹

Thus we see that the notion of responsibility has been constantly eroded until now, in the view of many legal experts, it is impossible to draw a distinction between legal fault and mental disease. Is there any way out of this cul-de-sac? Some experts in this area, for example, Herbert Fingarette and Anne Fingarette Hasse, have noted the confused morass which this area of law has become. They write:

...the law that has developed in this area is a thicket of confusion and controversy lacking in any rational ground plan.²⁰

They go on to review various proposals that have been made to eliminate what they call a "miasma of ad hoc legal doctrine and evidentiary confusion..."²¹ such as that of Lady Wooton, who proposed that all evidence as to mental condition, even that of *mens rea* be considered only after the trial, the trial itself being restricted to the determination of whether or not the accused did in fact do the act of which he stands accused.²² But Fingarette and Hasse regard the several proposals to remove the entire issue of mental disability from the trial process as too radical a surgery.²³ In the end they believe that the determination of *mens rae* is fundamental to the trial process.²⁴

Unfortunately it seems that their solution of what they call D.O.M., Disability of Mind,²⁵ does very little to move us beyond our present impasse. True they do wish to restrict what they call the "tyranny of the experts,"²⁶ that is the abuse of testimony by expert witnesses, and that surely is laudable, but in the end the reform attempted by the D.O.M. doctrine really seems to leave things too much in the state of the confused mess they are.

I should like to suggest that a possible way out of the impasse might lie along a different route, that of the doctrine of strict liability which is used in tort law, especially in what are called "public welfare offenses." In tort law Richard A. Epstein has proposed a theory of strict liability that has attracted a great deal of attention,²⁷ and, it seems to me, it might be useful, by way of analogy, in criminal law as well. In tort law Epstein wants to replace negligence theory (the "reasonable man" test) by a theory of strict liability, that is causation of an act gives rise, prima facie, to responsibility.²⁸ What I would like to suggest is that by way of analogy we might do the same thing in criminal law.

This notion of strict liability is of course anathema to some jurists,²⁹ constituting, as they think, a return to primitive legal barbarism.³⁰ But this of course need not be so and in my view would be a much needed redress of the present bias against personal responsibility.

Lady Wooton, for example, correctly notes that many, indeed most of the cases dealt with in criminal law are dealt with in terms of strict liability where no element of *mens rea* is considered.³¹ If one is charged with car theft, burglary, breaking and entering, or armed robbery, for example, no element of *mens rea* enters as exculpatory—*res ipsa loquitur*, the deed speaks for itself and nothing needs to be proved about intention, motive, capacity for control or whatever.

But what about the area where *mens rea* proves especially troublesome, murder cases. Blackstone wrote in the *Commentaries*,

"...no temporal tribunal can search the heart, or fathom the intentions of the mind, otherwise than as they are demonstrated by outward actions...", and he is of course correct. The law cannot search out the *secreta cordis*; after all, it is not God, who alone is "the searcher of hearts and reins." But neither need it be. It can follow Blackstone's advice and not try to search out all of the secret depths and mysteries of human motivation. It cannot, in any case, do that, and it need not. When a person does a lethal act, for example picks up a pistol, aims it and fires it at his enemy, the law may legitimately *infer* intent—when you pick up a lethal weapon, aim it and fire it, your intention is obviously lethal and that is all the law need prove for a *mens rea*. As R.J. Gerber has pointed out:

...insane persons clearly *do* intend their acts. A paradigm of many examples, M'Naughten himself manifestly intended killing, carefully premeditated it, and knew it to be wrong and punishable—this is precisely what his lengthy deliberation and careful concealment of plans connote. A strictly honest reading of his test on its face would exonerate neither M'Naughten nor many, if any, similarly insane defendants.³²

Epstein's theory of strict liability in tort law holds that proof that the defendant caused harm creates a presumption of intention and there is no room to consider, as part of the *prima facie* case, allegations that the defendant did not intend harm to the plaintiff or could have avoided the harm he caused by the use of reasonable care. The choice is plaintiff or defendant and the analysis of causation is the tool which, *prima facie*, fastens responsibility upon the defendant.³³ I would like to suggest that criminal law, analogously, might follow this approach. When a person, be it M'Naughten, Hinckley, or whoever, intentionally does a death-dealing act, the presumption, *prima facie*, is that *mens rea* is present.

1. This tendency to deny freedom of will on the part of science which has adopted a totally materialistic vision of man is noted by the eminent neurobiologist and Nobel Laureate Roger Sperry in "Changing Concepts of Consciousness and Free Will," *Perspectives in Biology and Medicine* XX, no. 1 (Autumn 1976): 10. Thus he writes: "Ever since the advent of behaviorism and the adoption of the materialist philosophy in the early 1900s, the prevailing doctrine of twentieth-century science has been telling us that conscious mind and free will are little more than introspective

illusions.... In other words in the world view of Materialist science, real mental freedom to act and choose is an illusion...." This tendency to deny any freedom of the will by science which has accepted a materialist world view is also noted by Sheldon Glueck, "Diminished Responsibility: A Layman's View," *Law Quarterly Review* LXXVI (1960): 232.

2. H.L.A. Hart, "Responsibility," *Law Quarterly Review* LXXXIII (1967).

3. There is also a healthy tendency among some scientists, Roger Sperry is a notable example, in the opposite direction, that is to view the materialist vision of man as inadequate. Thus he remarks in "Changing Concepts of Consciousness and Free Will," p.11: "The reason lies in the emergence in recent years of a modified interpretation of the nature of the conscious mind and of the fundamental relation of mind to brain mechanism. These latest views represent a substantial swing away from the classic materialist position and give renewed recognition to the role of mental over material forces." See also his *Science and Moral Priority: Merging Mind, Brain, and Human Values* (New York: Columbia University Press, 1983) in which he develops this theme that the old materialistic world view of science which rejected free will as romantic mysticism is now passé as a result of split brain research. Thus he writes, pp.39-40: "The proposed brain model provides in large measure the mental forces and abilities to determine one's own actions. It provides a high degree of freedom from outside forces as well as mastery over the inner molecular and atomic forces of the body. In other words it provides plenty of free will as long as we think of free will as self-determination. A person does indeed determine with his own mind what he is going to do and often from among a large series of alternative possibilities." It is to be hoped that this tendency in science continues, but unfortunately for the present it has had little effect on the legal order.

4. *Newsweek*, July 5, 1982.

5. Holmes, *The Common Law*, Lecture II, "The Criminal Law."

6. Daniel Robinson, *Psychology and Law: Can Justice Survive the Social Sciences* (New York: Oxford University Press, 1980), p.36.

7. William Blackstone, *Commentaries On the Laws of England* (London, 1765-1769).

8. Rita James Simon, *The Jury and the Defense of Insanity* (Boston: Little, Brown & Co., 1967), p. 18.

9. Herbert Fingarette, *The Meaning of Criminal Insanity* (Berkeley, University of California Press, 1972), p. 138.

10. H.L.A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford University Press, 1967), p. 186.

11. H.L.A. Hart, "Legal Responsibility and Excuses," in *Philosophical Issues in Law*, ed. Kenneth Kipnis (Englewood Cliffs, N.J.: Prentice Hall, 1977), p. 15.

12. *Ibid.*

13. Simon, *The Jury and the Defense of Insanity*, pp.22-23.

14. Ibid.
15. The term "irresistible impulse" is used already in 1834 in the United States in *State v. Thompson*.
16. Simon, *The Jury and the Defense of Insanity*, p.31.
17. Edward Hoedmaker, "Irresistible Impulse' As A Defense in Criminal Law," *Washington Law Review* XXIII (1948): 6-7.
18. Barbara Wooton, "Eliminating Responsibility," in *Responsibility*, eds. Joel Feinberg and Hyman Gross (Encino, Calif.: Dickenson, 1975), p. 148.
19. Ibid., p.144.
20. Herbert Fingarette and Anne Fingarette Hasse, *Mental Disability and Criminal Responsibility* (Berkeley, University of California Press, 1979), p.3.
21. Ibid., p.5.
22. Barbara Wooton, *Crime and Criminal Law* (London: Stevens & Sons, 1963), chapters 2,3,4.
23. Fingarette and Hasse, *Mental Disability and Criminal Responsibility*, p.5.
24. Ibid., pp.5-7.
25. Ibid., p.3.
26. Ibid., p.10.
27. For his theory of strict liability in tort law see especially his *Theory of Strict Liability: Towards a Reformulation of Tort Law* (San Francisco: Cato Institute, 1980); as well as the following. "Pleadings and Presumptions," *University of Chicago Law Review* XL (1973): 556-82; "Intentional Harms," *Journal of Legal Studies* IV (1975): 391-442; "Causation and Corrective Justice: A Reply to Two Critics," *Journal of Legal Studies* VIII (1979): 477-504; "Nuisance Law: Corrective Justice and Its Utilitarian Constraints," *Journal of Legal Studies* VIII (1979): 49-102.
28. Epstein, *Theory of Strict Liability*, p.25.
29. Jerome Hall, *General Principles of Criminal Law* (Indianapolis, Ind.: Bobbs-Merrill, 1947), pp.304-05.
30. Epstein, *Theory of Strict Liability*, p.71.
31. Wooton, "Eliminating Responsibility," p.138.
32. "Is the Insanity Test Insane?" *Readings in Philosophy of Law*, ed. John Arthur and William Shaw (Englewood Cliffs, N.J.: Prentice-Hall, 1984), p. 398.
33. Epstein, *Theory of Strict Liability*, p.25.

Lomasky Symposium*

AGAINST LOMASKYAN WELFARE RIGHTS

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“Once you give up integrity, the rest is a piece of cake.”
J.R. Ewing, *Dallas*

In this brief discussion I wish to examine Loren Lomasky's defense of the following claim, advanced in his *Persons, Rights, and the Moral Community*¹:

If a person is otherwise unable to secure that which is necessary for his ability to live as a project pursuer, then he has a rightful claim to provision by others who have a surplus beyond what they require to live as project pursuers. In that strictly limited but crucial respect, basic rights extend beyond liberty rights to welfare rights.[p.126]²

Lomasky states that the “thoroughgoing libertarian who regards all restrictions of liberty as impermissible whatever the grounds on which restriction is based will reject the claim that there

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are any welfare rights." And he adds, "Such a libertarianism is indefensible."(p.127)

Aside from the fact that I take the rights that would be violated by the exercise and enforcement of welfare rights inviolable, at least as legal principles of a just society, and thus reject Lomasky's view on those grounds, I confess, also, that I have been defending the libertarianism he claims is indefensible. Thus I have something of a professional stake in this issue apart from the more important stake I have in it as a person and citizen. So I will try to show that Lomasky is wrong, at least if he believes that welfare rights ought to be legally protected.

I want first of all to clear up a point. A thoroughgoing libertarian might not regard "all restrictions of liberty as impermissible whatever the grounds on which restriction is based." It is possible that within the sphere of personal conduct a libertarian will reject such restrictions, just in the kind of cases Lomasky has in mind. I have myself argued just that view in my paper, "Prima Facie versus Natural (human) Rights"³. I believe that Eric Mack argues a somewhat similar thesis in his papers, "Egoism and Rights"⁴ and "Egoism and Rights Revisited"⁵. I believe both of us made a worthy effort to dispel Lomasky's somewhat cavalier claim that our type of libertarianism is indefensible—they deserve at least a look-see before the claim is advanced with the kind of confidence Lomasky demonstrates.

Some libertarians, such as Murray Rothbard, do indeed take it that basic natural negative or, in Lomasky's terms, freedom rights imply that under no circumstances is it permissible to violate or disregard them. My view is that under no circumstances is it permissible for a just government—i.e., that of a free society—to violate such basic natural negative rights. But for individuals these rights may at times have to be disregarded.

Which is the position Lomasky claims is indefensible? I assume that since he is defending welfare rights and since rights are what a just government is established to protect, he would hold that government may protect welfare rights. This would imply clearly enough that Lomasky not only defends the occasional violation or disregarding of such rights but their violation by the government.

Let us now see what Lomasky has to say in defense of his soft libertarianism or restricted welfare statism. He argues that the strong libertarianism he finds indefensible "disconnects the theory of basic rights from its foundation in a theory of practical reason for project pursuers."(p.127) He goes on with his argument:

Individuals have reason to value the maintenance of a regime of rights because they value their own ability to pursue

projects. Should that ability be placed in jeopardy by a system of rights such that one can either continue to respect others' rights or be able to pursue projects but not both, then one would no longer have a rational stake in the moral community established by that system of rights....[p.127]

From this it seems to me what may follow is just the thesis Mack and I defend. In other words, from what Lomasky says it is permissible on occasions to disregard the rights of persons. But it does not follow from this that administrators of the legal system ought to do so. The police, the courts, the legislatures, etc., have no reason to grant welfare rights. Yet this does not imply that persons always act in such a way that rights are decisive in what they will do.

Here is why the extension of the occasional permissibility of the private disregard for rights to public policy is wrong. First, just government has as its function to uphold (protect, maintain, promote) broad principles of community life, not the exceptional or emergency policies that may befall certain individuals. Second, the rights individuals have cannot be in an irreconcilable conflict with each other—because (a) rights claims are truth claims and truth claims must be consistent with each other, given reality's character of not admitting contradictions or inconsistent state of affairs or principles, and (b) to act under the guidance of general political principles would not be possible if one set of them contradicted another set—i.e., liberty rights vs. welfare rights. (I take it that it is clear that if *A* has the liberty right to build and keep a fortune through his or her honest effort and succeeds, then the protection of this right is in practical conflict with protecting *B*'s welfare right to some of this fortune.)

Let me now suggest why Lomasky falls prey to the theory of welfare rights. He does so, I believe, because it is indeed true that sometime—as he puts it, “in cases of extreme exigency”—one may steal from others. But this does not show that one has a right to (some, even if ever so little of) the property of others. Rights are precisely general political principles, not principles guiding bits of rare actions individuals might have to take.

Admittedly—and this is where I think Rothbard is mistaken—not all normative principles are equal. Some are fundamental, some are virtually universal, while some may be rather specifically applicable. A principle of human conduct as such is going to be more fundamental than a principle of human political conduct. And while the agency established and committed to upholding the latter ought to take those principles as absolute within the context of politics, people in general need not do so, especially when they find them-

selves outside situations where, according to Locke (as quoted by H.L.A. Hart) "peace is possible."

To put this another way, there are varied dimensions of human life—personal, political, familial, fraternal, professional, etc.—and the principles bearing on the narrower dimensions do not properly apply to the broader ones. The dictates of personal morality—e.g., Aristotle's dictum of right reason or Rand's principle of rationality—apply most broadly, universally. So when appropriate by rational standards, it would be wrong to adhere to a subsidiary principle instead. So when in one's personal life one is facing the exclusive choice of either to invite death or to steal, one ought to steal. But this does not show that such a judgment should now become a principle within the narrower dimension of politics, to be enforced by political leaders.

One might model my argument on the familiar notion that hard cases make bad law. Yet this does not show that even within the operations of the legal system no notice may be taken of the applicability of the unusual and rare edict to steal. When the Donner Party engaged in cannibalism, because of the rare case it would have made perfectly good sense for a judge to use judicial discretion and pardon the culprits once they have been convicted of the crime they committed. Similarly, someone who steals in a condition of dire need, while subject to prosecution should not be allowed to linger in jail as a common thief should be.

The reason Lomasky thinks that there are welfare rights is that he takes it as unjustifiable to expect someone whose "ability [to pursue projects is] placed in jeopardy by a system of rights such that one can either continue to respect others' rights or be able to pursue projects but not both...[to] have a rational stake in the moral community established by that system of rights....[p.127] "He goes on: "If acknowledgment of rights is rationally motivated by concern for one's future as a project pursuer, it will be plainly irrational to pledge support to a regime in which one's prospects for project pursuit are extinguished"(p.127).

But all this can be granted without it being the case that persons have rights to welfare. In short, nothing about the exceptional cases demonstrates the existence of welfare rights. All it shows is that those who are in such dire straits have reason to disregard rights.

Lomasky however goes on to claim that "State establishment of a welfare apparatus is not inconsistent with, and may be required by, the maintenance of a liberal order. Public institutions may rightfully direct the transfer of resources among citizens. It follows by similar reasoning that there can be a limited place within the

law for 'Good Samaritan' (or, perhaps better, 'Minimally Decent Samaritan') legislation" (p.128). This follows from the above argument for welfare rights, since rights are just what governments are supposed to protect.

Now if my rejoinder is sound and all that Lomasky has shown is that there are emergency case that support some persons' disregard for rights, the welfare statist conclusion just does not follow. One needs to show that these exceptional cases create rights to services.

Of course, from a social contractarian position on rights, there may be reason to think that Lomasky has a point. If rights are mere strategic vehicles to get what one wants, then if a certain type of right won't do this trick, some other type will have to be introduced. So he is right from within such a contractarian viewpoint that what individuals require "is primarily liberty, but that fact does not rule out the need for a safety net that captures extreme cases"(p.128). A similar conclusion would seem to me to follow from a utilitarian theory of rights—see, for example, Russell Hardin's position in his "The Utilitarian Logic of Liberalism."⁶

But are rights grounded on social contract alone? Well, one might think so from reading the bulk of Lomasky's book. Yet at the end he does maintain that even though "the fact of commitment itself creates personal value,...such personal value rests on a foundation of pre-existent impersonal value" (p.241). So Lomasky says "a rational agent is not merely someone good at getting what he wants; he is someone who wants what is good to get" (p.241). It seems to me, then, that there is more to Lomasky's view than even a strong contractarianism that rests merely on commitment. There is, behind the commitment, objective value that is worth being committed to.

But once we begin with objective value, we must also do justice to certain ontological or metaphysical principles—e.g., the law of non-contradiction. Thus it seems to me that even from his own framework Lomasky cannot tolerate that his instrumentally conceived basic rights come into fundamental conflict with one another. Yet welfare rights and liberty rights do just that. If I have the liberty right to pursue my projects, based on the objective value of pursuing some projects that I ought to commit myself to pursue, then someone else could not also have the welfare right to violate my liberty right. And welfare rights would easily enough violate liberty rights.

Consider that a person in dire need for medical care has a welfare right to such care from those who can provide it. Another person is a doctor who has the skills to provide the medical care but has a serious project he is pursuing at the time which he also has the liberty right to pursue. One or the other right must give. To put

it more harshly, both rights cannot exist.

If it were all just a matter of social contract, the contract could be renegotiated for purposes of this particular situation and no conflict would be generated. But if the rights in question rest on something more basic than mere contract or convention, I see no way that this option could arise.

Perhaps, then, we ought to give up the natural rights approach in favor of the exclusively contractarian one. No value base is possible, since the moral-political problems we need to solve are insoluble. Since ought implies can, it follows that it could not be the case that a theory of rights issuing in the basic conflict sketched above rests on objective values.

But this move would be premature. As I noted at the outset, a natural rights approach does have adequate solutions for the moral problems that arise. Of course, it does not guarantee that such solutions will in fact be reached by the persons involved. But all we need is that the solution could be reached.

And it seems to me that the solution to the problem of emergency cases can be reached without any resort to welfare rights. We can consider the situation from the point of view that is advanced in some earlier libertarian work, work that seems to me to merit reconsideration before one accepts the seeming impasse I think we find in Lomasky's theory.

1. (Oxford University Press, 1987). All parenthetical page references are to this work.

2. James Sterba advances a very similar argument to show why natural rights libertarianism implies the full blown welfare state. See, Douglas B. Rasmussen and James Sterba, *The Catholic Bishops and the Economy* (Transaction Books, 1986). I discuss Sterba's argument at some length in my *Individuals and Their Rights* (Open Court Publishing Co., 1989).

3. *Journal of Value Inquiry*, Vol. 10 (1976).

4. *The Personalist*, Vol. 54 (1973).

5. *The Personalist*, Vol. 58 (1977).

6. *Ethics*, Vol. 97 (1986).

AGAINST AGENT-NEUTRAL VALUE

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Both the distinction between personal value and impersonal value and the claim that value of each sort exists are crucial to the argument of Loren Lomasky's *Persons, Rights and the Moral Community*.¹ In the early chapters of the book, the prominence of *personal* value motivates the rejection of utilitarianism and kindred doctrines and the adoption of a conception of rational social rules as mutually profitable accommodations among individuals each of whose profit lies, at least largely, in the fulfillment of his separate projects. The affirmation of *impersonal* value also plays a number of roles. First, within the argument for basic rights, the call of the impersonal value of others' project pursuit is supposed to reenforce purely *modus vivendi* arguments for respect for mutually beneficial interpersonal rules. Second, again within the argument for basic rights, the representation of our moral psychology as somewhat responsive to the impersonal value of others is supposed to assist *modus vivendi* arguments escape from an overly Hobbesian psychological ground. Third, the ascription of impersonal value to project pursuers is supposed to lend support to the inclusion a modest welfare component in the specification of basic rights. And, fourth, the adoption of impersonal value is the form in which Lomasky embraces moral objectivism or realism; thereby distancing himself from the subjectivism which he associates with personal value.

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I have complained elsewhere about Lomasky's identification of the personal/impersonal distinction (for which I will also use the language of agent-relative value vs. agent-neutral value) with the subjective/objective distinction.² And it is my sense that Lomasky would now want to recognize this distinction among distinctions. But it is also my sense that Lomasky wants to affirm not only the existence of objective values (which can, however, still be personal, agent-relative, values) but also agent-neutral values. In this paper I criticize the affirmation of agent-neutral values. Consideration of space and time limit me to two lines of argument. First, and extremely briefly, I assert the mysteriousness of the agent-neutrality of values by comparing agent-neutrality and agent-externality. Second, I consider and reject particular arguments for the agent-neutrality of some values. Three of the arguments I consider appear in Thomas Nagel's *The View from Nowhere*, but are arguments of the sort that are attractive to Lomasky. The fourth specific argument appears in Lomasky albeit with strong Nagelite coloration.

I

Agent-external value is value that would exist even were no agent ever to exist and, hence, were no agent ever to encounter, or relate to the valuable object or property in any way.³ Thomas Nagel believes that "...the objectifying tendency produces a strong impulse to believe that there are [external values]..." Yet Nagel himself seems to think that belief in such values can be plausible only if it,

...avoids the implausible consequence that they retain their practical importance even if no one will *ever* be able to respond to them. (So that if all sentient life is destroyed, it will still be a good thing if the Frick Collection survives.)⁴

Yet, as far as I can see, being good even if no one will ever be able to respond to it is the central necessary feature of any external good. The question is what, if anything, distinguishes such externality of value from neutrality of value? I want to argue that if a value is not conceived of as agent-relative, it must be conceived of as agent-external. Thus the sponsor of agent-neutrality has to choose between the enemy of agent-relativity and the implausibility of agent-externality.

One might imagine a sponsor of agent-neutral value proposing that a necessary condition of any *X* having agent-neutral value is that *someone, sometime, and somewhere* stand in some relation to *X* of the sort through which advocates of agent-relativity think value arises. Given this necessary condition, for any *X* which

qualifies as having agent-neutral value, it will not be the case that the X would have that agent-neutral value even were no agent ever to exist, etc. In this way, the sponsor of agent-neutral values may seem to distance himself from sponsorship of agent-external values. But what justifies the imposition of this necessary condition? We might have here merely a stipulation that a putative value will not be labeled an agent-neutral value unless *someone, sometime, and somewhere* stands in some R relation to it. But such a stipulation leaves open the question of whether that value would exist—would exist as an external value—even were the condition for its being labeled a neutral value not satisfied. It leaves open the possibility that the value which the sponsor of agent-neutral values wants us to affirm (and to label as agent-neutral) is agent-external.

We can be sure that the value we are affirming (under the label of agent-neutral) is not agent-external only if it is *in virtue of* X 's standing in relation R to *someone, sometime, and somewhere* that X 's value arises. The imposition of the *someone/somewhere* condition on X 's having value will be *justified* if it is thought that it is (at least in part) through the satisfaction of this condition that X has its value. But, if this is the way X 's value is conceived, then it appears that X 's value is agent-relative—in particular, relative to the agent who stands in relation R to X . For how, in turn, could the satisfaction of the *someone/somewhere* condition give rise to X 's value? The only way I can imagine is that the value arises *in and through* some particular *someone's* particular relation to X . And if X 's value arises *in and through* this particular relation to agent A —by being, e.g., the object of A 's desire or need or ambition—then it is A who can directly and especially be said to have reason to promote X . That is to say, X 's value will be relative to A . Only if there is a sufficiently robust principle of transmission of reason whereby A 's having reason to promote X by transmission leads to B 's having reason to promote X , will X 's value re-emerge as agent-neutral. We shall shortly examine and dismiss the idea of there being such a principle of transmission. For now we can summarize the present argument as follows: The satisfaction of the *someone/somewhere* condition with respect to X either is not essential to X 's value or it is essential to X 's value. If it is not essential to X 's value, then X 's value (if it exists at all) will be agent-external value. If it is essential to X 's value, then that value will be agent-relative. So the theorist who seeks to avoid the agent-relativity of all values will have to affirm the agent-externality of some of them. This conclusion should be of no surprise in light of Nagel's own characterization of external value as "value which is not reducible to [its]

value for anyone."⁵ For, if a value is not external in this sense, the value *will* be "reducible" to its value for someone, *i.e.*, it will be agent-relative.⁶

II

Some of these same points, and others, can be made more concretely by examining Nagel's own specific example of an agent-neutral (dis)value; the purportedly agent-neutral badness of pain. Nagel begins with the claim that,

...primitive pleasures and pains provide at least agent-relative reasons for pursuit and avoidance—reasons that can be affirmed from an objective standpoint [*i.e.*, reasons that "can be recognized...from outside] and that do not merely describe the actual motivation of the agent.⁷

But does pain provide, in addition, an agent-neutral reason for its avoidance? Although he is fully aware of the difficulty of constructing arguments for this conclusion, Nagel does offer three somewhat discreet arguments.⁸ The first we may label "the dissociation argument;" the second we may call "the concern by/for others argument;" and the third we may designate "the impersonal hatefulness argument."

IIa

Dissociation occurs, according to Nagel, if I do not assign agent-neutral badness to my pain. My objective self would become dissociated from my subjective self because the latter would see that my suffering should stop while the former, as objective spectator, could only and would only acknowledge that *EM*, the observee, has reason to want it to stop.⁹ My subjective self is, as my four year old daughter would say, "really really" against this suffering; but my objective self is...well, objective, disinterested. If only agent-relative badness is assigned to my pain, only the agent whose pain it is can take a substantive, contentful, stand against the pain. If only agent-relative badness is assigned to my pain, the only judgment that the objective self can make is that this person, *EM*, whom the objective spectator is observing, has reason to negate the suffering. My objective self is, then, as distant from my subjective self as other reason-acknowledging agents are.

If I had an objective self, if I were in part an objective self of the sort Nagel is imagining, then I *might* be concerned about being dissociated from my subjective self.¹⁰ On the other hand, the dominant strand within the dualist tradition looks with great favor

upon dissociation. What's the point of having two selves unless the objective, rational, depersonalized, and disembodied self can free itself from, rise above, and *view with detachment* the concerns of the subjective and particularistic self? To assert both the existence of two selves (or two parts or aspects of the self) and a structure for value which allows those two selves to live in harmony may be a matter of wanting both to have and to eat one's metaphysical cake. Furthermore, while in itself belief in the agent-neutral badness of *EM's* suffering will tend to align and associate my objective self with my subjective self, belief in the agent-neutral badness of *others'* suffering will have the opposite effect. The agent-relative badness of suffering tells me (or my subjective self) to focus on the reduction of my suffering while the agent-neutral badness of suffering at large tells me (or my objective self) to focus on the reduction of suffering at large. In almost all circumstances, one of these practices will have to be sacrificed to the other. If I dispose myself to respond to the impersonal values affirmed by my objective self, I will usually have to suppress the counsel of my subjective self. The result may not be Nagelian dissociation of my objective and subjective selves. The result may only (!) be the loss of an integrated (subjective) self. It is, however, precisely because utilitarianism threatens this sort of loss that Lomasky rejects it. One should expect a like reaction to the comparably threatening demand for the unification of one's subjective and objective selves.

IIIb

The second, "concern by/for others," argument suggests that plausible accounts of others being moved by our suffering and our being moved by others' suffering invoke the agent-neutral badness of suffering. Nagel argues that,

If...we limit ourselves to relative reasons, [the sufferer] will have to say that though he has reason to want an analgesic, there is no reason for him to have one, or for anyone else who happens to be around to give him one.¹¹

This is partially correct; but mostly misleading. Clearly, if the badness of suffering is agent-relative, the sufferer cannot say that there is an agent-neutral reason for him to have the analgesic. But that is not to deny the existence (or "objectivity") of an agent-relative reason for him to have it. Nor is it to deny the existence of agent-relative reasons had by some of those who happen to be around him to provide him with an analgesic. A blissful cessation of my screams, or even my feeling better, may be among the states

of affairs that are good for some or all of these agents. Nagel asks us to imagine a fellow sufferer who,

...professes to hope we both will be given morphine, but I [the first-person, agent-relativist, sufferer] fail to understand this. I understand why he has reason to want morphine for himself, but what reason does he have to want *me* to get some? Does my groaning bother him?¹²

That may be it. My groaning may be drowning out the answers on Hollywood Squares. Or it may be that my groaning bothers him because my being in pain, in a way that is vivid and present to him, bothers him. Because I am near to him and he is a person of normal sympathies, his sympathy extends to me and he is discomforted by my suffering. So he has reason to want it to stop—a reason which does not extend to the suffering of those to whom, perhaps simply because of their distance from him, his sympathies do not embrace.

But implicit in Nagel's final rhetorical question is another, more difficult, question. Does the fellow patient's reason for wanting my suffering to cease rest merely on his tastes and distastes, *e.g.*, merely on his distaste for my groaning or on his distaste for my suffering? Nagel, as a "normative realist" wants to hold about reasons for action that "...we have to discover them instead of deriving them from our preexisting motives."¹³ For such a realist the suggestion of the rhetorical question is that it is the badness of suffering that makes the preference for its disappearance rational not the preference for its disappearance that makes the suffering bad. It is this "real" or "objective" badness of my suffering that underlies my fellow patient's discomfort at my groaning. This suggested answer leads to an affirmation of the agent-neutrality of the fellow patient's reasons given a further, implicit, premise, *viz.*, that values which are "real" or "objective" so that the rationality of tastes, desires, preferences, etc., depend on their fit with "real" or "objective" values must be agent-neutral values. But this further premise is clearly contentious and is one which, I take it, Lomasky would not now want to invoke.

One further point needs to be made about the reasons that others might have for relieving my suffering. Even the total absence of *value-based* reasons for others to alleviate my suffering hardly entails the absence of *all* reasons; my doctor may have a duty to do so whether he likes it or not, whether it advances his values or not. To say that all values are agent-relative and that, therefore, all value-based reasons for action are agent-relative, is not to deny the existence of other sorts of reasons for or against action; in particular

of deontic constraints on people's behavior.

IIc

Nagel's third, "impersonal hatefulness," argument urges us to see a component of our rejection of pain as occurring on an impersonal plane where objective self confronts agent-neutral value:

...the pain, though it comes attached to a person and his individual perspective, is just as clearly hateful to the objective self as to the subjective individual. The pain can be detached in thought from the fact that it is mine without losing any of its dreadfulness. It has, so to speak, a life of its own.¹⁴

One response to this passage runs as follows: I understand, of course, that pain which is not my pain can be as dreadful to the sufferer as my pain is dreadful to me. I understand what it is like to be subject to such dreadful stuff. But except for those rare individuals who achieve or succumb to an extraordinary identification with others (and who, therefore, can say, "Their pain is my pain"), the discovery that an impending pain will be suffered by another and not oneself does radically reduce its perceived dreadfulness.

Yet this focus on perceived dreadfulness, *i.e.*, on how fearfully motivating a prospective pain will be, misses the real force of this passage. The force lies in the simple idea that pain is dreadful. It is dreadful in itself so that the *correct* response to prospective pain is dread; pain is the sort of thing that a rational person wants not to exist. This is the claim of the normative realist with respect to pain. But is this force well directed? Does it specifically point to the agent-*neutral* badness of pain? One can agree that the dreadfulness of pain has "a life of its own"—so that anyone facing the prospect of pain has a reason to avoid it whatever his attitude toward pain—without agreeing that the "real" or "objective" awfulness of pain gives everyone reason to want a specific prospective pain not to exist. In recognizing the dreadfulness of the pain faced by another, I do more than understand his motivation in avoiding it; I also see that he ought to want to escape it. But as a mere objective spectator, I do not, thereby, have reason to prevent his pain.

However other passages within Nagel's "impersonal hatefulness" argument seem designed to block the idea that the awfulness of pain may yet sustain only agent-relative reasons. This is how we may read the argument that:

The [sufferer's] desire to be rid of pain has only the pain as

its object.... [I]f I lacked or lost the conception of myself as distinct from other possible or actual persons, I could still apprehend the badness of pain, immediately.... [T]he fact that it is mine—the concept of myself—doesn't come into my perception of the badness of my pain.¹⁵

It is true that I do not have to *register* the pain as mine in order to apprehend its badness. I don't have to say to myself, "This is the pain that *I* am undergoing," before I can recognize that it merits elimination. I simply indict pain as I immediately experience it. But the pain that I indict is the pain that is immediate to me, which is to say, my pain. "[T]he immediate attitude of the subject" of the pain is simply that this current condition should cease. The subject does not, within that immediate indictment, address the issue of who has reason to eliminate this suffering. But if it is his suffering that he indicts and if he recognizes that others in parallel fashion indict the suffering immediate to them, the natural conclusion is that each has reason, assuming mutual disinterest, to eliminate his own suffering.¹⁶

II d

An argument offered by Lomasky, in the style of Nagel, can be read as challenging this last claim in the name of the "transmissibility of practical reason." Lomasky claims that:

...*A*'s recognition that *B* has end E_2 provides *A* at least some reason to act so as to advance E_2 ... [O]ne who recognizes *R* as a reason for E_2 is thereby *logically bound* to admit that it is not totally and in every respect indifferent whether E_2 obtains. *R* is why E_2 should obtain; otherwise *R* could not be conceived to be a reason.¹⁷

Lomasky recognizes the likelihood of being charged with illicitly adopting a neutralist "moral point of view" in the shift to talk about whether "it" is indifferent, whether E_2 "should obtain." But Lomasky thinks he has a non-question-begging argument for transmissibility.

...it is being maintained that there are not two radically different ways of understanding reasons for action: understanding a reason as mine, which is suffused with motivational force, and understanding it as thine, which is entirely bereft of motivational force.¹⁸

However, there is no threat of "two radically different ways of understanding reasons for action." If anything is suffused with

motivational force, it is *A's* reason; *not his understanding* of that reason. The reason, not his understanding of the reason, has motivational force for *A*. Similarly, *B's* reason has motivational force for *B*. That *A's understanding* of *B's* reason "is entirely bereft of motivational force" does not, therefore, mark it off as a different type of understanding of reasons than is exemplified in *A's* understanding of his own reasons for action. Understanding does not become agent-relative just because reasons and values are.

Thus, two bases have been offered against the existence of agent-neutral values: (I) Belief in agent-neutral values commits one to belief in agent-external values; and (II) Four positive arguments for the existence of agent-neutral values are deeply flawed.

1. Loren Lomasky, *Persons, Rights and the Moral Community* (Oxford: Oxford University Press, 1987).

2. Cf., my review of *Persons, Rights and the Moral Community* in *Reason* (January 1988) and "Moral Individualism: Agent-Relativity and Deontic Restraints" in *Social Philosophy and Policy* (forthcoming).

3. To deny the existence of external values is not to deny the existence of "external reasons" as that term has recently been used by Bernard Williams. An external reason is a reason the having of which need not motivate the agent possessing that reason. External values would provide agents with external reasons. But an agent might have an external reason, e.g., his (recognition of his) objective need for *X*, which was not indicative of an external value. Cf., Williams, "Internal and External Reasons" in *Rational Action: Studies in Philosophy and Social Science*, ed. R. Harrison (Cambridge: Cambridge University Press, 1979), pp.17-28.

4. *The View from Nowhere*, p.153. The survival of the Frick Collection might, of course, fulfill the posthumous interests of various agents and, in this way, be a good thing. But this would not support the collection's external value.

5. *Ibid.*

6. Moreover, it does not seem that *X's* external (and, hence, fully intrinsic and self-contained) goodness as such would provide reasons for action among such agents as might appear on the scene. Property *G* (or whatever it is that purports to be intrinsically good) will provide such agents as appear with reasons for action only insofar as the realization of *G* in some way fulfills or is constitutive of their desires, projects, or selves. But, in that case, the agents' respective reasons for action will correspond to the agent-relative value of diverse realizations of *G* and not to the supposed external goodness of *G*. Even should it exist, the intrinsic good would be too dissociated from the life of flesh and purpose bound agents to provide those agents with reasons for action.

This conclusion may be too quick. Perhaps the perception (veridical or not) of the Form of the Good could itself motivate an agent. In such a case it would be putting the cart before the horse to say that the agent's reason

for action corresponds to the agent-relative value of his participation in the Good. Of course, the agent will not be acting with reason unless his perception of the Good is veridical.

7. *Ibid.*, p.158. In the uncut version of what appears within the brackets, Nagel (p.150) speaks more portentiously of reasons that “can be recognized and *accepted* from the outside.”

8. *Ibid.* Nagel precedes his arguments with the claim that he has already argued that “the *possibility* of assigning agent-neutral value to pleasure and pain should be admitted.” (p.160) But this, I think, is mistaken. He seems to be referring to arguments made in a section labelled “Antirealism.” (pp.143-149) Yet in this section Nagel’s target seems to be “disbelief in the reality of values and reasons” and, clearly, this can be rejected without embracing even the possibility of agent-neutral values and reasons. (The situation is further complicated by Nagel’s characterizations of “realism” (p.139) which suggest that realism takes one a step beyond reason-acknowledging, objectivity-incorporating, doctrines such as “the position that each person has reason to do what will satisfy his desires or preferences.” (p.149)

9. The relevant couple of sentences in Nagel, *Ibid.*, read:

The dissociation here is a split attitude toward my own suffering. As objective spectator, I acknowledge that *TN* has a reason to want it to stop, but I see no reason why it should stop. My evaluation [*i.e.*, the evaluation of the “objective spectator”?] is entirely confined within the framework of a judgment about what it is rational *for this person* to want.(p.160)

10. Perhaps the reason that Nagel thinks that this intra-personal dissociation is worrisome is that, although my objective self acknowledges that *EM* has reason to end his suffering, the inability of my objective self to *share* this reason suggests that its existence is an illusion, *i.e.*, suggests the Humean subjectivism according to which there are motives but not reasons. This suggestion runs counter to Nagel’s recognition that even agent-relative reasons count as real reasons. Nevertheless, Nagel does continue to flirt with his earlier view that the only real reasons are agent-neutral ones. *Cf.*, the next passage from Nagel in the text.

11. *Ibid.*, p.160.

12. *Ibid.*, p.160.

13. *Ibid.*, p.139.

14. *Ibid.*, p.160

15. *Ibid.*, p.161.

16. Moreover, it is implausible to imagine, as Nagel does, that an agent who lacked or lost the conception of himself would form the sophisticated judgment, “*This experience* ought not to go on, *whoever* is having it.” *Ibid.*, p.161.

17. Lomasky, *Persons, Rights and the Moral Community* p.63 and p.64. Latter emphasis added.

18. *Ibid.*, p.65.

LOREN LOMASKY'S DERIVATION OF BASIC RIGHTS

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In *Persons, Rights, and the Moral Community*,¹ Loren Lomasky develops a general theory of basic rights and traces some of the implications of the theory for various contemporary controversies. The implications of the theory are for the most part liberal, in the classical sense of the (much abused) term. Even where not persuasive, the conclusions Lomasky draws are interesting and provocative. My interest, however, is the "derivation of basic rights" that is meant to support many of the political conclusions of the work. If Lomasky succeeds in his derivation, then this part of his work alone is a significant contribution to moral theory. I shall, then, critically examine the derivation of basic rights.

A *project* is an end that "persist[s] throughout large stretches of an individual's life and continue[s] to elicit actions that establish a pattern coherent in virtue of the ends subserved." (p.26) Projects give persons' lives a certain structure and coherence they would otherwise lack. People, Lomasky convincingly argues, are *project pursuers*.

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"Project pursuit, though, is partial." (p.27) That is, projects provide their pursuers with personal *standards* of value. Such standards provide only "reasons-for-that-individual" (p.49); in the language of contemporary value theory, projects provide *agent-relative values*.² Consequently, there is conflict between agents (pp.47, 55). "Philosophical normative ethics", Lomasky believes, "is the search for rationally justifiable standards for the resolution of interpersonal conflict" (p.47). Lomasky's basic rights are the most important standard for the resolution of such conflict. Basic rights³ protect project pursuers by delineating a sphere in moral space where each may act unconstrained by the demands of others.

Lomasky argues that project pursuers must value their ability to pursue projects (pp.56ff). "That means that they value having moral space." (p.60). But this does not suffice to generate basic rights. For it only follows that individuals value moral space for themselves (pp.60-61; see also p.36). The problem is clear: "how can one go beyond the bare recognition of others as project pursuers to a rational motivation to respect them *as* project pursuers?" (p.62)

The problem appears to Lomasky to be that of the celebrated Is-Ought distinction ("How can it be crossed?" [p.62]). I do not think that the problem need be so construed. If the Is-Ought problem concerns the relation between facts and values, descriptions and prescriptions, then it is unclear that this is what is at issue here. For Lomasky's problem is to show that agents who have reasons to pursue their projects also have reasons to respect one another's liberty. That is, given certain values (reasons of one sort), how is it that others (reasons of another sort) follow? The problem is an Ought-Ought, or Value-Value, one.

Lomasky proposes three "paths" to enable us to cross what he takes to be the Is-Ought divide. He is unsure which to take, adding "Perhaps some one of them can be validated, perhaps, luckily, the passage is overdetermined, or, what I suspect to be the case, perhaps the most credible account of the grounds of rational motivation involves elements of each." (p.62) Although perplexed by these remarks as to the nature or structure of the derivation, I shall attempt to outline the three arguments or parts of the "tripartite derivation of rights".

The first argument or "path" consists in noting that humans characteristically are social animals, that is, they tend to be "moved by the needs of others, especially the needs of kin" (p.62). This fact about humans does not, Lomasky rightly points out, suffice for a

derivation of basic rights; a causal (e.g., sociobiological) *explanation* of other-regarding sentiments does not provide a *justification* of these sentiments, much less a justification of rights. What it does show is that humans are *capable* of respecting the rights of others; thus "A necessary though not sufficient basis for grounding rights has been uncovered." (p.63)

I concur with Lomasky's claim that humans are characteristically moved by the needs of others. The contention is true, and I think that moral theories ought not to begin with assumptions that deny its truth.⁴ I shall, however, make two critical remarks about the first argument or part of Lomasky's derivation. If all that is established by the altruism characteristic of humans is this necessary condition for the respect for rights, then it is unclear why Lomasky regards it as one of three possible paths to his conclusion that persons have certain basic rights. At most it establishes only one, amongst many necessary conditions for his conclusion.

More importantly, it is not clear that altruism is a necessary condition for respect for the rights of others. That depends only how we understand such respect, and this is an important matter. Lomasky notes (and I quote at length),

If it is the case that people *ought* to acknowledge and respect the rights of others, then it must be true that people generally *can* respect the rights of others. They can do so only if the recognition that others crave moral space within which to carry out their projects will somehow provide a *motivation* to cede that space. (p.63)

This will not be possible if psychological egoism⁵ is true.

What constitutes *respect* for the rights of another? Let us distinguish between what might be called *intensional* and *extensional* respect for rights. Suppose that Albert has a right to do *x* and that Beatrice has a correlative duty to refrain from interfering with Albert's doing *x*. Suppose that Beatrice cares about Albert and so refrains *because* she so cares. Then Beatrice has respected Albert's right only *extensionally*. Suppose that she doesn't care about him, that she is indifferent or unconcerned about his interests; nonetheless she refrains from interfering with his liberty to do *x because* she believes that she is so obligated. Then Beatrice respects Albert's right both *extensionally* and *intensionally*.

If respect for rights is to be intensional as well as extensional, then the altruism characteristic of humans is not a necessary condition for respect for rights. For such altruism only motivates

agents to perform the acts required of them, *not* to perform them with certain intensions or for certain reasons. The distinction between the two different understandings of respect for rights is crucial to the question of the nature of moral obligation (and of rights), as we shall see presently.

I move now to the second argument or part of the tripartite derivation of basic rights. This "second line of approach" is complementary, Lomasky claims, to the first and is suggested by Thomas Nagel in his well-known *The Possibility of Altruism*.⁶ The basic idea is that of the "transmission of practical reason" (pp.63ff). If Albert has a particular end which provides him with a reason to act, then Beatrice's recognition of Albert's end also provides her with (some) reason to promote Albert's end. The reason for this (as far as I can make out) is that one cannot recognize something as a reason for someone without recognizing that there *is* a reason. If Albert has a reason to do *x* and Beatrice recognizes that Albert has a reason ("understood personally") to do *x*, then there is a(n "impersonal") reason to do *x*; from this it follows that Beatrice has some reason to advance Albert's doing *x*.

I am not sure that I understand the argument fully, and I shall leave further explication of it to Eric Mack and to our discussion of his critical analysis of Lomasky's theory.⁷ Let me simply remark that the premise that seems to be doing most of the work of this argument is an assumption of impersonal value. Thus I interpret Lomasky's second "line" to involve appeal to such value.⁸ Critics, such as myself, who deny the existence of what is normally called agent-neutral value will consequently not be moved by the argument, until Lomasky is able to persuade us that such value exists.⁹

In any case Lomasky notes that the argument from impersonal value does not necessarily lead to the conclusion that he wishes to derive. For it is possible that agents not have *sufficient* reason "to accord rights to others" (p.65), although they have *some* reason to do so. At best, then, the second argument is incomplete.¹⁰

I turn now to the third argument or part of the tripartite derivation.¹¹ Lomasky asks what strategies should project pursuers adopt faced with morally unconstrained interaction with other persons? He analyzes the situation in which such agents find themselves as a Prisoners' Dilemma (*PD*). Agents might choose from amongst three possible strategies, which he labels Active Aggression, General Neglect, and Active Deference. I shall recast his argument in terms of two strategies, which I shall label *C* and *D* respectively.¹² The preferences of agents are the normal *PD* preferences: (*C,C*) or "universal cooperation" is ranked by each

agent above (D,D) or "universal defection", but each agent ranks "unilateral defection" in the first place. In a single-play and in a variety of repeated-play or iterated PD s, the rational strategy is D and the outcome is universal defection. But another outcome, universal cooperation, is ranked by each agent above the outcome achieved by rational action. The problem is familiar to all contemporary moral and political theorists.¹³

Lomasky argues that no solution is available "from a starting point of nakedly egoistic agents for whom all value whatsoever is personal" (p.69). As he argued above, humans are not egoists. I do not understand the point here. For the denial of egoism certainly does not entail the denial that all value is personal.¹⁴ More importantly, the PD does *not* require that agents be egoists in the sense characterized by Lomasky. All that is required for agents to find themselves in a PD is for them to rank the various outcomes in the usual manner; whether their rankings are self-regarding or other-regarding, whether they are based on subjective or objective values, whether they presuppose agent-relative or agent-neutral standards of value is irrelevant.¹⁵

In any case, Lomasky appears to argue that the situation in which agents find themselves in the absence of basic rights is *not* that of a single-play PD . The analysis that he defends has agents repeatedly interacting. Readers may conclude that the situation is essentially that of a repeated or iterated PD . But I think that this would be an incorrect interpretation of Lomasky's analysis.¹⁶ In repeated PD , agents find themselves in a series of PD . Lomasky's agents, by contrast, find themselves repeatedly interacting, albeit in situations that gradually change as they interact. What is novel about Lomasky's analysis is that he suggests that rational agents, capable of other-regarding sentiments, will empathize with those with whom they interact; further, cooperative behavior elicits increased empathy.¹⁷ Thus, cooperative interactions lead agents to change their rankings of the outcomes and eventually to come to prefer cooperation to defection (or rather, to prefer cooperative outcomes to non-cooperative ones).¹⁸ The result may be the "rudimentary mutual acknowledgement of moral space...[that is] the result of a natural process in which project pursuers confront each other and achieve a *modus vivendi*." (p.74).

To summarize my interpretation of the third argument: rational agents who are moved by the needs of others may find that their rankings of outcomes change as they interact with like-minded agents and that they come, by empathizing with others, to prefer cooperation (C) to unilateral defection (D). Repeated interactions

between such agents may, then, under certain conditions, result in the mutual acknowledgement of moral space. Lomasky's derivation of basic rights is essentially complete.¹⁹

I shall now make some critical remarks about the general derivation. First, it should be noted that Lomasky does not provide a theorem, that is, a conclusion which is derived from clearly laid out premises. Rather, what is provided is a sketch of such a theorem. This is unfortunate, because one of the virtues of theorems is that the conditions for their truth—their premises—are more easily ascertained than with argument sketches. This criticism, it should be noted, is complimentary. For if my general interpretation of Lomasky's third argument is correct, it should be possible to prove its conclusion as a theorem. This criticism is minor.

Secondly, and more importantly, it is important to understand clearly the conclusion Lomasky is entitled to by his argument. Rational agents, moved by the needs of others, interacting over time will come to respect each other's liberty and thus create a type of moral space within which each may act freely. Note that if we wish to identify this "moral space" with respect for rights, the latter can only be *extensional*. Albert and Beatrice, interacting over time, come to respect one another's rights because they come to care about one another. Their rankings of the various outcomes change with repeated (cooperative) interaction. They start in a *PD* but end up in something more akin to an Assurance game.²⁰ Such agents do *not* respect other's moral space because they believe that they are obligated to do so. They do so because their rankings of the outcomes have changed.

This is important because one might claim that moral obligation requires *intensional* rather than merely *extensional* compliance. One might claim this because one might believe that if one is genuinely morally obligated to do *x*, then one is so obligated whether or not one most prefers to do *x*. Further, one might claim that if one is obligated to do *x*, then one has a reason to do *x* which *constrains* one's preferences. Lomasky's conclusion do not allow us to say this about obligations.

I am consequently puzzled why Lomasky's agents would be interested in using the language of morals. For such agents "respect rights" only insofar as doing so is the most efficient means to their (non-egoistic) ends. At no point does the "respect for rights" that Lomasky is able to derive from his assumptions allow one to say that someone morally ought to refrain from interfering with another's liberty even when so refraining is *not* the most efficient means of realizing one's (personal and impersonal) values. Appeals

to non-moral reason suffice at every point to do what appeals to Lomasky's "obligations" do, given that the latter are never able to secure compliance with constraints that would have one refrain from pursuing one's most preferred outcomes.

The usefulness of the single-play *PD*²¹ is that it illustrates, with unyielding clarity, the problem posed by accounts of obligation such as Lomasky's. Let us understand a *preference* to be a ranking of two outcomes: to say that outcome *x* is preferred (by someone) to *y* is to say that it is ranked (by that person) higher than *y*. Preferences can be self-interested, but they need not be, in this sense of 'preference'. Suppose that we are able to determine how two agents rank a number of outcomes (the feasible set) in terms of their ends, values, tastes, desires, sentiments, and the like, excluding only their moral principles and moral values. Let these rankings be based on objective and/or impersonal (or agent-neutral) value. Suppose that our two agents find themselves in a situation characterizeable as a single-play *PD*, given their preferences. Suppose that they realize they find themselves in such a situation. In order to achieve the cooperative outcome (where each chooses *C*), they invoke a moral device, promising. They promise to one another to choose *C*. Promises create obligations. Let us understand the obligations created by promises to bind promisors to do something, whether or not so acting best satisfies their non-moral preferences as characterized above. Agents capable of so acting will be able to cooperate in single-play *PD*s. Lomasky's agents will not. I would claim that this shows that Lomasky's agents do not have available to them the resources of moral obligation.²²

Thirdly, it would appear that the account of agents as project pursuers does not play an essential role in the derivation of basic rights. (This makes me unsure of my interpretation of the argument.) The assumptions that appear to be doing the important work are (1) the claim that humans are not purely self-interested and (2) the claim that people come to take an interest in the interests of those with whom they interact, especially if the latter are cooperative. Both of these assumptions seem to be true. And they are what make Lomasky's argument original. However, if the conclusion about respect for rights follows, it would seem to do so independently of the assumption that agents are project pursuers. The assumption is used to establish partiality (p.27) and presumably conflict (p.47). But presumably many other features of agents establish this. Further, the fact that people pursue projects does not entail that the only values that move them are those provided by their projects. Thus an understanding of the projects of agents

might be insufficient to determine how agents will or should act in situations such as the *PDs* above.²³

The account of agents as project pursuers might, however, be used to address the problem of compliance discussed above. Project pursuers are agents capable of acting according to plans and thus, we may presume, of acting counter to their occurrent preferences. Now the alleged irrationality of counter-preferential choice is what leads agents to defect in (most) Prisoners' Dilemmas, as those agents are usually characterized. Lomasky's project pursuers, however, have available to them the means to commit themselves to conditional cooperation (choose *C* whenever you believe others are so disposed); they can act counter-preferentially when so acting accords with their plans (and intentions). Lomasky thus has in his account of agents the resources to address and possibly to resolve the problem of compliance discussed above.²⁴

Fourthly, we should note that the respect for rights that Lomasky derives at most provides reasons to respect the moral space of those with whom one "interacts". Reasons to respect the rights of others depends on the development of the requisite other-regarding sentiments. Presumably this depends on proximate interaction. If that is so, then agents who do not interact proximately—e.g., most market interactions?—do not have a reason to respect the rights of others.

Lastly, I have concentrated on Lomasky's derivation of basic rights in part because I view it as the foundation of the conclusions he draws about various moral and political controversies. But I may be mistaken about this. For he may be a coherence theorist, appearances to the contrary. In the last chapter he claims that "Moral theories are tested in the first instance by how well they fit and systematically account for strongly held pretheoretical intuitions." (p.196) If this is the case, we must ask about Lomasky's theory, as we must about Rawls', what then is the purpose of the derivation?²⁵

The text of remarks made at the American Association for the Philosophical Study of Society Symposium on *Persons, Rights, and the Moral Community*, held at the meetings of the American Philosophical Association, Washington, D.C., December 28, 1988.

1. (New York: Oxford University Press, 1987). All parenthetical references are to this work.

2. *Impersonal value* presumably is *agent-neutral value*, that is, value from any perspective. I am not completely confident in my understanding of Lomasky's notions of personal and impersonal value. For in the last chapter, he argues that personal value presupposes impersonal value (pp.233ff); the text there suggests that impersonal value is (merely?)

inherent or agent-independent value. I suspect that perspective (agent-relativity vs. agent-neutrality) and independence of subjective ends (inherent vs. "subjective") are being conflated. Insofar as this is possible, I leave these issues to Eric Mack's discussion.

3. The set of *moral* rights is a proper subset of that of *basic* rights (pp.101ff). We may, however, suppose that the latter are moral rights in the sense that they are rights granted by morality. Lomasky's unusual terminology may mislead.

4. I argue elsewhere that contractarian theories of justice should not assume that people are self-interested. If, despite appearances, Lomasky's theory is not contractarian, my arguments nonetheless supplement his contention. See "The Relation between Self-Interest and Justice in Contractarian Ethics", *Social Philosophy & Policy* 5, 2 (Spring 1988): 119-153.

5. Lomasky characterizes psychological egoism as the thesis that "nothing can possibly move a person to action except desires for his own personal well-being" (p.63).

6. (Oxford: Clarendon Press, 1970).

7. I might note that I find it somewhat odd to invoke an argument made almost two decades ago by Nagel when the consensus in the field has been for some time that the argument fails and when Nagel himself no longer appears to endorse it. Had Lomasky clearly set out and defended Nagel's position, the matter would be different.

8. This conjecture is supported by Lomasky's claim at the end of the "tripartite derivation" that "it has been claimed that moral space will be fenced off through individual's [sic] exercise of a practical reason that recognizes both personal and impersonal value" (p.74).

9. On these matters I am in agreement with Eric Mack. It is important to understand that one may deny that there are agent-neutral values without denying that (some) values are inherent (or agent-independent). Further, one can deny that values are agent-neutral as well as inherent without denying that value-judgments are objective, that is, judgments whose truth-values can be ascertained.

10. I make this point in an unpublished essay, "Agent-Relative Value, a Problem with Justice, and Contractarian Ethics".

11. An interpretative problem is created by the text's not clearly indicating the beginning of the presentation of the third argument. I take it that one of the paragraphs in the second half of p.65 introduces the third argument, although I am not certain. I hope that my understanding of the argument is not affected by this problem.

12. I do this in part because I am not sure that Lomasky's three strategies are logically exhaustive, as they must be for the sort of game-theoretical conclusions that he wishes to draw. I do not believe that my recasting of his argument adversely affects its cogency.

13. The matrix for a 2×2 Prisoners' Dilemma is as follows:

		Beatrice	
		C	D
Albert	C	2, 2	4, 1
	D	1, 4	3, 3

(where $1 > 2 > 3 > 4$). The problem is that although the (C,C) outcome Pareto-dominates (D,D), the former is not stable.

14. My suspicion that several distinction have been collapsed is reinforced by the discussion on pp.69-70.

15. Suppose that Albert and Beatrice each confront the choice of helping him- or herself (C) or of helping the other (D). And suppose that, although each most cares about the other, each is better off if both help only him- or herself; their preferences over outcomes are then the following:

- | | |
|--------|----------|
| Albert | Beatrice |
| (D,C) | (C,D) |
| (C,C) | (C,C) |
| (D,D) | (D,D) |
| (C,D) | (D,C) |

Then Albert and Beatrice find themselves in a standard Prisoners' Dilemma, although their preferences are *not* self-interested.

16. This is just as well. Contrary to what philosophers often think, it is *not* the case that universal cooperation is to be expected in repeated PDs. In his celebrated *The Evolution of Cooperation* (New York: Basic Books, 1984), Robert Axelrod shows only that there are cooperative equilibria in PDs where agents interact in pairs, results that are not generalizable to n-person interactions. The conditions under which Michael Taylor demonstrates the possibility of cooperation are restrictive; see his *The Possibility of Cooperation* (Cambridge: Cambridge University Press, 1987). For a recent theorem that there are *no* cooperative equilibria in finitely, but indefinitely, iterated PDs, see John W. Carroll, "Indefinite Terminating Points and the Iterated Prisoner's Dilemma", *Theory & Decision* 22 (1987): 247-256, and "Iterated N-Player Prisoner's Dilemma Games", *Philosophical Studies* 53 (1988): 411-415.

17. Edward McClennen, in "Justice and the Problem of Stability," in *Philosophy & Public Affairs* 18 (Winter 1989): 3-30, argues in a similar manner for Rawls' difference principle.

18. A game-theoretic situation (e.g., a PD) is determined by the structure of the agents' preferences. If the preference ordering change, the situation changes.

19. The actual presentation of the argument in the book is in two stages: a two-person version is first developed, followed by a generalization to n-persons. My neglect of the distinction of the two stages should not lead readers to underestimate the difficulty of generalizing from the two-person to the n-person case. I believe that Lomasky's generalization will fail

because of the problem posed by coalitions (p.77), but the argument is insufficiently formal to be able to argue this here.

20. A two-person Assurance Game is represented in the 2×2 matrix below:

		Beatrice	
		C	D
Albert	C	1, 1	4, 2
	D	2, 4	3, 3

(where $1 > 2 > 3 > 4$).

21. Or of a variety of repeated-play *PDs*, such as finite series of *PDs*, where the agents know when the series terminates.

22. The criticism here is very similar to that commonly made of Hobbes, that he lacks an account of moral obligation. It should be emphasized that this criticism in no way depends on construing moral obligations as categorical imperatives in Kant's sense.

In response to this criticisms it is often said that cooperation in one-play *PDs* is uninteresting as we never or rarely find ourselves in such. This response has always struck me as inadequate. For one, it may be that we rarely find ourselves in one-play *PDs* simply because we do whatever we can to avoid them, and we might do this because we in fact are agents that find it rational to choose *D* whenever *D* is the dominant act (or strategy). Secondly, *D* is the dominant act (or strategy) in a variety of iterated *PDs*; if Carroll's theorem (see note 14) is significant, then it is only in infinite iterated *PDs* that cooperative equilibria can be expected. Surely the problem posed by *PDs* cannot be so easily dismissed.

23. It must be that this account of agents is to determine either the form (basic rights) or the content (certain rights) of the "moral space" that is defended by Lomasky. I would not think it necessary for this purpose; James Buchanan and David Gauthier each defend rights theories without appealing to such a view of agents. See Buchanan's *Limits of Liberty* (Chicago: University of Chicago Press, 1975) and Gauthier's *Morals by Agreement* (Oxford: Clarendon Press, 1986).

I might note that references to the *Limits of Liberty* are not to be found in Lomasky's book, which is surprising given how similar the theories are in so many respects. *Morals by Agreement* is reviewed by Lomasky in *Critical Review* 2 (Spring/Summer 1988): 36-49. Lomasky is skeptical about Gauthier's theory, as he believes that "Gauthier's understanding of *rationality* and *morality* are both too straitened to explicate adequately what it is for someone to be a rational, moral person." This criticism of Gauthier is ironic give my similar criticism of Lomasky (which Gauthier would probably endorse).

24. These resources are also present in Gauthier's revisionist account of practical rationality as "constrained maximization". Lomasky appears to be misled as to the nature of Gauthier's theory by focusing on the latter's

assumptions of self-interest and of subjective value, neither of which are necessary or sufficient for his revisionist account of rationality.

25. I am especially puzzled by this matter, as I am by a related query: why isn't Lomasky's theory *contractarian*? It clearly is not a natural rights theory, if by that one means a theory which asserts that persons have certain basic rights *by virtue* of their possession of certain natural attributes (e.g., rationality), independently of and prior to convention. Lomasky's derivation appears to be an attempt to generate rights from non-moral, albeit normative, premises. The assumptions of other-regarding sentiments or of impersonal value do not make the theory non-contractarian, unless the impersonal value includes moral value (in which case the assumption, unless defended, is question-begging). I fail to see how the theory is not contractarian in the manner in which Hume's account of justice and property, Buchanan's account of law, and Gilbert Harman's general moral theory are contractarian. (For the latter see "Relativistic Ethics: Morality as Politics", in Peter A. French et al., eds., *Midwest Studies in Philosophy*, Vol. 3, [Morris, MN: University of Minnesota, 1978], pp.109-121. Regarding Hume, see David Gauthier, "David Hume, Contractarian", *Philosophical Review* 88 [1979]: 3-38.) But this controversy is a matter for another time.

THE RIGHT TO PROJECT PURSUIT AND THE HUMAN *TELOS*

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Loren E. Lomasky in *Persons, Rights, and the Moral Community*¹ has written an important and yet problematic defense of individualism. His defense is important because he makes progress in showing why there needs to be an irreducible moral concept of "rights." His defense is problematic because he argues that the justification of rights depends on the existence of ultimate value that is independent of human preferences or desires.²

According to Lomasky, human beings need rights³ because they are individuals, and a crucial feature of being an individual is that one has ends which are unique and bound up in a person's very identity. These ends provide the individual, and only the individual, with a reason for doing something. They are not transmissible to others. The value of these ends may be based on nothing more than an individual's commitment to them and is not necessarily objective. Lomasky calls these ends personal projects and describes them in the following way:

Projects clash with impartiality. To be committed to a long-term design, to order one's activities in light of it, to judge

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one's success or failure as an acting being by reference to its fate; these are inconceivable apart from frankly partial attachment to one's end. If E_1 is bound up with A 's conception of the type of person he is and the kind of life he has chosen to lead, then he cannot regard its attainment as subject to trade-off with B 's E_2 simply on the ground that some impersonal standard of value ranks E_2 above E_1 . Rather, A will appraise possible courses of action by reference to a personal standard of value. His central and enduring ends provide him reasons for action that are recognized as his own in the sense that no one who is not committed to those very ends will share the reasons for action that he possesses. Practical reason is *essentially differentiated* among project pursuers, not merely contingently differentiated by the unique causal constraints each person confronts from his own distinct spatio-temporal location. That E_1 can be advanced by A might provide A overwhelmingly good reason to act. That B could equally effectively advance E_1 might merit vanishingly little weight in B 's moral deliberations. To put it slightly differently, practical reason is inherently and ineliminably indexical. A will regard the assertion, " E is my deep concern," as a significant reason in itself for his seeking to advance E_1 rather than some competing end.⁴

A system of abstract and universally categorical rules does not of itself account for the possibility that A and B may give different weight to E_1 . Indeed, if those rules are themselves about various " E s," the opportunity for divergence on any E covered by a rule vanishes. It is precisely the *fact* that individuals are different in their values, circumstances, goals, talents, personalities, etc. that a term signifying the *moral* propriety of those differences be available. The general, the abstract, the universal does not capture what is captured in the term "rights." An individualistic and hence pluralistic component is missing. Basic rights, then, are needed in order to protect human beings in the course of pursuing these personal projects. Rights function so as to provide 1) the moral sanction for an individual's activities—whether they be truly valuable or not—that do not invade the moral territory of others; and 2) the moral obligation of others to respect the moral territory of the individual.

Yet, Lomasky holds that the importance of protecting people's status as project pursuers depends on the existence of objective value. If all value is reduced to preference, what does it matter if

people's status as project pursuers is not protected? Lomasky claims that the objective value of being a project pursuer is presupposed by the personal value that accrues to me as I pursue my project. If this is true, however, there seems to be a problem. Can rights have the "deontic" force Lomasky wants them to have, that is, can they be a moral side constraint on attempts to do good and avoid evil, and yet, in terms of a deep justification, be based on objective value? How can some activity or project whose value is based on nothing more than a person's commitment to it and which may in fact not promote the objective value of being a project pursuer, be made untouchable if the justification for keeping that activity so protected is the objective value of being a project pursuer?

In what follows I will first consider Lomasky's understanding of the problem of reconciling basic rights with a deep justification that is based on objective value together with his insights as to how a solution to this problem might be found. Second, I will argue that the beginning of a reconciliation of rights and objective value is found in a conception of ultimate value whose nature is both objective and individual, but not impersonal, subjective, and, most importantly, unrelated to human agency. It will be argued that an Aristotelian⁵ or, if some prefer, a quasi-Aristotelian, inclusivist conception of the human *telos* fits such a conception of value and provides a possible foundation for the rights Lomasky seeks to defend.

I

Lomasky realizes that the liberal desire to recognize the individual as sovereign with respect to his own ends cannot require that a liberal regime be neutral regarding all ends that individuals might choose to pursue.

No political order can vest in private individuals complete discretion to seek value wherever they choose. There will always be those for whom nothing is more charming than bashing heads, and neutrality towards *that* kind of end would be ludicrous. It is tacitly assumed that liberal neutrality ends where violation of rights begin, and that a hands-off policy is appropriate only towards rightful actions. But once it is admitted that not everything is permitted, why should the line be drawn at rights violations? Why should not it be the business of the state to promote what is *right* rather than merely respect for *rights*?⁶

There are, of course, many practical objections to the state taking

on the function of directly promoting virtue, but as Lomasky observes, "objecting on grounds of practicality to direction by Philosopher-Kings tacitly admits that such a state would be the best regime if only it were attainable, and that thus liberal individualism is no more than a second-best solution to the problem of civility."⁷ He further notes that a denial of any knowledge of what is truly good or valuable is a two-edged sword. While it may leave the Philosopher-King without any knowledge of the good, it also leaves the right to project pursuit without moral foundation. Thus, Lomasky is looking for a conception of the good that will allow for a morally principled defense of the liberal claim that the state should only prohibit and punish rights-violating activities and leave to individuals and non-governmental institutions the task of commending and condemning various modes of life.

Lomasky raises the foregoing problem at the very end of his book and thus does not try to provide a definitive solution. Yet, he does refer to the old adage that no one can be compelled against his will to act virtuously. Given that E^* is of luminous worth according to some objective standard of value and that E is what one desires but is only a middling valuable end or even not valuable at all, Lomasky notes that

if one is *made* to advance E^* when it is really E that one wants, one's efforts on behalf of E^* are not directed by the value that is in E^* but instead by the whip or by its civilized equivalent, tax preferences....There are some things that persons must do for themselves, and do freely, if they are to be worth doing. This is not a new and radical proposition but one of the oldest verities of moral philosophy. It finds its fullest and most consistent expression in the theory of liberalism.⁸

Virtuous living cannot exist if one does not choose such a way of living for himself.

Is the claim that self-directedness or autonomy is necessary for virtue to exist sufficient to establish the claim that government should not have as its task the direct promotion of virtue but instead only the protection of rights? This depends entirely on how directing and using one's own mind to take action to achieve ends is related to an individual living virtuously. If following one's choices is merely the necessary means to virtue, then in those instances where an individual's choices are clearly not going to realize his good, it cannot be claimed that the individual has a right to have these choices protected from coercive interference. In such situations his

choices are, *ex hypothesi*, not going to result in the realization of his good and so protecting these choices is not necessary for his realizing his good. Trying to base the right to project pursuit on self-directedness being the necessary means to a life of virtue is not going to work.

Henry B. Veatch has expressed this viewpoint clearly. "A person's rights are strictly conditioned upon that individual's life, liberty, and property being the necessary means of his living wisely and responsibility and of his becoming and being the person that a human being ought to be."⁹ Thus, if one engages in conduct that is not, to use Veatch's terms, perfective of one's nature, then one would not have a right to engage in such conduct. "The actions that he takes and the conduct that he pursues are then no longer right at all; nor can his natural right to life, liberty, and property be said to entitle him to live in the way he has foolishly and unwisely chosen to do. In other words, that one should abuse one's right [viz., engage in nonperfective conduct] must not itself be taken to be right, or even one's right in any strict sense."¹⁰ Government would not in virtue of a right possessed by an individual, then, have any duty to refrain from interfering with a person's nonperfective behavior. For Veatch, rights are not an irreducible moral concept. A person's right to *X*-ing is but a short hand for saying two other things: (1) it is right that the person *X*'s, or *X*-ing is necessary to *Y*-ing which is right for the person to do, and (2) in virtue of the rightness of *X*-ing or *X*-ing being necessary to do what is right, say *Y*-ing, others (somehow) have the duty not to interfere with a person's *X*-ing.

II

If an irreducible right to project pursuit is to be based on objective value and if the liberal claim that the state should not use its coercive power for directly promoting virtue but only for rights-protection is to be defended, the relationship between self-directedness and what is of objective worth needs to be more intimate and vital than has so far been conceived.

What follows is an account of the human good that I believe will prove helpful to the defense of the right to project pursuit. This account is of Aristotelian inspiration. It holds that human flourishing or living in accordance with virtue to be the human *telos* and thus the ultimate, objective standard of value. It makes the following claims about the character of the human *telos*:

- (a) The human *telos* is "the most final end and is never sought for the sake of anything else because it includes all

final ends.¹¹ As such, the human *telos* is an inclusive end, not a single dominant end which competes with all other ends and allows no other ends to have value except as a means to it. Thus, it is possible for an activity to be done for its own sake without just being a necessary preliminary or means to human flourishing.¹²

(b) The human *telos* is an activity, and other final ends or virtues are “included” in it not as things might be included in a box but as expressions of it. They are the very activities that constitute the activity that is human flourishing.

(c) The human *telos* is an integrated set of activities or virtues, not merely a collection. As an integrated set of activities each of which is valuable as an essential feature of this way of living and not merely as a means, human flourishing has a unique excellence—a fundamentally essential activity which makes possible and explains the existence of all the others activities which constitute human flourishing. This *arete* which unifies the human *telos* is the activity of human reason or intelligence.

(d) Human reason or intelligence is not automatic. Be it speculative or practical in character, effort to initiate and effort to maintain human rationality is required. Autonomy or self-directedness is the *exercise* of human intelligence and thus is at the very core of human flourishing—it is what makes human flourishing *human*.

Eric Mack has expressed point (d) as follows:

The centrality of autonomy, as a property necessary to any activity’s being *constitutive* of living well, allows us to be more specific about the (proper) function of a person’s activity, capacities, etc. It is the (proper) function of a person’s activities, capacities, etc. to be employed *by that person* in (toward the end of) his living well. The function of a person’s activities, etc. is individualized not only with regard to whose well-being it is the end of the activity (capacity, etc.) to serve but also with regard to who must employ the activity (capacity, etc.) for it to fulfill its function. The activity (capacities, etc.) of *A* must be employed by *A* if it is to fulfill its function of contributing to the active, ongoing, process of *A*’s living well. (And *A*’s activities, capacities, etc. have no “higher” end.)¹³

Self-directedness or autonomy is, therefore, no mere means or necessary condition for human flourishing. Rather, it is the central necessary feature of human flourishing which is and indeed must be present in all other activities which constitute the human good that is human flourishing.

According to this conception of the human good, self-directedness is not only necessary for human flourishing to exist; self-directedness is necessary for human flourishing to be human flourishing. It is not external to the essence of human flourishing, but is the very form, the only form, in which a life in accordance with virtue (human flourishing) can be lived. In other words, if I am not the author of the activity, that activity is not good or right for me even if it should nonetheless be true that if I were the author of that activity it would be good or right for me.

Since the human *telos* is an inclusive end, one can know that certain activities are good or right for man by an analysis of the nature of human flourishing and not by merely appealing to whether the consequences of following these activities will promote the natural end. An Aristotelian conception of the good does not require a consequentialist theory of obligation. Thus, the moral justification for the protection of one's self-directedness is not merely consequentialistic in character. Yet, since self-directedness is the very form in which human flourishing exists, neither is the protection of it to be morally justified in the manner by which the practice of a constituent virtue is morally justified—namely, by the obligation to live a life in accordance with virtue. Letting the moral justification for protecting someone's self-directedness rest on the duty to perfect one's nature would make the justification for protecting self-directedness dependent on whether the exercise of this power in a particular situation was morally appropriate. If this were so, then the liberal's traditional worry about finding a principled basis for legal tolerance of activities that are not authentically good would be well-founded. How could there be any moral justification for legal tolerance of morally inappropriate conduct if such tolerance is based on a theory of the human good? There has been ample theoretical reason for liberals to traditionally avoid accepting the claim that there is a human *telos*.

However, if self-directedness is the one and only form in which human flourishing exists, that is, if virtuous life must be self-directed life, then the moral justification for protecting self-directedness is much different than has so far been conceived. What many advocates of natural end ethics have failed to realize and what some liberals come very close to seeing but do not quite see is that to hold that the

human good is to perfect one's nature in accordance with the standards of human flourishing is also to hold that the human good is a life of self-directed activity. Before ever addressing questions of what someone should think or how someone should act, an analysis of human flourishing shows that human beings ought to live their lives according to their own judgments. Human flourishing, excellence, or well-being cannot be what it is without self-directedness or autonomy. This is the most crucial insight we have into the character of human well-being: because it allows us to see that just as human flourishings is the ultimate end or value of all human choices, so it must be that individual human beings following their own choices (and not those of others) while engaging in the concrete activities that constitute their lives among others is the most important social/political value.¹⁴

Indeed, once we abstract from the central virtues called for by human rationality and the specific activities for concrete goods a particular human being's reason or intelligence tells him he needs to take because of the circumstances in which he finds himself, we have the exercise of human reason or intelligence itself—that exercise, that power, is self-directedness or autonomy. Self-directedness is the activity of human flourishing most abstractly and universally conceived. The protection of self-directedness or autonomy is, therefore, to be morally justified simply because the human *telos* is to be protected.

This most universal and abstract characterization of an Aristotelian conception of the human good would not, however, have a point if it were not the case that this conception did not also recognize (1) that human beings are social and political animals who can only flourish among others; and (2) that the human good is always and necessarily the good for an individual human being. This most universal and abstract characterization of the human good in conjunction with the recognition of the social/political and individualized character of the human good allows us to see the fundamental need for an irreducible moral concept of "rights." This need stems from the twin requirements of providing a legal framework for a human community within which project pursuit and the protection of the autonomy of each and every person can simultaneously occur. To better appreciate this point, however, we should consider the individualized character of the human good more carefully.

Though the social and political character of an Aristotelian conception of the human good is generally recognized, the individualized character is generally not. Yet, it must be remembered

that the human good is not some Platonic form. The good of any human being is to that human being as act is to potency, and since the actuality of a human being is but the actuality of that human being's very potentialities, the good for a human being is not something abstract. One has potentialities not only in virtue of *what* one is but also in virtue of *who* one is. Indeed, human beings cannot actualize their specific potentialities except through an actualization of their individuating potentialities. The human good neither exists apart from the choices and actions of individual human beings nor independently of the particular "mix" of the goods that the individual human must determine as appropriate for his circumstances.¹⁵

Does this mean that this Aristotelian conception of the human *telos* does not provide any unequivocal guidance regarding human interests? This depends, of course, on what it means for there to be "unequivocal guidance regarding human interests." If, on the one hand, it means that there is no common set of virtues that all human beings need to possess and follow if they are to find fulfillment, then the answer is "no," because if an Aristotelian conception of the human good means anything, it is that there are certain virtues with which all human beings, simply because they are human, need to conduct their lives. If, on the other hand, it means that what the virtues which constitute human flourishing call for in terms of concrete action can vary in the lives of individual human beings, then this is not saying something which is inconsistent with this conception of the human good, but indeed something required by it. As Henry B. Veatch has observed regarding the doctrine of the mean, "the whole point of the doctrine of the mean is that in the very nature of the case it will be related to the particular situation, the principle being that how we feel and react to a situation should not be a mere uncritical and undisciplined response, but rather the sensible and intelligent reaction which the particular situation calls for."¹⁶ We may conceptually distinguish between the potentialities a human being has in virtue of *what* and *who* he is, but they are never separate in the individual human being. Though it may not have always been recognized, there is plenty of room for pluralism and diversity within an Aristotelian conception of the good.

Though the human good is indeed objective and universalizable and something all men are obligated to pursue according to an Aristotelian conception, it is instructive to note that the principle of universalizability need not be interpreted so as to require that none of the individuating features of human beings be allowed to impinge on our moral reasoning. It must be remembered that the

principle of universalizability in an Aristotelian ethics does not operate as some a priori principle. This principle is justified only to the extent one can through an act of abstraction conceive of human nature and truly predicate this nature of individual human beings. Though the concept of human nature does have a foundation in reality, that is, it is based on features that all human beings through an act of abstraction can be seen to share, these features are always and necessarily individualized. Human nature does not exist abstractly or universally—either *ante rem* in a Platonic manner or *in rebus* in a Porphyrian manner as the “universal part” of an individual human being. Accordingly, when it comes to developing a conception of the human good based on our knowledge of human nature, it would be a mistake to treat the human good as if it were something that was not always and necessarily the individual human being’s own good. Thus, the principle of universalizability cannot function in an Aristotelian ethics as a principle of impartiality—that is, as a principle that requires moral reasoning to ignore those ends which are unique to the individual.

According to Lomasky, to say that a standard of value is impersonal is to say that it is a standard of value that is impartial among persons. What this implies is that the fact that “*E* is *my* end; it is *what I* most of all care for provides no moral reason for my choosing *E*₁.”¹⁷ The only moral reason for my choosing *E*₁ is one that everyone else could share. Personal projects clash with the principle of impartiality. Personal projects and the partial attachments they involve do not, however, clash with an Aristotelian account of the human good. As already implied, the principle of universalizability need not be interpreted as implying either that one man’s good is another’s or that the moral point of view requires that he has no more moral reason to pursue his own good than that of any other human being.

As is well known, Robinson Crusoe without Friday has no need of the moral concept of “rights,” but when they meet, there is the possibility of the one interfering with the autonomy of the other—that is, using the other for a purpose the other has not chosen—and thus destroying any possibility of the other flourishing. Such conflict, however, need not be simply the result of some moral failing on the part of the parties involved, it could also stem from the fact the what is objectively good for Friday and what is objectively good for Crusoe may not be the same when it comes to concrete actions. Morally speaking, Friday may have no objective interest in Crusoe’s end and vice-versa. They may even conflict. Given such potential for conflict, there needs to be a moral principle which protects the

autonomy of each so as to allow for the possibility that each may flourish in his own unique way—that is, pursue personal projects.

According to this Aristotelian conception of the human good, the legitimacy of an irreducible moral concept of “rights” is founded on the moral propriety of individualism or pluralism and a principled commitment to human flourishing which recognizes the need for producing a compossible set of moral territories, what Nozick calls, “moral space,” consistent with the diversity of human flourishers. Rights are the principles used to create a legal system which defines a set of compossible territories that provide the necessary social/political condition for the possibility that individuals might carry on a life in accord with virtue. They establish the legal limits in which pluralism may express itself in relation to others. They provide the moral side constraint on attempts to promote good and avoid evil that would require using persons for purposes to which they have not consented. So construed, rights are nothing less than the social and political expression of human flourishing.¹⁸

1. (Oxford: Oxford University Press, 1987).

2. Lomasky states: “If all value reduces to preference, then there can be no reason at bottom to prefer one thing to another....No meaningful content could be found to the proposition that satisfying desires is better than not satisfying desires. For if the good for a person just is, definitionally, his getting what he happens to desire, then to assert that satisfaction of desires is good (and dissatisfaction of desires is bad) is logically equivalent to saying that getting what one desires is getting what one desires (and not getting what one desires is not getting what one desires). Arid tautologies can do no justificatory work....If there is no value antecedent to desire, then the desire for *X* is desire for the valueless, and satisfaction for the desire for *X* is valueless satisfaction.” *Ibid.*, pp.251-252. Regarding what Henry B. Veatch has called the “Euthyphro test,” Lomasky would seem, then, to hold that *X* is not valuable because it is desired, but rather desires are for the sake of what is valuable.

3. Though Lomasky does make some provision for positive rights minimally conceived, I am only concerned with his argument for, what rights theorists call, “basic, negative claim-rights.”

4. “Personal Projects as the Foundation for Basic Rights,” *Social Philosophy & Policy* 1 (Spring 1984): pp.40-41.

5. I use this term to designate a broad tradition rather than an individual. It includes such diverse thinkers as Thomas Aquinas, various contemporary Thomists, Henry B. Veatch, Ayn Rand, Alasdair MacIntyre, Jacques Maritain, John Finnis, David Norton, and the like. In other words, this

approach takes its inspiration from this tradition but does not claim that every position taken is located within the text of Aristotle himself.

6. *Persons, Rights, and the Moral Community*, p.250.

7. *Ibid.*, p.251.

8. *Ibid.*, pp.253-254.

9. *Human Rights: Fact or Fancy?* (Baton Rouge and London: Louisiana State University Press, 1985), p.205.

10. *Ibid.*

11. J.L. Ackrill, "Aristotle and Eudaimonia," in Amelie O. Rorty, ed. *Essays on Aristotle's Ethics* (Berkeley and Los Angeles: University of California Press, 1980), p.23.

12. This point is crucial because it means an Aristotelian account of the human good does not generate a consequentialistic theory of obligation. One does not determine what ought to be done by merely asking what conduct will produce consequences that maximize the good. Rather, an analysis of the human good reveals the virtues that constitute the human good and thus what one's obligations are. See John Cooper, *Reason and Human Good in Aristotle* (Cambridge, Massachusetts and London: Harvard University Press, 1975), pp.87-88 and chapter two.

13. "How to Derive Libertarian Rights," in Jeffrey Paul, ed. *Reading Nozick* (Totowa, New Jersey: Rowman and Littlefield, 1981), p.290.

14. Also, as I have noted: "Nor can a world which compels people to do the 'right' thing be viewed as a morally justifiable means to creating a world in which human beings *choose* the right thing; for it is the individual human being's self-initiated and self-maintained achievement of his...potentialities that is the moral standard employed here and not some reified or collectivized version of human flourishing." *The Catholic Bishops and the Economy: A Debate* (Bowling Green, Ohio: Social Philosophy and Policy Center and New Brunswick, New Jersey and London: Transaction Books, 1987), pp.59-60.

15. Further, an individual's very own insight and judgment are absolutely crucial to knowing what is the right thing for the person to do in the concrete situation.

16. *Rational Man* (Bloomington, Indiana and London: Indiana University Press, 1962), p.93.

17. *Persons, Rights, and the Moral Community*, p.25.

18. I have only tried to offer insights which might prove helpful to Lomasky's argument for the right of project pursuit and have not, of course, presented a complete argument on behalf of basic rights. This task is undertaken in *Towards Liberty: A Neo-Aristotelian Approach to Natural Rights* (forthcoming from Open Court) from which parts of this essay were taken. I coauthor this work with Douglas J. Den Uyl. This essay has also benefited from his suggestions.

RESPONSE TO FOUR CRITICS

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I

Douglas B. Rasmussen

“The Right to Project Pursuit
and the Human *Telos*”

There are two strings to Professor Rasmussen’s bow. The first is the response of a sympathetic critic: sympathetic in endorsing rights protective of individuals’ project pursuit but critical of the strategy employed in *Persons, Rights, and the Moral Community* (hereafter *PR&MC*) to undergird them. The second string is affirmation of an Aristotelian human telos for which self-directedness is a necessary constituent and from which strong liberty rights fall out. There is much that I find attractive about Rasmussen’s approach, but I doubt that the road to rights is as smooth as he suggests. I begin by spelling out what I see as obstacles along the way. The argument of *PR&MC* was constructed as a deliberate attempt to evade those obstacles. I will

say a little about how it differs from Rasmussen's and then indicate why I believe that it does not jeopardize the rationale of rights in the way he suggests.

Rasmussen maintains that self-directedness or autonomy is imperative for human flourishing. In his paper, the two terms are presented as equivalent. I think this is a mistake, if not philosophically, then at least tactically. That, though, is a hobby-horse I shall ride on some other occasion. Here I strongly second his claim that self-directedness is not to be conceived simply as a necessary means to an end that lies outside of human activity, or even as one among several gems in the package of intrinsic human goods, but rather, as he nicely puts it, "the very form [Rasmussen, p.104]" of a flourishing human life.

From this he believes that rights to noninterference follow fairly straightforwardly. There are such rights because usurping the self-directedness of someone in order to steer that person to his proper end is necessarily self-defeating. Whatever the end is toward which another directs me, we know that it cannot be the end which is specifically *my* human good. It cannot be that because, insofar as I am rendered a patient rather than an agent, I fail to achieve the good of *activity* in accord with reason. Second-hand *eudaimonia* is no *eudaimonia* at all. Thus, a necessary precondition of human flourishing is the maintenance of a regime of studied noninterference.

I think this is right as far as it goes. The problem, as I see it, is that it does not go nearly far enough. Specifically, it doesn't explain why we should endorse rights that serve as *side constraints* rather than accede to an impersonal standard of value that directs us to maximize human self-directedness. It may seem that these are equivalent: to violate the moral space of someone is to thwart self-directedness and thus to fail both the side constraint and the maximization requirements. Unfortunately, that is not quite accurate. It is true, *ceteris paribus*, that to compel someone to "do something for his own good" is to impede self-directedness. However, as Nozick¹ and many others have observed, all else need not be equal. Suppose that by interfering with Emily I can prevent Edna from interfering in an equally grave manner with five different people. Or suppose that by interfering on this occasion with Walter I can render him capable of effective self-direction on many subsequent occasions. In each of these cases, the side constraint view forbids my interference but the maximization view commends it. Which is correct?

If you believe that there are non-derivative rights, that is, if

you believe that rights are not simply handy rules of thumb in the service of maximization, then you are committed to defending the side constraint view in preference to the maximization view. That is what I attempt in the book, and I assume that it is also Rasmussen's position. The problem is that his Aristotelian argument provides no obvious basis for taking that position. In fact, I am strongly inclined to believe that an unfortified Aristotelianism will give the nod to maximization. I shall subsequently offer circumstantial evidence to that effect.

What, from the perspective of Rasmussen's version of an Aristotelian *telos* is wrong with the exercise of paternalism? Well, for starters we can say this: a life of constant paternalism by one's "betters," perhaps by a coterie of Philosopher-Kings, would be intolerable for the readers of this journal. It is the life of a slave, and although Aristotle holds that there do exist natural slaves, they are hardly a model of human flourishing. That, though, is not the point. Rather, the question that must be addressed is this: what is wrong from the Aristotelian perspective with a little paternalism—or even with a great deal of paternalism—just so long as its long term product is more self-direction exercised by the individual in question? So far as I can see, nothing.

The best life, all else equal, is one of uninterrupted self-direction. That, indeed, is the sort of life an Aristotelian might characterize as "godly." However, the divine state is not ours to attain. The currency in which we reckon our successes is the coin of more and less. More self-direction is better than less. Therefore, paternalism is, in principle, entirely justified. I say "in principle" because, of course, we can present a long list of ways in which well-intended paternalistic intervention can go awry. We need merely borrow the list from J.S. Mill. I cannot recommend such borrowing because interest on the loan is reckoned in utiles. The problem is to find an approach that does not presuppose the consequentialist maximization we are trying to evade.

Similarly, a permission or even duty to sacrifice one person's self-directedness for the sake of salvaging several other people's self-directedness also seems to be entailed by this Aristotelian line. There is a response that will naturally suggest itself to an Aristotelian. It is to object on grounds of *justice* to a sacrifice of one for the many. In effect, that is to endorse an understanding of justice in which it figures as a side constraint, specifically a side constraint against trading off one person's good for other people's good. As an exponent of rights as side constraints, I am

very much in sympathy with this response. However, merely to cite justice as barring such tradeoffs is conspicuously to beg the question at hand. What is needed is a defense against an omnivorous maximization requirement. I do not see where such a defense can be found in the Aristotelian position put forward by Rasmussen.

Of course, it would be a different sort of violation of justice to hold Rasmussen responsible for not having done everything required for the development of a complete theory of basic rights in this essay. He will, I am sure, have more to say along such lines in his forthcoming book with Professor Den Uyl. I look forward to reading it. However, unless they supplement their Aristotelianism with foreign principles, I am pessimistic concerning their prospects. Previously I said that I would provide circumstantial evidence supporting such pessimism. I now proceed to do so.

One conspicuous proponent of an Aristotelian theory of the human *telos* is Aristotle. Indeed, there are some who would maintain that, in this respect, he occupies a privileged position. It might, therefore, be suggestive to glance at Aristotle's own characterization of the status of liberty to see how rigorous he takes the demand for unimpeded liberty to be. When we do, the result is not heartening to the would-be Aristotelian liberal. As Fred Miller observes:

Aristotle is a trimmer on the subject of liberty. He tends to regard it as only an external good and not as essential to the good life... "Freedom" was a catchword for Greek democrats, who, Aristotle says, defined it as "living as one wants"... Aristotle objects against this conception of freedom on the grounds that it is inimical to a life of moral virtue and leads to the violation of the rights of others.²

Rasmussen could object, and with cause, that he has not presented his views as the inerrant writ of Aristotle. Rather, he explicitly characterizes his theory as "Aristotelian or, if some prefer,...quasi-Aristotelian [Rasmussen, p.100]." Quite so. My hunch, however, is that if he is to steer his way clear of the sorts of difficulties I have identified, he will have to resign himself to being a good deal less Aristotelian and a good deal more quasi.

That may or may not be a problem for him; for me it is not. I believe that I possess non-Aristotelian resources adequate to meet his challenge: "How can some activity or project whose value is based on nothing more than a person's commitment to it, and which may in fact not promote the objective value of being a project pursuer, be made untouchable...? [Rasmussen, p.100]"

The short answer—and I must now keep it short—is that individuals have reason to adhere to a standard of mutual noninterference, and that this reason has (virtually) *nothing* to do with their judgment that other people's projects are objectively valuable, that their exercise of self-directedness is necessary to their attainment of the human good. Instead, it has (almost) *everything* to do with the fact that, from the perspective of individuated practical reason, one has reason to demand liberty to pursue the ends that one takes to be constitutive of a meaningful life for oneself. I say "takes" because whether one in fact has reckoned well or ill is irrelevant to the fact of one's commitment to those ends. They are simply the ends one has and, as such, they will present themselves as worth fighting to preserve. Because practical reason is essentially individuated across persons, your rational stake in seeing to it that I hew to what you believe to be the Good, the True, and the Beautiful is less than your stake in seeing to it that *you* are able to serve those ends. This is, admittedly, more Hobbes than Aristotle. It is not, I believe, coincidental that Hobbes is the father of liberal political theory and Aristotle, despite his many achievements, remains distant from liberalism.

As both Rasmussen and Mack note, I do concede in the final chapter of the book that a system of rights responsive to the claims of personal value ultimately rests on a presupposition of impersonal value. It does so, however, not in the way that a theorem rests on the axioms from which it is derived. We do not deduce our projects from an antecedently held theory of the good. However, to regard one's projects as legitimately directive for oneself, one necessarily takes them to be more than appetites, that is, more than an expression of the desires with which one happens to be blessed or burdened. Rather, one regards one's projects—and thus oneself—as controlled by a good which one has rightly apprehended. Project pursuit is to desirous craving as perception is to hallucination. Of course, individuals do sometimes confuse their fantasies with reality. The point, though, is that unless one takes what one experiences as a veridical representation of the way things are, one will not judge that the experience provides adequate grounds for belief. Similarly, unless one is convinced that what one values represents with tolerable accuracy what genuinely is valuable, one will not hold that these valuations provide adequate reason for action.

Suppose you knew that tomorrow when you awoke you would loathe that which you now prize, esteem that which you now scorn. However, you will be at least as capable tomorrow of

advancing that reversed set of ends as you are now with respect to your current ends. How pleased would you be with that prospect? Would you maintain that the worth of your life will be unimpaired? Or would you regard that prospect as the greatest of misfortunes that could befall you, one that renders worse than useless any success you might subsequently experience in your pursuit of those different projects? If the latter, then you, like me, believe that the value one assigns to one's projects is not foundationless but rather rests on a conception of impersonal value that those projects serve.

That is not, however, to accept Rasmussen's characterization of my account as depending on "the existence of ultimate value that is independent of human preferences or desires [Rasmussen, p.98]." I certainly do believe that value is not merely a function of the particular desires one happens to have: that is, one may desire that which is in fact disvaluable. Alas, people do it all the time. However, and here I quote the book, "I do not understand the sort of value that could subsist in a world without consciousness and desire [*PR&MC*, p.240]." I have no truck with what Eric Mack, following Nagel, refers to as 'agent-external value'. I now turn to his piece.

II

Eric Mack

"Against Agent-Neutral Value"

In setting himself squarely against recognition of agent-neutral value, Mack broaches one of the most important and most difficult topics in moral philosophy. It is not possible here to do more than begin to identify the crucial issues, let alone satisfactorily resolve them. In particular, I shall make no attempt to defend Nagel's views except insofar as they seem to be equivalent to something I have maintained. Nagel is quite capable of coming to his own defense, and, frankly, I am not altogether confident that I can satisfactorily carry off my own. This is an area in which my first thoughts routinely give way to second thoughts, and then to thirds. The best I can do is exhibit, in all their nakedness, the views to which I am currently drawn. I shall simultaneously indicate where I think that Mack might also be feeling a draft.

In *PR&MC* I deliberately avoided using the term 'agent-relative value' and its contrary, 'agent-neutral value'. I did so to evade ambiguity. An agent-relative value is, according to the usual

definition, that which is valuable for some particular agent. However, two distinct interpretations of that characterization come readily to mind. It may pick out that which the agent *takes* to be of value, such as my taking it to be of value that I receive rare lamb chops for dinner. Alternatively, it can be construed as that which is of value for someone, whether he takes it to be valuable for himself or not. In this second sense, my health or honor may be of agent-relative value for me although I am delighted to jeopardize my health by eating those cholesterol-laden lamb chops and think that "honor" is a sorry relic of antediluvian moral codes.³ Clearly, the two senses of 'agent-relative value' not only are different but may conflict: that to which I am wholeheartedly devoted may be very bad for me, and not just instrumentally. More confusing still, they can give birth to a third, hybrid sense of agent-relativity: *V* is a value of magnitude *M* for *P* if, in virtue of *P*'s commitment to *V*, *V* therefore is of value *M* for *P*, although, absent such commitment, *V* would either not be of value for *P* or else would be of only lesser value than *M* for *P*. I believe this to be an extremely important species of agent-relativity but will not argue for that position on this occasion.

As I said, because of the potential for ambiguity I refrained in *PR&MC* from characterizing value as "agent-relative" or "agent-neutral." Instead, I distinguished between "personal" and "impersonal" value, meaning by the former that value which is consequent upon an agent's commitments taking the particular form they do. That, though, is to fall into an ambiguity between the first and third senses of 'agent-relative'. What is worse, on several occasions, especially in the final chapter, I employed 'objective value' as a synonym for 'impersonal value'. However, agent-relativity in both the second and third senses are properly held to be "objective" in a non-deviant use of that slippery term. Mack, and also Christopher Morris, call me up on failing to make the necessary distinctions, and I am prepared to plead guilty. On some future occasion I would like to draw *many* such distinctions and try to work out their consequences, but this is not that occasion. Instead, I shall address just one of the issues Mack puts on the table: interpersonal transmission of rational motivation. Does, say, the fact of someone's awareness that I am in great pain thereby constitute a reason for him to do anything?

Mack admits that it may. My groaning may interrupt his enjoyment of Hollywood Squares. More centrally: "Because I am near to him and he is a person of normal sympathies, his sympathy extends to me and he is discomforted by my suffering [Mack,

pp.81].” The problem with this explanation is that it ducks all the important questions. The first of them is: how are we to understand the reference to *normal* sympathies? By ‘normal’ we can intend either mere statistical frequency or the satisfaction of some normative standard. For example, it is “normal” in the former sense to be discomfited by the sound of chalk scraping on a blackboard. However, the minority of individuals who don’t mind that sound are not deficient with regard to some norm (second sense) of perceptual acuity. Conversely, those whose vision is worse than 20-20 fail to satisfy a perceptual norm, although they may be a majority of the population. When Mack speaks of “normal sympathies,” which does he have in mind?

If it is the latter, ‘normal’ as connoting a norm, then he has essentially abdicated his position of opposition to agent-neutrality. I therefore interpret him as conceding only that most people, most of the time do not find themselves entirely indifferent to the circumstance of someone next them groaning in agony. That, though, raises the further question: what are we to make of this statistical regularity? Is it analogous to our wincing when the blackboard squeals, a more or less direct physiological product? Or is it better accounted for after the fashion of explaining the tendency of most people to arrive at an answer of “12” when they add 7 and 5 as their successfully following an arithmetic norm? Again, it seems that Mack must adopt the former approach.

That, though, is to place *himself* in a statistical minority. It is fair to say, I think, that most of us believe that our perception of the agony of someone else does not operate as a brute cause of whatever helping activities in which we may subsequently engage. Rather, if we elect to aid the sufferer, it is because we take his suffering as a *reason* to alleviate his distress. It is one of those things that—normatively—count as providing a potential basis for action. I say “potential” because, of course, there may be other reason-giving factors that override any tendency one has to extend relief. Most obviously, one may desire the pain killer for oneself or for one’s suffering friend. If one feels spiteful toward the sufferer, one may smash the vial containing the analgesic although it means that none is available to relieve one’s own distress. Note, though, that even in this case the awareness of someone’s pain does indeed provide a reason, albeit a malicious one, to act. The apprehension of another’s pain is not motivationally inert.

Many facts *are* motivationally inert. That today is Wednesday, or that Brenda is wearing designer jeans are two such facts. They

do not, in themselves, afford me reason to do anything. Of course, when coupled with other circumstances, they might. I may believe that Wednesdays are terribly unlucky or loathe designer jeans. If so, I could have reason to cower under my covers all day or throw an inkwell at Brenda. But then it is the special belief or loathing that carries the motivational weight. If you ask me why I am trembling under the bed sheets, and I answer, "It's Wednesday," it would be entirely proper for you to respond, "So?" However, if you asked me why I provided the suffering individual a dose of morphine, and I told you that it was because he was in excruciating pain, it would be remarkably obtuse of you not to understand me as having provided a *full* explanation of my action. If you are puzzled about why someone else's pain should count more for me than the initials on someone else's jeans, *one* of us has missed something important.

It is open to Mack to respond that the difference between these two cases represents nothing more than a difference in degree of statistical likelihood: many people are disposed to respond to others' suffering while very few are terrified by Wednesdays. That is why we don't need the background conditions spelled out to us in the former case but do in the other. I find this response distinctly unilluminating. It does not illumine because it declines to consider that there may be some further and more revealing fact behind the statistics. Specifically, it does not acknowledge that there may be a *reason*—and not merely a *cause*—to explain why we are disposed not to take another's pain as motivationally inert. Against Mack, I maintain that the best explanation we can give for this statistical regularity is that we recognize that the sufferer's pain is a misfortune for him, and that in virtue of our correctly apprehending its badness for him we thereby understand that we have (some) reason to disvalue the occurrence of the pain, and thus (some) reason to take action to alleviate it.

Admittedly, this is not a knock-down deductively valid argument. It is rather of the form of an inference to the best explanation. You may be unpersuaded, believing instead that a better explanation is that others' pain is to be accounted on the model of squealing chalk. I think that is wrong. More to the point, I suspect that such an account conflicts with other things that you believe, at least if *you* are among those possessed of "normal sympathies."

If squealing chalk drives you up the wall, then you would do well to *extinguish* the reaction. That portion of your life conducted in proximity to blackboards would be more pleasant, and at no epistemic loss to you. That is, extinction of the chalk response would

not render you oblivious to something that remains genuinely an evil. There is no "fact of the matter" concerning the badness of chalk squealing independent of the subjective tinge of your experience. Would it correspondingly be a pure gain to extinguish your sympathetic response to the pain of others? You would thereby avoid some emotional distress and would free up your busy schedule by removing pain-alleviation from your to-do list. Those are genuine benefits. Why, then, might you be disinclined to adopt the sympathy-extinction strategy?

I suggest that it is because you find that strategy permeated by irrationality. It would be akin to your deliberately refusing to read the newspaper in order to persist in the belief that the lotto ticket you bought yesterday has made you a millionaire today. That is irrational if what matters is not simply or primarily the state of your consciousness but the way things are in the world. Similarly, the extinction strategy is irrational because it would be to take a capacity for apprehending what is valuable and disvalue in the world as if it were only a spotlight on one's own psyche.

I have not argued that there exists agent-external value or that one is rationally obliged to adopt a stance of impartiality between one's own pains or projects and those of someone else. Rather, I advance only the much more modest claim that apprehension of the pains and projects of others is not to be classified as among the motivationally inert facts that continually assail us. One's recognition of reasons for others *is* recognition of reasons for oneself. They can, of course, be overridden by other reasons one has. In particular, the fact that some end is *mine* may afford me overwhelmingly good reason to pursue it rather than the conflicting end that commands your allegiance. Nonetheless, my capacity to respond to you as another project pursuer, and not simply as a very complicated mechanism that can affect me for good or ill, is consequent upon my taking what you have reason to do as thereby relevant to what I have reason to do. Importantly, the relevance is not simply instrumental in the way it is when one engages with a machine: e.g., the temperamental cash-dispensing device that dined on my plastic last week.

As Mack writes elsewhere, "Some difference in one's actions must be called for when one moves from the solipsistic conviction that the only real values in the universe are one's own (agent-relative) values to the equal existence of value-for-others. It would be bizarre for such an enormous shift in one's normative convictions to have no implications for one's views about how one should act."⁴ I fully concur. Mack proceeds to maintain, however, that the shift

has no implications for one's ends but only for the justifiability of deontic constraints governing how they may be pursued. I have at least as much difficulty making sense of deontic constraints entirely divorced from judgments of value as he does with making sense of agent-neutral values. I therefore redirect my incomprehension away from Mack toward Morris.

III

Christopher M. Moris

"Loren Lomasky's Derivation of Basic Rights"

Christopher Moris asks, "What constitutes respect for the rights of another? [Morris, p.88]" and then offers us a useful distinction between *intensional* and *extensional* respect for rights. He writes:

Suppose that Beatrice cares about Albert and so refrains *because* she so cares. Then Beatrice has respected Albert's right only *extensionally*. Suppose that she doesn't care about him, that she is indifferent or unconcerned about his interests; nonetheless she refrains from interfering with his liberty...*because* she believes that she is so obligated. Then Beatrice respects Albert's right both *extensionally* and *intensionally* [Morris, p.88].

I suspect that this does not quite succeed in stating the distinction that Moris intends. Suppose that Beatrice refrains from interfering with Albert because she solemnly promised Clarence, whom she admires and would hate to disappoint, that she will leave Albert alone. Beatrice's noninterference can then be explained as consequent upon her sense of obligation and therefore, on Moris's definition, is *intensional*. However, that would seem to be the *wrong* kind of obligation to establish the distinctively *moral* basis of respect for rights that Moris believes to be requisite. There are two respects in which he might claim that it is deficient. First, it mislocates the ground of the obligation by placing it in Beatrice's relation to Clarence rather than her standing *vis-à-vis* Arthur. And second, it leaves her compliance a matter of altruism, albeit with respect to Clarence, not Arthur, rather than the product of a

nonderivative sense of obligation.

A different way of making Morris's point then seems necessary. While I do not mean to foist on him some particular understanding of what that way should be, it is hard to escape the impression that he is adverting to a Kantian distinction between actions that are (merely) in *accord with duty* and those that are motivated from a *sense of duty*. Such an interpretation fits his subsequent suggestion that "one might claim that moral obligation requires intensional rather than merely extensional compliance," and his puzzlement as to "why Lomasky's agents would be interested in using the language of morals [Morris, p.91]." The point seems to be that an order of extensional rights compliance can—or, perhaps, *must*—do without any *specifically moral* sense of reasons for action. And this, of course, is reminiscent of Kant's classification as *pathological* of actions motivated by inclination. For Morris, as for Kant, love of self is a source of pathology, but so too is action predicated on one's taking an interest in the well-being of others. That is because "such agents 'respect rights' only insofar as doing so is the most efficient means to their (non-egoistic) ends. [Morris, p.91]"

The comparison with Kant not only helps us better understand the nature of the problem Morris is attempting to present but also gives us fair warning that it is one that stands at a critical divide in moral theory. It is a divide which, I suspect, may be of more difficult passage than any "Is-Ought" gulf. For what it presents—and this is more clear in Kant than in Morris—is a dilemma for practical reason. If one's motivations to cede moral space to others is understood as in any way a function of one's *concern* for those others, that is, if it involves my taking what is a value-for-them as thereby being a value-for-me, then there is nothing distinctively *moral* about one's response to them. Rather, one is, as Morris puts it, efficiently pursuing one's ends. Or, as Kant would put it, this is an instance of the exercise of practical reason, but not of *pure* practical reason. On the other hand, if the purity of one's practical reason is impeccable in the sense that the circumstance of one's valuing or disvaluing an outcome is studiously excluded from one's reason to act, the difficulty becomes to understand how such reason can be practical. What reason do I have not to encroach on the moral space of others if such restraint neither directly nor indirectly is a product of that which I find to be of personal value? Mack maintains that a rational being acknowledges purely deontic constraints on his conduct. His is, in at least this respect, a fairly straightforward Kantianism. Morris, would seem to have situated himself similarly, but since he does not explicitly draw such a conclusion, I shall not

proceed further with hypothetical Morris exegesis. Instead, I shall try to state how I prefer to confront the dilemma.

I am, as I stated earlier, pessimistic concerning the prospects of any account of rational motivation that does not ultimately rest on agents' considerations of value. Therefore, I am obliged to concede that whatever moral motivation is, it too is necessarily grounded on whatever it is that individuals have reason to acknowledge as valuable. Critics who hew to a Kantian line can then charge that this is to abandon what is distinctively moral about a certain subset of our motivations. Quite possibly they are correct; two centuries of post-Kantian philosophy may have rendered this a linguistic truth about how the term 'moral' functions in, at least, the idiolect of a certain segment of the academy. If so, I would respond: all the worse for morality. It may be a fit subject for noumenal egos but not for us lesser folk. I suspect that, in this respect, Rasmussen and Machan stand closer to my approach than they do to that of Mack and Morris.

That is not to maintain, of course, that one has reason not to invade the moral space of someone else if and only if one stands toward that person in a relationship of special affection or esteem. That would indeed be to cast ourselves back into the Hobbesian state of war, with only the slight difference that one is possessed of an ally or two instead of perpetually flying solo. Instead, a rationale for respecting rights can take this sort of turn: I have reason to value the maintenance of a regime of secure moral space for individuals, both so that I can pursue those projects that are of special concern to me, and also—these are not exclusive—so that I am able without severe loss to my own standing as a project pursuer to display empathetic concern with those individuals for whom I hold a motivationally fecund degree of such concern. Therefore—and, of course, I am omitting the crucial intermediate steps—I have reason to accede to an order in which individuals generally forbear in their relations with all other project pursuers, irrespective of the particular appreciation one has for them or their projects. This understanding of the basis of rights is firmly value-based, but it does not crudely suppose that one has reason to acknowledge rights for all and only those toward whom one is brimming with altruistic concern.

Morris asks what special role the account of agents as project pursuers plays in the derivation of basic rights in *PR&MC*. There are several respects in which it figures. First, project pursuit is pivotal in explaining why it is that individuals are not rationally obliged to acknowledge some one impersonal standard of value as

incumbent on all agents alike. Second, it explains why rights take the form of an acknowledgment of claims to moral space, and especially the form of rights to noninterference. I believe that these two strands are developed in *PR&MC* with adequate emphasis. His remarks have made it clear to me, however, that a third strand of the argument was not presented with equal clarity.⁵ I should like to take this opportunity to pursue the response that he suggests.

Project pursuers are not beings who, as it were, are born afresh each moment. They are not a collection of person time-slices, not what I have called "Indiscriminate Evaluators." Rather, their actions are shaped by a persistent pattern of directive values that constitute for them what will and will not be a possible source of motivation for them. When project pursuers acknowledge the demands of rights, they do not do so as would person time-slices. For time-slice sets, it is on each occasion of action an open question how they are to comport themselves. If they are instrumentally rational in the standard decision-theoretic sense⁶, they will calculate afresh on each occasion whether value-for-them is best served by respecting or obliterating the moral space of others.

For project pursuers, things will be different. If they have reason to acknowledge the existence of rights, that acknowledgment will serve as a *standing commitment*, a disposition brought to their various encounters with others. Their respect for rights on some particular occasion will be explained as the result of their being the sorts of people rationally disposed to forbear in relations with others, not vice versa. That is not, of course, to advance the ludicrous claim that such individuals will invariably display fidelity to the rights of others. We know better than that. What it does indicate, however, is that the problem of accounting for compliance looks far different when one is considering it as a problem posed specifically for project pursuers than when it is taken to be a nostrum for the reform of "intelligent devils."⁷

Will Morris allow that a theory of rights consequent on one's reasons to be generally disposed to respect the moral space of others, those reasons in turn resting on one's valued ends, deserves the honorific title of "moral theory?" I shall not hazard an answer on his behalf. I freely admit on my own behalf, however, that I aspire to no more than this.

At least that is the case with respect specifically to the theory of rights. I believe that, both within and outside of professional philosophy, we are bombarded with a sensory overload of apostrophes to rights. In large measure that is due to tacit acceptance of an imperialism of rights within which respect for rights is

taken to constitute virtually the whole of what has moral standing, or at least its most portentous feature. Against that, I wish to put forward an understanding of rights as doing no more than setting the boundaries of minimally adequate conduct toward others. Within those boundaries, much room remains. In particular, rights as such answer few of the most difficult and important questions concerning how one is to direct one's life. So I strongly sympathize with Morris's concern that the book presents at best a pallid conception of ethical life. I can only plead in self-defense that I have not attempted to survey the entire moral landscape, but only its outer perimeter. Tibor Machan complains, however, that the boundary markers have been sorely misplaced. It is to his criticism that I next turn.

IV

Tibor R. Machan

"Against Lomaskyan Welfare Rights"

Professor Machan believes that to accord to welfare rights any legitimacy, even if only that of a contingent claim to provision in a strictly limited range of cases, is to sin against the logic of rights. It does so in two respects:

1. To acknowledge the existence of welfare rights alongside of liberty rights is to land oneself in a contradiction. For example, one simultaneously acknowledges the liberty right of the physician to lead his life as he sees fit but also a conflicting welfare right on the part of the ill individual that medical services be extracted from the physician.
2. Rights are to be understood as "general political principles, not principles guiding bits of rare action [Machan, p.72]." Because conditions of desperation are rare, they are not properly a ground for rights.

I shall presently state why I believe that Machan is mistaken with regard to both of these claims. But first, in a spirit of conciliation, let me note one crucial respect in which Machan and I are thoroughly in accord. He and I agree that an individual whose existence as a project pursuer cannot be maintained without the provision of goods held by others may have overriding reason to act to acquire those goods, irrespective of the propriety of the claims other people have to possess those goods. This agreement is not

trivial. Both Machan and I will be opposed by those who maintain that liberty rights be upheld though the heavens may fall. Indeed, I suspect that such Kantian or Rothbardian absolutists will invoke Professor Ewing's dictum against Machan. They will contend that acceding to the violation of rights, no matter how urgent the need, is itself an egregious blow to integrity. How morally elevating, they will ask, is one's commitment to respecting rights if it can conveniently be forgone when the going gets rough? That, though, is their question, not mine: as noted above, I am moved by a spirit of conciliation.

Conciliation has its limits. In particular, contradictory propositions are not reconcilable. So if recognition of both liberty rights and welfare rights is inconsistent, one or the other must be surrendered. Machan's preference concerning which it should be is clear. It is also my preference: *if* one of them is to go, it is welfare rights. That is because claims to positive provision are contingent, coming into effect only in those circumstances in which individuals are unable to provide for themselves and in which private charitable provision is not forthcoming. In contrast, the right to noninterference is properly a claim that everyone can lodge against everyone else, irrespective of the particular nature of the projects one pursues and irrespective of their sympathies with those projects.

But is it the case that there is a logical incompatibility between the two? If so, it would be a surprising fact that this disability persistently eluded the gaze of those classical liberals intent to argue the primacy of liberty yet who nonetheless accorded to welfare claims a limited yet enforceable scope. From Locke to Kant to Mill, state-enforced aid to those in distress was taken to be consistent with, perhaps even requisite for, the maintenance of a liberal regime. Of course, it is possible that these philosophers all suffered from a blind spot. I do not mean to assail Machan with an argument from authority. Rather, I cite this tradition to suggest that the inconsistency indictment demands a fuller and more persuasive brief than Machan provides.

If there are welfare rights, they limit the rightful liberties we would otherwise enjoy. In particular, my property rights are not absolute, holding come what may. That, though, is far from the demonstration of a contradiction. It cannot be news to anyone that one person's liberties are limited by the *liberties* of others. It does not follow, of course, that liberty rights are inherently self-contradictory. Rather, what we cannot concede is that each person, in the pursuit of his ends, must be afforded an *unbounded liberty* of "doing any thing, which in his own judgment, and reason, he shall

conceive to be the aptest means thereunto.”⁸ Similarly, my rights to enjoyment of my property are limited by claims that others have against me to provide rectification for trespasses that I may have culpably or nonculpably committed. Machan does not tell us whether he acknowledges the legitimacy of claims to rectification. I suspect that he does, but even if that is not so, he will err if he maintains that liberty rights and rectificatory rights are inconsistent. They are not, and neither are liberty rights and welfare rights. Rather, the scope of one adjusts itself to the scope of the other.

Machan’s other objection is that putative welfare rights lack generality because they are concerned only with exceptional cases. As such, they lack political standing: “The police, the courts, the legislatures, etc., have no reason to grant welfare rights [Machan, p.72].”

Like Machan, I believe that it will rarely be the case in a free society that individuals will be constrained to steal in order to live. Rights to positive provision will then only rarely come into play. (At least that is so with regard to unimpaired adults. If we lend serious consideration to the status of children, those who are severely disabled, and others who could not qualify as heroes of an Ayn Rand saga, welfare rights may not seem so anomalous.) Were individuals in this society not hampered by restraints on their liberty of a sort that both Machan and I deplore, e.g., restrictive licensing, minimum wage laws, zoning, and so on, claims for state provision would, I estimate, be closer to 0% of GNP than 1%. For this reason, I find his reference to my “welfare statist conclusion” curious. Given the particulars of Machan’s objection, it is ironic: he rejects welfare claims not because they are vast and thus oppressive but because they are exceedingly rare and thus not properly accountable within the domain of politics.

I believe that there are several respects in which this objection is flawed. First, Machan errs in taking rarity to be contrary to generality. To the contrary, a provision that only occasionally comes into play can be entirely general. For example, individuals have the right to use deadly force in order to thwart murderous assault on their person. Only rarely is there call to exercise this right. Nonetheless, it is of general application and properly a matter for political recognition and endorsement. Provisions allowing the quarantine of highly infectious persons are even more apt in this context. They come into play only contingently and limit far more drastically than does nugatory taxation to fund “Lomaskyan welfare rights” an individual’s enjoyment of liberty and property.

Second, Machan’s characterization of rights as “general *political*

principles [Machan, p.72, emphasis added]" is unfortunate. The rights we enjoy are, in the first instance, held against other individuals, not against the state. They are not born in legislatures nor euthanized in courts. States are obliged to recognize the rights we have, not create them *ex nihilo*. We have those rights because we have reason to accord others the moral space within which they are able to pursue their projects, subject to receipt of like forbearance from them. Thus, the theory of basic rights is inextricably tied to the theory of individual practical rationality. The job of states, if one may put it that way, is to serve as instruments of the reasons that individuals antecedently possess, not to manufacture new reasons. Machan, however, maintains that a person may have overriding reason to requisition the property of others, that each of us may have reason to acknowledge that that individual is acting reasonably in so doing, but that it would be thoroughly improper, even an assault on integrity, to countenance affording political sanction to such claims *in extremis*. I simply fail to understand the conception of political justification that undergirds this position.

Third, Machan's recommended alternative is thoroughly mischievous. "When in one's personal life one is facing the exclusive choice of either to invite death or to steal, one ought to steal [Machan, p.73]," he tells us. One ought, that is, violate rights but never, not *ever*, concede the existence of a right to positive provision. Even setting aside what this says about the conception of rights as especially stringent moral demands, the costs attaching to this alternative are substantial. Burdens imposed by theft are highly localized. The unfortunate person who is selected as victim will bear all of it, those lucky or smart enough to be elsewhere none of it. It is, therefore, far more likely in Machan's approved world than in mine that the needs of some individuals will be translated into disaster for others. The weak and the guileless are most likely to be victimized but are least able to ensure their own survival should they be in the position of needing to steal in order to live. People possessed of special skills enabling them to relieve the distress of others are also conspicuously at risk. If Machan is genuinely concerned for the liberty of the unfortunate physician, he would do well to rethink his position.

Locke commends civil society as the appropriate remedy for the "inconveniencies of the state of nature." Machan, in contrast, would bring those inconveniencies to civil society. If each individual is to judge in his own case whether he has sufficient reason to violate the rights of others, some will be scrupulously impartial. But others will apply a magnifying glass to their own interests, seeing them

as disproportionately larger than the liabilities imposed on others. Even when they judge correctly that theft is requisite for them to live as project pursuers, they may be inclined to take a larger share than a disinterested adjudicator would allow. Potential targets will, in self defense, expend resources to protect themselves from assault, very possibly launching preemptive sorties of their own. That will, in turn, create further victims, thus escalating the spiral of rationally justifiable rights violations.

If I possess rational warrant to violate rights when I am in great distress, may I not similarly violate rights in the service of my family, my friends, or even on behalf of anonymous individuals for whom I happen to have some sympathy? That is what Robin Hood did. The Sheriff of Nottingham objected, but he, after all, was incurably statist. If lots of us emulate Robin Hood and violate lots of rights to help out some destitute person, we may provide far more than that person needs. In the process, considerable havoc may have ensued. It will be even worse if competing Robin Hoods have different ideas about who the proper victims and beneficiaries are. Someone could then alternately be stolen *from* and then stolen *for*. These scenarios incorporate more than one coordination problem, each largely solved through recognition of politically enforceable welfare rights. Machan, though, demurs. This is privatization with a vengeance!

The minimal state of classical liberalism claims for itself a monopoly over use of force to protect the rights of all citizens. More parsimonious is what Nozick calls the "ultraminimal state,"⁹ an agency that provides enforcement and protection only to fee-paying clients. Machan, however, situates himself to the far side of even the ultraminimal state. He bids state agencies to take their cue from the Donner Party trial and "not allow to linger in jail [Machan, p.73]" someone who violates the rights of others in order to bring himself up to a welfare threshold. Let us call this regime of rationally sanctioned and unpunished rights violations the "totally ultraminimal state," or TUMS for short. For attacks on integrity, Machan prescribes TUMS. TUMS promises fast relief from upsets due to loss of generality and the distress that contradiction brings. Unfortunately, it has pronounced side effects. These include severance of the theory of rights from its base in the theory of practical reason as well as normative disarray consequent on returning welfare provision to the state of nature. All in all, I judge TUMS to be a typical over-the-counter nostrum: overpriced and of dubious efficacy.

This paper derives from remarks presented at the meeting of the American Association for the Philosophic Study of Society, December 28, 1988. Changes from that text are primarily stylistic. I would like to thank the four presenters for useful stimuli to further thinking.

1. *Anarchy, State, and Utopia* (New York: Basic Books, 1974), pp.28-30.
2. "Aristotle and the Natural Rights Tradition," *Reason Papers* 13 (1988), p.178.
3. The ambiguity is first cousin to that which philosophers have found in expressions of the form "X is a reason for person P," and which they attempt to disambiguate via a distinction between one's *having a reason* and *there being a reason*.
4. In "Moral Individualism: Agent-Relativity and Deontic Restrictions," forthcoming in *Social Philosophy & Policy*.
5. This was brought home to me also by David Gauthier's *Morals By Agreement* (New York: Oxford University Press, 1986). Unfortunately, I did not see Gauthier's book until after mine had already gone to press. Although I see the approach of *Persons, Rights, and the Moral Community* being, in some crucial respects, fundamentally incompatible with that of *Morals By Agreement*, Gauthier's is a work from which no one who wishes to address himself to the theory of rights can fail to derive benefit.
6. I believe that rationality so conceived is incapable of doing all the work that properly can be required of a full theory of practical rationality. That is why I characterized Gauthier's account in the work to which Morris refers in his footnote 19 as "too straitened to explicate adequately what it is for someone to be a rational, moral person." Morris finds that characterization of Gauthier's theory ironic, presumably because he perceives project pursuit to be carrying negligible weight in my attempted derivation of rights. Although these remarks may remove some of that apprehension of irony, the discussion of what a non-straitened account of practical rationality (and morality) will incorporate must await another occasion.
7. The phrase is from Kant's "Perpetual Peace" in *Kant's Political Writings*, ed. Hans Reiss (Cambridge: Cambridge University Press, 1970), p.112. In private conversation, David Gauthier has accepted a depiction of his project as being that of reforming such a race of intelligent devils. Despite Gauthier's formidable talents as evangelist, I have serious reservations concerning the feasibility of generating born-again devils. That, though, is Gauthier's project, not mine.
8. Thomas Hobbes, *Leviathan*, Chapter 14, "Of the First and Second Natural Laws, and of Contracts."
9. *Anarchy, State, and Utopia*, p.26.

RORTY'S FOUNDATIONALISM

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In *Consequences of Pragmatism* Richard Rorty distinguishes between Philosophy and philosophy.¹ The former is a systematic enterprise which seeks transcultural and extrahistorical foundations for knowledge, morals, etc., i.e., systematic philosophy as criticized in Rorty's earlier *Philosophy and the Mirror of Nature*.² It

sees itself as the attempt to underwrite or debunk claims to knowledge made by science, morality, art, or religion.... Philosophy can be foundational in respect to the rest of culture because culture is the assemblage of claims to knowledge, and philosophy adjudicates such claims. It can do so because it understands the foundations of knowledge...³

Systematic philosophy's (i.e., Philosophy's) representatives include Plato, Aristotle, Descartes, Locke, Kant, the early Wittgenstein, and logical positivists, among others.

The latter enterprise (philosophy, lower-case *p*) works under the assumption that efforts to find the True, the Real, the Rational, and the Good, have all failed and that these should be abandoned in favor of edifying discourse, the aim of which is "to help (its) readers, or society as a whole, break free from outworn vocabularies and attitudes, rather

than to provide 'grounding' for the intuitions and customs of the present."⁴ Edifying philosophers—Rorty's 'neopragmatists' or 'hermeneuticists'—“think it will not help to say something true to think about Truth, nor will it help to act well to think about Goodness, nor will it help to be rational to think about Rationality.”⁵ The main champions of edifying discourse have been Rorty's three favorite twentieth century philosophers: Dewey, Heidegger, and the later Wittgenstein; also James, Nietzsche and Gadamer; and possibly by implication a lineage reaching back through Montaigne to the ancient Sophists against whom Plato and Aristotle reacted.

In this note I intend to raise and discuss in some detail a fundamental objection to Rorty's argument that systematic philosophy (Philosophy) ought to be abandoned wholesale in favor of edifying discourse. The objection I have in mind was raised in passing in a recent article by Richard Dien Winfield, and implies that any effort such as Rorty's to “deconstruct” the epistemological tradition and pave the way for edifying discourse invariably must commit the very mistake it attributes to others and thus fall prey to the very trap it seeks to avoid. In Winfield's words, Rorty must assume that “his pragmatic description of discourse accurately mirrors the reality of conversation,” and that therefore his position inevitably “reinstates the dilemma of foundational arguments it wishes to overcome.”⁶ I wish now to develop this line of criticism in detail. If sound, it shows that Rorty's position can be more accurately characterized not as edifying discourse but as a form of foundationalism, and that it cannot avoid being so if its arguments are to have the force that Rorty wants them to have. Rorty, I hope to show, has his own version of the “myth of the given”⁷; Rorty's “given” is discourse itself and the social practices it embodies. As such, he writes under the assumption that discourse is transparent to the “eye” of the “deconstructionist” and the descriptions thus obtained are consequently *true* descriptions. Yet his position, if true, undermines its own ability to account for this transparency.

Any meaningful discourse, philosophical or otherwise, has a subject matter or some intended scope of reference (however we flesh these notions out). *PMN* and *CP* take as their subject matter or scope of reference the totality of philosophical discourse, whether systematic or edifying. They argue that in whatever form it takes, the view of knowledge as an assemblage of privileged representations was the product of accidental twists and turns of intellectual history, beginning with Descartes's “invention of the mind” and quest for indubitability, proceeding through Kant's “deduction” of a transcendental matrix of categories, down to modern analytic philosophy's quests for commensuration, for a privileged vocabulary and a standpoint “outside of history and culture.” Since our present-day preoccupations with epistemology, formal seman-

tics, philosophy of mind, and so on, are outgrowths of these quests, if the former are accidental and optional, then so are the latter: "The moral to be drawn is that if this way of thinking of knowledge is optional, then so is epistemology, and so is philosophy as it has understood itself since the middle of the last century."⁸ The foundationalist's quest for a privileged set of mental representations yielding privileged access to "the world" thus collapses, leaving the historical fact of conversation.

Rorty therefore prescribes that in this light, the whole cluster of epistemology-centered preoccupations simply be dropped. Philosophers, argues Rorty, should give up trying to identify "marks of the mental," stop trying to produce better "theories of reference," resist the temptation to eternalize historically particular language games, and cease the quest for eternal canons of rationality for the legitimization of all knowledge claims whatsoever. In other words, the philosopher should give up Philosophy and instead become a hermeneuticist, an "informed dilettante, the polypragmatic, Socratic intermediary between various discourses..."⁹

This position, I will argue, gets into trouble by virtue of its own internal dialectic. Let us reconstruct this dialectic by stating Rorty's main claim as precisely as we can and seeing what happens when we develop its logical consequences. Rorty's main claim, on which the rest of his position depends, can be most concisely stated as follows:

- (1) No discourse occupies a privileged, foundational status, has privileged access to the world," or special means of "representing" it.

This is what Rorty seems to be after with his denial that there is an ontologically special entity, the "mind," which represents or "mirrors" nature (cast in linguistic terms, of course). It should be clear, though, that this claim—and the arguments used to present and defend it, are part of the totality of philosophical discourse—whether systematic or edifying. Thus Rorty's position cannot avoid the property of being reflexive or self-referential. Indeed, any piece of philosophical writing which takes the *totality* of philosophy for its subject matter will be self-referential.¹⁰ So if Rorty is to present and defend (1) above, he must also be willing to agree to (2):

- (2) *PMN* and *CP* do not occupy a privileged, foundational status, have special access to "the world," or special means of "representing" it.

So far, there is no reason to think Rorty would object. However, he follows Quine and countless others in holding that discourse is a natural phenomenon no different in kind from any other natural phenomenon;

just as with "mind," there is nothing ontologically special about discourse, no "language-fact distinction." Therefore, discourse is part of the world and not something standing separate from it, "over" or "above" it, as it were. This, though, permits us to recast (1) above as (3):

(3) No discourse occupies a privileged, foundational status with respect to the rest of discourse, has special access to it, or means of "representing" it.

And from (3), we can infer (4):

(4) *PMN* and *CP* can occupy no privileged status with respect to the rest of discourse, have privileged access to it, or special means of "representing" it.

(4), I submit, is where serious difficulties intrude; (4) has direct and paradoxical implications for the status of Rorty's own position and the force of its arguments. Furthermore, Rorty is aware of the paradox. As Charles B. Guignon recently reported:

Asked about the status of his own philosophy, Rorty replied that it is an interesting move in the latest language games, but that 100 years from now it may come to be seen as having no point whatsoever...Rorty's own writings seem to be pushed into an impossibly awkward position. In order to work out a conception of conversation with no referent, he has to describe a saying which is not saying anything *about* anything. But this means that he has to use language to convey information about the impossibility of using language to convey information about anything.¹¹

Rorty himself has been surprisingly untroubled by this. I shall now argue that he *should* be troubled, because the internal dialectic of his position has led to a result the very intelligibility of which is suspect. We seem entitled to ask, By what means does Rorty have access to the rest of discourse in such a way that he can make assertions about it and argue in their defense? By allowing the inference to (4) Rorty has undermined a crucial necessary condition for his talking about discourse or indeed about anything else; as Steven J. Bartlett recently put it,

If we assume we want to talk about a collection of objects of various sorts, we are compelled to allow some means for this thinking of talking about them to proceed—we must be permitted somehow to refer to what we want to think or talk about. This is trivially true, and therefore I take it as basic.¹²

Rorty must therefore avoid the consequence described by Guignon if his thesis about the hopelessness of foundationalism is to be more than an exercise in futility. Let us consider briefly some of the strategies he might take.

One obvious strategy he might take is to maintain that works such as *PMN* and *CP* are of a higher *type* than the works of Descartes and Locke down through contemporary analytic philosophy of mind and representation (though, of course, Rorty would not put the matter this way). Yet there are reasons why this kind of move will not work. Had it been successful, the Theory of Types (where all such strategies originate) would have prevented any sentence, theory, or discourse from referring in some way to itself, or including itself in the domain to which it applies. But as both Frederic B. Fitch and Paul Weiss were able to show, the Theory of Types and all strategies based on it quickly get entangled in the very difficulties which they were designed to avoid.¹³ These would have precluded reference to the *totality* of discourse by banning from philosophy all propositions of unrestricted scope. Weiss had no difficulty in showing, however, that the Theory of Types must be formulated in propositions of unrestricted scope. Thus it fails; and all derivative strategies for avoiding the self-reference of a philosophical discourse about philosophy fail.

A more promising move Rorty might make is to offer a better interpretation of the claim that his work has no privileged status, where by "privileged" is meant ahistorical. This would involve his maintaining (as indeed he does, following the later Wittgenstein) that the meaningfulness of a contribution to the philosophical conversation as regards its having a subject matter, etc., is dependent on its place in the conversation. Therefore what is meaningful and appropriate at one time might come to lack all meaning and appropriateness later, perhaps due to changes in the rules of the language games during the intervening period. Even if we make this move, though, it does not solve the basic problem implicit in (4) above; it does not show how, in Bartlett's sense, we are permitted to refer to philosophical discourse at all if Rorty's theses are right. It does not answer the question of how his descriptions of discourse *at present* acquire their validation and provide the basis for a way of philosophizing that has advantages over foundationalist competitors. I submit that Rorty's position is trapped by its internal dialectic, no matter what move he makes. By granting (4) he effectively removes his means of referring to his subject matter and thus undermines the force of his entire position. Of course, this result is unacceptable. As stated above, Rorty intends to refer us to philosophical writings, and we are expected to be persuaded of the *soundness* of his arguments. He must therefore reject (4) and

implicitly (and, on his own terms, illicitly) adopt an assumption of a precondition for reference (5):

(5) *PMN* and *CP* have at least some privileged, foundational status, special access to the rest of discourse, and means of “representing” it.

With his illicit but nevertheless necessary presupposition of (5), Rorty reinstates foundationalism in the very sense Winfield mentions, and which he himself criticizes. For (5) is clearly a foundationalist's thesis; it offers Rorty the equivalent of a transcendental standpoint from which he can survey the whole of discourse and declare that it does or does not have certain properties—and declare that we *should* cease philosophizing as we have been and begin philosophizing in a new way (that is, give up Philosophy and simply do philosophy).

To summarize, Rorty's position fails in that in the act of attempting to persuade us of the hopelessness of foundationalism it cannot avoid reinstating foundationalism. Rorty sought to “deconstruct” our contemporary preoccupations with theories of knowledge, rationality, mind, and reference, only to end up with the equivalent of a transcendental philosophy by misadventure. As such, his own position is subject to whatever criticisms can be validly made against transcendental philosophy generally, the prototype of which is Hegel's critique of Kant. According to Hegel, Kant's transcendental turn faced the problem of being unable to account for its own standpoint: if every act of cognition presupposes the categories, then how, by what means, do the categories themselves become transparent to cognition?¹⁴ Following this prototype we can conclude that Rorty's arguments fail the same way, by assuming the transparency of discourse from a standpoint “outside” of it combined with an inability to account for that standpoint.

There remain, of course, many legitimate questions about the possibility of systematic philosophy, beginning with the question of whether systematic philosophy can be done in the absence of “foundations.” There is also the question of the role of edifying discourse in conveying philosophical insights. But these topics must wait for another occasion.¹⁵

1. Minneapolis: University of Minnesota Press, 1982, pp.xiv-xvii. Hereafter *CP*.

2. Princeton: Princeton University Press, 1979; hereafter *PMN*.

3. *PMN*, p.3.

4. *Ibid.*, p.12.

5. *CP*, p.xv.

6. Richard Dien Winfield, "The Route of Foundation-Free Systematic Philosophy," *The Philosophical Forum* 15 (1984): 330.

7. As Richard Bernstein also suggested—cf. his "Philosophy in the Conversation of Mankind," *Review of Metaphysics* 23 (1980): 772.

8. *PMN*, p.136.

9. *Ibid.*, p.317.

10. For the best discussion of this point see Frederic B. Fitch, "Self-Reference in Philosophy," *Mind* 55 (1946): 64-73. A slightly different version of the same article appears in the authors text *Symbolic Logic: An Introduction* (New York: The Ronald Press, 1952), pp.217-25.

11. Charles B. Guignon, "On Saving Heidegger from Rorty," *Philosophy and Phenomenological Research* 66 (1986): 410.

12. Steven J. Bartlett, "The Idea of a Metalogic of Reference," *Methodology and Science* 9 (1976): 89.

13. Fitch, "Self-Reference in Philosophy"; Paul Weiss, "The Theory of Types," *Mind* 37 (1928): 338-48.

14. In Hegel's *Logic* we find the following:

Kant undertook to examine how far the forms of thought were capable of leading to the knowledge of truth. In particular he demanded a criticism of the faculty of cognition as preliminary to its exercise. That is a fair demand, if it means that even the forms of thought must be made an object of investigation. Unfortunately there soon creeps in the misconception of *already knowing before you know*—the error of refusing to enter the water until you have learnt to swim. True, indeed, the forms of thought should be subjected to a scrutiny before they are used: yet what is this scrutiny but *ipse facto* a cognition?

G.W.F. Hegel, *Logic*, trans. William Wallace (Oxford: Clarendon Press, 1975), p.66.

15. Richard Dien Winfield and William Maker are currently at work on at least the first of these; cf. Winfield, "The Route to Foundation-Free Systematic Philosophy." See also his "Conceiving Reality Without Foundations: Hegel's Neglected Strategy for *Realphilosophie*," *The Owl of Minerva* 8 (1984): 183-98; "Dialectical Logic and the Conception of Truth," *Journal of the British Society of Phenomenology* 18 (1987): 133-48, and other recent articles; cf. also William Maker, "Reason and the Problem of Modernity," *The Philosophical Forum* 18 (1987): 275-303. An earlier and rather different version of the present paper was read under the title "Three Inconsistencies in Rorty's Antifoundationalism" to a Special Session of the Society for Systematic Philosophy, 83rd Annual Convention of the American Philosophical Association, Eastern Division Meeting, December 28, 1986. I am very grateful to Professor Winfield for offering detailed criticisms of earlier versions of this paper, for helping to arrange the above session, and for encouragement; this paper has also benefited from a number of discussions with Professor Maker.

IN MY OPINION, THAT'S YOUR OPINION: IS RORTY A FOUNDATIONALIST?

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Richard Rorty is well known for his sophisticated presentation of the idea that systematic philosophy has failed and should be abandoned. For our purposes here I will call Rorty's position skepticism, though he prefers the term pragmatism. Steven Yates argues that just as the systematic philosopher attempted to step back from human subjectivity and determine the real truth about real reality, so Rorty is attempting to step back and give us objective truth about the history of philosophy, which after all is an aspect of reality too. Rorty's attempt to tell us something objectively true about the history of philosophy is supposed to put him in the same boat with the other philosophers whose efforts to determine some important truths he is criticizing. Yates says that Rorty is attempting to give us an objective truth in the very saying that the attempt to achieve objective truth has failed.

It is an old objection to skepticism, going all the way back to Plato, that it is self-referentially incoherent. The objection is that

if a skeptic so much as speaks, he implicitly betrays his position. In speaking he is presumably enunciating something he believes to be true and he is making an implicit and sometimes explicit argument for the thing he is saying. On this view, however little we may be said to know, it is incoherent to say we know nothing. This is the essence of Yates' and Winfield's and Guignon's objection to Rorty.¹

But it is unlikely that skepticism is so easily refuted. In the first place, note that skepticism has no burden of proof. The skeptic, if he chooses, need only sit in Buddha-like calm, observing the "strife of systems", waiting for the philosophers to satisfy their own collective minds, waiting for them to quit their mutual refutations of each other. The skeptic need not refute the dogmatists so long as they are refuting each other. In the meantime he merely observes that nothing of philosophical interest has achieved even the appearance of satisfactory resolution. One might note that this observation is itself a knowledge claim of some philosophical interest, rendering the observer a minimal dogmatist himself, with implied standards of knowledge, etc. But this is not necessarily so as we shall see shortly, and even if it were, it is really to no great purpose to admit we can know nothing except that we can know nothing.

It is as if a man were lost at sea, who knows he is lost, who is told, the knowledge that you are lost shows an implicit recognition of the lack of certain landmarks or other reference points. Since you see that no reference points are present, you also see that they are absent. In that respect then, you are not essentially lost; you know you are away from all your reference points and it is thus self-referentially incoherent to say "I am lost". This speech is of course small comfort to the man and does not address his central plight. Similarly, Yates and many others admit that knowledge is not *yet* satisfactorily grounded, but wish at the same time to deny that we are essentially lost. We are not *essentially* lost, they think, because we can *recognize* that we are lost. This line of reasoning may be true as a technicality, but it evades the skeptic's real contention and man's essential plight.²

For now we note only that the skeptic has no burden of proof and Rorty does not trouble himself with elaborate efforts to *prove* the skeptical conclusion (such an attempted proof would be doing systematic philosophy all over again). In effect he merely invites us to survey the history of philosophy and open our eyes to the evident chaos. The conclusion that the enterprise has failed should be manifest. Rorty explicitly deplores positive efforts either to underwrite or to *debunk* claims to knowledge. So he is not in the uncom-

fortable position of refuting knowledge claims with positive arguments. He merely observes the devastation all about.

Now it is true that when a man speaks, even to affirm the skeptical position, he does necessarily presupposes some considerable mass of shared meanings and standards with his audience. But this necessity hardly prevents the expression of the skeptical position. The skeptic implicitly prefaces all his remarks with a statement something like this: "Assuming for purposes of this conversation a great mass of shared meanings and standards, and standing thus on a provisional platform presumably largely shared by you, my hearers, I would say..." The skeptic therefore must speak *as if* reason enjoys some competence, *as if* we had some standard for distinguishing the meaningful from the meaningless, the probable from the improbable, the true from the false. He believes that *ultimately* all is at sea, but this does not prevent him from performing the experiment of thinking. In fact, everyone performs in this position since reason, whether inductive, deductive, or abductive, has not been grounded in a way that meets even its own demands (and if it were it would then only circularly justify itself or claim a minimal self-consistency), so everyone who reasons necessarily does so in the *mere* faith that reason will be vindicated by and by. If the word faith alarms, we may put it another way. In conversing and arguing we *act as if* we had foundations upon which we stand together, we *suppose* various things for purposes of discussion, etc. In talking and thinking we hope for insights and even perhaps convincing conceptions to appear, notwithstanding that much is being presupposed in the conversation. Nothing hinders these modest hopes, since skepticism merely doubts that anything can be established objectively. But since something is always being presupposed in any argument, any conclusion is always provisional, even skepticism itself if it endeavors to base itself on arguments.

It certainly appears that we can only talk about anything by presupposing numerous other things. We can only critique some subject matter by standing on the ground of other things not at present under scrutiny. The examined subject matter, having been scrutinized and perhaps improved (by standards held in the background), can then become part of the presupposed background as some other subject is examined. We are obliged to lift ourselves by our own bootstraps. Though we have no objective referent for the word "lift", our interpretation of things may grow in apparent breadth and coherence. But so far as we can now see, interpretations can never be grounded outside themselves, and they are prone

to "revolutions" in which they collapse and are replaced by wholly other interpretations. Our reason for rejecting one interpretation in favor of another is that it fails to satisfy in some particular, as often as not a non-rational particular. In the contemplation of scientific, religious, and especially metaphysical theories, we necessarily presuppose a background of meanings and standards of a very primitive nature, so primitive that they are themselves difficult to isolate or critique. And if they are doubted in a living way the result is what we are liable to call, alternatively, madness, or a "crack in the cosmic egg" (Joseph Chilton Pearce), or, in other cases, prophetic revelation and revolution.

My purpose here has been to defend Rorty's right intelligibly to affirm that philosophy has failed, or more specifically that epistemology has failed. But whereas I conclude from this that we have a right to continue our speculations, I am not sure what Rorty would have us do. If he is saying that we may proceed with all aspects of philosophy, but only in the light of the fact that we are not likely ever to *ground* these speculations in objectivity, then I would agree with that. He does wish for the conversation to go on. But if he goes further and says that we should abandon speculative philosophy altogether, then I demur from that, and am left entirely puzzled about what intellectuals should be talking about. In that case I would endorse Guignon's criticism that Rorty's proposed conversation "has no referent". If we are not permitted to speculate about some supposed actual something, say reality, then our talk must be a pure spinning of wheels, a phenomenon hard to imagine were it not almost perfectly exemplified in the writings of the Continental philosophers most admired by Rorty.

In any case I would defend Rorty's right to speculate on the nature of human "conversation", and his right to observe that it has never been grounded. Certainly Rorty would not *argue* that he can demonstrate the truth of his view. He is expressing a viewpoint which seems true to him and he is inviting his readers to agree with him. There is nothing in his denial of philosophical foundations to prevent him from expressing an opinion, an opinion based no doubt upon various considerations and, more ultimately, upon certain broad *assumptions* about standards of meaning and thought which he presumes to share with his readers. If he is wrong in that assumption, well, excuse him. He surely has no illusions about proving his thesis.

One may proceed with argument and conversation in the hope of achieving a perspective on the world which is highly satisfying personally. One may search for interpretations which are intrigu-

ing, mind-expanding, satisfying, edifying, even apparently true, all without pretending that any of them rest upon unshakable or even fully stateable foundations. The satisfaction aimed at can be aesthetic, moral, intellectual, or the best balance of all such factors, "all things considered" in a favorite phrase of James'. A skeptic can have a viewpoint which is highly satisfactory to him personally without pretending to be able to prove it either certainly or probably. Nor, I repeat, is he under any obligation to prove that no viewpoint can be proved. Only if he takes such a burden upon himself does he risk an unpleasant appearance of incoherence or self-contradiction.

I am tempted to say that with effort we could probably find a way of expressing the skeptic's position which evaded the self-referential problem, something like "It seems that men probably know nothing", or "It seems that men have no agreed-upon criteria of truth". But, as a skeptic, I can foresee that one could write a book exploring endless variations and possibilities along these lines, exploring criticisms and counter-criticisms, the Theory of Types, etc., the end result of which would be a morass of complexity and confusion, concerning which there would be little or no agreement among even the wisest readers of the book. And even if there were a clear outcome, the investigation itself would have had to presuppose standards of meaning and reason such that the outcome would be provisional upon those presuppositions.

Finally, I would make this point. The skeptic is not the only one with self-referential problems. The dogmatist has a corresponding problem. If knowledge is supposed to exist, there must be some standard or standards by which candidates for such alleged knowledge are judged. Whatever these standards are supposed to be, they must be measured for their validity. But we should then be in the position of judging the truth of our standards of truth by themselves. This is self-referential in a question begging mode (though not in a self-contradictory mode). According to Brand Blanshard,

It must be admitted that no valid *argument* can be offered for any exclusive criterion of truth. For the supporter of such a criterion is always in a dilemma: if he rests his case upon the use of his own criterion, he begs the question; if he rests it on any other criterion, he is either admitting the validity of that other criterion, and then his own is not the only one, or else offering an argument that he must grant as worthless.³

This is the perennial problem of the criterion. It is exceedingly difficult to imagine how it may be resolved. Certainly no answer to this problem has achieved philosophical consensus. Further, the difficulty appears to be substantive, not merely technical. It complicates wonderfully the predicament we are in: The claim to know and the claim not to know are alike claimed to be self-referentially incoherent. If *both* claims are incoherent, that would seem in a left-handed way to favor the incoherence involved in the skeptic's position more than the incoherence involved in dogmatism. If all sense seems to collapse upon close examination of these issues, do we not need a word to express this appearance?

In summary, (1) skepticism hardly makes an argument, merely noting the appearance of devastation. (2) Skepticism speaks from a platform of mere assumptions presumably shared by hearers. (3) The skeptic is entitled to express opinions, and (4) equally entitled to look for conceptions which are personally satisfying and which are even supposed to be true. (5) The dogmatist faces the problem of the standards used to establish his standards, a self-referential problem of far more moment than that facing the skeptic. I thus conclude: there is no real problem with saying, "In my opinion, everything's a matter of opinion".

1. As noted in Yates' article.
2. This is only a rough analogy. I do not know how much weight it will bear.
3. Brand Blanshard, *The Nature of Thought* (New York: Humanities Press, 1939), Vol. II, p.219.

THE SKEPTIC'S DILEMMA: A REPLY TO DAVIS

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The self-refutation argument has a long and controversial history beginning with Socrates' arguments against Protagoras in the *Thaetetus* down to the handful of similar efforts against today's forms of relativism, skepticism, and nihilism. Arrayed on the one side are those who hold the self-refutation to be a sound and distinctively philosophical argument¹; on the other are those who either see a logical-linguistic sleight of hand²—or at least see ways of reformulating the positions at stake to avoid self-refutation. Professor Davis's effort to defend Rorty-style skepticism³ from me seems to fall into this last group.

Davis seems to concede that if the skeptic is uttering genuine categorical propositions then his position is self-refuting. But need the skeptic utter propositions? As Davis puts it, the skeptic "has no burden of proof...if he chooses, [he] need only sit in a Buddha-like calm, observing the 'strife of systems'...(p.148). In other words, the skeptic need only let dogmatic philosophers contradict and refute one another. Thus his position need not be self-referentially incoherent.

Indeed the skeptic may take this stance—that much I concede. But note that he is no longer an *inquirer*; he no longer seeks truth.

Rather, the Buddha-like silent skeptic has opted out of the game, so to speak, by virtue of his conclusion that inquiry is futile. However, I as a systematic philosopher may simply elect to ignore him and go about my business as if he wasn't even there. The silent skeptic is therefore in a hopelessly awkward position: his "position" is entirely compatible with my ignoring him. To my decision to ignore him it seems he can have no response, for this would require him to break his silence and thus fall back into self-refutation. This, of course, is very strange: to my mind, giving up speech to avoid self-refutation is not the best of all possible trade-offs.

But according to Davis, a skeptic need not be entirely silent. Rorty, after all, has not been silent. (Indeed, he is among the most widely published and anthologized philosophers of our time.) As Davis describes him, the Rortian skeptic "invites us to survey the history of philosophy and open our eyes to the evident chaos" (*ibid.*), speaking the language of both analytic and continental philosophers and thus "presupposing some considerable mass of shared meanings and standards with his audience" (p.149). Thus his assertions will all be conditional. "The skeptic...must speak as if reason enjoys some competence..." (*ibid.*).

I must submit the following, though: (1) This does not accurately characterize Rorty's position, and (2) even if it did, he would not be significantly better off than the silent skeptic. Let me take these one at a time. (1) One can hardly read Rorty's main tracts without getting the impression that a substantive position is being offered about past and present philosophical discourse⁴—a position which, moreover, Rorty wishes us to accept as *true*.⁵ Specific prescriptions follow; these are intended to cure us of the "disease" of wanting to do systematic philosophy. (2) But let us suppose for the sake of argument that Rorty really *is* only making conditional assertions, using the systematic philosopher's tools to undercut those very tools. There are two ways we may read this. A conditional is an if-then statement, and so asserts nothing categorically. If this is read as not really asserting *anything* the audience can take as true, then it is likely that Rorty's position is that of the silent skeptic, and my earlier criticisms apply. But a conditional *does* assert a logical relationship between two propositions which can be given truth conditions. In this case there *are* factual claims being made, even if only about discourse, position (2) collapses into (1), and those arguments apply. The skeptic still faces a basic dilemma—remaining silent and allowing inquirers to ignore him, or speaking up and falling into self-refutation.

However, does the nonskeptic have related difficulties? Davis

ends his paper by turning the argument the other way, observing that if the skeptic has self-referential problems, then so does the rationalist. As he explains,

If knowledge is supposed to exist, there must be some standard or standards by which candidates for such alleged knowledge are judged. Whatever these standards are supposed to be, they must be measured for their validity. But then we should be in the position of judging the truth of our standards by themselves. This is self-referential in a question-begging mode... (p.151)

Space limits unfortunately preclude full discussion of this problem.⁶ So I will simply suggest that a false dilemma is being posed here. Davis suggests that we have the choice between skepticism and a dogmatism forced to rest on intellectual foundations or standards which we cannot adjudicate without begging the question. I propose, on the other hand, that *some* propositions need no "adjudication" in this sense because they cannot be intelligibly doubted or denied⁷; as well, recognition of their truth is involved in their comprehension.⁸ Aristotle's principle of contradiction seems a likely candidate for an absolutely basic proposition of this sort, his having argued in the *Metaphysics* that the principle of contradiction is a presupposition for the intelligibility of discourse itself. If something like this rationalist view can be upheld, we easily pass through the horns of the dogmatist's dilemma.⁹

To sum up, Davis's effort to save skepticism does not succeed because (1) the silent skeptic's stance is entirely compatible with my deciding to ignore him; and (2) the stance of the skeptic who speaks in conditionals either reverts to silence or to self-refutation. Thus the skeptic's dilemma remains. Finally, the charge of dogmatism directed at the rationalist does not succeed if we can demonstrate the existence of absolutely basic propositions such as the principle of contradiction which are necessary for intelligible discourse.

One final remark seems in order. Davis's title, "In My Opinion, That's Your Opinion," seems to capture one aspect of the skeptic's stance—to wit, the view that philosophy has failed to move beyond opinion despite over 2,000 years of effort. I will refrain from stating that *this* opinion is self-refuting in order to wonder aloud: If philosophy cannot move beyond clashing opinions, the "strife of systems," then are philosophy's critics (who I suspect are more numerous than most of today's professional academic philosophers realize) on firm ground when they ask, what, then, is the use of philosophy?¹⁰

1. See the Fitch essay cited in n.10 of my "Rorty's Foundationalism" above; for a tremendous bibliography dealing with self-referential and reflexive phenomena of all kinds cf. *Self Reference: Reflections on Reflexivity*, eds. S.J. Bartlett and P. Suber (Dordrecht: Martinus Nijhoff, 1987), pp.259-364.

2. E.g., Jorgen Jorgensen, "Some Reflections on Reflexivity," *Mind* 62 (1953): 289-300; or Michael Stack, "Self-Refuting Arguments," *Metaphilosophy* 14 (1983):327-35.

3. For simplicity's sake I am following Davis's construal of Rorty's position as a kind of skepticism. For some discussion of the senses in which Rorty is and is not a skeptic see Richard Bernstein, "Philosophy in the Conversation of Mankind," *Review of Metaphysics* 23 (1980), pp.761-63.

4. I would maintain in addition that Rorty is offering us a substantial *metaphysics* as well—a form of eliminative materialism—but *that* must wait for a fresh occasion.

5. Were he to offer them as anything less than *candidates* for truth in some sense of this term, he would be in violation of basic conversational implicature. Cf. H.P. Grice, "Logic and Conversation," in *The Logic of Grammar*, eds. Donald Davidson and Gilbert Harmon (Encino: California: Dickenson, 1975), p.67: "Try to make your contribution one that is true."

6. It is this problem that motivated Winfield's project (see n.6 and n.15 of "Rorty's Foundationalism"); cf. also Winfield's "Logic, Language, and the Autonomy of Reason," *Idealistic Studies* 17 (1987): 109-21; and "Dialectical and the Conception of Truth," *Journal of the British Society of Phenomenology* 18 (1987): 133-48. Winfield attempts in these and other papers to use some of Hegel's ideas to develop a foundationless systematic philosophy which generates its own categories, content, and method from scratch, as it were; though I find it rather baffling how such a mode of inquiry can actually get off the ground, Winfield's work is valuable for its powerful criticisms of the standard analytic empiricism.

7. Cf. S.J. Bartlett, "Phenomenology, Self-Reference, and the Philosophy of Science," *Methodology and Science* 13 (1980), esp. pp.148-51, and the literature cited there. Cf. also the same author's "The Idea of a Metalogic of Reference," *Methodology and Science* 9 (1976): 85-92.

8. I am grateful to Tibor R. Machan for his suggestion of a version of this notion (private conversation).

9. Incidentally, this suggests that Davis's analogy between the skeptic and the "man lost at sea" also fails; if there are absolutely basic propositions, then it is simply not true that we are "lost," with none of our claims to knowledge "grounded."

10. I am grateful to Professors Machan and Davis for valuable discussion leading up to this paper. The results are, of course, my own responsibility.

Review Essays

Love is a Many Splintered Thing

Dreams of Love and Fateful Encounters: The Power of Romantic Passion. By Ethel Spector Person. New York: W.W. Norton, 1988.

D*reams of Love and Fateful Encounters* is Ethel Spector Person's attempt to remedy what she sees as this century's lack of serious studies of love. Her approach purports to serve as an antidote to the accounts of reductionistic rationalists and other bunglers who, like early cartographers, mark love's territory with "here bye savages" without troubling to travel its interior. Her study is confined to the form of love most inimical to rational analysis, romantic passionate love. Person, who teaches psychiatry at Columbia, hopes through a combination of Freud, fiction and film to present a lover's-eye view of this passion. Her approach is seasoned with some philosophy, used not unlike the way the Elizabethans used spices, to mask the taste of spoiled meat. The resultant stew wants more seasoning, and far more simmering.

The central thesis of *Dreams of Love and Fateful Encounters* is that love is a powerful agent of change. Person limits the discussion to its passionate form precisely because she considers it "the most complete form of love...the one, above all, that allows for self-transformation and self-transcendence" (p.50). By "self-transcendence" she seems to mean the surmounting of ego boundaries towards

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union with the other, usually effected sexually. She describes it mystically, like a Buddhist describing Nirvana. This merger, as she calls it, has plenty of potential for pathology, becoming not the union of two souls, but the escape of one by submersion, surrender, or enslavement. Person treats these pseudomorphs the same as the genuine article without advice on avoiding the former and attaining the latter. These false forms, by the way, are explained admirably in Sartre's *Being and Nothingness*, a work Person claims to have read, as flights from self-responsibility into slavishness. Since they are no cause for celebration, they must not be what Person means by love's magical power of change.

Because self-transformation involves a real change and not this loss of self, it is the more promising phenomenon. While Person is far from systematic in specifying change from what, to what, the central notion seems to be that in passionate love we obtain a uniquely insightful perspective on another person. Through love we can grasp another, contra Sartre, not as object but as subject, a soul in its own inwardness. One result of this perception is that we thereby soothe the isolation inherent in the human condition. Person makes much of Aristophanes' myth as told in Plato's *Symposium*. The story is a charming one: Speedy eight-legged, carwheeling, spheres attempt to roll up Olympus and are consequently punished by Zeus to surgical halving; thereafter, love is the longing force by which these aboriginal humans seek their better halves. She takes this tale almost literally, and, by ignoring the rest of the *Symposium*, concludes that love arises from deficiency and is driven by need. If romantic passion restores to us, however fleetingly, this sense of wholeness, to her that is wonder-work enough. The conclusion, however, results from a flawed premise, as we shall later see.

The lovers' unique perspective yields a more noteworthy result, one that Person mentions but does not develop. The lovers incorporate each other into themselves; they see the world through each other's eyes; they share an identity; both stand ready to waive their own interests in behalf of the other. Lust and love contrast sharply here: in the former the other is an object, a means to our own gratification; in love the other is an end whose needs outrank our own and whose joy it is our joy to give. Here is a genuine stretching of ego boundaries, in both psychoanalytic and ethical terms.

Nowhere is this phenomenon better described than by William James in "What Makes a Life Significant:"

Every Jack sees in his own particular Jill charms and perfections to the enchantment of which we stolid onlookers

are stone-cold. And which has the superior view of the absolute truth, he or we? Which has the more vital insight into the nature of Jill's existence, as a fact? Is he in excess, being in this matter a maniac? or are we in defect, being victims of a pathological anaesthesia as regards Jill's magical importance? Surely the latter; surely to Jack are the profounder truths revealed; surely poor Jill's palpitating little life-throbs *are* among the wonders of creation, *are* worthy of this sympathetic interest; and it is to our shame that the rest of us cannot feel like Jack. For Jack realizes Jill concretely, and we do not. He struggles toward a union with her inner life, divining her feelings, anticipating her desires, understanding her limits as manfully as he can....Whilst we, dead clods that we are, do not even seek after these things, but are contented that that portion of eternal fact named Jill should be for us as if it were not....May the ancient blindness never wrap its clouds about either of them again!...We ought, all of us, to realize each other in this intense, pathetic, and important way.

This "ancient blindness" to others is our normal human state. It is, as James suggests, a serious defect in us, the self-centered stupor from which ethical systems labor to remove us. Toward one other person at least, Jack has achieved the moral point of view. Stolid onlookers advance the notion that love is blind in order to exculpate themselves; what Jack sees in Jill is both real and right.

The onlookers' dismissal of the lovers may stem from the fact that Jack and Jill see in each other what we do not, or that they fail to see in us that same specialness. But there is a more likely source. Passionate lovers are notorious for their exclusion of the world beyond that encircled by their embraces. Face to face, the lovers block out the world, rendering it superfluous, an exile to which the world does not take kindly. In this the lovers are at fault; but we, who wonder "What does he see in her?," are worse.

What do the lovers see that we do not? Person is unsure. In one sense or another, the lover has idealized the beloved. It could be that he has heaped on her all the qualities his own fantasy demands. This process is described as "crystallization" by Stendhal, and it ends badly, as it was begun, by the lover denuding the beloved of the virtues he invented for her. (Person celebrates love's imaginative power because of events such as this.) Alternatively, the lovers could be seeing past the dross into some true best self implicit in the other. In this vein, Person says:

Because of the way in which each lover sees the other as his best self, the worth of each, previously buried or unrealized, is allowed to surface. It is this goodness towards which love strives. The lover feels expanded, conscious of new powers and a new-found goodness within himself. He attempts to be his best self....The beloved sees good in the lover, of which the lover was only dimly aware. Often what allows us to fall in love is the lovely picture of ourselves reflected in the lover's eyes. (p.68)

Although she doesn't say so, this is the Platonic view, and there is no question that for Plato this true best self is real, albeit in the mode of potentiality. The lover perceives truly; he does not invent. If so, it is hard to see why Person believes that even this form can end in deidealization. The other's good remains good regardless of whether we remain in love with it. Yet there is a puzzle there, too, for how can anyone, in Plato's view, fall out of love with Good, except through ignorance? Love—Eros—for Plato is the motive force of life towards goodness, ever impelling us upward in the direction of perfection. Were the beloved to forsake her own potential good by lapsing into indifference to it or by actively pursuing evil, these would be excellent grounds indeed for disaffection with her. But this is not, strictly speaking, a deidealization, since the beloved's good remains good, although unactualized.

While Plato colors much of Person's discussion of love as an agent of change, there is an acute divergence between them. In the above quotation, Person seems certain love strives towards goodness. But that remark is atypical, suffocated under numerous others wherein love brings change for good OR ill. While Platonic Eros is always agathotropic, growing towards good, Person seems to applaud change per se. Note that disease and disaster both wreak change, but only a callous novelty-seeker would welcome them in themselves.

Whether love sees a true or false idealization of the beloved, James is clear on the good use to be made of this superior insight. Here again Person ambivalates. The lover may

...go so far as to renounce his very right to possess the beloved or to be with her. In so doing he asserts his altruism, his goodness, his capacity for self-sacrifice on behalf of the beloved. He achieves a kind of moral superiority and one of the 'purer' forms of love: the ability to put the beloved first. (p.118)

Thus granting the other's viewpoint the same stature as one's own is what James had in mind. But, according to Person, the lover is as likely to see in the beloved's "palpitating little life-throbs" only

the capacity to arouse and gratify his own. The lover has both "a need to love...a need to minister to the beloved," and the capacity to "idealize" the beloved's usefulness to him: "It is not just the physical or spiritual person per se who is idealized; it is the potential ability of the beloved, as imagined by the lover, to gratify him" (p.120). In addition, while the lover is ministering to the beloved he is also identifying with her; thus, "through his identification with his beloved he shares vicariously in the pleasure of being ministered to" (p.121), a kind of auto-eroticism. Self-sacrifice, altruism's highest flying arrow, is here bent back into the boomerang of egoism, however indirect. Person will not say which of these motivates true love, nor to which love ought aspire.

Perhaps Person conceives the enterprise of *Dreams of Love and Fateful Encounters* to be strictly descriptive. I fear I find such normative nonchalance offensive. Why write a book on love and why read one except to sort out pathology from paradigm? Our personal experience of love is, of necessity, limited (unless we boast with Don Juan "a thousand and three in Spain alone"), and we seek to supplement it. Love tainted or love true are equally instructive, equally something to steer by, provided someone exercises the judgment to label them both.

Dreams of Love and Fateful Encounters is fatally flawed by a lack of this judgment. Hence, true Platonic idealization, Stendhalian crystallization, and self-serving egoistic constructions are all on equal footing. Similarly, while she vaunts love's power to change the lover she is unconcerned with distinguishing better from worse. At fault are several factors that conspire against the inquiry at the outset.

The first is Person's practice as a psychiatrist. The "talking cure" of psychoanalysis requires a disciplined nonjudgmental acceptance on the part of the analyst, regardless of the patient's depravity. While Person does not, for obvious reasons, include patient material from her own practice, she makes use of that of other psychiatrists. All of it is presented in the same supposedly straightforward and descriptive manner with which she approaches fiction and film. Some jarring juxtapositions of street-talk and muse-inspired poetry result. An unrepentant rationalist would note here that a sample drawn from psychiatric patients, Hollywood, and contemporary fiction is representative of exactly nothing. In fact, such samples are biased towards the crash and burn victims. Combined with her "let-it-all-hang-out" attitude is her apparent belief that exhaustive description is the necessary purgative for the reductionism she attributes to other accounts of love.

Consequently, the book has a catalogue quality. Numerous pages proceed "for some,...for others,...and still others," etc. in an enumerative steeplechase that never sights a conclusion to merit the hunt. This book romps over a lot of turf without covering much ground. The struggle against reductionism need not condemn us to such unsorted and amorphous heaps of multiplicity.

Secondly, there is Person's fixation on passionate romantic love. In this stage, the lovers are where we left them, face to face, their backs to the world. Falling in love boots us out of our self-absorption into this rapt attention with another, where we are privileged to the insight James describes. The process is aptly defined by Ortega as a "phenomenon of attention" (*On Love, Aspects of a Single Theme*, Chap. 2). Allowed to stay here, however, the lovers can expand only so far as the egoism of two that Person describes. Normally, the world intrudes: who, after all, is that endlessly fascinating? Simone de Beauvoir, who also appears in Person's bibliography, is correct in stating that "two lovers destined solely for each other are already dead: They die of ennui, of the slow agony of a love that feeds only on itself" (*The Second Sex*, Chap. 23), a statement Person overlooks. The lesson learned, we are meant to move on and make use of it.

The transition beyond the obsession of passionate love is often accomplished through the birth of a child, although this is by no means the only way. In Person's view, this is hardly a blessed event. Citing several convoluted psychological causes, and overlooking all the obvious physical ones for the woman, Person has childbirth spelling the death of sexual passion and the beginnings of disillusionment. The only reason to regard it as such, I maintain, is this intransigent allegiance to love's obsessive phase. Notions of duty, responsibility, and commitment enter with the birth of the child. Person is inclined to use such terms pejoratively. For her they always characterize passion's remains, the ashes and embers of wildfire domesticated, what she calls "affectionate bonding." On this subject, Person does for once give us the benefit of her judgment: "In affectionate bonding, the form of love most highly touted by mental health professionals, a couple gradually develops deep and reliable ties of mutual caring, interests and loyalty. They come to believe in one another and to feel assured of the ongoing sustaining nature of their relationship." So far, so good; but she continues, "Not Romeo and Juliet, but Ma and Pa Kettle are the exemplary pair" (pp.51-52). Having thus forestalled disagreement, who would dare to champion "affectionate bonding"? Person is biased toward the preservation of passion in a Peter Pan love that refuses to grow up.

While "mutual caring, interests and loyalty" are nice,

throughout the book she regards them as tepid leftovers. She underrates these virtues by comparing them, anachronistically, to the intensity and excitement of passion's stage. While lamenting that passion is short-lived and unreliable, she is unwilling to credit "affectionate bonding" with the concomitant virtues of longevity and steadfastness. A lack of subtlety and a faulty quantitative model seem to lurk behind Person's treatment of the birth of a child. She envisages the lovers paring their portions of love for each other in order to share with the child, thus diminishing their own store. While the lovers' attention is distinctly divided by the child, their love, I suggest, is increased. Love is not like money depleted by spending; it is more like light played upon mirrors, magnified by the number of plays upon. The child forces the lovers' attention outward toward another. Now, in Saint-Exupery's phrase, "love does not consist in gazing at each other, but in gazing outward in the same direction." Through this movement, love has qualitatively improved, deepened, grown constant and endlessly renewable in a joint venture of unequalled importance. The insight into another's subjectivity and specialness now extends to a third person. From there, in thinking beings and in theory, it should be capable of extension by inference to the vast portion of the world not made up of loved ones. Person construes this major moral work as a loss.

Instead, she advocates desperate measures toward the preservation of passion. She offers this advice:

Excitement can be fostered by uncertainty, by periodic separations, by unconventionality, and, most importantly, perhaps, by ready access to the unconscious and the primitive reaches of one's own and one's lover's soul. It can be renewed by threats of triangulation [i.e., "affairs"]....And intensity can sometimes be maintained courtesy of particular neurotic fits (pp.330-331).

(Person is unaware of the ambiguity of "neurotic fits," by which I believe she means neuroses tailored to the contours of one's own, not contrived conniptions.) She speaks of a dance of give and take in which the lovers alternate the roles of parent and child (p.122). And she celebrates the "delights of regression" (p.336).

And that brings us to the final flaw of the book, Person's relentless Freudianism. It is not possible in this space to investigate the limits of the theory itself, but only to suggest the particular ways in which it hobbles Person's enterprise. Primarily at fault are the theory's developmental impoverishment and its inadequate notion of health.

Person credits Freud with “fleshing-out the Platonic insight” (via Aristophanes’ myth) that love is a re-finding. She says:

It was Freud’s genius to see that all the lover’s unfulfilled yearnings are transferred to the beloved, who is as a consequence experienced as the reincarnated source of all that is potentially good. The enormous power the beloved seems to exert on the lover can in part be explained by the love object having been invested with the mystique of all the lost objects from the past (p.114).

Love “seeks (unconsciously) to undo the losses of early life, to gratify unfulfilled and forbidden childhood wishes” (p.115). What we hope to restore through love is the purportedly Edenic state of childhood where we basked in our own narcissistic perfection. Sane and sick alike, we all seek to return to childhood, recover oneness with mother, restore the infantile belief in our own omnipotence, and resolve old Oedipal conflicts. Love lightens the load of the baggage we bear from our pasts, by making pack-mules of our lovers, but we are constricted by a “straightjacket of repetition” (p.247).

Plato and Freud agree that Eros is the force that propels us. Here Person turns Whitehead’s observation that everything is a footnote to Plato, and all of history, on their heads by remarking that “The traditional philosophic view *echoes* the psychoanalytic” (p.325, my emphasis). But the direction of Freudian movement is backwards, regressive where Plato is progressive. As adults we go back to the ideal state we imagined as infants. In what sense exactly is this growth? We never outgrow this chrysalis; we are condemned to creeping caterpillarhood. What is accomplished by this regression other than a return to the starting block? Where ought we to go from there?

The essential difference between children and adults in the Freudian scheme seems to be only one of size. As children we stuff the unconscious full of the slings and arrows of Oedipal misfortune. As we grow larger, the unconscious also enlarges, much in the way spleens and appendices do, stuffed full of inflamed repressions. Dysfunction apparently results from something like a burst unconscious. On this view, “normal” people have the same repressions, but not, by definition, more than the unconscious can handle. Freudians posit repressions in the healthy by the evidence of the sick, evidence which comes *ex post facto*. There is, then, a thin line between normal and abnormal, and about the best we can say of the former is “you haven’t cracked, yet.”

The interesting question is of course how some can cope with

these repressions while others cannot. Similarly, how do some lovers do more with love than daunt it with this dalliance with childhood? Person, unhelpfully, credits chance. Never does she discuss recognizably healthy forms of relationships without employing the language of luck. For example, she says one can overcome the power struggle she claims essential to love "only if he has the good fortune to become his own authority" (p.183). IF one has negotiated one's childhood dilemmas successfully, IF one is not cursed with a harsh superego, IF one was blessed with particularly understanding parents, etc., THEN it appears one can escape this regression to make an autonomous authority of oneself. But if some can escape these Freudian determinants, then surely others can, too, a fact that repudiates their power as determinants at all. What is a causal determinant in the dysfunctional patient appears as no more than a factor in the functional.

It is interesting to note that passion happens to us; it is undergone; affectionate bonding, however, is willed, a work of choice, not chance. While attempting to convince herself of some virtues in affectionate bonding (she protests too much), Person notes some interesting things. The first is that the envy which stokes those Oedipal furies "may well have its origin in the feelings of exclusion experienced by the child vis-à-vis his parents, particularly and paradigmatically when the parents seek the communion of love behind closed doors" (p.323). On the other hand, she notes that children consider themselves fortunate if their parents' love is of the companionate form, that is, affectionate bonding. She says, parenthetically, "Perhaps the reason is that these relationships leave room for the children while the more passionate variety sometimes does not" (p.327). Taken together, these two observations would seem to suggest that the health of all concerned might be obtained through the achievement of affectionate bonding. Because it is chosen, affectionate bonding is not the result of a deterministic repetition of childhood. It is the work of autonomous adults, an achievement, not an accident. Because they have moved on from obsession with each other, as parents they are capable of including their children in their love. The children, consequently, need not compete like Oedipus or Electra for the love they require. Thus, this whole Freudian cycle can be avoided.

Others have amply noted the scientific deficiencies of Freudian theory. (See Ernest Nagel et al., in *Psychoanalysis, Scientific Method, and Philosophy*, edited by Sidney Hook, for example.) Because it is a theory of unconscious motivation, it is not confirmable by observation. Its best evidence is that of the analyst's

interview, evidence that is tainted by the analyst's interpretation and that lies beyond objective scrutiny. Person employs the fallacy of the invincible thesis throughout the book by claiming that a complex exists regardless of one's awareness of it. Often the analyst reads in the patient's resistance to the suggestion of a complex further proof of its existence. In this regard the theory is also unfalsifiable. Add to these a view of love that renders us utterly feckless, unlucky in love and life. Pray, why keep the theory?

When not overly stretched, Freudian metaphor can explain much. In Person's hands it is Procrustean, demonstrating that it is not reductionism she abhors, but only other people's. Bishop Thomas Wilson is credited with the remark, "love is a talkative passion." The length of this book demonstrates that. Perhaps Person hoped to effect her own "talking cure." But as I understand it, the "talking cure" works, if at all, by bringing the dark demons of the unconscious into the light of the conscious mind where they can be dealt with. This view attributes certain powers to the conscious mind, and chief among them must be the tools of reason. Only by employing them—to sort out paradigm from pathology—can Person enable her readers to achieve their growth.

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The Rise and Decline of Western Liberalism.

By Anthony Arblaster. Oxford: Basil Blackwell. 1984.

Anthony Arblaster has composed, mainly in the form of a historical account, a polemic against liberalism in all the conventional senses of the term, but especially against classical liberalism. In his preface the author declares that "liberalism has therefore had, in my view, a rather better press than it deserves," and it is clear on practically every page that he intends to redress the balance.

Arblaster deserves credit for taking on a subject of the scope and complexity of western liberalism; other recent writers in this highly important area have either dealt with the topic all too briefly, or concentrated on particular periods or national traditions. In the end, however, the product of his efforts is highly disappointing, with occasional insights overwhelmed by massive prejudice, ignorance, and outright fatuousness.¹

The author correctly asserts: "There is a sense in which any book about liberalism in general is bound to be a book about exploring the definition, or the concept of liberalism....For liberalism is not reducible to a set of general or abstract propositions. It is a historical movement of ideas and a political and social practice." Still, as he concedes, the recognition of "certain continuities and common threads" is required in order to demarcate what, out of all the thinking and events that have taken place in the past several centuries, is to count as pertaining to liberalism. The question, of course, is whether the author has hit upon the right "continuities and common threads."

The book is divided into three parts, the first providing an analysis of the philosophical foundations of liberalism and the other two dealing with its history ("rise and decline"). In what follows I shall confine myself to discussing Arblaster's treatment of classical

liberalism, in my view (for which I cannot argue here) the authentic form of the doctrine.

A major defect of part one is shared by other works in the field: too much weight is given to technical philosophical thought. There is a good deal of truth in Arblaster's statement that "at the base of every major political doctrine" lies "a distinctive conception of man, or human nature, and a general theory of human society logically related to that conception." Much more dubious, however, is the proposition that the coherence of an ideology's values "is derived from the metaphysics or ontology lying behind them." Have liberals then always, or almost always, shared the same metaphysics and ontology? Arblaster seems to say so. He believes that while "this relation between political and moral values and ontological or metaphysical theory is not always made plain," Hobbes and Bentham have the merit of having displayed "*the* structure of the argument" (emphasis added).

Arblaster thus appears to assume that the foundation of liberalism is the nominalist-atomistic world-view, with an empiricist epistemology and a utilitarian ethics. He then has the job of trying to fit historical liberalism into this Procrustean bed. One method is through omission. While Kant, for instance, is referred to on eleven pages, the only reference to his deviation from the supposed philosophical foundation of liberalism occurs on page 334: "Rawls's Kantian approach implies more respect for the rights of the individual than classical utilitarianism allows for." There is no mention of Kant's divergent metaphysics and epistemology. Some other liberals who would not fit into Arblaster's stereotype are simply never mentioned at all: Wilhelm von Humboldt, the French Doctrinaires, and the French Liberal Catholics, for instance. In this way, the author makes the task of conforming liberal political values to a particular philosophical outlook a good deal easier for himself.

Restricting liberalism in the analytical section to the tradition of British empiricism, and then mucking about with the various components of that tradition, Arblaster succeeds in creating a parody of "the" liberal world-view. In the liberal view, "desires are taken as given...the whole process of socialization...is generally ignored by liberal theory... [There is] a liberal suspicion of any intellectual developments which...suggest that the social conditioning of individuals extends as far as the shaping of their wants and aspirations." Just what does the author suppose the whole liberal distinction—from Benjamin Constant to Herbert Spencer—between military and industrial societies was about? Moreover, that he could believe that his description reflects the ideas of, say,

Adam Smith or Tocqueville is incredible.² This absurdity is appropriately followed by a discussion of the Marquis de Sade lengthier than the book's treatment of Constant.

We then learn that in "the" liberal world-view "at its most fundamental ontological level a man can be certain only of his own existence—which means that solipsism is an ever-present threat in this philosophy." Yes, of course. Liberalism has a "tendency to stress the inherently anti-social, or at least, non-social character of human beings." Here Hobbes (who was not, *pace* Leo Strauss, the first liberal, or any liberal at all) is the chief—really, the sole—exhibit presented, and Arblaster displays a good deal of confusion in arguing his point. He states, of "many liberals, from Locke to Mill," that, *in contrast* to Hobbes, "they simply denied that self-interest necessarily ruled out either individual benevolence or the possibility of social harmony"; they entertained "hypotheses of a natural harmony between the interests of individuals" and an "optimistic account of the relation of the individual to society." Well and good. Arblaster nonetheless concludes: "the difference between, let us say, Hobbes and Adam Smith is not over the essential characterization of human nature. They are agreed in thinking of man as naturally non-social and egoistic." But what is the force of this, given the liberals' belief in "natural harmony" and the "optimism" just mentioned? And what, for instance, of Smith's ascription to "human nature" of "the propensity of truck, barter, and exchange one thing for another"?³ In Arblaster's way of doing intellectual history, not even such an obvious counter-example as this need be accounted for.

Arblaster's donnish English parochialism is illustrated by his treatment of the plight of ethical values. Part of the rising tide of liberalism in the early modern period was the growth of the "orthodox outlook of modern science," which conceives of nature as totally ethically neutral. This creates a problem, he feels: "Where do values go when they are excluded from the empirical world of science? The answer of modern liberal moral theory is that they become a matter of individual choice and commitment." Arblaster follows these words with a quotation from—Iris Murdoch. Previously he had illustrated the liberal concept of the "individual" by a quotation from E.M. Forster. It is an annoying habit of his to bolster his interpretation of liberal thought at key points by citing, not important and acknowledged representatives of classical liberalism of the past and present, but various twentieth century English writers, usually novelists. (Forster is mentioned on eighteen pages.)⁴

What Arblaster is trying to demonstrate is that in a liberal society man must suffer from deracination and anomie. His dialectical talents are insufficient for his purposes, however. Consider the following passage:

...the liberal conception of the moral life is essentially individualistic. Values are not woven into the fabric of the universe, as they had been by Aristotelianism and medieval Christianity. Nor can they be laid down by any form of traditional or institutional authority, whether secular or religious. From the beginning liberalism disputes the right of priests or kings to force conscience. The individual must choose his values for himself, and construct his own morality.

This clearly resembles the attitude of modern British academics much more than it does that of most of the great figures in the history of liberalism, or even many present-day classical liberal philosophers who consider themselves in the Aristotelian tradition. Note how the author takes the genuinely liberal principle that priests and kings (and everyone else) are prohibited from forcing conscience to be more or less equivalent to the notion that no traditional or institutional authority may "lay down" values. Liberals who are Roman Catholics, Orthodox Jews, or Mormons will accept the first proposition while without contradiction denying the second. Moreover, the claims in this passage simply have no relevance to the history of liberalism even as Arblaster proposes to recount it. Leaving aside the believers in natural rights (is it possible to recognize John Lilburne or John Locke in the above description?), Arblaster himself has just quoted Bentham: "Nature has placed Mankind under the governance of two sovereign masters, pain and pleasure. It is for them alone to point out what we ought to do, as well as to determine what we shall do. On the one hand the standard of right and wrong, on the other the chain of causes and effects, are fastened to their throne." To claim, as Arblaster implicitly does, that this amounts to holding that "the individual must choose his values for himself, and construct his own morality," is nonsense.

In these musing, whose hidden agenda is what is currently called "communitarianism," the author leans a good deal on another critic of liberalism, Alasdair MacIntyre; he states, for instance: "liberal morality differs from both Marxism and traditional Christianity, which share the belief that questions about the nature of the world and of human beings have to be asked and answered before it is possible to answer the question, 'But how ought I to live.'"

Does this mean that liberalism must first pass judgment on the existence of an after-life (as both Marxism and traditional Christianity, for instance, do) before it can deal with questions of social ethics? MacIntyre and Arblaster seem to find it impossible to comprehend an ideology that quite deliberately takes no position on the great issues of ultimate meaning.⁵ Liberalism functions on a radically different level from all-encompassing religious, quasi-religious, or philosophical outlooks, in that it refuses to propose an answer to the question of how people ought to live. It may, in fact, be viewed in its cultural dimension as a solution to the problem of how society is to be organized once we realize that an abundance of diverse responses to the great questions of ethics and religion is here to stay.

As a communitarian, Arblaster wants to deny the inevitability of pluralism in modern societies, but he never clearly and forthrightly joins issue with liberalism on this point. Instead, he stresses the alleged drawbacks even of toleration of conflicting religions: indifference and skepticism. "In practice the most tolerant society is likely to be also the one which is the most *aimless*" (emphasis added). But what would a modern society with a well-defined, comprehensive set of "aims" look like? How would it be possible in the absence of a politically-empowered, ideologically-coherent elite, of the sort that was available to traditional Christianity and that Marxist regimes find indispensable?

While the tendency to misanthropy, solipsism, alienation, anomie, and sadism are among the major charges he levels against liberalism, the author is willing to take up virtually any criticism he might find lying around: e.g., "liberalism has never developed a satisfying theory of art and imagination." Presumably, he believes that conservatism and socialism do have such satisfying theories. Such is the not merely critical, but relentlessly captious and carping tone to which anyone undertaking to read this book must resign himself.

Unfortunately, only a very few of the points made in the historical section can be addressed here.

Arblaster begins by rejecting the "old Whig version of English, and even Western history," which traces the roots of liberalism to the medieval period. Instead, betraying again his preference for high philosophy over institutional history and *Weltanschauung* over politics and law, he claims that it was in the Renaissance that the assembling of the liberal doctrine begins. Great stress is laid on the humanist thought of Marsilio Ficino and his disciple Pico della Mirandola. In Pico's *Oration on the Dignity of Man*, God hails man as "the maker and moulder of thyself," who is free to fashion himself

“in whatever shape thou shalt prefer.” This is doubtless a noble celebration of the high human estate; yet not every such apotheosis can be considered liberal—Marx’s Promethean view of man, for instance. When, as Arblaster notes, Tasso remarked that “there are two creators, God and the poet,” he was certainly glorifying boundless human creativity in a certain sphere; but so far nothing at all has been said on behalf of a liberal social order.

Already fatal to Arblaster’s project is that he has gotten his starting point wrong. What the disparaged “Whig” historians, above all Acton, understood was that liberalism was born in the West, out of the womb of the Europe that was, or had once been, in communion with the Bishop of Rome, nowhere else. It happens that the history of this particular culture includes episodes like the conflict of emperor and pope and the rise of the chartered towns of the Middle Ages, the emergence of representative bodies restricting the royal prerogative, of declarations of rights like the Magna Carta, and of a political discourse justifying those rights. In general, it comprises the growth of a system of divided and competing jurisdictions, within which property rights and freedom of action could find a haven, prove themselves in practice, and furnish precedents and models. This grand history, so far from being irrelevant to liberalism’s story, is the beginning and foundation of it.

More illuminating for the development of liberalism than the heroic humanism of Renaissance Italy is its evolution as “a political and social practice”—in other words, how the institutions and attitudes bequeathed by the Middle Ages were transformed in a liberal direction under the impact of modern conditions. Arblaster rightly emphasizes the importance of the growth of religious toleration and of the polity that first established it in western Europe, the commercial republic of the Netherlands.⁶ In a nice passage, he states:

in the difficult, piecemeal, haphazard process of the establishment of liberal principles in Europe, this middle-class republic represents their first secure foothold in modern history. And its national struggle against Spain rightly became a potent symbol for liberals in later times. The plays and music of Goethe and Schiller, Beethoven and Verdi, are the noble salutes of liberal posterity to the heroic struggle against Spanish absolutism.

After the successful war of liberation against Spain, no new monarchy arose in the Netherland: “Holland provided a working example of a headless commonwealth,” which, by combining religious toleration, intellectual freedom, the rule of law, and com-

mercial prosperity, served as a highly attractive model. Arblaster quotes a passage from Spinoza, (reminiscent of Voltaire's remarks on the London Stock Exchange):

The city of Amsterdam reaps the fruit of this freedom in its own great prosperity and in the admiration of other people. For in this most flourishing state, and most splendid city, men of every nation and religion live together in the greatest harmony, and ask no questions before trusting their goods to a fellow-citizen, save whether he be rich or poor, and whether he generally acts honestly, or the reverse.

Among the many liberal developments influenced by the evolution of Holland was the Leveller movement.⁷ Arblaster is to be commended for emphasizing the significance of the Levellers. Contrary to the propaganda of their opponents, who wished to tar them with the brush of economic equalizers, they were firm believers in property rights. In fact, it is with the Levellers, advocates of private property, religious liberty, and freedom of the press as natural rights, and enemies of state monopoly grants and any church establishment, that liberalism makes its debut on the stage of history.⁸ By the middle of the seventeenth century, it was possible for the Levellers to assert that the unprecedented degree of emancipation they proposed was perfectly consistent with the continued integrity and harmonious functioning of society. Arblaster would have been well-advised to follow up this line of development, since it represents the core of what has been characteristically liberal as a "political and social practice." That line continues with the Real Whigs and the late-18th century English radicals, including Price, Priestly, and Thomas Paine. Arblaster does quote Paine's famous dictum from *The Rights of Man*:

Great part of that order which reigns among mankind is not the effect of government. It has its origin in the principles of society and the natural constitution of man. It existed prior to government, and would exist if the formality of government was abolished.⁹

He does not, however, dwell on the statement, nor does he appear to realize that it does not simply reflect Paine's version of liberalism, but instead contains the central insight of authentic liberalism: society must be understood as separate from and in opposition to government, as a network of individuals interacting within the very wide bounds of their natural rights, and, so understood, it is by and large self-regulating.¹⁰ On this basis, a kind of

ideal-type of classical liberalism could be elaborated. The figures and episodes who would then fit into the story would include Jefferson and the American Jeffersonian tradition, Benjamin Constant and the *Censeur* group in France, the Anti-Corn Law League and its counterparts in France, Germany, and elsewhere, Bastiat and the *Journal des Économistes*, and Herbert Spencer and the radical individualists of the late nineteenth century. Other movements and thinkers could then be considered, as they were situated nearer or further from this liberal central line. Following such a procedure would have clearly delineated the features of a liberalism that evolved but did not finally disintegrate into a meaningless, featureless set of mental attitudes and personal preferences. It would have avoided the recourse Arblaster is compelled to adopt of "then there was this, and then there was that," over three hundred years.

On the nineteenth century, Arblaster is as tendentious as ever. The Irish famine is laid down as a trump card against liberalism. The author is obviously irked that while fascism and revolutionary Marxism have been debited with millions of victims, liberalism has gotten off rather easy. Insofar as the British stood by "the principles of free trade and laissez-faire economics" and allowed the Irish to starve, liberalism "also has its massacres and cruelties to answer for." More to the point, however, would have been to confront the question, Why did Britain and the rest of western and central Europe *not* fall victim to a similar catastrophe? Here a rational and balanced discussion of the Industrial Revolution would have been in order. Instead, Arblaster resorts to the latest dodge of the anti-industrialists: the truth of what happened to the living standards of British working people during industrialization, it now turns out, after generations of debate on that very question, is not important. "Whether or not the living standards of the mass of people rose or fell in real terms, the sheer visibility and extent of urban poverty and squalor" and the disparity in wealth between capitalists and factory workers led many to question the new system. Arblaster shows no appreciation of the meaning of the Industrial Revolution, that it was the West's solution to an unprecedented population explosion. As a recent historian has written in assessing industrialization in Britain:

...what would have happened to Britain's teeming population had industrial growth not rescued it from a Malthusian population trap? It is difficult to see how a "check" on an even more catastrophic scale than the Irish famine of 1845-47 could have been avoided, and to this not inconsiderable

extent the Industrial Revolution brought the benefit of permitting a much larger population to survive and, in the long run, thrive.¹¹

Critics of capitalist industrialization like Arblaster might consider the likely results of having tried to keep the new tens of millions in Europe alive through, say, the central planning of the Saint-Simonians or the state-funded worker cooperatives of Louis Blanc and Ferdinand Lassalle.

This is the fundamental economic condition that should be borne in mind in considering the liberal fear of democracy—or the “mob”—that emerged under certain circumstances, and that Arblaster so enjoys gloating over. “In 1848 [in Paris]...the demand was for social revolution, for the ‘red republic.’” Tocqueville’s horrified condemnation of the June uprising is, accurately enough, taken as representative of the attitude of liberals of the time. According to Arblaster, Tocqueville

feared the masses, and saw their rebellion in June as a threat to the whole order of civilized society...when democracy threatened to open the way to socialism, Tocqueville drew back and joined the side of “order,” which, in 1848, was a euphemism for direct, brutal repression of the urban poor.

But, in the first place, the June uprising was not a manifestation of “democracy.” Arblaster ignores the fact that the Parisian workers and the socialist intellectuals who lead them were in conscious opposition to the great majority of Frenchmen, who had made their conservative sentiments clear in the elections of May, conducted according to universal manhood suffrage.¹² That, when it came to an actual vote, the majority of the French could not be had for a “social republic” annoys a writer like Arblaster, who consequently directs attention to the anti-democratism of the liberals.

Second, Arblaster is justified in disparaging the liberals’ fear of the socialist-led “mob” only if he can show that liberals like Tocqueville were wrong in believing that the transformations proposed by the socialists would have led to disaster for the great majority of people.¹³

On John Stuart Mill Arblaster is not only better informed, but much more interesting. This is largely because the author’s policy of undercutting liberalism is more refreshing when applied to the “saint of rationalism,” who enjoys a vastly inflated position in the conception of liberalism entertained by English-speaking people.

Arblaster points out that for Mill, "society" posed even greater dangers for individual liberty than the state itself. This is a view that leads to pitting liberalism against perfectly innocent, non-coercive communitarian values and arrangements, and is another respect in which Mill was actually a "modern," rather than a classical liberal. It also tends in the direction of forgoing an alliance between liberalism and the state-power, since it is exceedingly difficult to see how, as a practical matter, non-coercive social norms are to be foiled except with the aid of the state. (Historically, the chief method for counteracting "oppressive" traditional arrangements has been for the state to displace the church, particularly in education.)

Similarly, as Arblaster states, "Mill is concerned to attack not merely governmental action, but also any kind of action in which individuals band together and act as a collective body." He adds: "Liberal individualism has generated a widespread, and often rather silly, suspicion of all forms of collective action, *as if individuals, and individualism, were somehow diminished by the very act of working together*" (emphasis added). This is very much on the mark, and what it shows is that it is not individualist and liberal doctrine that is at fault, but rather Mill's obsession with the individual shedding the constraints of non-governmental social institutions. In contrast to Mill, the indispensability of voluntarily-sustained traditions and freely associated "collective" action was stressed, among others, by the post-Revolutionary French liberals, such as Constant, the Doctrinaires, Tocqueville, and Laboulaye. Much more exemplary of the spirit of liberalism than John Stuart Mill is Wilhelm von Humboldt, who stated, in the work that was an inspiration for *On Liberty*:

...indeed, the whole tenor of the ideas and arguments unfolded in this essay might fairly be reduced to this, that while [men] would break all fetters in human society, they would attempt to find as many new social bonds as possible. The isolated man is no more able to develop than the man who is fettered...unions and associations, so far from having harmful consequences of themselves, are one of the surest and most appropriate ways of promoting and accelerating human development.¹⁴

As for Arblaster's journalistic diatribe against Hayek, Milton Friedman, and Nozick in the book's last chapter, "Liberalism Today," it is not worth answering.

1. As for fatuousness, one example may stand for scores: when Arblaster comes to discuss the rise of capitalism in the sixteenth century, the ethical-theological voluntarism expressed by William Tyndale in his statement, "to steal, rob, and murder are holy, when God commandeth them," elicits this from him: "Such teachings were extremely congenial to the development of the capitalist economic order." Can Arblaster really believe that what early capitalism desperately needed was masses of people who felt that stealing, robbing, and murdering were holy acts when commanded by God?
2. Arblaster allows a glimpse of the cloven hoof when he complains: "For liberals, people's apparent desires are also their real desires and should be respected as such." Presumably he does not hold that people's "apparent desires" deserve to be respected.
3. Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, ed., R.H. Campbell, A.S. Skinner, and W.B. Todd (Indianapolis: Liberty Classics, 1981), I, p.24.
4. While George Eliot, Matthew Arnold, and Alexander Herzen are discussed and Virginia Woolf and W.H. Auden mentioned several times, there is no mention at all of the School of Salamanca, Grotius, Pufendorf, the Physiocrats, Destutt de Tracy, Say, Charles Comte, Dunoyer, Thierry, Bastiat, Gustav de Molinari, or Auberon Herbert, among many others.
5. Cf. Ludwig von Mises, *Liberalism: A Socio-Economic Exposition*, trans., Ralph Raico, 2nd ed., (Kansas City, Kans.: Sheed Andrews and McMeel, 1978), p.192.
6. The crucial role of Holland as a nursery of liberal ideas and an exemplar of the liberal polity is sketched by Christopher Dawson, in "The Historic Origins of Liberalism," *The Review of Politics*, vol. 16, no. 3 (July, 1954).
7. Cf. for example, Richard Ireton's citation of the Dutch example in arguing against military impressment in *A Remonstrance of Many Thousand Citizens*: "the Hollanders our provident Neighbors have no such cruelties, esteeming nothing more unjust, or unreasonable..." Don M. Wolfe, ed., *Leveller Manifestoes of the Puritan Revolution* (1944; reprint, New York: Humanities Press, 1967), p.125.
8. Perez Zagorin's terminology is more confusing than helpful when he calls the Levellers "the first leftwing movement in English and, indeed, European politics." *Rebels and Rulers, 1500-1660*, II (Cambridge: Cambridge University Press, 1982), pp.163-164.
9. Arblaster usefully underscores (although for his own purposes) the acceptance by radical liberals like Paine and Jefferson of the economic inequality inevitably generated by a liberal order. Paine is quoted, from his *Dissertation on First Principles of Government*: "That property will ever be unequal is certain. Industry, superiority of talents, dexterity of manage-

ment, extreme frugality, fortunate opportunities, or the opposite, or the means of those things, will ever produce that effect, without having recourse to the harsh, ill-sounding names of avarice and oppression....All that is required with respect to property is to obtain it honestly, and not to employ it criminally." This point is relevant to the debate among German historians revolving around Lothar Gall's assertion of a rupture in the development of liberalism brought about by the new "class society" resulting from the Industrial Revolution.

10. Cf., in regard to economic liberalism, Albert Schatz, *L'Individualisme économique et social. Ses origines, son évolution, ses-formes contemporaines* (Paris: Armand Colin, 1907), p.32, states: "...little by little the idea will emerge and spread that the economic order is no more the artificial work of the legislator than the order that naturally reigns in the functioning of an organism is the work of the hygienist...that there is, in a word, a natural economic order and that this order is capable of being substituted for the artificial order of regulation...The day that this idea is scientifically established one may say that the individualist doctrine was born."

11. Eric J. Evans, *The Forging of the Modern State. Early Industrial Britain, 1783-1870* (London/New York: Longman, 1983), p.153. That Evans is in general critical of the Industrial Revolution makes his conclusion all the more impressive.

12. Eighty-four per cent of those eligible voted in the elections for the Constituent Assembly. The socialists won only one hundred out of 900 hundred seats. See Jean Tulard, *Les révolutions de 1789 à 1851* (Paris: Fayard, 1985), pp.422-423.

13. In discussing Tocqueville's social thought, the author characterizes his celebrated phrase, "the tyranny of the majority," as "melodramatic," adding that "Tocqueville does not provide the evidence to justify it." This is incorrect, and one might have expected Arblaster to be more sensitive to some of the evidence Tocqueville does cite, including the prevention of the publication of freethought works and interference with the right of free blacks to vote. Alexis de Tocqueville, *Democracy in American*, trans., Henry Reeve and Francis Bowen, ed., Phillips Bradley (New York: Vintage, 1945), I, pp.275 and 373.

14. Wilhelm von Humboldt, *The Limits of State Action*, ed., with introduction by J.W. Burrow (Cambridge: Cambridge University Press, 1969), pp.98 and 101.

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The Libertarian Idea. Jan Narveson. Temple University Press, 1988.

Robert Nozick's widely admired work *Anarchy, State, and Utopia* brought libertarianism to the attention of the philosophical community. Most courses in political philosophy these days include a discussion of "Rawls and Nozick" and scores of authors of journal articles have found in the labyrinthine complexity of the book ample material for discussion.

Although Nozick's powers of imagination and argument have won him much praise, few philosophers have become libertarians. Jan Narveson, influenced by Nozick and David Gauthier, is perhaps the most distinguished exception to this generalization. His outstanding new book is a thoroughgoing defense of libertarianism.

Before turning to a discussion of the book, it is worth noting that there is a group of philosophers sympathetic to libertarianism whose work has been to a large extent independent of Nozick. The thinkers in question will no doubt be familiar to readers of *Reason Papers*. Under the influence of Ayn Rand, they have defended a neo-Aristotelian basis for libertarian natural rights. Unfortunately, Narveson does not discuss their arguments at length, except for a few pages devoted to Ellen Paul's argument for property rights. As we shall see, Narveson has little use for natural rights, but a fuller examination of the Randian argument by an author of such manifest critical powers would have been valuable.

The first of the three parts into which Narveson's study is divided deals with the question: "Is Libertarianism Possible?" Narveson offers very valuable classifications of a large number of terms vital to any discussion of political philosophy, e.g., freedom, rights, intervention, acquisition, etc. After a definition of libertarianism as the view that "the only relevant consideration in political matters

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is individual liberty" (p.1), he develops in some detail a libertarian position on the manner in which liberty should be pursued. He strongly defends the right of individual ownership of property against charges that this right unduly restricts liberty.

One can only admire Narveson's comprehensive and detailed grasp of the literature on the concepts of ethics. At times his speed in darting from one issue to another leads him into some hasty formulations. In his discussion of freedom, e.g., he advances this definition: "Person A is [completely] free with respect to $S^1 = S^1$ obtains if and only if A chooses that S^1 " (p.18). Suppose that God determines everything down to the minutest detail before he creates the world. Among the states of affairs he brings about are both A 's choice that S^1 and S^1 . Surely we would not normally say that A is free with respect to S^1 in these circumstances. But A is free by Narveson's criterion.

Again, suppose that A chooses S^1 , for some unproblematic case. As an example, let A be Mike Tyson and S^1 be the state of affairs in which Tyson remarries Robin Givens. Tyson is then free to remarry Robin Givens just in case that his remarriage to her obtains if and only if he chooses to remarry her. So far, so good.

Now let us examine this question: was Tyson free to choose whether to remarry Robin Givens? On Narveson's analysis, Tyson will choose to choose to remarry her if he is free with respect to his choice to do so. This hardly strikes one as a plausible account of what is meant by A 's being free whether to choose to perform S^1 .

Narveson probably would be able to 'fix this up' without too much trouble, and for the purpose of his book the points just given are not terribly important. But one still needs to avoid undue haste in an effort to be comprehensive. On the whole, however, Narveson's conceptual classifications are succinct and valuable.

He continues to raise a number of significant points after he turns from definitions to an examination of libertarianism. As he rightly notes, libertarians do *not* support maximizing liberty. This goal might require that one interfere with someone's rights in order to advance liberty overall. Instead, libertarians hold that one should interfere with each person's liberty as little as possible. (p.32; at line five from the bottom, '(2)' should be '(1)') An example will clarify the difference. It might be that giving a poor person a few thousand dollars taken from a billionaire will increase the poor person's liberty more than it will decrease the rich person's. The former will be able to do a great many more things than before his involuntary subvention, while the latter will hardly miss the money. (I do not mean to suggest here that quantitative com-

parisons of liberty are possible: this is just a 'rough-and-ready' assessment for the sake of the example.) If, however, the rich person has just title to his money, in the libertarian view one cannot take it from him since doing so violates his rights.

Narveson's distinction is of crucial importance, but I do not think he has matters precisely on target. On his formulation, one would be allowed to violate someone's rights if doing so minimizes the total amount of interference. Suppose that one imprisons without trial someone who is very likely in the future to commit a large number of serious violations of rights. One may well have lessened the total extent to which people interfere with one another's rights by doing so, but this violates libertarian principles, as they are normally understood.

It is precisely examples of this sort that Nozick had in mind in his contention that rights are side-constraints. Narveson wrongly interprets Nozick's phrase as an endorsement of absolutism—the view that it is always wrong to perform an act of a specified sort, regardless of consequences (p.54). Instead, side-constraints address the same point as Narveson has in mind in his criticism of maximizing liberty. The 'side-constraints' approach avoids the problem just raised for Narveson, since it does not allow rights violations whose result is to minimize total rights violations.

Narveson presents very effectively the libertarian view that each person has certain basic rights over his or her own body. Whether one calls this view 'self-ownership,' or something else, the position has compelling force. It hardly seems plausible to claim that people are obligated to surrender a kidney or an eye because someone else has a vital need for one of these. (After all, you have *two* eyes. Isn't it unfair that a blind person has *no* eyes that see?) As the author points out, the outstanding Marxist philosopher G.A. Cohen has acknowledged the strength of the self-ownership principle (pp.66-67).

The road from rights over one's body to libertarianism still remains to be negotiated. Some philosophers, such as Cohen and Allan Gibbard, claim that libertarian property rights unduly restrict liberty. The argument for this surprising thesis relies on the fact that if one owns property, one has the right to exclude others from its use. Does not such exclusion constitute a restriction on other people's liberty?

Narveson skillfully indicates the defects of this argument. Before people acquire property, no one has claim rights over it. People are at liberty to use available property, but this liberty guarantees them no access to anything in particular. I am at liberty

to pick up a dollar on the sidewalk; but if you 'beat me to it' you have not violated any of my rights. Incidentally, Narveson himself prefers to avoid the Hohfeldian terminology of 'liberties' and 'claim rights.'

Defenders of the anti-libertarian position on this issue may reply that individuals *do* have the right to use property, although not to exclude others. But why should one start with a system in which 'everyone owns everything'? Unless Cohen and others who employ the idea of initial collective ownership of property to criticize individual rights to ownership advance arguments in favor of this view, there is no need to regard it as an option available for choice (p.73).

Narveson's point seems to me an excellent one. Individual ownership of property restricts the freedom of action of the March of Dimes, if one compares a libertarian system with one in which all resources are assigned from the outset to that organization. But unless there is something to be said for a particular non-libertarian view, it does not require consideration.

Although the sum and substance of Narveson's argument is correct, one of his arguments against Gibbard does not succeed. Against Gibbard's claim that property rights are restrictions of liberty, Narveson points out that restriction of other people is not the essence of a right to property. A right to property confers powers of various sorts on the owner to use the property. Property rights cannot be equated with restrictions: a legislature, e.g., can restrict people from using property in various ways without itself owning property.

All of Narveson's points are right; but unless Gibbard meant to be offering a definition of property, they leave his claim untouched. All Gibbard needs is a premise to the effect that property rights *entail* restrictions on other people. He need not claim that a full analysis of property rights results in nothing but statements about restrictions.

The reader of Part I will get an excellent grasp of the libertarian position. In Part II, "Is Libertarianism Rational?", Narveson discusses the moral justification of the view he has so ably presented in Part I.

Moral arguments come in many shapes and sizes; and before giving his defense of libertarianism, Narveson has a great deal of interest to say about the nature of morality. For him, intuitionism is the enemy. This position comes in two varieties, metaphysical and methodological.

The first of these views is that 'good' (or 'right' in another version) is a property that is directly apprehended. Perhaps the best

known example of this view is G.E. Moore's contention in *Principia Ethica* that good is a simple non-natural property.

Narveson gives this view short shrift. The entities that theories of this sort conjure up are mysterious and he knows nothing of them. People disagree about what is good: if goodness were a property known by intuition, many people must be morally blind since they fail to 'see' the things that these theories assure us are there. Narveson believes that the claim that something is wrong "isn't *at all* like the claim that grass is green" (p.119). Unlike factual matters, moral statements are not matters of observation.

Although this is not the place to start an extended argument on the subject, I think there is more to be said for this position than Narveson allows. The position that moral statements are true or false judgments about the world entails nothing about invisible properties. Whether a statement has a truth-value and how the statement is to be analyzed are two very different matters. Moral disagreements are of course a fact that proponents of 'metaphysical intuitionism' need to explain. But the fact that disagreement exists is not usually by itself enough to require abandonment of a contention. Practically every important philosophical thesis is controversial. Narveson's claim about observational testability rules out many mathematical propositions that are usually taken to be true. Are statements about imaginary numbers observationally testable?

The foregoing remarks are not an argument in favor of the view Narveson so speedily rejects: they merely question his attack on it. Narveson, not content with the dismissal of a thesis that has few contemporary advocates, proceeds next to much more controversial ground. He also will not countenance what he terms 'methodological intuitionism.'

According to this view, people have pretheoretical moral knowledge. We know, e.g., that cruelty is wrong. Theories of morality can be tested by how well they accord with our pre-theoretical intuitions. These intuitions, however, are not graven in stone; our beliefs can be modified by our moral theories, as well as vice-versa. By oscillation between theory and intuition, we will, if 'things go rights,' eventually reach a position that is both theoretically satisfactory and accords with our now-modified intuitions. John Rawls' 'wide reflective equilibrium' is the best known case of a view of this type.

Narveson's arguments against this kind of intuitionism again emphasize the existence of moral disagreement. To grasp his position fully, it should be noted that he uses 'intuitionism' to cover a wider range of options than one might expect. As an example, most

of the neo-Aristotelian writers mentioned earlier reject what *they* call 'intuitionism.' Instead of relying on beliefs that particular acts are right or wrong, morality should as they see it be structured around the question: What does an individual require for his flourishing as a rational human being? But Narveson, if I have understood him correctly, would include this position in his condemnation of intuitionism. It falls victim to attack because this view rests on a notion, 'human flourishing,' which does not command universal agreement. For the same reason, Narveson spurns any appeal to natural rights.

Once again, a full examination of Narveson's argument cannot be undertaken here. A reply to it would have to descend to the details of particular theories. To answer him at his own level of generality would merely substitute counter assertions for his assertions. It does seem to me worth saying, however, that he makes very heavy weather over moral disagreements.

What does Narveson wish to put in place of intuitions? He thinks that contractarianism, along the lines developed by David Gauthier, offers an escape from arbitrary moral claims. In this view, one starts with people who are basically self-interested but who have some desire to 'get along with others.' So that constant conflict can be avoided, nearly everyone will wish to reach agreement on a system of rights. The key question then becomes, on what terms will these people agree? As Narveson puts the point, according to contractarianism, the "principles of morality are (or should be) those principles for deciding one's conduct which it is reasonable for everyone to accept" (p.131).

In reply to criticism from Arthur Ripstein, Narveson denies that he has introduced controversial substantive views of morality into his construction. Most people *do* have the desire he imputes to them of willingness to cooperate with others as a means to best advance one's own interests. Those who do not can be overpowered. There are very few of them; and, as they will not agree with the rest of society, on what moral basis can they complain over the way others treat them?

Narveson has not fully dealt with the objection that his own position includes controversial assumptions. The issue he considers is whether what he 'puts into' the initial situation of the contractors is reasonable. But even if he is right that his assumptions about people are acceptable, he has left the most vital issue unmentioned.

This issue is *not*, to repeat, that Narveson's assumptions about people's rationality and self-interest are questionable. Rather, the point at which Narveson is hoist with his own petard is his implicit

assumption that nothing else except the features he ascribes to his contractors is relevant to morality. If Narveson wishes to 'throw out' intuitionism as a method of argument, very well then. But he certainly cannot assume without support that the contents of intuitionist theories are all false. All that the refusal of intuition entitles him to do is to decline to assume the truth of theories of a certain type. To say that the sum and substance of morality consists *only* of what can be agreed to by rational contractors is a very large extra step. Does it not rest on just the sort of controversial intuition Narveson elsewhere so eagerly rejects?

Contractarianism of the kind Narveson favors also has internal problems. Many of these have emerged from the widespread discussion that Gauthier's *Morals by Agreement* has provoked. As an example, Narveson, here following Gauthier, likens morality to a cooperative solution to a Prisoner's Dilemma (p.145). But not all Prisoner's Dilemmas *ought* to be solved to the mutual advantage of the parties to them. Morality does not require, e.g., that criminals cooperate so as to maximize their 'take.' If one must already know when cooperation is morally desirable in order to decide which PD's should be solved, the attempt to characterize morality as a means of advancing people's interests through cooperation does not look promising. (This point has been raised by Peter Danielson.)

Also, on the contractarian view, one has no moral obligations at all to people who will not 'cooperate.' No doubt one is justified in using force to repel aggression; but it strikes me as implausible to say that one is free to kill anyone just because his words or behavior indicate he has not accepted an agreement. Perhaps Narveson would reply by saying this is a mere intuition. If he is willing to 'bite the bullet' by saying that non-contractors have no rights whatever, I for one have nothing further to say.

In the course of his defense of contractarianism, Narveson briefly considers some competing moral theories. He makes an excellent criticism of utilitarianism, a theory of which he was earlier in his career an outstanding advocate. He notes that utilitarians have failed to show why an individual should treat someone else's utility as equal to his own in significance (p.152). Henry Sidgwick, probably the most painstaking of all utilitarians, had to resort to intuition to justify the assumption that individuals wish to maximize total utility, not just their own. The reader will by this time not have to be told what Narveson thinks of this intuition.

Narveson also discusses an argument in favor of property rights advanced by Ellen Paul. Her argument seems to me stronger than

he allows, and one of his criticisms is particularly weak. She contends that without property rights, people's survival is precarious. To this Narveson rejoins: "But then one's survival is always contingent in any case" (p.173). True enough; but why has Narveson not dealt with the obvious next step in the argument: survival is much more 'contingent' without property rights than with them?

Narveson's defense of contractarianism has not been undertaken just for its own sake. He contends that from his starting point, libertarianism is rationally supportable. His argument to this effect, although influenced by Gauthier, differs substantially from Gauthier's own variety of contractarianism.

Gauthier's contractors follow a very carefully structured path. They adhere to a bargaining principle, the Maximin Concession Rule, that prescribes how the gains from cooperation should be distributed. For Narveson, the bargaining situation is fluid and open. He rejects Gauthier's bargaining principle and substitutes no other in its place.

Why then does he think his contractors will arrive at a libertarian exit from the state of nature? Narveson believes that one cannot answer this by an a priori argument. It is a mistake in moral theory to separate sharply issues of principle from factual questions (p.183). The strength of the libertarian case becomes apparent only after one considers how libertarian institutions will handle various social problems.

This brings us to final part of the book, "Libertarianism and Reality." Here Narveson gives us a wealth of original and insightful remarks about various features of a libertarian society.

He boldly faces issues that many libertarians have found problematic. Against those who support the free market but think that the government must provide people with information in order for the market to work, he notes that the provision of information is itself a market good. It is up to freely contracting individuals to decide how much information they wish to obtain. The provision of information is not a 'free good': like any other economic good, it has its price (p.201).

Narveson's discussion of public goods is brief but effective. He maintains that voluntary agreements of a kind he describes can overcome the 'public-goods trap' (p.235) Whether or not the provision of aid to the needy is a public good, some have found in this issue the Achilles heel of laissez-faire capitalism. Thomas Nagel, for instance, has argued that it is too much of a burden on people to confront them continually with the choice of helping the

poor or spending money on themselves. If the government compels donations to the welfare of the poor by means of taxation, people will rest much easier. As Narveson aptly notes, those who in a libertarian society wish to relieve themselves of the burden of free choice are entirely at liberty to agree to have money deducted on an automatic basis from their pay (p.248).

One suggestion Narveson advances will probably start some arguments among libertarians. He thinks that the system of government medical insurance in Ontario, Canada, where he lives, has worked very well. People in a libertarian society might continue arrangements like this, although of course dissenters would be free to leave the system. Why cannot a health insurance plan be attached to one's protection agency? (p.252)

I see nothing that rules this out; although if I may be allowed a guess, the free market is unlikely to arrive at this situation. At least, there seems no more likelihood of this than that steel companies will be branches of protection agencies. But who is to say?

If, after reading Part III, one returns to the issue of whether Narveson's contractors will agree to establish a libertarian set of rights, can one now agree with Narveson that they will? Narveson has certainly made a good case that a libertarian system can handle problems often thought beyond its capacities. But it does not follow from this fact that the contractors will agree to libertarianism. That an alternative will 'work well' certainly tells in its favor, but the lack of restrictions on the contractors leaves the outcome of their deliberations indeterminate. Narveson himself thinks that there is a substantial conventional element to the definition of property rights. He fails to show that his contractors must be limited in their decisions on this matter to results that are recognizably libertarian.

Narveson has written an original and important book that opponents of libertarianism will *have* to study and that libertarians will *enjoy* studying. No one who reads it can fail to be provoked and enlightened.

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Book Reviews

Liability...The Legal Revolution and its Consequence.
By Peter W. Huber. New York: Basic Books, 1988.

To be informed that a hidden tax has been levied upon each and every consumer of goods and services in the United States may be somewhat of a surprise to most of the individuals who enjoy the benefits of the free market. However, such a surprise will surely pale when compared to the shock almost all will experience when they are confronted with facts and arguments that support the thesis that the tax, in being hidden, has never been voted for, is generally in excess of those taxes that have been voted for, does not clearly promote that for which it is employed, and is chiefly responsible for the elimination of many goods and services which might, arguably, further that purpose for which the tax was initially employed.

The above thesis is forcibly presented with a plethora of case examples and urgent arguments by Professor Huber. Moreover, Huber proffers an alternative approach designed to circumvent those problems alleged to plague the method which brought about the tax while also satisfying the social needs for which the tax was created.

According to Professor Huber, the hidden tax has been created by the perhaps well-intentioned judicial usurpation of contract law by tort law in the area of commercial relations. One would suppose and traditional common law once paid respect to the idea that when one party wished to secure the goods or services of a second party, the law of contract would prevail and dictate the rights and obligations between the parties.

A contract is simply a promise or set thereof between two or more parties, the breach of which the law will offer a remedy. In order to have the sort of promise the law will enforce, there must be both mutuality of assent and mutuality of obligation. Mutuality of assent is satisfied in general by an offer and an acceptance of that

which is offered. Mutuality of obligation is the requirement that consideration obtained between the parties. Thus, for example, one party would make an offer, e.g., to do *A* for *B*, the second party would accept doing *B* for *A*, and each party would perform what was promised in the offer and acceptance and for which neither party suffered a prior legal duty to perform but for their agreement.

Since the party who makes the offer is considered, at law, the master of the offer, i.e., she may make any offer not proscribed by law, and the essence of commercial relations is the contract role's, the party who makes the offer is, generally, the master of the commercial relation. This is not to say that common law failed to protect the party accepting the offer. First, the clause "not proscribed by law" would, for instance, disallow the offer and acceptance of criminal activity from being enforced. Second, in order to have mutuality of assent, the parties had to be referring to the same goods or services. Other than the proscription regarding the making of certain contracts and the necessity of identity of reference within the contract, any further protection derived for a party in an "at arm's length negotiation" was to be secured by that party. After all, nothing at law prevented the second party from rejecting the offer made by the first party and making a counter offer. If the parties enjoy capacity, i.e., are autonomous individuals, the agreement is at arm's length, e.g., there is no overreaching or no undue influence, and the agreement is not already proscribed by the law, then the parties might arguably be said to have a binding contract. Any further legal interference in such a contractual relation might reasonably be argued to be paternalistic.

Nevertheless, as Huber points out, the legal revolution brought about just that further legal interference to ensure the mitigation of the mastery of the offer by the party making the offer. The legal interference came in the form of tort law. As Huber notes, "Tort" means "wrong." Actually the term "tort" is derived from the Latin "Tortus" or "twisted" which is to say 'not straight' or 'crooked'. A tort is an area of civil law which denotes the violation of a publicly-recognized right for which the law will offer a remedy if the right is enforced by the injured private party.

According to Huber, tort law and contract law pose an interesting contrast. Contract law allows autonomous individuals to make binding agreements, while tort law, at least in the appropriate circumstances, allows individuals to recover for harms they suffered at the hands of their own autonomy. When tort law is employed simply in conjunction with old common law notions of contract, since it is the party who accepts the offer who suffers the

obligation or risk of failure to inquire, nothing is altered save a showing of fraud, coercion or other malfeasance. However, if tort law is employed to ameliorate the common law of contract, then as some have argued a more reasonable balance will be secured between one party's claim to protection against damage and the other party's claim to freedom of contract.

This, according to Huber, is what the civil law revolutionaries (or as Huber calls them: 'the Founders') accomplished. One manner of altering contractual relations between the offeror-producer and acceptor-consumer is to grant the consumer the right to information about the product they could not discover upon reasonable inspection. Thus, the obligation to ask the offeror-producer for information was eliminated in favor of a duty suffered by the offeror-producer to warn the consumer of dangers. But the obligation suffered by the producer to disclose dangers to the consumer could be discharged adequately or negligently. The consumer, therefore, acquired a cause of action based upon the producer's failure to warn in a satisfactory fashion or to a sufficient extent.

The shift of obligation was initially based upon dangers not obvious to the consumer. Dangers the consumer could not discover and dangers the consumer would not expect soon became the borders of the producer's liability. That is to say, producers were not only liable for the negligent warning of dangers not expected by the consumer, but producers soon became liable for harms suffered by consumers from products that failed to function as consumers expected. The producer was deemed to warrant the product. With the warrant, the manufacturer is liable for harm that arises from the failure of the product to perform in the manner ordinarily associated with the product.

This did not mean that the producers could not disclaim such warranties but in so far as the obligation fell upon the producer to disclaim, the warranties were obviously implied or obtained unless disclaimed. Moreover, not only did the producers suffer the duty to disclaim but disclaimers were viable only if done under certain formalities.

In the same spirit, the creators of the expanded tort protection realized, according to Huber, that while the consumer did not expect the products placed in the market place to be dangerous, more than an obligation to warn and warrant merchantability could be extracted from the producers. Thus, strict liability arose for injuries suffered by the consumer at the hands of products that were unaltered and used properly, but were dangerous because of a nonnegligently-caused defect. "Unreasonably dangerous" simply

came to mean that the danger was to an extent beyond that which would be contemplated by the ordinary consumer possessed with the knowledge common to the community. Defects are of two types. The first and palpable sort of defect is one caused by mismanufacture. The mismanufacture of a good that subsequently causes injury in the hands of the consumer who employed the product properly and without alteration, has a cause of action against the manufacturer. Nonetheless, what if the product is new and has not yet been subject to mismanufacturing risks? In such an event, a second type of defect may be realized. A product infected with a defective design is one that is simply unreasonably dangerous when employed as prescribed in an unaltered condition.

Huber notes, in addition, that tort expansion enlarges the scope of possible plaintiffs by eliminating the requirement of privity, i.e., the legal relation created by the contract.

Huber concludes his castigation of the Founders' program by noting two paradoxes, one that is internal to the program and one that is the result of the program. First, the Founders decided that the average consumer is ill-equipped to negotiate a contract with manufacturers, yet when it comes to judging whether a warning is adequate, whether a contract is tenable, or even more amazingly, whether a product is defective in design, a decision for which the average consumer has absolutely no training, the average consumer, now placed in the jury box, is very well equipped indeed.

The second paradox is that the Founders extended tort protection for the consumer in the area of commercial relations in order to benefit the consumer. Yet what has been accomplished is just the opposite. Rather than serving as an incentive for safer and less-expensive products, litigation and resultant insurance rates, have simply eliminated the products. Thus, a product that, according to the evidence, would be a significant improvement over the previously-accepted prototypes, is either not available on the market or if available, is priced beyond the purchasing power of the consumer. This is all due to extended tort protection for consumers.

What are Professor Huber's proposals for dealing with the lamentable situation? Generally, Huber's suggestions fall into three broad categories. First, as many states have already enacted, there is tort reform. Huber suggests, for instance, abdication of the collateral source rule. The rule forbids informing a jury that a collateral source, e.g., insurance, has already compensated the plaintiff-consumer for the harm suffered. The rule was at least initially thought to disallow penalizing the consumer who was smart enough to purchase insurance. On the other hand it appears

to allow the plaintiff to recover twice for the same injury, once under the insurance policy and once from the defendant-producer. However, not only does the insurer's right of subrogation place the insurer in the legal position of the injured consumer, eliminating the consumer from the suit, but when employed, the result of the rule is reintroduced in a number of suits. Smart attorneys introduce into evidence, where the jury has been made privy to the collateral source, the amount of the insured's premiums and just how long the insured has been making such payments. The insured then asks for the total costs of such insurance premiums payments. Although generally not as high as the award for damages, the cost of premiums need not be miniscule.

Huber's second general suggestion is to extricate damage awards from tort law's appurtenance of 'wrong' and rather model awards on worker's compensation programs. According to such programs, employees are required to purchase insurance for employees. Employees bargain away tort law suits against employers for injuries suffered in the course of employment. Employees bargain away common law defenses, e.g., contributory negligence, the fellow-servant rule and assumption of the risk. The worker's compensation program places a ceiling upon the amount of the award for the injured employee. Such an 'exclusive remedy rule' might also be employed in products' liability, state programs and services.

Finally, Huber argues that the spirit of common law contract ought to be exhumed. Respect for individual autonomy, that respect which gives rise to consumer rights to be fully informed, must be taken seriously. If a knowing consumer purchases a product with a discoverable disclaimer, the consumer ought to be treated as having assumed the risk. It is arguably self-nugatory to allow one to enter into a relationship with presupposes autonomy, and place at each party's disposal a contractual remedy for breach yet also place at each party's disposal, a tort remedy for an injury or damage one contractually assumed. The argued conjunction of contract law and extended tort law appears to be an oxymoron of sorts, an oxymoron that is neither humorous nor inexpensive.

Professor Huber's thesis that the Founders' amelioration of common law contract with an extended form of tort law and that such amelioration has not enhanced the consumer's position is beautifully (and if not excessively) illustrated and almost always cogently argued. Huber's command of the language and law is laudable and very frequently entertaining. The combination renders the book highly informative and eminently readable.

Despite the well-deserved panegyric, there are just a few main minor points one might wish to note. First, the oftentimes noted sensational cases employed to support the thesis are never fully explained. The arguments proffered by the court and never presented but rather, only the holdings of the court. But a court's holding may well seem disjointed and indeed odd when severed from its argumentative justification. (See Fred Strasser. "Tort Tales: Old Stories Never Die", *The National Law Journal*, 2-16-87). A court's ruling, although it enjoys *stare decisis*, is not itself self-justifying.

Second, some of Huber's suggestive paradoxes and analogies beg for immediate retorts. This is not to suggest that Huber could not, with philosophical grace and alacrity, extricate himself from such retorts. Nevertheless, it might have proved beneficial to have considered such responses and then done away with them. For example, as noted above, Huber maintains that the Founders found consumers incapable of understanding and negotiating contracts yet decided that these same individuals were capable of making difficult technological decisions about safe designs for products. The attractiveness of this suggestive comparison notwithstanding, it might reasonably be argued that the analogy fails because in the case of contract, experts are not adversarially presenting the issues and ramifications, whereas just this type of presentation is occurring in court. The better analogy, one might argue, would be between the consumer unable to understand the tortuous language of an adhesive contract and the juror prior to trial or the juror subsequent to trial in which neither attorney employed language or arguments the juror could understand.

Third, although always mellifluous, Huber is wont to employ terms and illustrations that win his case *prior* to and sometimes unaided by argument. In Huber's defense the use of loaded language might be explained in terms of the passion with which the work is written and perhaps the fear that the harm worked by the Founders may not be believed in spite of the arguments he puts forth.

On balance, Professor Huber's work is fantastic and should prove to be thought provoking, and informative. The work is a very nice piece of scholarship.

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Faith and Freedom: The Christian Roots of American Liberty. By Benjamin Hart. Lewis and Stanley. 1988.

Hart's thesis follows: God, the Bible, true religion, and the federal relationship of primitive Christian congregations constitute the fountainhead of human rights, representative government, and the *Constitution of the United States*. This mighty stream goes underground during the early development of Catholicism (following the mistakes of Constantine and Augustine), but emerges with Wycliffe and Tyndale, and becomes an irresistible force in English Protestantism, particularly in the Puritan and Separatist traditions, from which it flows directly into New England with the Pilgrim Fathers and even into ostensibly Anglican Virginia. This stream of faith and thought, respecting the inalienable rights of life, liberty, and property, antedates the Enlightenment (owing it nothing) and largely declines deistic and secular philosophical contributions. Thus, the Framers of the *Constitution* brought pure, Protestant, Christian theism to bear on their political creation and in consequence gave Americans an inspired document whose provisions for the separation of religion and government were intended to protect religion from government (far more than vice versa), to prevent government from advancing one Christian sect over others, and to preclude a national (but not state) ecclesiastical establishments. The virtues and benefits of the *Constitution* together with the benefactions of biblically inspired capitalism, which have made America great, are now imperiled by skeptical, secular, pluralistic, moral relativists, found everywhere from the public schools to the Supreme Court, from the ACLU to universities (harboring revisionist historians), from liberal churches to socialists and communists, and worst of all, one supposes, to card-carrying secular humanists. Unless America awakens and returns to her spiritual roots, perdition awaits. This thesis calls to mind an old refrain.

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The eighth century Hebrew prophets (Amos, Hosea, Micah, Isaiah), surveying the moral and religious conditions of their times, called on Israel to forsake her wicked ways and return to the pure paths of the Mosaic period when the children of Israel walked innocently with their god. Unfortunately, the eighth century prophets knew little or nothing of the thirteenth century (Moses' approximate time) except by rumor and tradition, not a little of which was distorted. To compound their confusion, these prophets were, morally speaking, well in advance of the Mosaic period, yet they were calling Israel back to what they mistook to have been an ideal time in religion and morals. Readers of Hart's book will be treated to similar confusions.

The concept of natural, inherent, universal human rights appears nowhere in the Bible. Conjugal rights are mentioned once in the New Testament (I *Cor.* 7:3), but only in passing and unrelated to the general subject. *The Interpreter's Dictionary of the Bible* (five large volumes including supplement) contains hundreds of entries (including a long one on slavery) but none on rights. Hart, not knowing Hebrew apparently and using only the King James Bible, does not know that 'eved means slave primarily, not the euphemistic "servant" of the King James. In the Old Testament human chattel could be capture in war (*Deut.* 20:10-14), purchased and inherited (*Lev.* 25:44), bred (*Ex.* 21:4), and acquired in the form of people unable to pay their debts (*II Kings* 4:1, *Neh.* 5:5). In the chapter following the Ten Commandments (in *Ex.* 20) comes information concerning a father's sale of his daughter into slavery (*Ex.* 21:7). A slave who is still alive a day or two after being beaten needs not be avenged (*Ex.* 21:21). None of this supports the notion that the Bible teaches inherent human rights.

Hart knows not that the Greek, *doulos*, means slave. Paul was well aware of slavery (I *Cor.* 7:22, 12:13; *Col.* 3:11), counseled slaves to obey their earthly masters in all things (*Col.* 3:22), and sent a particular slave back to his owner (see Philemon). Slavery was so much in his mind that he taught that human beings are either the slaves of Satan or of God (*Rom.* 6:16-23). In this portrayal of their condition, human beings have neither rights nor moral autonomy. The Bible's failure to condemn slavery (in Jesus' day the High Priest, no less, had slaves) and its failure even to introduce the concept of universal human rights leave Hart unsupported.

Moreover, biblical society was patriarchal, hierarchic, theocratic (under Samuel and Ezra), and monarchical (under Saul, David, and the Davidic dynasty in the Old Testament and under the Hasmoneans during the intertestamental period), not

democratic. To make matters worse for Hart, Jesus' teachings are set, in the synoptic gospels, in an eschatological (from *eschaton*, the end time) framework which anticipates a quick, cataclysmic end of the present, wicked world order (*Mk.* 13:24-33; *Acts* 2:17-21; *II Pet.* 3:3-10). Jesus disciples will not have time to evangelize all the towns of Israel (a small country) before the end comes (*Mt.* 10:23, *I Pet.* 4:7), some standing with him will not die before the heavenly kingdom arrives (*Mt.* 16:28; *Jas.* 5:8), the (then) current generation will not pass away before all these things are accomplished (*Mt.* 24:34; *Lk.* 21:32). Paul is so convinced of the speedy end of the present world order that he advises married Christians to abstain from sex with their spouses (*I Cor.* 7:28-31). Although it is unclear what the historical Jesus was about, it is clear that with such a world-view he felt little if any need to address the major social, economic, and political evils of his day and, according to the gospels, did not. He announced, rather, a time close at hand when God's perfect rule would break into the human sphere and when God's will would be done on earth as it was already being done in the heavens. If the parable of the talents (*Mt.* 25:15-30) seems to endorse capitalism, what is one to do with Jesus' command (in *Lk.* 6:30), "Give to every man that asketh of thee; and of him that taketh away thy goods ask them not again."? If the statement (in *Mt.* 22:21), "Render...unto Caesar the things that are Caesar's; and unto God the things that are God's," reveals Jesus' awareness of the differences between government and religion, how can one find out precisely who should get what? He does not say.

Paul's view of the proper relationship between Christians and the state, colored no doubt by his eschatology, was one maintaining the propriety of submission, servility, and political quietism (*Rom.* 13:1-4; *Titus* 3:1). John's gospel (19:11) and the first Petrine letter (2:13-14) agree. The Christian is simply to obey the authorities as ordained by God. If the Pilgrim Fathers and the Puritan Divines found political inspiration in the Bible for the construction of their compacts, covenants, and articles of confederation, they must have misread it as egregiously as Hart. The principal author of the *Declaration of Independence*, however, did not call for Christian submission to George III (à la Paul) but announced that it was the American people's right and duty to overthrow despotic government. The Framers of the *Constitution* were no more naive and Bible-believing in this particular than was Jefferson.

Hart thinks the congregational polity of New England's churches not only pointed forward to the federalism of the *Constitution* but also back to the primitive church. *Acts* 2:44-45 says of the

earliest congregating of Christians, And all that believed were together, and had all things common; and sold their possessions and goods, and parted them to all men, as every man had need. *Acts* 4:34-35 reinforces this early socialism which is never criticized by the author of *Acts* as unChristian. The leader of the developing Jerusalem Church (the earliest) was James, the brother of Jesus, a figure of such towering import that even Paul bent the knee to him (*Acts* 21:17-25). S.G. F. Brandon says (in *Jesus and the Zealots: A Study of the Political Factor in Primitive Christianity*, 1967, p. 165, n. 4), "The dynastic factor in the leadership of the primitive Christian movement has long been recognized." Although the New Testament provides no single polity (and none well worked out) for Christian congregations, hierarchies soon developed, the episcopal form of government becoming the norm. Hart merely announces, but gives no support for, his conviction that the primitive church was paradigmatic for American federalism.

It is common for "true believers" to fancy that all good things flow from their god through their religion. For example, it never occurs to Hart that Christianity may have acquired ideas and values not originally its own, may have baptized these (once alien) items, and passed them on as its own to unsuspecting believers. But this is precisely what has happened—and more than once. The *Dictionary of the History of Ideas* (Vol. III, p. 17b) says, "The influence of Stoic thought came to fruition with the advent of Christianity." Hart seems not to know the importance of Stoicism in introducing the idea of natural law, based on cosmic reason, that transcends the posited laws of various times and places. The notion of natural law leads directly to the idea of natural rights, an idea of utmost importance to the Founding Fathers. That it came more from Stoicism than Christianity undercuts his thesis.

Moreover, he dismisses Aristotle on the ground that he had a god different from Scriptures'. Ernest Barker, who brought out a new translation of Aristotle's *Politics* in 1946 (Oxford University Press) wrote in the preface, "It inspired the political thought of Aquinas: that in turn inspired Hooker: Hooker in turn helped to inspire Locke; and the thought of Locke, with all its ancestry, largely inspired the general thought both of Britain and America in the realm of politics." While the Jews were still enmeshed in theocracy, Aristotle, in his *Politics* (Bk. IV, Chap. 14) was already inquiring into "the methods of establishing constitutions, in relation to the three powers—deliberative [i.e., legislative], executive, and judicial." Samuel Eliot Morison wrote, "Most of the American state and federal constitutions were the work of college-educated

men who had studied political theory in Aristotle, Plato, Cicero, Polybius, and other ancient writers and had given deep thought to problems of political reconstruction" (*The Oxford History of the American People*, p. 271).

The principal Founding Fathers (i.e., Washington, Franklin, Jefferson, Madison, and J. Adams) were much more deistic than Hart cares to acknowledge and, therefore, opposed to religious (including Christian) superstition (see "Deism," in *The Encyclopedia of Philosophy*, Vol. II, pp. 333-34). The *Constitution* they helped in various ways to write marks a sharp break with the tenor of earlier covenants ranging from *The Mayflower Compact* to *The Northwest Ordinance* in which religious goals and theological requirements, such as believing in the Trinity, are prominent.

The *Preamble* to the *Constitution* contains no religious goal among the six enumerated. Its main body contains no article of religious faith and begs no theological questions by presupposing, acknowledging, or invoking any deity whatsoever. Scriptural language and theological concepts never invade its pages. Prayer and pious acts remain beneath its gaze, and it no more requires theism for citizenship than it tolerates religious tests for office holding. In the *Bill of Rights*, religion is treated generically, no more favor being shown to Christianity than to any religion, to say nothing of favoring one sect of Christians above other sects. What is most astonishing about the pervasive secularity of the *Constitution* is not that the Fathers left all traces of Christianity out of it but that they also left all traces of their Deism out of it. As it stands, it could easily have been written by atheists.

The original version of the little known *Treaty of Tripoli*, written by Joel Barlow and signed in Tripoli while Washington was still President but presented to the Senate by President John Adams and duly ratified on June 10, 1797 says in Part:

As the government of the United States of America, is not, in any sense, founded on the Christian religion; as it has in itself no character of enmity against the laws, religion, or tranquillity of Musselmen [Muslims]; and as the said States never have entered into any war or acts of hostility against any Mahametan nation; it is declared by the parties that no pretext arising from religious opinions shall ever produce an interruption of the harmony existing between the two countries [i.e., the United States and Tripoli].

This treaty was clearly designed to allay certain Muslims' fears that our government might treat Muslim states with Christian

prejudice. However, it could as easily have been designed to allay Hindu, Buddhist, Shinto, or any other religion's fears. The treaty simply expresses the truth, particularly from the standpoint of the New Testament.

Hart's book is neither a serious inquiry nor a scholarly work, but, rather, a case of special pleading which results in a Fundamentalist tract, albeit a fat one. It is also a futile work. The vast majority of Americans, especially of educated Americans, is not going to return to the fictitious, even if spiritual, roots Hart fancies he has found in God, the Bible, true religion, and the presumed federalism of the primitive church.

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Hayek's Conservative Liberalism. By Hannes H. Gissurarson. New York: Garland Publishing. 1987.

Hannes H. Gissurarson's *Hayek's Conservative Liberalism*, is a four-chapter dissertation work for Oxford University, attempts to answer some weighty questions regarding the politico-economic philosophy of F.A. Hayek, a Nobel laureate in economics and a profound political philosopher of this century. The questions that Gissurarson seems to have in mind can be divided into two distinct groups. First, is the politico-economic philosophy of Hayek a coherent whole? Do its various threads—anti-rationalism, individualism, traditionalism, spontaneous order, evolutionism, radical policy proposals (denationalization of money, for example)—mesh together? Moreover, what is the structure of the relationship between these threads? Is it like a web, where all threads are independent and equally important though interconnected? Or like a cotton pollen with threads emanating from a center and extending in various directions? Second, does Hayek belong to the camp of either conservatives, (classical) liberals or libertarians? Or does he defy these typical categories and demand a new one?

The answer to the second query is in the title of the book, and Gissurarson erects a new castle of conservative liberalism for Hayek on the road stretching from conservatism to anarcho-capitalism. He argues that Hayek's anti-rationalism and traditionalism sets him apart from the liberals, while his individualism and radicalism differentiates him from the conservatives; but, he continues, the tension between the conservative and the liberal threads in Hayek's thought is apparent. Hayek's theory of spontaneous order, Gissurarson contends, serves as a center holding the threads that extend in seemingly opposite directions. The theory of spontaneous order allows Hayek not only to reconcile

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the intellectual elements of conservatism and liberalism that are traditionally thought to be antagonistic but also helps fill in the elements that are lacking in both. Gissaurarson argues that with the use of spontaneous order theory, Hayek can effectively counter the criticisms of liberalism from conservatism and vice versa. He concludes: "[Hayek's conservative liberalism] is, I believe, a liberalism from which conservatives have much to learn, but Hayek's fellow liberals even more" (p.166).

I

Chapters one and three of the book provide the definition and elaborate on the meaning of conservative liberalism and then discuss it with reference to (Hobbesian/ Hegelian/Habermasian) conservative critics such as Michael Oakeshott, Roger Scruton, Irving Kristol, Charles Taylor, Ian Gilmore, and Noel O'Sullivan. Chapters two and four deal with Hayek's theory of spontaneous order and the liberal critics of Hayek, respectively. I shall first focus on Gissurarson's thesis that Hayek's system has more affinity with conservatism than with liberalism and that the archetypical conservative elements dominate the system enough to call him a conservative liberal rather than a liberal conservative.

According to Gissaurarson, conservative liberalism is to be characterized by two aspects; one, a conception of man as "both very ignorant and fallible in his judgement," and as a limited altruist. Man's altruism is limited since "he will not [be] able to know more than a fraction of people with whom he will have some direct or indirect contact in his life, he will not be able to care much about the rest or to take their interests into account." The second characteristic is the "acceptance and indeed enjoyment of a given concrete historical and social reality, the liberal and progressive civilization of the West... [T]hat man has developed, but not designed, a system of rules which makes this order possible" (pp.10-11).

With the help of Russell Kirk, conservatism is said to be comprised of six elements, two of which—the principle of prudence and variety—seem to be acceptable to all the parties in the dispute: conservative, conservative liberal, and liberal. The remaining four elements are as follows; first, "a transcendent moral order, to which we ought to try to conform the ways of society." Second, the principle of social continuity, that is, "[t]hey prefer the devil they know to the devil they don't know." Third, the principle of prescription or the "wisdom of our ancestors," and the fourth, that men are "chastened by the principle of imperfectability" (p.24).

While comparing the similarities between Hayek and conservatism, Gissaurarson states that "what is interesting from the point of view adopted in this thesis, is that Hayek would agree with all six of Kirk's ideas" (p.24). However, immediately after this statement he points out the difference in the interpretation of transcendent moral order between Hayek and the conservatives: "There is a difference between a moral order upon whose principles it is rational to act as if they are fixed, as Hayek's is, and a moral order whose principles are genuinely believed to be fixed, eternal, and true, as Kirk's is" (p.24). In what sense, then, could Hayek be said to be in agreement with conservatism? A few pages later Gissaurarson generously quotes Hayek denouncing the principle of social continuity by arguing that conservatives uphold the principle because they have no principles with which to criticize the present; they are unable to derive a meaningful political programme from their premises, and that they are fearful of change, "they have a timid distrust of the new as such" (p.31). Above all, the conservatives' resistance to change, Hayek argues, impedes any emergence and maintenance of spontaneous order since spontaneous coordination is possible only if people adjust to the changes as and when required. Is Hayek then in agreement with the conservatives on the principle of social continuity?

On the principle of imperfectability, Gissaurarson does not raise the question whether Hayek and the conservatives have the same meaning in mind. The conservatives' conception of imperfectability is akin to that of "Original Sin," while Hayek is referring to limited knowledge or ignorance and fallibility of human beings. The limited knowledge of man does not imply any existence of an all-knowing being.¹ One could even ask Hayek: By what standard is he labeling man's knowledge as limited? Hayek, to tackle his adversaries on their own ground, usually compares man with the hypothetical Planner and points out that even if each man possessed far less knowledge than the Planner, a competitive liberal order would be more efficient in using and creating knowledge. Moreover, Gissaurarson only alludes to the conservatives' general presumption of coercion in conforming the society to their transcendent moral order, while the use of coercion in the moral arena would certainly differentiate Hayek and the liberals from the conservatives.

Hayek is in agreement with the conservatives on their emphasis on the wisdom of the ancestors, but this does not set Hayek apart from the liberals. On this point, I believe that the best charge that can be levelled against liberalism is only of omission—it has not sufficiently stressed the importance of giving benefit of doubt to

developed traditions before advocating their elimination or change. Liberals have rarely repudiated all customs, morals, traditions, and social institutions, and have never demanded a *complete* reconstruction of a society on “rational” principles.

To demonstrate the superiority of conservative liberalism over liberalism, Gissaurarson argues that conservative liberalism can better handle the conservative criticisms of a competitive market order. Following the lead of Hegel and Habermas conservatives like Kristol, Taylor, and Gilmore have criticized market order as “uninspiring” and “self-defeating” because of its failure to create a sense of community; as Burke put it, “[t]o make us love our country, our country ought to be lovely” (p.83). Gissaurarson answers admirably the conservative charges by pointing out, among other things, that the concept of economic man is not an ethical postulate but only a methodological tool, and that economic theory does not depend on altruism or selfishness of the actors. The conservatives’ conception of human nature as “imperfect” does not allow them a theoretical foundation to argue for any possibility of social progress, but Gissaurarson aptly demonstrates that Hayek’s spontaneous order provides the necessary “self-regulative and self-corrective forces which, if properly cultivated, can operate in a free society, and make some kind of progress possible” (p.7). Besides, a competitive market order enables individuals to search for and fulfill their identities through various types of voluntary associations.

However, all the arguments that Gissaurarson makes on behalf of conservative liberalism can, in my opinion, also be made by liberalism, including the argument of spontaneous order. As we will see later, contrary to Gissaurarson’s contention, the theory of spontaneous order does not depend on the conservative elements of traditionalism and imperfectability.

II

In the final chapter the author tries to show that conservative liberalism is better than contractarianism and libertarian liberalism by contrasting them on three major issues: Traditionalism, common law, and the theory of justice and rights. Focusing on Hayek’s emphasis on traditions, liberal critics like Roy Harrod, Lionel Robbins, and Samuel Brittan charge Hayek with historical relativism and self-contradiction (in proposing radical reforms in monetary and parliamentary systems). How could Hayek condemn slavery of the past? Gissaurarson answers that comparisons over time and space are very difficult and that people

in the past did not have the "concepts, knowledge, and information" to judge the issue. This argument might convince us that we should not apply the present standards of justice if we were to actually execute some slave-owner of the last century; it is not, as Gissaurarson seems to think, a reply to the charge of historical relativism but an acceptance of it (albeit with a reason). Of course one would have to show what is wrong with such historical relativism, but that is beyond the scope of this review.

In defending Hayek's radical policy proposals, the author points out that Hayek is only trying to remove impediments to spontaneous growth of the institutions concerned. However, he overlooks the fact that Hayek is not merely asking to leave the people alone to develop those institutions, but proposing a *specific* monetary and parliamentary system, so the proposals need to be defended on their own merits rather than simply asserting that they allow for spontaneous growth.

The real question, however, is which side Hayek would take in a conflict between tradition and reason. Hayek's discussion of common law provides an answer. In case of a "dead end" in the evolution of common law and when common law tradition conflicts with Hayek's conception of justice (usually the test of universalizability), Hayek favors overriding of common law typically with statutory law. Gissaurarson notwithstanding, Hayek's defense of common law is not based on his faith in traditions; Hayek uses a tradition-independent standard of justice to evaluate common law. In this sense Hayek's view of tradition and reason is not so much in contrast with other liberals.

In the debate over the theory of justice and rights, Gissaurarson's reasons for preferring Hayek's protected-domain theory over the "narrow" rights theory of Robert Nozick and Murray Rothbard ultimately come down to the question: "How are the anarcho-capitalists going to convince people who do not share their conception of human nature, from which they derive their rights...?" (p.156)² He invites the charge of gross ignorance of the rich libertarian tradition that attempts to provide a philosophical foundation for natural rights theory when he states: "You can of course define individual rights in whatever way you like, and then go on to deduce their political consequences.... But this will not appear very persuasive to others than the already converted" (p.156). There seems to be some confusion between philosophical/analytical arguments for or against natural rights theory and the theory's persuasive or polemical power. Many sound arguments do not appear persuasive, otherwise we would not be in the present moras of welfare statism.

It has been repeatedly pointed out that natural rights theorists need make only one "assumption" about human nature...that the use of reason is man's primary mode of survival. Reason is understood not as a tool to construct utopias or social orders, but as a means to deal with practical aspects of human life—its survival and enjoyment. There is a strong parallel between rights theorists' emphasis on reason and Hayek's on knowledge or information. Hayek recognizes that "[h]uman beings are in some respects pretty similar wherever they live; they react to prices; they want more than less" (p.131). Would one claim that human beings "react" to price changes in a more or less predictable way because of tradition, or law, or because of their use of reason in understanding and analyzing the data they acquire?

After shooting down the straw-man version of natural rights theory, Gissaurarson engages Hayek and Ronald Hamowy on the issue of the definition of coercion. The whole discussion centers on the example of an owner of a single spring in an isolated oasis who demands an exorbitant price for water. Hayek wants to call such an action coercive, while Hamowy retorts, "By what standard?" One wonders whether anyone can derive a *general* moral or political principle from this (life-boat) situation. What would Hayek or Hamowy tell the thirsty and dying people of the isolated oasis to do? Consult a common law judge, set up a committee to decide what price is fair, or take over the spring by violence? Besides, brooding over the oasis example does not help settle the question of the definition of coercion.

Reading through Gissurarson's discussion of the libertarian liberal thought, one feels that the objective of the author is mainly polemical: By portraying a wide gulf separating Hayek and the liberals, "full-blooded" conservatives are urged to move into the shining Hayekian castle. This feeling is reinforced when one puts together the author's scattered remarks about the role of government in a society.

I conclude, again, that Hayek has not argued moderate intervention out of court (p.76); there is nothing in the conservative liberal position which prohibits poverty relief, provided it is done outside the market and not by interfering with the price mechanism (p.106); [c]onservative liberals would not agree with romantic individualists, that pornography and prostitution, for example, are experiments in different lifestyles (p.116); [m]onopoly, for example, is a problem which may require some government interference, or

“judicious lordship” (p.125); contrary to what Hayek wants to believe... [s]ome positive rights or welfare rights seem to me to be consistent with the maintenance of a market order (p.151).

III

Gissaurarson argues in chapter two that the theory of spontaneous order is the central theme of Hayekian thought which makes conservative liberalism superior to liberalism and that it rests on conservative ideas of tradition, wisdom of our ancestors, and imperfectability of man. I shall contrast Hayek's theory of spontaneous order with that of Carl Menger who is, in Gissaurarson's opinion, a conservative liberal and also one of the intellectual fathers of Hayek (the other being David Hume).

Hayek's spontaneous order theory is characterized by the twin ideas of evolution and spontaneous formation of an order. That is, cultural evolution through natural selection of traditions and the results of human action but not of human design. It should be noted that the famous phrase “results of human action but not of human design,” conveys the intended meaning only when one equivocates on the word “human,” interpreting in its first use (in human action) as plural and then as singular in its second use. Some would say that it is precisely the equivocation that makes the phrase tick. The equivocation, however, leads to the fallacy of the missing horn, the fallacy with which Hayek and other Austrian economists have charged the proponents of central planning. Austrians have unfailingly pointed out that the relevant choice is not, as is usually posited, between the Plan and no Plan, but between the Plan and the individual plans. Extending this argument one could say that the relevant choice is not between the Human Design and no Human Design, but between the Human Design and the human (plural) designs. This is not a mere exercise in logic, the distinction brings out two—not totally but significantly—different conceptions of spontaneous order, that of Hayek and Menger. Menger recognizes that though social institutions are unintended consequences of human efforts, they are nonetheless products of individuals' interests, knowledge, and design. Gissaurarson, on the other hand treats Menger as a forerunner whose theory of spontaneous order was extended and enriched by Hayek.

The difference between Menger and Hayek crystallizes when one focuses on the Hayekian idea of cultural evolution through natural selection.³ Like Hayek, Menger has an evolutionary theory

of spontaneous order, but in Menger the forces of evolution are entrepreneurs rather than natural selection. Menger consistently emphasizes the fact of dispersed and *differential* knowledge among economic agents, and its relevance to the evolutionary processes of social institutions. While elaborating on his theory of the emergence of money, Menger states:

The exchange of less marketable wares for those of greater marketability...is in the interest of every *single* economic individual. But the actual closing of such an exchange operation presupposes the knowledge of this interest on the part of those economic subjects.... This knowledge will never arise simultaneously with all members of a national group. Rather, at first only a number of economic subjects will recognize the advantage accruing to them. But,...there is no better means to enlighten people about their economic interests than their perceiving the economic successes of those who put right means to work for attaining them... [The general acceptance of money is the product of the practice] for quite a long time on the part of the most perspicacious and ablest economic subjects for their own economic advantage (1985, p.155).⁴

Gissaurarson does describe the above story and recognize Menger's causal-genetic method of explanation but later dismisses it as reductionism and favors Hayekian natural selection.⁵ It is clear that to advance a theory of spontaneous order, one need not subscribe to Hayek's or the conservatives' conception of man as an ignorant and imperfect being.

In conclusion, one may not accept all the answers that Gissaurarson has offered but the questions raised about the consistency and the structure of the various elements of Hayek's thought, its relationship with traditional political theories, and the role of spontaneous order and its conceptualization are of critical importance and deserve further efforts.

1 Graham Walker, in his *The Ethics of F.A. Hayek* (New York: University Press of America, 1986), clearly points out the wide gulf that separates Hayek and that conservatives on issues of morality and law.

2. Here Gissaurarson attacks the subjectivity of the conception of human nature, but he uncritically accepts Hayek's and the conservatives' conception of man as being fallible and imperfect being. One wonders about how the later's conception is judged to be more accurate or realistic than that of the natural rights theorists.

3. The author is also surprisingly innocent of the critique of Norman Barry, "The Tradition of Spontaneous Order," *Literature of Liberty* (Summer 1982): pp.7-58; and Viktor Vanberg, "Spontaneous Market Order and Social Rules," *Economics and Philosophy* (1986): pp.75-100, of Hayek's emphasis on natural selection of traditions.

4. Menger's insistence on human reason and entrepreneurship is very clear in his discussion of the origins of law, *Investigations into the Method of the Social Sciences* (New York: New York University Press, [1883] 1985), pp.225-35. The fact that law is a result of unintended consequences of human efforts is, "however, by no means excludes the genesis of law as the result of human intelligence" (p.230). Moreover, to avoid "any mystic allusions attached to [the word organic or spontaneous]," Menger uses phrases like, "unintended results of historical development" and "unintended results of social development" (pp.149, 130).

5. Anticipating the charge of reductionism, Menger states: "The opinion that the unified nature of those social structures which are designated as 'social organisms' excludes the exact (atomistic!) interpretation of them is thus a crude misunderstanding" (1985, p.144).

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