

REASON PAPERS

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Fall 2011

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Editorial

It's customary to leave expressions of gratitude to the end of an editorial preface, but our first issue as Co-Editors-in-Chief of *Reason Papers* leaves us with debts that deserve to be highlighted from the start. The current issue of *Reason Papers* is the journal's thirty-third in thirty-seven years, the first twenty-six of which were edited by its founder, Tibor Machan (1974-2000). We had the privilege of working as Co-Managing Editors with the journal's second editor, Aeon J. Skoble (2001-2010), for the last five years of his decade as editor. What strikes us on reflection on our predecessors' efforts is the intellectual excitement and interest of the journal they've put in our care. Readers who browse our online archives will, we think, be surprised to discover the now-familiar scholars who got their start at *Reason Papers*, as well as the now-familiar books and ideas first discussed here. Tibor and Aeon have made the "early" *Reason Papers* a tough act to follow. We hope to follow that act well into the journal's next stage, with gratitude for their having taken the journal as far as they have.

We'd also like to thank the small but dedicated group of "tech guys" who have facilitated the journal's transition into the twenty-first century via its website, www.reasonpapers.com. Aeon J. Skoble first arranged to get *Reason Papers* its presence on the Internet in 2005, and David Veksler set up the journal's first website and served as webmaster for its first five years (2005-2010). Stephan Kinsella, Editor of *Libertarian Papers*, took time out of his busy schedule to create and manage *Reason Papers*'s PDF archives, spanning several thousand pages of documents. We owe a particularly large debt to Israel Curtis of Somatic Studios for creating our new WordPress-based site this past summer (and again to Kinsella for help in transitioning over to it); we particularly appreciate the tasteful version of Raphael's "The School of Athens" Curtis chose to adorn the site. Thanks also to Jeff Tucker of the Mises Institute for volunteering to host the site from its inception.

As the journal's newest editors, we are tasked both with maintaining *Reason Papers*'s continuity with its past, and with taking it in new directions of our own. Perhaps the best way to explain both the continuity and the venture into new directions is by way of a gloss on the journal's long-standing subtitle: "a journal of interdisciplinary normative studies." As our website blurb puts it, *Reason Papers* publishes work whose "content is normative in the philosophical sense." So construed, the concept of "the normative" refers broadly speaking to conceptual analyses of three kinds: (a) of the norms or standards by which we evaluate human action and its consequences, (b) of the norms or standards by which we evaluate the conditions and products of those actions, and (c) of the prescriptions for action based on such evaluations. On this understanding, "normative in the philosophical sense" refers principally to inquiry in ethics, political philosophy, philosophy of law, and aesthetics. It also refers to work in meta-ethics on the nature of reasons and value, and to work in economics, political science, and legal studies that provides the raw

empirical material for conceptual analysis. Work in these disciplines has always been at the core of what we publish, and will continue to be.

We suspect, however, that our understanding of “normative studies” is somewhat broader than that of our predecessors, and extends to sub-disciplines within philosophy beyond the ones just mentioned. The contribution of epistemology is perhaps the most obvious. It’s long been a commonplace in epistemology that epistemic norms bear an affinity to ethical ones (e.g., “justified,” “obligatory,” etc.), and that epistemic inquiry has implications that are as central to the evaluation of our social lives as are inquiries in ethics, political philosophy, and the philosophy of law. Though *Reason Papers* has occasionally published work in epistemology, we hope to increase the proportion of work on epistemology that finds its way into our pages. Beyond this, normative theories of meaning have become current in the philosophy of language,¹ and discussions of normative issues have long been central to work in the philosophy of science (e.g., on the value-free or value-laden nature of science) and the philosophy of religion (e.g., on the problem of evil). *Reason Papers* has published very little on any of these topics, but would welcome the opportunity to publish some more. While metaphysics and the philosophy of mind are not *directly* normative in subject-matter, it’s arguable that many paradigmatically normative concepts involve presuppositions about volition and mind that are of interest to both disciplines. So both metaphysics and the philosophy of mind have important contributions to make to normative studies. Finally, questions about the general relationship between fact and value are well-illuminated by work in those parts of the philosophy of biology that focus on fact-based evaluations of health, fitness, and the like (to say nothing of their relevance to bioethics). Our hope, then, is to open up the journal to these previously underrepresented sub-disciplines of philosophy.

Since the concept of “the normative” is a philosophical one, philosophy has always been at the center of *Reason Papers*’s editorial mission. Both of the journal’s previous editors, and both of its current editors, are professional philosophers. But *Reason Papers* is an interdisciplinary journal, not a journal of philosophy, and to that end, the journal’s mission has always been guided by an epistemological ideal of integration or coherence that extends beyond armchair reflection on normative concepts. Crudely put, the idea is that there is one truth out there, but a variety of complementary (or instructively competing) disciplinary routes to it. No one discipline can track that truth by itself, philosophy included. The task is to marry inquiries in ostensibly unrelated sorts of disciplines, to adjudicate the disputes that inevitably arise from such marriages, and thereby to bring unity to the knowledge we have.

¹ See Kathrin Gluer and Asa Wikforss, “The Normativity of Meaning and Content,” *Stanford Encyclopedia of Philosophy*, accessed online at: <http://plato.stanford.edu/entries/meaning-normativity/>.

Put more precisely, we might think of interdisciplinary study by distinguishing two varieties of it: strong and weak. In the strong sense, scholarship is interdisciplinary when it self-consciously involves inquiries from two or more distinct disciplines, and seeks to integrate these inquiries into a single inquiry with a common subject matter.² In a weaker sense, work can be interdisciplinary in the sense of operating within a given discipline but being written so as to be self-consciously accessible to scholars in other disciplines, and amenable to confirmation or development by such scholars. There are probably intermediate senses between these, and hybrids as well. In no sense, however, is interdisciplinary study the special province of philosophy. Philosophers can be interdisciplinary in both senses of the term, but so can anyone else.

Reason Papers aims to be interdisciplinary in all of the preceding senses. We welcome work of a self-consciously interdisciplinary or “mixed” variety, as long as it meets the relevant standards of rigor for all of the fields it discusses. And we welcome work that is conducted entirely within a given field or even sub-field, as long as it is written so as to be accessible to interested readers from other disciplines, and as long as its normative implications are clear or made explicit. Again, we’d like to broaden the journal’s scope beyond what it’s taken in the past. As remarked above, *Reason Papers* has typically been heavy on work from philosophy, economics, legal theory, and political science. We’re eager to see more work from other fields in the humanities and social sciences (e.g. anthropology, art history, classics, cultural studies, educational theory, history, literary studies, musicology, psychology, religious studies, sociology), as well as from underrepresented parts of well-represented fields (e.g., area studies, comparative politics, and international relations in political science), and from professional studies as well (e.g., business, medicine). We’re also inclined to think that physical scientists and mathematicians have important contributions to make to normative studies, and look forward to publishing some.

It’s easy to overlook the significance of one last part of the subtitle. *Reason Papers* is a *journal* of normative interdisciplinary *studies*. Both “journal” and “studies” connote objective academic scholarship, a connotation we wholeheartedly endorse without excluding journalists or independent scholars. It’s worth stressing, then, that while *Reason Papers* has often published work from an Objectivist or libertarian perspective, *Reason Papers* is not an Objectivist or libertarian journal, or for that matter, a journal edited for conformity with any particular philosophical or ideological perspective.³

² For this conception of “mixed” inquiry, see Mortimer J. Adler, *The Difference of Man and the Difference It Makes* (New York: Fordham University Press, 1993), chap. 1. See also Adler’s *The Four Dimensions of Philosophy: Metaphysical, Moral, Objective, and Categorical* (New York: Macmillan, 1993), Parts One and Three.

³ We thus disagree with the characterization of the journal offered by Walter E. Block in his “Austro-Libertarian Publishing: A Survey and Critique,” *Reason Papers* 32 (Fall

We think of the journal as a forum for inquiry and debate across a wide spectrum of views rather than as the instrument of any one ideology, party, or camp.

By reverse token, however, it's also worth stressing that we do not take the journal's commitment to objective academic scholarship to be *incompatible* with polemics, advocacy, or a focus on the immediately contemporary. Contemporary academic culture inherits from Max Weber the unfortunate idea that scholarship must, to qualify as genuinely objective, be detached from the scholar's strongly held normative or political commitments about contemporary issues.⁴ On this view, scholarly prose must be blandly uncontentious rather than polemical; scholarship must be value-neutral rather than normatively committed; and a commitment to objectivity obliges the scholar to forswear discussion of contemporary issues, since the emotional or normative urgency of such issues unfits them by definition for rational discussion. Polemical advocacy about contemporary issues would thus best be left to the activist, the journalist, the lobbyist, and the politician.

We see no reason to accept this conception of scholarship. By its dictionary definition, "polemical" writing is simply writing that is self-consciously disputatious. "Advocacy" is merely the defense of a definite normative thesis. And the "contemporary" refers to what is taking place in the "here and now" of the recent past. There is no good reason to think that polemical advocacy about contemporary normative issues is doomed to irrationality, and ought to be written by everyone *but* those who study the relevant topics within an academic setting. *Reason Papers* is devoted to the proposition that we can do better than that.

The present volume of the journal is a nice exemplification of some of the foregoing themes. As usual, the central focus of the issue is philosophical. Two items focus on issues in meta-ethics and ethics, offering accounts from very different perspectives of the nature of moral dilemmas. Jakub Wiśniewski defends a rationalist conception of moral reasoning in which dilemmas are ultimately accepted as playing an "integral" and "corrective" role. By contrast, Carrie-Ann Biondi's review of recent scholarship on Aristotelian ethics highlights neo-Aristotelian views that (among other things) attempt to dissolve moral dilemmas altogether. A common theme here is the need for *specification* in ethical reasoning—a theme that, as both pieces make clear, links philosophy in important ways to the study of history and literature. Elsewhere, two articles discuss contentious issues in applied ethics, drawing in interdisciplinary fashion on work from legal studies and the philosophy of language. Stephen Kershnar defends

2010), pp. 107-35. See, e.g., p. 130, where the journal is described as "dedicated to libertarianism," and p. 133, where it is described as "mostly libertarian."

⁴ See Max Weber, *The Vocation Lectures*, ed. David Owen and Tracy B. Strong, trans. Rodney Livingstone (Indianapolis: Hackett Publishing Company, 2004).

“extremely harsh treatment” as a form of justified criminal punishment; Mazen Guirguis rejects the legitimacy (not of same-sex civil unions but) of same-sex *marriage*.

Nine pieces explore issues in political philosophy variously related to libertarianism. The issue begins with a symposium on “Rand and Hayek on Cognition and Trade,” featuring contributions by David Kelley and J. A. Baker.⁵ Kelley offers a “descriptive and explanatory” account of the fundamental differences between Ayn Rand’s and Friedrich Hayek’s conceptions of cognition and mind, arguing from an Objectivist perspective that Hayek’s conception “undermines individualism by eliminating the basis for a coherent conception of the human individual.” Baker’s view is friendlier to Hayek and more critical of Rand, suggesting from a Hayekian perspective that Rand’s conception of “socially objective value” is at odds with the best insights of the Austrian economic tradition.

Our Discussion Notes section continues with three debates on kindred subjects. Dennis C. Rasmussen defends his interpretation of Adam Smith’s conception of economic happiness against the criticisms leveled against it by Douglas Den Uyl and Douglas Rasmussen in *Reason Papers* 32; Den Uyl and Rasmussen respond. Claudia R. Williamson offers a friendly amendment to Daniel Klein and Michael Clark’s account of “direct and indirect liberty” from *Reason Papers* 32, while Walter Block offers a frontal attack on it. Klein and Clark will respond to both commentaries in our 2012 issue. Stephen Kershner offers a critique of the anarchist arguments of Aeon J. Skoble’s recent *Deleting the State: An Argument about Government*. We hope to run a response by Skoble in our 2012 issue. Finally, two book reviews draw attention to important recent defenses of libertarian politics. Edward Feser reviews Tom G. Palmer’s admirably interdisciplinary *Realizing Freedom: Libertarian Theory, History, and Practice*, and Scott Gerber reviews David E. Bernstein’s justly celebrated *Rehabilitating Lochner: Defending Individual Rights against Progressive Reform*.

Four items reflect in very different ways on the legacy of 9/11 a decade after the fact, three of them on the intellectual legacy of Islamist ideology. Elizabeth Barre’s review of Roxanne L. Euben and Muhammad Qasim Zaman’s *Princeton Readings in Islamist Thought* brings much-needed precision to our understanding of “Islamism” and related concepts. Irfan Khawaja’s review of books by Paul Berman and Tariq Ramadan raises pointed moral questions about “Western” intellectuals’ responsibility to engage with and pass judgment on the theorizing of “Westernized” Islamist ideologues. David Kelley’s discussion of Islam and the Reformation calls into question a popular historical analogy. And Sadek al-Azm’s commentary on

⁵ Our symposium began life as one called “Hayek and Rand on the Role of Reason,” at the annual conference of the Association for Private Enterprise Education (April 10, 2010, Las Vegas, Nevada) organized by Stephen Hicks of Rockford College. We thank Professor Hicks for his cooperation and help in publishing some of this material.

the Arab Spring gives voice to the author's four decades of militantly secular struggle against obscurantism and tyranny in the Islamic Near East. It's appropriate that in locating the roots of the Arab Spring in the Damascus Spring of 2000—more than a year before the 9/11 attacks—al-Azm confirms his own long-held views about the ultimate impotence of Islamist terrorism. From this perspective, the real struggle for justice in the Arab Near East began over a decade ago in Damascus, boiling over last December in Tunis, and spreading from there to the rest of the Arab world. Osama bin Laden and 9/11 were but a regrettable footnote to this potentially revolutionary moral-political project.

Writing on art history and aesthetics has been an underrepresented but still significant presence at *Reason Papers* since the journal's inception. Adrienne Baxter Bell's masterful treatment of Akela Reason's *Thomas Eakins and the Uses of History* makes a contribution to both fields while also enriching our understanding of American and regional history. Though Bell's review is the only art-related item in this issue, it connects nicely with recent work in *Reason Papers* by Brenda Molife on art history (*Reason Papers*, vol. 28, Spring 2006) and by David E. W. Fenner and Jason Holt on aesthetics (*Reason Papers*, vol. 32, Fall 2010).

At 229 pages, our 2011 issue ought to last readers the year or so it takes to produce a new issue of *Reason Papers*. Our 2012 issue promises to be even bigger. In the meantime, feel free to bookmark our page, keep up with upcoming symposia and calls for papers and reviews at our website (under "News"), and spread the word.

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Symposium: Rand and Hayek on Cognition and Trade

Rand versus Hayek on Abstraction

David Kelley
The Atlas Society

1. Introduction

Ayn Rand and Friedrich Hayek were two of the most important and influential theorists of a free society from the mid-twentieth century onward. Yet they defended the free society from radically different philosophical standpoints. Both were systematic thinkers whose defense of capitalism was rooted in more fundamental issues, and they differed systematically on a wide range of those issues, from metaphysics and epistemology to ethics and political philosophy. In this article, I will discuss the radical difference in their respective views about the nature and power of reason, focusing more narrowly on their respective views about a core issue in epistemology: the nature of abstractions—that is, our concepts for general kinds of things and their common attributes, and the abstract principles and rules that we form with our concepts.

2. Rand versus Hayek on the Power of Reason

Rand holds that reason is the cognitive faculty that produces conceptual knowledge based on the evidence of the senses and logical integration. It is a volitional faculty, one that we control by initiating the effort to think and taking responsibility for the results. On her view, reason is efficacious, allowing for the open-ended acquisition of objective knowledge of the world. The possibility of objective knowledge applies not only to descriptive matters of fact, but also to evaluative and prescriptive principles in ethics and politics. Rand holds that it is possible to establish a rational moral code based on the objective needs and capacities of human beings, a code whose values and principles of action are universal, not culturally relative. And she holds that individuals have the capacity (and responsibility) to rely on reason in choosing their specific goals and applying moral principles to their particular circumstances. Indeed, rationality is the primary virtue in her ethics. Though she is all too aware that many people do not think or act rationally, and analyzes a number of irrational syndromes, she holds that anyone *can* function rationally, at whatever level of intelligence and knowledge, by choosing to exercise reason and making it a practice.¹

¹ Ayn Rand, “The Objectivist Ethics,” in Ayn Rand, *The Virtue of Selfishness: A New*

Hayek, by contrast, is a critic of what he calls “constructive rationalism.”² His concept of rationalism is somewhat idiosyncratic, and is not equivalent to Rand’s conception of reason. Nevertheless, it leads him to claim that “no universally valid system of ethics can ever be known to us,”³ which is obviously not consistent with her view. For Hayek, moral rules have a status lying “between instinct and reason.”⁴ They are not literal instincts of the kind we ascribe to animals; they are not inborn. They are habits people acquire in the course of maturation and experience, as they are acculturated to the norms of their society. But neither are such norms the product of reason. People acquire them essentially by imitation of others, not by understanding their rationale or the long-term benefits of following them. Indeed, says Hayek, they are largely tacit. People incorporate them into their habitual modes of action because of social pressure, conformity, and sometimes coercion.

Neither, Hayek claims, do societies acquire their norms through the insights or teachings of previous thinkers, nor do the norms arise through any “social contract” among individuals. Instead, he offers an evolutionary account to the effect that rules evolve by a process akin to natural selection. Societies that adopt certain rules flourish, increasing in wealth and population; societies that adopt other rules fail and die out. If our rules of behavior and interaction are well-adapted to modern industrial-commercial society, it is because our society survived the winnowing process of social selection, in the same way that natural selection eliminates animal species that are ill-adapted to their physical environments.

This difference between Rand’s and Hayek’s views of moral knowledge carries over to politics, and gives a different cast to their respective defenses of freedom. Rand holds that the organizing principles of a proper society, like the principles of ethics, can be validated by reason. The core political principle is individual rights, which defines and sanctions “man’s freedom of action in a social context”⁵:

The source of rights is not divine law or congressional law [nor tradition nor “social selection,” she would certainly have added in response to Hayek], but the law of identity. A is A—and Man

Concept of Egoism (New York: New American Library, 1964), pp. 13-35.

² Friedrich A. Hayek, *Rules and Order*, Volume 1 of *Law, Legislation and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy* (New York: Routledge, 1973), pp. 9-10; Friedrich A. Hayek, *The Fatal Conceit: The Errors of Socialism* (Chicago, IL: University of Chicago Press, 1988), pp. 61-62.

³ Hayek, *Fatal Conceit*, p. 20.

⁴ *Ibid.*, chap. 1.

⁵ Ayn Rand, “Man’s Rights,” in Rand, *Virtue of Selfishness*, p. 110.

is Man. Rights are conditions of existence required by man's nature for his proper survival.⁶

Rand is referring to the classical rights of life, liberty, property, and the pursuit of happiness. Embodied in a society's legal code, these rights protect individuals against coercive interference from others, including the state. But their essential function is positive: to enable individuals to live by their own rational judgment and to gain the values of trade with others.⁷

Hayek, too, affirms the classical conception of freedom from coercion, and holds that such freedom is essential to the operation of a market economy, with all of its benefits. He gives much less emphasis, however, to rights. And his anti-rationalist conception of moral rules covers political principles and institutions as well: "[M]orals, including, especially, our institutions of property, freedom and justice, are not a creation of man's reason but a distinct second endowment conferred on him by cultural evolution."⁸ Hayek regards this view of moral knowledge and moral psychology as the only protection against "constructive rationalists" who think that they can design and manage society by deliberate, scientific means.

In his famous essay "The Use of Knowledge in Society," Hayek argues that socialist economic planning is impossible because the vast bulk of the knowledge required for the effective allocation of resources is local knowledge of particular circumstances known to particular individuals, knowledge that cannot possibly be assembled in one place, in real time, by a central planning agency.⁹ Such knowledge can be put to use only within the price system of a market, based on individual property, freedom to trade, and protection of contracts. This case for market freedom is essentially negative. Hayek seems to think that if socialist planning were possible, socialism might be the morally ideal system. But the inescapable ignorance of would-be planners excludes that possibility: "If there were omniscient men, if we could know not only all that affects the attainment of our present wishes but also our future wants and desires, there would be little case for liberty."¹⁰

⁶ Ayn Rand, *Atlas Shrugged*, 35th anniversary ed. (New York: Dutton, 1992), p. 1061.

⁷ Rand uses broadly the term 'trade' to encompass not only economic exchange of goods and services, but "all human relationships, personal and social, private and public, spiritual and material," so that rights protect voluntary interactions in all of these realms; see Rand, "Objectivist Ethics," pp. 34-35.

⁸ Hayek, *Fatal Conceit*, p 52.

⁹ Friedrich A. Hayek, "The Use of Knowledge in Society," in *Individualism and Economic Order*, Friedrich A. Hayek (Chicago, IL: University of Chicago Press, 1948), pp. 77-91.

¹⁰ Friedrich A. Hayek, *The Constitution of Liberty* (Chicago, IL: Henry Regnery Company, 1960), p. 29. See also Hayek, *Fatal Conceit*, pp. 6-7.

In defending his view of how moral-political norms arise, Hayek takes the same analysis one step further. Here he argues that if such norms could be understood, assessed, and revised by reason, then utopians might be able and entitled to impose a new ethic of universal brotherhood and solidarity, à la Karl Marx, “from each according to his abilities, to each according to his needs.”¹¹ Hayek does not oppose these collectivist schemes on ethical grounds; he claims instead that they are factually impossible because of our inescapable ignorance—in this case, our ignorance of all of the historical circumstances that produced the norms, the benefits of following the norms, and the complex relation between the norms and society-wide consequences. Once again, his case for a free society is essentially negative.

Rand and Hayek can be seen as representing two different strands of Enlightenment thought. Rand is the best twentieth-century representative of the tradition of John Locke, Thomas Jefferson, and others who have prized man’s power of reason and have wanted to liberate that power in science, production, and the individual pursuit of happiness. What Rand adds to the tradition is an individualist moral theory based on man’s need to think and produce in service to his life, and epistemological insights regarding the nature and validation of reason, including the theory of concepts outlined below. Hayek represents the tradition of the Scottish Enlightenment, including thinkers such as David Hume, Adam Smith, and others who were more skeptical of the power of reason. Such thinkers tend to look at man not as the subject of rational knowledge or agent of rational action, but as the object of an inquiry about how societies function. This is the tradition that gave rise to the concept of “spontaneous order”—order that arises from human action, but not from human design. Hayek extends that concept from economics to the cultural order of norms and, as we shall see, to the functions of mind and brain.

3. Reason and Abstraction

Both Rand and Hayek recognize that the nature and power of reason depends on the nature of the abstractions by which we classify things and identify their common properties. The stark differences in their respective views of the power of reason are paralleled—and explained, at least in part—by the radical differences in their analyses of the nature, origins, and objectivity of abstractions. Before we turn to those differences, however, the fact that both of them identify the abstractness of human knowledge as the central issue in epistemology is worth noting as a striking point of connection. Both thinkers developed their theories outside of academic philosophy. For most of the past hundred years, philosophers have not considered the issue of concepts and abstractions as relevant to epistemology at all. The linguistic

¹¹ Karl Marx, “Critique of the Gotha Program,” in *Karl Marx: Selected Writings*, ed. Lawrence Simon (Indianapolis, IN: Hackett Publishing Company, 1994), p. 321.

turn in analytic philosophy shifted attention from thought to language, and the acquisition of abstract concepts has long been considered a question for psychology rather than philosophy.

In addition, there are striking similarities between Rand and Hayek in the way they employ the idea of abstractness outside of epistemology, as an explanatory term for understanding society. One similarity concerns the evolution of modern society. Hayek often states his view that what he calls “the extended order” of modern society emerged from earlier modes of tribal life, characterized by identification with the group, altruism toward other group members, hostility toward outsiders, and cooperation for common ends. The latter is the most significant aspect for our subject because those common ends are concrete. In tribal life, group members work together on specific tasks: hunting, building shelters, moving from summer to winter areas, and so forth. In the slow evolution to the extended order, the expansion of social contact and trade requires new habits. There are more interactions with strangers, chiefly through trade. Individuals are freer to pursue their individual ends and less bound up in the life of a tribe. Privacy increasingly replaces the completely public, communal life of primitive society.

As a result, the bonds of family and tribal relationships are increasingly replaced by standards of contract, commercial honesty, promise-keeping, and respect for the property of others on principle. The essence of this progression is a change in the way people coordinate their activities. Cooperation to pursue concrete common ends is possible for a small group, but not for a large, modern society, where coordination is achieved by abstract rules. Universal laws replace rule by edicts from tribal leaders. The use of resources is determined by impersonal markets, based on abstract rules of property and contract rather than deliberate distribution of specific goods to each member of a small group. Abstract rules allow the individual to adopt and pursue his own ends; the rules serve to coordinate his actions with those of others so that conflicts can be avoided, but the rules do not demand cooperation with others in any active sense. The rules of property and contract allow coordination among people who do not care about each other and may not even know about each other.¹²

Rand agrees with Hayek in seeing human progress as in large part a movement from tribalism in which people identify themselves with their kinship, ethnic, or other unchosen groups, to individualism in which people identify themselves with their own personalities, projects, and chosen relationships with others. At the core of this progress, in her view, is the increasing premium on the ability to think conceptually. Tribalism is characterized by what she calls “the anti-conceptual mentality,” a tendency to function mentally in a concrete-bound way, using basic-level concepts and language but unable to function with higher-level abstractions.¹³ The anti-

¹² See, e.g., Hayek, *Fatal Conceit*, chap. 1.

¹³ On the distinction among levels of abstraction, see Ayn Rand, *Introduction to*

conceptual mentality, Rand says, tends to treat such concepts as if they were perceptual givens, whose meaning is determined by association—“an indiscriminate accumulation of sundry concrete, random facts, and unidentified feelings”¹⁴—rather than by the logical integration of more basic concepts and a clear definition that specifies the referent of the concept. One aspect of the syndrome is the tendency to treat moral rules as concrete isolated injunctions—don’t lie, love your mother—rather than as principles. Such principles are not clearly distinguished from the rituals and traditions of the group; for that and other reasons, the anti-conceptual mentality breeds dependence on a group that shares the same constellation of values, practices, history, language, etc.¹⁵

Hayek regards socialism as a desire to restore the solidarity and altruism of tribal life within the modern extended order, and thus views its aspirations as a hopeless anachronism.¹⁶ In a similar way, Rand views socialism as a desire to remake modern society in a tribal form in order to free individuals from the need to take full responsibility for their lives, motivated fundamentally by the desire to escape the risk and effort of thinking for themselves. Socialism, in effect, is the desire to make the world safe for the anti-conceptual mentality.¹⁷

A second point of similarity is the recognition of generality as an essential element in law. This is one of Hayek’s major themes; he contributed in a significant way to the analysis and defense of the rule of law, and he stresses the abstract character of proper laws.¹⁸ A central requirement is that laws must apply uniformly to all people (or at least to all who meet a general condition set by the law). In particular, the law must apply to ruler as well as the ruled, an essential condition for the goal of being ruled by law, not by men. The function of such generality is not only to meet a standard of justice, but also to serve an epistemological function: to allow people to make long-

Objectivist Epistemology, ed. Harry Binswanger and Leonard Peikoff, 2nd expanded ed. (New York: New American Library, 1990), chaps. 2-3

¹⁴ Ayn Rand, “The Missing Link,” in Ayn Rand, *Philosophy: Who Needs It* (New York: Bobbs-Merrill Company, 1982), p. 47.

¹⁵ *Ibid.*, pp. 48-50.

¹⁶ Hayek, *Fatal Conceit*, chaps. 4-5.

¹⁷ Ayn Rand, “For the New Intellectual,” in Ayn Rand, *For the New Intellectual* (New York: New American Library, 1961), pp. 10-57. Unlike Hayek, Rand rejects socialism primarily on ethical grounds; she rejected the subjection of the individual to the collective and the underlying ethic of altruism. Nevertheless, as she explains in this essay, she regarded the anti-conceptual mentality as one of the cultural bases for altruist and collectivist doctrines.

¹⁸ See especially Hayek, *Constitution of Liberty*, part II.

range plans because they know in advance what the legal consequences of their actions will be.

Rand would certainly have agreed with this point, given her view that the principles of individual rights are required to allow individuals to act on the basis of reason in a social context. Law in her view must be objective, and her idea of objective law included the formal elements associated with the rule of law. Laws must be general in scope and uniformly applied, with objective procedures for proving criminal guilt and resolving civil disputes.¹⁹ She also wrote extensively about the destructive effects of the discretionary, non-objective nature of government regulations such as anti-trust.²⁰

Rand and Hayek, then, are aligned both in recognizing that the nature and power of reason depends on abstractions, and in using the distinction between concrete and abstract to explain a range of social phenomena. Despite these similarities, they differ radically about the nature, origins, and objectivity of abstractions. That difference is the chief topic of the rest of this article. In the next two sections, I summarize the theories Rand and Hayek put forward. I then turn to the significant points of difference between them.

4. Rand's Theory of Concepts

In her monograph *Introduction to Objectivist Epistemology*, Rand addresses the philosophical issue that is known variously as the problem of universals or the problem of concepts or abstractions. The core of the problem is to explain how concepts for types of things and attributes relate to the particulars we observe in the world. A concept such as 'human' is universal. It includes each and every individual human being. It is not a name for any one person or set of people, but refers indifferently to things that are numerically different. In addition, concepts are abstract. The concept 'human' abstracts from the specific characteristics on which individual people differ, such as height, hair and skin color, sex, occupation, etc. Any individual must have some particular height, color, sex, etc., but may have any within a certain range. Even the rational capacity, an essential feature of humans as such, comes in many specific forms; people differ in degree of intelligence, knowledge, and every other dimension of rationality, and the concept 'human' abstracts from all such differences. To say that John is human and that Jane is human is to make exactly the same claim about them, despite their many differences as individuals. In short, concepts are *universal*: they refer

¹⁹ Ayn Rand, "The Nature of Government," in Rand, *Virtue of Selfishness*, pp. 107-15.

²⁰ Ayn Rand, "America's Persecuted Minority: Big Business," in Ayn Rand, *Capitalism: The Unknown Ideal* (New York: New American Library, 1967), pp. 44-62. See also Ayn Rand, "Antitrust: The Rule of Unreason," in *The Voice of Reason: Essays in Objectivist Thought*, ed. Leonard Peikoff (New York: Meridian, 1989), pp. 254-59.

indifferently to instances that are *numerically* distinct. And they are *abstract*: they refer indifferently to instances that are *qualitatively* distinct.

What we observe in the world, however, are particular things, not universal types as such, and those things are specific, determinate, and concrete, not abstract. So the epistemological question is: How could we acquire cognitive devices with those properties? How—by what process—do we acquire concepts that are universal and abstract when everything present to our senses is particular and concrete? As John Locke puts the issue: “[S]ince all things that exist are only particulars, how come we by general terms; or where find we those general natures they are supposed to stand for?”²¹ The related question is: What justifies us in using concepts when they do not correspond to anything in the world that is actually universal or abstract? In what sense can they be objective?

Rand’s primary concern was to answer the second question—that is, to show how concepts are objective—but to do so she had to answer the first question, regarding the process of concept-formation. The process, she says, begins by grouping things together on the basis of their similarity to each other and their differences from non-similar (or significantly less similar) contrast objects. A child notices, for example, that the dogs he sees are similar, despite their specific differences in size, hair, degree of friendliness, etc. Those differences are certainly observable, but they are less salient than the substantive difference between any of the particular dogs and the cats or rabbits the child has seen. So the child groups those dogs together, isolating them mentally from the contrasting animals. That is the cognitive context in which the child can form the concept ‘dog’ to designate animals like the ones he has grouped together, a concept designating any animal that is similar to these along the relevant dimensions of similarity, such as shape and behavior.²²

In basing concept-formation on similarity, Rand is obviously rejecting the realist theory of universals put forward by many Aristotelians: that concepts correspond directly with some genuinely universal and/or abstract component in things. Abstractions do not exist as such in things, apart from our method of grouping and uniting them into a single object of thought. But she also rejects nominalist and conceptualist theories which explain concepts in terms of similarity, because those theories have never given an adequate account of similarity itself, something she regards herself as doing. For Rand, the grouping of similar objects in isolation from contrast objects is only the first stage in concept-formation. She refers to the members of such a group as “units,” a term reflecting her insight that similarity is a quantitative relationship. What makes two or more things similar is that their specific

²¹ John Locke, *Essay Concerning Human Understanding*, ed. Alexander Campbell Fraser (New York: Dover Publications, 1959), vol. 2, III.iii.6, p. 16.

²² Rand, *Introduction to Objectivist Epistemology*, chap. 2.

characteristics are *commensurable*: they differ in degree on some dimension of measurement. One dog is taller than another, for example, one has longer hair, etc. The second stage of the process is the omission of the measurements of the units. Since the units differ only in degree, we can abstract from the differences and thereby treat the units as identical. We integrate the initial units of the group into a new mental unit, the concept ‘dog’, on the principle that a given dog must have some specific height, hair length, degree of friendliness, etc., but may have any degree (within a specific range) on those dimensions.²³

Rand elaborates and builds on this theory of abstraction in her monograph, and a number of secondary works examine the theory in detail.²⁴ For our purpose of contrasting Rand and Hayek, however, we need only consider two additional points.

The first is the primacy of perception. As an empiricist, Rand holds that the entire conceptual level of knowledge rests on the evidence of the senses, the direct, pre-conceptual perception of objects in the environment. On Rand’s view, it is from direct perceptual awareness of things in the world—and their specific qualities, actions, and relationships—that we form our *initial* stock of concepts. To be sure, the vast bulk of our concepts are not directly formed from perception. Most of them are “abstractions from abstractions,” to use Rand’s phrase.²⁵ We use concepts already acquired to identify more complex similarities and differences among things, including things that are not directly observable, and thereby form higher-level concepts such as ‘government’, ‘justice’, ‘particles’, to mention a few. Nevertheless, the first-level concepts formed from perception are necessary to get the process going. Perception is where cognition begins.

The second point is the objectivity of concepts. The question of objectivity, as noted above, is whether concepts can be considered objective, given that they do not correspond to anything literally universal or abstract in the things themselves. The fact that concepts are derived from perceptual

²³ In speaking of the attributes or characteristics that are common to the referents of a concept, or to the dimensions on which they are commensurable, Rand is not treating them as realist universals. What exists are the specific, determinate characteristics of things and their specific, determinate quantitative relationships. A dimension of measurement is an ordered set of such relationships. See David Kelley, “A Theory of Abstraction,” *Cognition and Brain Theory* 7 (Winter 1984), pp. 26-27, accessed online at: <http://www.atlassociety.org/sites/default/files/TheoryofAbstraction.pdf>.

²⁴ In addition to Kelley, “A Theory of Abstraction,” see David Kelley and Janet Krueger, “The Psychology of Abstraction,” *Journal for the Theory of Social Behaviour* 14, no. 1 (March 1984), pp. 43-67; Leonard Peikoff, *Objectivism: The Philosophy of Ayn Rand* (New York: Dutton, 1991), chap. 3; and Allan Gotthelf, *On Ayn Rand* (Belmont, CA: Wadsworth, 2000), chaps. 6-7.

²⁵ See Rand, *Introduction to Objectivist Epistemology*, chap. 3.

awareness of those things provides part of the answer. What we perceive is “out there,” and the content of perception is a constraint on the concepts we form. That content includes the entities present to our senses, including such of their specific qualities, actions, and relationships that our senses can detect. It also includes the specific similarities those entities have in virtue of those features.

In addition, Rand argues that objectivity does not require a one-one correspondence between concepts and abstract elements in the world. Even more generally, she argues that the objectivity of any mode of cognition—perceptual or conceptual—does not require that the mind mirror reality in some diaphanous way. Our cognitive capacities are natural, biologically rooted functions. They operate in specific ways to produce our awareness of reality.²⁶ If Rand’s theory about the process of concept-formation is correct, then a concept formed in accordance with that process is a valid, objective way to grasp its referents. The nature of the process sets constraints on concepts over and above the need for a perceptual basis. “Rand’s Razor,” for example, prescribes that “concepts are not to be multiplied beyond necessity,” a standard one would violate by forming a concept on the basis of a superficial similarity and thus trying to unite into a single unit items that are essentially different.²⁷ This standard is based on the nature and proper functioning of the process of concept-formation and conceptual thought. Objectivity, then, must be understood as having two elements: (1) an orientation to reality and commitment to taking account of all but only the facts one observes, and (2) the exercise of one’s conceptual capacity in accordance with standards that govern proper functioning.

5. Hayek on Abstraction

To understand Hayek’s view of abstraction, we can begin with his conception of moral rules as lying “between instinct and reason.” Such rules are inherently abstract; they prescribe a *kind* of action in a *kind* of situation. While the rules can sometimes, and to some extent, be articulated explicitly, they normally operate below the level of consciousness. In his theory of mind and knowledge, Hayek extends this concept of preconscious abstractions beyond the normative realm, applying it to the entire realm of cognition and its neurological basis. In all of its operations, says Hayek, the mind operates in accordance with abstract rules, based on classifications of stimuli affecting the sense organs and of patterns of behavioral responses. These abstractions are required even in the elementary perception of concrete objects, and therefore

²⁶ Ibid., chap. 8; David Kelley, *Evidence of the Senses* (Baton Rouge, LA: Louisiana State University, 1986), chap. 1; David Kelley, “Rand and Objectivity,” *Reason Papers* 23 (Fall 1998), pp. 83-86.

²⁷ Rand, *Introduction to Objectivist Epistemology*, p. 72.

cannot be derived from prior sensory awareness of those objects, as Rand (and many other empiricists) have held. As Hayek puts it in “The Primacy of the Abstract”:

[A]ll the conscious experience that we regard as relatively concrete and primary, in particular all sensations, perceptions and images, are the product of a super-imposition of many classifications of the events perceived What I contend, in short, is that the mind must be capable of performing abstracting operations in order to be able to perceive particulars, and that this capacity appears long before we can speak of a conscious awareness of particulars.²⁸

Hayek does not refer to these preconscious classifications and abstracting operations as concepts, but treats them as having the core attributes of concepts: they are both universal and abstract, subsuming numerically and qualitatively distinct items.

In defense of his view, Hayek cites a number of theories in ethology, linguistics, and psychology. The most significant for our purposes is his reference to Hermann von Helmholtz’s theory of “unconscious inference” in perception. Helmholtz, one of the founders of scientific psychology, bases his view of perception on the doctrine that sensations of isolated sensory qualities (a patch of color, a sweet taste, a feeling of warmth, etc.) are the basic mode of sensory awareness, and that perceiving objects as entities possessing those qualities is the result of integrating sensations through inference. He posits, for example, that the visual perception of an object at a distance in three-dimensional space results from inferring what external object, at what distance, could produce the sensations one experiences.²⁹ Many of the theories of perception developed since that time have been variants of Helmholtz’s. The significance for Hayek, of course, is that inference is an operation in which a propositional conclusion is derived from premises or data in accordance with logical rules, and is thus an *inherently* abstract operation.

In his earlier work *The Sensory Order*, Hayek developed his own speculative theory of perception. Like other theorists, he takes his task to be that of explaining how the order of sensory qualities relates to the external world, with the physiology of the nervous system as the intervening explanatory level. His basic idea is an early version of what is now called

²⁸ Friedrich A. Hayek, “The Primacy of the Abstract,” in Friedrich A. Hayek, *New Studies in Philosophy, Politics, Economics and the History of Ideas* (London: Routledge & Kegan Paul, 1978 [1969]), pp. 310-11.

²⁹ Hermann von Helmholtz, *Popular Scientific Lectures*, ed. Morris Kline (Mineola, NY: Dover Publications, 1962), p. 178. For an analysis and critique of this view, see Kelley, *Evidence of the Senses*, chap. 2.

connectionism or neural net theory.³⁰ Stimulation that activates receptor cells in the sense organs sends neural impulses into layer after layer of intervening cells. When these impulses result in the activation of the same response at some layer of the network, the stimuli are “classified” as the same:

By ‘classification’ we shall mean a process in which on each occasion on which a certain recurring [neural] event happens it produces the same specific effect All the different events which whenever they occur produce the same effect will be said to be events of the same class, and the fact that every one of them produces the same effect will be the *sole* criterion which makes them members of the same class.³¹

It is only when this classification has occurred that there can be any sensation of sensory qualities such as red, round, hot, loud, salty, etc. Since a classification is an abstraction, the theory embodies Hayek’s general view on the primacy of the abstract: “If sensory perception must be regarded as an act of classification, what we perceive can never be unique properties of individual objects but always only properties which the objects have in common with other objects.”³² Perceiving an apple, for example, requires a prior classification of it as red, round, having a glossy surface, etc., and is never just perception of *this* apple *here* as a particular.

Hayek also notes that the sensory order evolved to serve the organism’s need to act. He goes on to claim, accordingly, that the neural states underlying the sensory order are characterized not only by incoming stimulation, but also by the outgoing action impulses they evoke. And just as those states specify abstract properties of the stimulus object, they specify abstract kinds of action to take. In this respect, they have the character of rules: if the object is of type X, then perform action of type Y, where X and Y are classes. As Hayek puts it,

[t]hese several dispositions toward *kinds* of movements can be regarded as adaptations to the typical features of the environment, and the ‘recognition’ of such features as the activation of the kind of disposition adapted to them. The perception of something as ‘round’, e.g., would consist

³⁰ See Barry Smith, “The Connectionist Mind: A Study of Hayekian Psychology,” in *Hayek, the Economist and Philosopher: A Critical Retrospect*, ed. Stephen Frowen (New York: St. Martin’s Press, 1997), pp. 9-30.

³¹ Friedrich A Hayek, *The Sensory Order: An Inquiry into the Foundations of Theoretical Psychology* (Chicago, IL: The University of Chicago Press, 1952), p. 48.

³² *Ibid.*, p. 142.

essentially in the arousal of a disposition toward a class of movements of the limbs.³³

These classifications and rules give rise, over time, to a stable representation of the external environment. But this representation is a “distorted reproduction” of objects in that world. Impulses from objects that appear similar are classified together despite differences in the way they act; objects are classified separately even though they behave in the same way. A higher level of neural activity, however, gives rise to conscious perceptual awareness. Though the conscious mind knows of the world only through the classes established by the sensory systems, it is capable of revising those classifications (i.e., the assignment of qualities to objects): “The new classes formed by a rearrangement of the objects of the sensory world are what are usually described as abstract concepts.”³⁴ Despite the higher and more accurate level of classification, however, the underlying process is essentially the same. Concepts, conceptual thought, and abstract reasoning are ultimately operations of the central nervous system that are different in degree but not in kind from the formation of preconscious classifications of sensory impulses.³⁵

6. Hayek’s Functionalism

It is difficult to compare Hayek’s view of abstraction with Rand’s directly.³⁶ Rand is concerned with the metaphysical and epistemological issues in the classical debate about universals and concepts, while Hayek was concerned with issues in what now would be described as philosophy of mind and cognitive science. Hayek neither addresses the classical problems, nor develops any theory of how abstractness and universality are possible. Rand, for her part, offers nothing beyond a few observations about the relation of the conscious mind to the physical brain, which she regards as chiefly a scientific issue.³⁷

Nevertheless, there are clear points of difference between their views of abstraction underlying the basic differences I outlined above about the power of reason. The first of these has to do with consciousness and intentional content. In describing the preconscious operations of the nervous system, Hayek is talking about nerve cells and/or neural circuits. He is

³³ Hayek, “Primacy of the Abstract,” p. 315.

³⁴ Hayek, *Sensory Order*, p. 145.

³⁵ *Ibid.*, pp. 108, 145-46.

³⁶ The only previous systematic comparison, to my knowledge, is Larry Sechrest, “The Irrationality of the Extended Order: The Fatal Conceit of F. A. Hayek,” *Reason Papers* 23 (Fall 1998), pp. 38-65.

³⁷ Rand, *Introduction to Objectivist Epistemology*, pp. 289-90.

speculating about the causal operation of a physical system. In describing the physical system as “classifying” the stimulus (or the neural impulses), he is attributing intentional content to these physical states. On the face of it, this attribution involves an equivocation between causal regularities that we *describe* abstractly and cognitive processes that *employ* abstractions. Natural and man-made physical systems respond in causally regular ways to the factors that affect them. A motion-sensitive light, for example, will respond in the same way to any motion within the range of its infrared device; *we* would describe this in terms of the abstractions ‘motion’ and ‘light’, but the light is not literally employing these concepts, since it is not in the business of classifying, abstracting, or conceptual recognition. The same distinction—and apparent equivocation—applies to Hayek’s description of physical states that embody rules. There is a difference between acting *in accordance with* a rule and *following* one. A projectile “follows” a parabolic path determined by initial angle and momentum, and we can compute the path it will follow from the relevant equation with a specification of initial conditions, but the projectile itself is not literally following that rule by computing what path to take. Instead, it merely behaves in accordance with a rule. Neurons, circuits, and other neural features react in regular (though highly complex) ways to similar stimuli, but this does not mean that the brain is literally classifying those stimuli or following rules.

For many philosophers of mind, however, the motivation for ascribing content to physical states of the brain is precisely to reduce intentionality to causal regularity, and this appears to be Hayek’s view as well. Hayek adopts a position that would now be described as *functionalism*, according to which a mental state is a physical state whose content is nothing but the complex of relations with other physical states that constitute its input (ultimately from sensory stimulation) and its output (ultimately in behavior). Consciousness, on this approach, is an accidental and possibly dispensable attribute of intentional states.³⁸ Hayek claims, for example, that sensory qualities have no intrinsic phenomenological quality; their content consists solely in their effects on other mental states or on behavior.³⁹ In light of his claim that higher-level conceptual thought is to be understood in the same terms, he would presumably agree with contemporary functionalists that even conscious ideas are to be analyzed in functional terms. The content of the belief that snow is white, for example, is entirely relational; it consists in the fact that the belief-

³⁸ For a good introduction to contemporary functionalist theories, see Janet Levin, “Functionalism,” *Stanford Encyclopedia of Philosophy*, accessed online at: <http://plato.stanford.edu/entries/functionalist/>. For a classic statement of the view, see Daniel Dennett, “Intentional Systems,” in Daniel Dennett, *Brainstorms* (Montgomery, VT: Bradford Books, 1978), pp. 3–22.

³⁹ Hayek, *Sensory Order*, pp. 15-16, 18, 35, and 119. See also Hayek, “Primacy of the Abstract,” pp. 315-16.

state arises from certain stimulus conditions and that it results in certain further thoughts and behavior.

Rand, by contrast, holds that intentional content cannot be divorced from consciousness. Consciousness is an axiomatic concept, identifying the basic fact of awareness of objects in the world—from the most primitive sensation to perceptual awareness to conceptual thought and the highest reaches of knowledge in science and philosophy. On her view, every form of cognitive content is a mode of consciousness, in the same way that the distinctive attributes of particular things in the world are modes of the axiomatic concept *identity*. The operations of the nervous system can be described in causal terms, but ascribing content to them without reference to consciousness—describing these states as engaged in abstraction, classification, inference, rule-following, representing objects, etc.—is illicit.⁴⁰

Rand did not deny the existence of subconscious states and processes that have content but are not conscious at a given point in time. On the contrary, she emphasizes their importance, especially in regard to concepts and conceptual thinking. Since the scope of conscious attention—the number of cognitive units we can attend to simultaneously—is very limited, concepts perform the function of unit-reduction. They replace the mass of perceptual information about things of a kind with a concept for that kind. The concept functions as a single mental unit, and the cognitive links that connect it with its referents are automated as subconscious processes that enable us to recognize new instances.⁴¹ Nevertheless, as against the functionalist view that content can be ascribed to neural states without any reference to consciousness, Rand holds that subconscious states are automatizations of information and cognitive procedures that were previously learned consciously. And such states are open to conscious access and recall, at least in principle. In that sense, the concept of nonconscious states with content is dependent on the concept of consciousness.⁴²

7. Hayek's Kantianism

In Hayek's view, perceptual experience and the conscious reasoning based on it are shaped by a preconscious framework of abstract categories and connections among categories. If these abstractions and abstract cognitive operations are not derived from conscious perception, then where do they come from? Some of them are hard-wired, produced by the evolution of the brain; others are established by preconscious processing in the life of the individual. From an epistemological standpoint, both are *a priori*. The result is

⁴⁰ Rand, *Introduction to Objectivist Epistemology*, chap. 4.

⁴¹ *Ibid.*, chap. 7.

⁴² See John Searle, *Rediscovery of Mind* (Cambridge, MA: Bradford Books, 1992), chap. 7, for a more developed version of this view.

a materialist version of Kantianism: we do not grasp reality as it is, but only the representation of reality structured by the categories we impose on it. (While Hayek draws more on Hume overall in his moral and political theory, his theory of cognition has much in common with Kant's, as Hayek himself acknowledges.⁴³) The features we attribute to perceived objects, he says, are not "properties of that object at all, but a set of relations by which our nervous systems classifies them." Perception is "theory-laden," to use the conventional philosophical term. Hayek goes so far as to claim that we could not perceive a fundamentally new kind of object or attribute for which we had no prior abstract category.⁴⁴

From Rand's Objectivist standpoint, any such claim is self-refuting, since it cannot be applied to itself. Writing as a social scientist—putting forward claims about the operation of the nervous system, social and cultural evolution, law, politics, and economics, including his Nobel-Prize-winning work—Hayek presumably means to be taken as describing reality as it is. It is impossible to interpret his theses as a social scientist and philosopher of science unless he means to assert them as true of the world, and true of human knowers including himself, not merely as an expression of his own conceptual framework. But the content of his theory of knowledge implies that his theses *are* just the expression of his conceptual framework. In short, *what he asserts* is not consistent with *what he presupposes* in asserting it.

In any case, any such Kantian perspective is unjustified, since it claims to be based on actual knowledge to make its case. This includes observations and theories from brain science, psychology, ethology, and other sources of specific scientific knowledge, as well as the evolutionary theory of natural selection, which is Hayek's basic reason for thinking there is a general correspondence of mental contents with facts of reality. Hayek draws on all of this knowledge, with apparent confidence that it identifies facts about the world, to support his thesis that our "knowledge" of the world is at best a model that we can revise to some extent but can never fully validate.⁴⁵

⁴³ Hayek, "Primacy of the Abstract," p. 319.

⁴⁴ Hayek, *Sensory Order*, pp. 143 and 176; Hayek, "Primacy of the Abstract," pp. 38-39. See also Robert Nadeau, "Hayek and the Complex Affair of the Mind," paper delivered at the Sixty-Seventh Annual Conference of the Southern Economic Association, Atlanta, Georgia, November 21-23, 1997, Panel session on "Hayek and the Theory of Complexity," p. 6, accessed online at: http://www.er.uqam.ca/nobel/philuqam/dept/textes/Hayek_on_Mind.pdf.

⁴⁵ On the internal conflicts of Kantian theories, see Kelley, *Evidence of the Senses*, pp. 27-35; and the exchange regarding that analysis in David Kelley, Tibor Machan, and Peter Munz, "Letters: The Evidence of the Senses," *Critical Review* 2, no. 4 (1988), pp. 183-87.

8. Active versus Passive Cognition

The final point of contrast between Rand and Hayek concerns the question of whether and to what extent conceptual thinking is an active or a passive process. The question is not about the nervous system, which is obviously engaged in a whirlwind of activity, but about the conscious subject of knowledge. To what extent do individuals act as *agents* in control of the process of thought? To what extent do individuals initiate cognitive processes? To what extent are individuals capable of generating new ideas by thinking outside of their inherited traditions or acquired conceptual framework?

Rand holds that the conceptual level involves active cognitive processing, which we as cognitive subjects have the ability (and responsibility) of initiating, directing, and validating. She holds that forming concepts, unlike perceiving, is an active process of integrating classes of things and differentiating them from other things. Her famous injunction “check your premises” reflects her view that we are capable of identifying the implicit assumptions in our conceptual framework in order to question their truth and revise them as needed.⁴⁶ Her novels dramatize these views through characters who exhibit great initiative as independent, innovative thinkers.

Rand also believes in free will, in the strong sense in which it affirms that we face alternative possibilities open to choice, and denies that all thoughts, choices, and actions are necessitated by antecedent factors. She locates man’s freedom in the choice to think, to raise the level of conscious attention, and to direct attention to relevant facts in the course of reasoning. As noted above, Rand does not speculate about the mind-brain relation, and thus does not offer any specific theory of how the choice to think relates to underlying physiological processes. In my view, the most promising approach is the view of consciousness as an emergent property of the brain’s interaction with the world, a control mechanism that serves the purpose of maintaining unity of action when the nervous system has evolved to a certain level of complexity. Freedom of will is then a further level of emergence related to the additional complexity of the greatly expanded cortex in human beings and the attendant capacities for conceptual thought and self-awareness.⁴⁷

In his political works, Hayek also stresses the creative powers of human beings when left free of coercive controls. But such creativity, he claims, is less the result of conscious thought than of evolution through social selection. The value of freedom is not primarily to enable individuals to innovate by rational insight, but rather to allow a proliferation of ideas, preferences, and practices from which the processes of social selection will

⁴⁶ See, e.g., Rand, “Philosophy: Who Needs It,” in Rand, *Philosophy: Who Needs It*, pp. 1-11.

⁴⁷ Cf. Ayn Rand, “The Metaphysical Versus the Man-Made,” in Rand, *Philosophy: Who Needs It*, p. 34.

filter out the unsuccessful ones.⁴⁸ By the nature of his view of mind, moreover, Hayek is a determinist. The mind just is the brain, the totality of neural states and processes engaged in dynamic interaction with its environment; ontologically, “mental phenomena are ‘nothing but’ physical processes.”⁴⁹ To be sure, he emphasizes that we could never predict or control the thoughts, feelings, or actions of an individual on the basis of underlying physical causes. That would require the impossible task of identifying every dimension of the individual’s neural constitution, every sensory stimulus throughout his life, every dimension of every interaction with his social environment, etc. As a result, Hayek says, we necessarily use the language of mind to describe cognition and action, and we must treat the individual as a unique agent of his actions.⁵⁰ This “as-if” volition, however, is merely a methodological limitation. It does not change the fact of actual determinism, nor does it alter Hayek’s claim that conscious thought operates within a system of preconscious abstractions. Conscious thought gives us some ability to modify our categories and conceptual framework, but not much. As he says in “The Primacy of the Abstract,”

the formation of abstractions ought to be regarded not as actions of the human mind but as *something which happens to the mind, or that alters the structure of relationships which we call the mind . . .* . . . In other words, we ought to regard what we call mind as a system of abstract rules of action . . . ; while every appearance of a new rule (or abstraction) constitutes a change in that system, something which its own operations cannot produce but which is brought about by extraneous factors.⁵¹

It is worth noting here the parallel between Hayek’s spontaneous-order model of society and his theory of mind and knowledge. In his social theory, society is the system, the units are individuals, and their interactions produce a spontaneous order in which there is coordination among individuals but no top-down control. We can understand the general causal principles of the economic system, based on the structural rules that govern interactions among people, but we could not possibly assemble all of the specific local knowledge that determines the specific prices and outputs of the system in such a way as to predict those outputs. In Hayek’s theory of mind and knowledge, the

⁴⁸ Hayek, *Constitution of Liberty*, chap. 2.

⁴⁹ Hayek, *Sensory Order*, pp. 35 and 191.

⁵⁰ *Ibid.*, pp. 193-95. See also Gary T. Dempsey, “Hayek’s Evolutionary Epistemology, Artificial Intelligence, and the Question of Free Will,” *Evolution and Cognition* 2 (1996), pp. 139-50.

⁵¹ Hayek, “The Primacy of the Abstract,” pp. 317-18, emphasis added.

individual is now the system, the units are neural cells, circuits, and larger structures, and their interactions produce a spontaneous order—an order in which there is coordination and coherence in action but at best little top-down control.

9. Conclusion: Hayek and Rand on Epistemology and Politics

The purpose of this article has been chiefly descriptive and explanatory. My goal has been to explain why Rand and Hayek have such different views about the efficacy of reason and its role in the case for a free society by describing their respective theories of abstraction. Those theories belong to the domains of epistemology and philosophy of mind. As an Objectivist epistemologist and philosopher of mind, I side with Rand on every point of contrast, and consider Hayek's approach fundamentally wrong-headed, as the works of mine I have cited will make clear. In any case, these are the domains in which their theories must be evaluated. One cannot validly argue for the truth of one theory in these domains over the other by reference to which provides the best support for political freedom; political philosophy is a derivative branch of inquiry, dependent on prior assumptions about human nature and knowledge.

That said, I believe that Rand's theory of concepts supports a view of knowledge and mental functioning that in turn provides the strongest support for individualism and freedom. On her theory, individuals have voluntary choice over the exercise of their conceptual faculties. Those who take responsibility for thinking, and for acting on the basis of their reason, need freedom from those who don't; and since knowledge is contextual and error is possible, individuals need the freedom to agree or disagree with others and to act independently. Freedom, she says, "is the fundamental requirement of man's mind."⁵²

Hayek's view of abstractions, on the other hand, undermines individualism by eliminating the basis for a coherent conception of the human individual. When he writes about economics and politics, he stresses the individual as a possessor of local knowledge and a source of creative innovation. But his psychological and epistemological theory implies that individuals are less agents than mere crossroads in which genetic, physiological, and social influences interact. Just as would-be government planners of an economy have no way to govern the economy top-down in a rational way, so, for Hayek, the individuals who are the real units of economic activity are equally unable to know and govern themselves by reason. If a defense of freedom depends on individualism, and individualism presupposes individuals capable of genuine self-direction, Hayek cannot successfully defend freedom. He certainly does not provide a moral ideal worth striving for.

⁵² Ayn Rand, "What Is Capitalism?" in Rand, *Capitalism: The Unknown Ideal*, p. 17.

Meaning in the Market: The Incompatibility of F. A. Hayek's and Ayn Rand's Accounts of the Free Market

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It might even be accurate to say that these days, the arguments for liberal orders and free markets from an economic perspective are quite solid and that the next frontier in the battle of ideas is the ethical.

—Douglas J. Den Uyl¹

1. Introduction

What the public requires in terms of an ethical defense of market processes is unclear. Economist and anti-consumerist Juliet Schor notes that many Americans have reservations about our market-based system, but not in a way that “coheres into a persuasive, well-articulated critique”; instead, she recognizes a widespread sense that markets obscure “worthwhile values and ways of living.”²

Non-academics are not the only ones to have vague misgivings about functioning markets. Dan Haybron's work on happiness is bookended by his concerns on how capitalism leads us astray when it comes to what we value. Whereas the rest of his book is carefully argued, on this point he admits only to the same general discomfort that Schor describes, and recognizes the paradox in wanting people to have less freedom for their own good.³

¹ Douglas J. Den Uyl, “Homo Moralis,” *Review of Austrian Economics* 22 (2009), p. 349.

² Juliet B. Schor, “The New Politics of Consumption,” *The Boston Review* (Summer 1999), accessed online at: <http://bostonreview.net/BR24.3/schor.html>.

³ Dan Haybron, *The Pursuit of Unhappiness: The Elusive Psychology of Well-Being* (New York: Oxford University Press, 2008), p. 276. See also, Ian Maitland, “Virtuous Markets: The Market as School of the Virtues,” *Business Ethics Quarterly* 7, no. 1 (January 1997), pp. 17-31.

Indeed, the references to vague ethical reservations about markets, in both academic and popular work, can seem countless and constant. Yet, like Haybron's, they fall short of being full-blown political condemnations of market systems. They do not advocate for systems without markets. Their concerns do not seem to be about exploitation of the poor, nor do they seem to be calls for greater redistribution of wealth. As best I can tell, they express this concern: Markets are necessary for general affluence, efficiency, and freedom, but they also "appoint value" in a way that is not rational, fair, or conducive to personal satisfaction.

The many things that might be meant by "appoint value" are not easily determined, and this fact is, of course, part of the problem. That we pay teachers too little is one example of the sentiment.⁴ That CEOs are paid too much is another. Worries about conspicuous consumption are also representative of the concern, as is the idea that marketing replaces some of our own reasoning about products or best courses of action. The many books against advertising contain such concerns.

If we were to put these worries in some type of judged debate, they might do poorly against the "arguments for liberal orders and free markets." Such a debate is unlikely to happen, but as portions of common wisdom, these inchoate concerns about the market "appointing value" are resilient and need to be addressed. They block reception of economic arguments for markets. They are the stuff against which ethical arguments must be made.

In this article I will suggest that Ayn Rand's ethical arguments about the value of commodities—as seen in her distinction between a commodity's socially objective and philosophically objective value—feed into fears the public already has about markets. I find it surprising that Rand's way of thinking about the value of commodities can be seen to support anti-market worries. I will argue that her position on the value of commodities results from combining a staunch commitment to individualism with a misunderstanding of how prices function in a market.

Rand's commitment to individualism interferes with the two-part solution I propose to handle common reservations over the market "appointing value": (a) a better understanding of what market prices actually represent and (b) a robustly ethical approach to individuals' choices in the market. To take a robustly ethical approach to individuals' choices is to evaluate each of them according to some articulated standard of value, justifying our critiques case by case. I suggest that a political approach defends choices an individual has made because they are hers, whereas an ethical approach is able to condemn choices without questioning our right to make them.

My thesis supports what others have recognized: that some wires have gotten crossed when it comes to economic and ethical justifications of

⁴ I don't mean to hide the incoherence in this point being made when teachers are mostly hired by the state. This is just an aspect of popular views.

the market.⁵ We think we must approve of anyone's free choice in the market because they deserve that freedom. I argue that we need to be able to give ethical approval (or condemnation) even to choices that we do not doubt ought to be free. If we give ourselves permission to take this ethical (and not political) perspective, much of the amorphous "concern" for what markets "appoint" as valuable can be placed on the buyers making the choices in question. This might have a number of good effects on the public's appreciation of markets. I shall begin by providing some background on why the issue of value in the market has been confusing for some time, and then move on to a discussion of Rand's view.

2. Ethics and the Market

Ethicists provide standards for the evaluation of individual choices. An ethicist (as I mean to use the term) will insist upon the ability to evaluate the true or philosophical value of any product bought at any time by any particular person. Was it right for Joe to buy the motorcycle? Ideology about the free market tells us that, regardless of the merit of a person's choices, if they are made in a free market, violating no relevant laws or norms, they can contribute to general affluence for the rest of us. Does this require that we avoid critiquing the merit of a person's (or business's) choices in the market?⁶

I have suggested elsewhere that it does not, although it can be difficult to juggle economic and ethical standards.⁷ Adam Smith, famously, had no difficulty doing so,⁸ though the fact that his critics have been so regularly bemused by this is some evidence of how unusual his stance is. What is far more common is that ethicists emulate Aristotle, and ethically analyze commodities, occupations, and buying behaviors with no appreciation of how general affluence comes about. Aristotle determined, for example, that profit is misgotten; philosophers have the most salutary jobs, bee-keepers good ones,

⁵ Elizabeth Anderson, *Values in Ethics and Economics* (Cambridge, MA: Harvard University Press, 1993).

⁶ Some of those who are working on the vexed relationship between ethics and economics include economist Irene van Straveren, *Caring for Economics: An Aristotelian Perspective* (Delft: Eburon, 1999); and Debra Satz, *Why Some Things Should Not Be for Sale: The Moral Limits of Markets* (New York: Oxford University Press, 2010).

⁷ Jennifer Baker, "Virtue and Behavior: Incorporating Ethical Theory into Models of Choice," *Review of Social Economy* 67, no. 1 (2009), pp. 3-24.

⁸ As explained by Dogan Gocmen, *The Adam Smith Problem: Reconciling Human Nature and Society in The Theory of Moral Sentiments and Wealth of Nations*, International Library of Economics (I. B. Taurus and Co. Ltd.: London, 2007).

shepherds middling ones, and sales people unconscionable ones; and honey and wool are good purchases, whereas items for conspicuous consumption are bad.⁹ Like Aristotle, Rand, as an ethicist, is well poised to describe what she calls the objective philosophical value of certain commodities. About airplanes, for example, she writes “it can be rationally proved” they are “of immeasurably greater value to man (to man at his best) than the bicycle.”¹⁰ Like Aristotle, Rand generates her compliment by invoking her standard for human excellence.

Unlike Aristotle, Rand does not deem philosophically objective value to be the *only* type of value we ought to recognize in the market. Post-invisible hand story, we know better than to oversimplify like Aristotle and assimilate good behavior to good economic outcomes. Rand suggests a second category of value, “socially objective value,” in order to capture the popular appeal of bicycles, Elvis, and the like. I will argue that there is a need for distinguishing philosophically objective value from pricing in the market, but that Rand’s category of socially objective value misleads us.

3. Rand on the Philosophically and Socially Objective Value of Commodities

Rand writes that by “philosophically objective,” she means “a value estimate from the standpoint of the best possible to man, i.e., by the criterion of the most rational mind possessing the greatest knowledge, in a given category, in a given period, and in defined context (nothing can be estimated in an undefined context).”¹¹ She emphasizes that as objectively determinable as value is, these determinations vary considerably, context to context. But, again, as with Aristotle who is capable of judging a person’s situation, Rand also has a more general and generally recognizable context in mind as she shows with her conclusion about airplanes. Aristotle does the same thing: objective or philosophical value is assessed by the standard of man at his best. Man-not-at-his-best, however, will be making types of consumer choices other than those that philosophically astute people do. Aristotle finds these choices subpar and condemnable.¹²

⁹ See Aristotle, *The Politics*, trans. Ernest Barker (Oxford: Oxford University Press, 1995), I.10.1258b; I.9.1257a; I.8.1256a.

¹⁰ Ayn Rand, “What Is Capitalism?” *Capitalism: The Unknown Ideal* (New York: Penguin Books, 1967), p. 23.

¹¹ Rand, “What Is Capitalism?” p. 23.

¹² Aristotle states: “Some men” believe that “mere acquisition is the object of household management,” and the cause of this state of mind is “concern about living, rather than living well.” These men occupy themselves “wholly in the making of money,” and their enjoyment depends on “superfluity.” Furthermore, “if they cannot get (such superfluity) by the art of acquisition, they attempt to by other means, using

Rand's commitment to individualism is apparent in contrast to Aristotle's view, though. Whereas Aristotle warns that, without philosophy, consumer goods valued without limit lead to emptiness and dissatisfaction, Rand seems to assume that, with or without her philosophy being utilized, people buy what satisfies them. She points out that a person with limited reading skills has no "reason" to buy the "objectively" valuable works of Victor Hugo. In another example, she explains that "a microscope is of no value to a little stenographer struggling to make a living; a lipstick is; a lipstick, to her, may mean the difference between self-confidence and self-doubt, between glamour and drudgery," despite her claim that "it can be rationally demonstrated that microscopes are scientifically more valuable than lipstick."¹³ The lipstick purchase is a success. The glamour is obtained. People with tastes unlike Rand's achieve pleasure from their Elvis records. Aristotle, though, would be chary of things bought for the sake of glamour and concerned about people with poor morals getting worse from their enjoyment of rock and roll. Rand respects individual choices in a way Aristotle does not.

In doing this, Rand avoids one of three general mistakes that an ethicist can make in offering up an "ethical" evaluation of a purchasing choice. The first of these we might call (following Martha Nussbaum) Platonism.¹⁴ (I discuss the other two mistakes below in Section 4.) Aristotle himself is guilty of it,¹⁵ and it would be:

- (1) The assumption that every person is on the same developmental course, and that the only sound purchases are those that a person interested in virtue (or philosophy) would benefit from.

Rand is not guilty of (1), as we may take her at her word: "Since values are established contextually, every man must judge for himself, in the context of

each and every capacity in a way that is not consonant with its nature"; see Aristotle, *The Politics*, I.9.1258a1-20. Relatedly, he asserts, "the proper function of courage, for example, is not to produce money but to give confidence"; see *ibid.*, I.9.1258a17.

¹³ Rand, "What Is Capitalism?" p. 25.

¹⁴ Martha Nussbaum, *Women and Human Development: The Capabilities Approach* (Cambridge, MA: Cambridge University Press, 2001), p. 118.

¹⁵ John Tomasi, for example, describes Aristotle's "civic humanism" as an example of an outdated means of justifying political arrangements, as it would involve the "coercive imposition of some people's values on other people"; see John Tomasi, *Liberalism Beyond Justice: Citizens, Society, and the Boundaries of Political Theory* (Princeton, NJ: Princeton University Press, 2001), p. 67.

his own knowledge, goals, and interests.”¹⁶ To underline this point, she makes socially objective value its own category of value. Individual judgments (by all and sundry) are what underlie a commodity’s “socially objective value,” that is, the sum of the individual judgments of all the men involved in trade at a given time, the sum of what they value, each in the context of his or her own life. Thus, a manufacturer of lipstick may well make a greater fortune than a manufacturer of microscopes, even though “it can be rationally demonstrated that microscopes are scientifically more valuable than lipstick.” The lipstick may have more “socially objective” value.

I will try to articulate the many downsides of promoting “socially objective value” as a category into which popular commodities fall. The contrasts between Hayek and Rand are surely well known to close readers of each, but I will focus on the more general issue of whether the market requires, in its defense, the idea that our collective decisions can be read off of, and are revealing of, some type of objective value.

This, in fact, would be Rand’s means of rejecting the vague worries about the market that Schor finds so common: Rand would suggest the market does appoint value, and in the most legitimate of ways, with the proviso that we can distinguish philosophically objective value from market outcomes. Here is some of this defense from Rand:

Within every category of goods and services offered on a free market, it is the purveyor of the best product at the cheapest price who wins the greatest financial rewards *in that field*—not automatically nor immediately nor by fiat, but by virtue of the free market, which teaches every participant to look for the *objective* best within the category of his own competence, and penalizes those who act on irrational considerations.¹⁷

I will use some of the information we have about how we make our purchases to support the reasons Hayek offers as to why the idea that a market “demands the best (the most rational) of every man and rewards him accordingly,” is a misleading description of how buying is done and markets work. I will conclude by arguing that it is Hayek’s description of market outcomes—namely, that the market itself is a type of agent that plays a role in forming our values—that could mitigate some of the worries that Rand’s description would only exacerbate.

¹⁶ Rand, “What Is Capitalism?” p. 24.

¹⁷ *Ibid.*, p. 25, and she continues, “A free market is a *continuous process* that cannot be held still, an upward process that demands the best (the most rational) of every man and rewards him accordingly.”

4. Consumer Research and Rationality

Decades of research done in consumer choice by marketing experts, economists, and psychologists establishes how complicated a matter consumer choice (and rationality itself) is. The practices of consumers are not obvious nor are they transparent—not when we are in that role ourselves, nor to a floundering company. Models of consumer choice that regard it as a matter of deliberate and calculated decision have not held up. By 1979, research done by Richard Olshavsky and Donald Granbois was demonstrating that we cannot be said simply to purchase things as the result of deliberate and calculated decisions.¹⁸ Frequently, our choices in the market are uninvolved or passive. We buy on impulse,¹⁹ making choices that are simple, easy, non-analytic, and rapid.²⁰ It has been found that we are easily swayed by associations we cannot articulate. When interviewed about the items we purchase, we do not report consistent rationales, but give responses such as “I like it” or “I love it.” Sometimes, the criteria we use remain “mysterious,” even though when we choose we do so with certainty.²¹ Inarticulable “cues” can prompt us to buy.²²

¹⁸ Richard W. Olshavsky and Donald H. Granbois, “Consumer Decision Making—Fact or Fiction?” *Journal of Consumer Research* 6 (1979), pp. 93-100.

¹⁹ D. W. Rook, “The Buying Impulse,” *Journal of Consumer Research* 14 (1987), pp. 189–99.

²⁰ Terence R. Mitchell and Lee Roy Beach, “. . . Do I Love Thee? Let Me Count . . . : Toward an Understanding of Intuitive and Automatic Decision Making,” *Organizational Behavior and Human Decision Processes* 47, no. 1 (1990), pp. 1-20.

²¹ Wayne D. Hoyer, “An Examination of Consumer Decision Making for a Common Repeat Purchase Product,” *Journal of Consumer Research* 11 (1984), pp. 822-29. In this study, 120 consumers were observed while making a laundry detergent purchase. The results showed that a great majority of consumers (more than 70%) did not examine more than one package, did not make comparisons between brands or between different sizes within a single brand, and did not examine any shelf tag. The observed consumers spent an average of thirteen seconds from entering the aisle until making the purchase decision. Finally, when asked why they had made that particular brand choice, 91% of the consumers gave a single reason, related to price (e.g., “It’s the cheapest brand”), affect (e.g., “I love it”), performance (e.g., “It’s the best”), or social norms (e.g., “My wife likes it”). A more recent iteration can be accessed online at: <http://www.acrwebsite.org/volumes/display.asp?id=6942>.

²² Sandy Dawson and Minjeong Kim, “Cues on Apparel Web Sites that Trigger Impulse Purchases,” *Journal of Fashion Marketing and Management* 14, no. 2 (2010), pp. 230-46.

We make decisions that do not seem prudent. The research program on what is termed “price-quality” investigates why we knowingly pay prices that are higher than can be justified by the relative quality of various types of purchased products. One set of findings suggests that we overpay as a way to compensate for our uncertainty about a product. Another suggests that we overpay in order to barter for product reliability in the future.²³ If we pay more for a product by Chanel, it is, in part, a way of giving Chanel an incentive to keep its products high quality (even if the initial commodity we buy from the brand is not).

We do not respond to advertising in every case, but when we do, the effects are pronounced, and not traceable to a cogent rationale.²⁴ Advertising guides our decisions in cases where we recognize a lack of information on our part, and recognize, as well, a degree of “perceived differentiation among brand alternatives” along with “perceived consequences of a non-optimal choice decision.”²⁵ The immediate context matters in terms of what and how much we consume: what the item is near, how varied the presentations.

This is the briefest of summaries, and yet it may be enough to have us question the following assumption that underlies the second mistake ethicists can make when moralizing about consumer choices:

(2) Consumers can properly be described as evaluating a product by “evaluating facts of reality” through one’s “consciousness according to a rational standard of value. (Rational, in this context, means: derived from the facts of reality and validated by a process of reason.)”²⁶

A non-Randian, more general version of this mistake, and the third one that ethicists can make, would also be a very poor fit with the data:

(3) Consumers can properly be described as making their choices based on judgments of value.

²³ Available online at: <http://www.acrwebsite.org/volumes/display.asp?id=6402>.

²⁴ Rao H. Unnava and Robert E. Burnkrant, “An Imagery Processing View of the Role of Pictures in Print Advertisements,” *Journal of Marketing Research* 28 (1991), pp. 226-31.

²⁵ Friedrich Hayek, *The Fatal Conceit: The Errors of Socialism* (Chicago, IL: University of Chicago Press, 1988), p. 95.

²⁶ Rand, “What Is Capitalism?” p. 23.

A claim like (3) might seem the only possible way of describing what we do when we purchase, but only if there is no alternative. It is so general a statement that it may be impossible to keep it from applying to any findings researchers have. But such general statements can obscure far better alternatives, alternatives that highlight rather than mask the things we've learned about what we are doing when we buy. Let's turn to Hayek for such an alternative. What else might we be able to say consumers are doing, if they are not making judgments on the basis of value when they make a purchase?

5. What Are We Judging If Not Value? Hayek on Our Purchases

The Barbie is for your neighbor's child, whose birthday is coming up. You will be missing the party, and so would like to contribute a gift. You'd like to appear thoughtful, but not as if you tried too hard. You'd like to give something to this family that has always been kind to you. As you lift the Barbie to get a sense of its heft and to check the innumerable things we do when we choose Barbies (Are the colors pleasing? Does it look well-made?); you might check the price to see if it is, as you assumed, within the range you are comfortable with. If the Barbie were \$30, it would reinforce your expectation that this will be treated as a nice gift. If it were going for \$12, you'd think to look for something else, because you want to give the child a "nice" present. If it were \$60, you would forgo the idea of buying a gift for the neighbor's child altogether, as new possibilities for your spending become more "vibrant" when \$60 is at issue.²⁷

What is it, according to Hayek, for the Barbie to be worth \$20? He explains to us both what it is and what it is not. It is not, he writes in "The Use of Knowledge in Society," "that consumers in evaluating ('demanding') consumers' goods ipso facto also evaluate the means of production which enter into the production of these goods." Even the best economists can casually make such a statement, but they would not mean it literally, Hayek continues, because "taken literally, this statement is simply untrue. The consumers do nothing of the kind."²⁸

It seems obvious that when we are making our choices in the store aisle, we do not have access to information about the means of production. We never will have, nor be able to approximate, the information that

²⁷ This is to use the terminology of experts in consumer choice theory. Mainstream texts on consumer choice include Barry Schwartz, *The Paradox of Choice* (New York: HarperCollins, 2003); George Akerlof and Rachel Kranton, *Identity Economics: How Our Identities Shape Our Work, Wages, and Well-Being* (Princeton, NJ: Princeton University Press, 2010); Sheena Iyengar, *The Art of Choosing* (New York: Twelve, 2010).

²⁸ Friedrich A. Hayek, "The Use of Knowledge in Society," *American Economic Review* 35, no. 4. (1945), p. 529, reprinted online at the *Library of Economics and Liberty*, accessed online at: <http://www.econlib.org/library/Essays/hykKnw1.html>.

producers had at the time of production. The precise options available at that moment may be lost to the producers themselves. Yet we can assume that the producer had, at some time, a keen interest in evaluating her options prudently. What is not obvious, but instead counter to the ways we talk about buying in the market, is the notion that this judgment, made by the producer, is not one that can be connected to the judgment in the store aisle. Hayek insists that it is not safe to say that “the valuation of the factors of production is implied in, or follows necessarily from, the valuation of consumers’ goods.”²⁹ He is a stickler about the logical point: “this, too, is not correct. Implication is a logical relationship which can be meaningfully asserted only of propositions simultaneously present to one and the same mind.”³⁰ And here we see Hayek’s great emphasis, the fulcrum of market processes, the task of the economist:

We must show how a solution is produced by the interactions of people each of whom possesses only partial knowledge. To assume all the knowledge to be given to a single mind in the same manner in which we assume it to be given to us as the explaining economists is to assume the problem away and to disregard everything that is important and significant in the real world.³¹

When it comes to the type of value we are talking about—namely, the value of a commodity being sold in the market—Hayek maintains that such value is discernible *only through* “the mutual adjustment through exchange of the respective (marginal) rates of substitution (or equivalence) which different goods or services have for various individuals.”³² Hayek needs theorists to recognize that, when it comes to commodities, “value is not an attribute or physical property possessed by things themselves,” but solely dependent upon the ability “to take account, in . . . decisions about the use of such things, of the better opportunities others might have for their use.”³³ In other words, we could not meaningfully assess the value of any commodity (as commodity) apart from the price, and price as it appeals to particular individuals given specific ends that they have. (Hayek points out that even these ends are of different sorts, and constantly shifting.) Price, in the incredibly efficient way it does, gives us the information about what others are

²⁹ Ibid.

³⁰ Ibid., pp. 529-30.

³¹ Ibid., p. 530.

³² Hayek, *The Fatal Conceit*, p. 95.

³³ Ibid.

expected to be willing to pay for the opportunity to procure the commodity. Individuals bring to the table information that we cannot codify, nor pretend that it can be generalizable, readable, or static.

Note that Hayek's definition of value offers no way to assess the content of the commodity itself. There are two distinct banks of information in Hayek's account: information about the product itself (had by the manufacturer or very engaged consumers) and then the information consumers collectively provide, in making their appraisal of the relative worth of the opportunity that purchasing the commodity might afford. If we fail to recognize this distinction, we fail to recognize the role consumers play in making the free market work. To suggest consumers are doing more is to open the floodgates to the idea that we can rationally plan markets.

Hayek's explanation costs us many of our common assumptions about what we are doing when we buy. We assume we are assessing value, rewarding merit, apprehending and anointing worth. That is what it feels like. It poses no problem for Hayek if shoppers misunderstand what they do. Market systems accommodate that in practice, but it poses a problem for those of us interested in responding to the worries we have about markets appointing value.

There is a strong temptation to read off a collective evaluation from a product's having been sold. The thinking would go: "So much Elvis is being sold; some need must be being met! We are learning something objective about society today, through their consumer choices for Elvis." But we see the flaw in this thinking, if we turn to the example of water. So much water is being sold. Is this how we recognize the value of water? Is it on a par with Elvis? We need reminders like these, so that we recognize that the value of a commodity is unlike any "quantity observable by our senses."³⁴

6. Appointing Value

I began by proposing that what underlies some vague ethical dissatisfaction with the market is its ability to "appoint value" in ways that are irrational, unfair, and unsatisfying. Rand's response to this type of concern is to argue that the market reveals objective value, and that those with ethical concerns about these results best get over them. I've suggested that this approach will only stoke the fears the public currently has, as the market successes and buying processes that the public already has concerns about are merely held up to be even more vaunted than conventionally thought. Not only are our teachers paid enough, but it is objectively the case that they are. (I recognize that Rand's category of philosophically objective value might make another judgment about teachers, but how that category interacts with socially objective value is something on which I am very unclear.)

What frightens people about markets is surely the impression that we have so little control over the outcomes. Value is being appointed through a

³⁴ Ibid.

process we cannot control or guide. People might buy O. J. Simpson's book, and viewers might watch an interview with Casey Anthony.³⁵ But if we begin to think of prices as part of a signaling apparatus rather than as a system by which we grant value to commodities in some collective way, we might manage to accomplish a few things:

- We could make better sense of changes in price as the waning and ebbing of offered opportunities.³⁶
- Rather than being outraged by the price of things, or the things bought, we could focus on alternative opportunities, including other courses of action (such as not using a car that requires gas).
- We would shift our focus from a personified "market" that is doing things to us, and begin to focus on what we are doing as buyers and sellers.

The last possibility above is the one where I see an opportunity for traditional ethical thought. Ethicists have been frightened away from making such judgments, because we have confused a political justification of individual rights and markets themselves with traditional ethical analysis. If we recognize that we are not undermining defenses of rights or economic theory when we moralize about products, companies, or consumption, we will be able to give robust ethical critiques of each. I do not pretend that ethical evaluation will change the cultural issues that critics like Schor are focused upon, but the encouragement of it will shift the burden from the market itself to us. If we see philosophical value being dishonored and discouraged by advertising, in companies, or by our peers, we can develop a defense of philosophical value and target it properly. We would be aiming our greater

³⁵ O. J. Simpson wrote a description of the murders he was acquitted of in his 2007 intended-to-be memoir *If I Did It: Confessions of the Murderer*. Regan Books printed 400,000 copies of the book, but due to public outcry, cancelled their sale; see James Wolcott, "Murder He Wrote, (Sort Of)," *Vanity Fair*, January 22, 2007, accessed online at: <http://www.vanityfair.com/culture/features/2007/01/ojsimpson200701>.

Casey Anthony was acquitted of murdering her child in Florida in 2011, and the public has carefully monitored whether the media is going to pay for an interview with her. ABC News disclosed that they had paid for photographs prior to the trial. The ethics of payment to a person charged with a crime has been discussed in relation to this case in places such as *The New York Times*; see, e.g., Jeremy Peters, "Paying for News? It's Nothing New," *The New York Times*, August 6, 2011, accessed online at: <http://www.nytimes.com/2011/08/07/sunday-review/paying-for-news-its-nothing-new.html?pagewanted=all>.

³⁶ And it is not as if this proposal has not been made in other forms. Debra Satz rejects the idea of one "best understanding" of types of commodities. She worries that this is too controversial, and she also worries "that there is only a tenuous connection in most cases between the meaning we give to a good and its distribution in a market"; see Debra Satz, *Why Some Things Should Not Be for Sale*, p. 81.

scrutiny not at the market, which is no more than each of us plopping the bananas in our cart when they catch our eye, but at the people making choices. Going forward, I would thus propose we adopt this assumption, which avoids the three mistakes that ethicists can make (as discussed above in Sections 3 and 4) when assessing our purchasing choices:

(4) Consumers presented with priced commodities are presented with a time-based opportunity based on information only the agent herself can access. Consumers, like all agents, are best guided by commitment to ethical behavior, which occurs when they open their rationales and behavior to the scrutiny moral growth requires.

Articles

Do Moral Dilemmas Tell against the Consistency of a Given Moral System?

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1. Introduction and Conceptual Clarifications

In this article I shall look at the issue of moral dilemmas and attempt to analyze its implications for the structure of normative moral systems. My contention is that the phenomenon of moral dilemmas, though real and capable of placing us under two or more jointly unsatisfiable obligations (or duties, moral requirements, etc.), should not be considered a defect of rationality that requires eradication, but, on the contrary, can and should be accepted as an integral part of the application of moral systems, a part oftentimes capable of playing an important corrective role.

In arguing for the above-mentioned conclusion, I shall look at two distinct criteria of consistency¹ that can be applied to the assessment of a given moral system—they are both based on certain standard principles of deontic logic, the second incorporating some significant insights from the field of modal logic. The first criterion assumes that a satisfactory moral system, if properly followed, cannot allow for the occurrence of genuine, irresolvable moral conflicts in the actual world; it can allow for the occurrence of apparent or *prima facie* moral conflicts, but in such cases it must firmly point toward one specific course of action among a pair or a range of apparently conflicting options. The second criterion, on the other hand, counts among consistent moral systems those which allow irresolvable moral conflicts in the actual world, but also holds that there are possible worlds in which no such conflicts occur.

My thesis is that the second criterion should be endorsed as the more plausible of the two, but some of my remarks are intended to suggest that on a

¹ By consistency I mean the absence of logical contradictions in a given theoretical system, which in the case of moral systems translates into the non-existence of situations in which it is logically impossible to meet all of the moral obligations that a given system imposes upon its adherent.

sufficiently strict formulation of what qualifies as genuine adherence to a given moral system, the respective roles that these two criteria assign to moral dilemmas appear quite similar. Having described the overall structure of my work, let me now introduce a few further conceptual clarifications pertinent to the issues at hand.

The category of normative systems that I consider to be relevant to my analysis are rationalist moral systems, by which I mean systems whose principles are to be discovered or constructed by means of the intellect or, more specifically, by means of informal deductive reasoning. Some further, more detailed formal characteristics of rationalist moral systems are specified by Alan Donagan, who writes that

(1) they [the systems in question] rest on a few fundamental principles . . . , which are advanced as true without exception; (2) each of these principles lays down some condition upon all human action as being required by practical reason; (3) those principles do not constitute a set of axioms, from which all the remaining moral precepts of the theory can be deduced; but, rather, (4) the remaining moral precepts are deduced from the fundamental principles by way of additional premises specifying further the conditions those principles lay down as required of all human action.²

As regards the definition of moral dilemma that I shall adopt here, I rely on the summary of the phenomenon in question provided by Ragnar Ohlsson:

In a moral dilemma, the agent acts wrongly whatever he does. Either all available alternatives are forbidden, or two or more actions that cannot conjointly be performed are morally required in the same situation, or one and the same action is both forbidden and absolutely obligatory.³

2. The First Criterion

The first criterion of consistency that I shall look at (hereafter called “the first criterion”) assumes that a consistent moral system, if properly followed, cannot allow for the occurrence of genuine, irresolvable moral conflicts in the actual world. However, as one of my guiding presuppositions is that since moral conflicts are real, it seems to follow from this criterion that although they initially create an impression of logical inconsistency, a well-formed normative system which allows for their occurrence should also allow for

² Alan Donagan, “Consistency in Rationalist Moral Systems” *Journal of Philosophy* 81 (1984), p. 293.

³ Ragnar Ohlsson, “Who Can Accept Moral Dilemmas?” *Journal of Philosophy* 90 (1993), p. 405.

explaining away this impression. Thus, we should ask ourselves: When does a dilemma arise and what rationalist-friendly explanations for its appearance can be adduced?

Two articles written by Bernard Williams in the mid-1960s seem to offer some suggestions on how to answer the first part of the above question. In “Ethical Consistency,”⁴ Williams can be read as saying that a mark of a genuine moral dilemma is the feeling of regret that follows the decision to act on one of two or more conjointly unsatisfiable obligations; in other words, acting on one of two or more apparently conflicting *oughts* does not eliminate the other *ought(s)* from the scene. In “Consistency and Realism,”⁵ on the other hand, he points to situations in which the agent is unable even to reach the stage of feeling regret, since, all things considered, he is in a position where no reasons capable of justifying one rather than another course of action are forthcoming. Williams’s intention is to use these remarks to question the viability of moral realism, but I believe that they could be used in attempts to undermine rationalism as well, since they suggest that there exist difficult moral scenarios in which reason, intellect, or deduction can offer us only little or no help.

Philippa Foot presents some arguments aimed at countering Williams’s objections, which might be useful in elucidating the sense in which a dilemma can be seen as something less than an irresolvable moral conflict.⁶ She distinguishes between, as she puts it, type 1 and type 2 ought statements. Type 1 ought statements assert that one ought to do a certain thing in virtue of certain specific reasons. Thus, when an agent is confronted with a dilemma, he is also confronted with diverse reasons for action—but even if one of them ultimately prevails, it does not follow that the other ceases to be a good reason, and the agent’s awareness of that fact might make him feel regret for not actualizing certain positive outcome(s). The regret in question, however, constitutes an emotional remainder, not a logical remainder, so we need not think that failure to act on one of the jointly unsatisfiable type 1 ought statements impugns the power of our moral intellect or indicates an inconsistency in the moral system to which we adhere. By way of further conceptual clarification, in this context I use the phrase “logical remainder” to refer to a reason that, in hindsight, required being acted upon on pain of inconsistency. “Emotional remainder,” on the other hand, refers to a reason that, in hindsight, required being acted upon on pain of sacrificing a certain value (and feeling a subsequent painful sensation of loss), though the

⁴ Bernard Williams, “Ethical Consistency,” *Proceedings of the Aristotelian Society* 39 (1965), pp. 103-24.

⁵ Bernard Williams, “Consistency and Realism,” *Proceedings of the Aristotelian Society* 40 (1966), pp. 187-206.

⁶ Philippa Foot, “Moral Realism and Moral Dilemma,” *Journal of Philosophy* 80 (1983), pp. 384-86.

attainment of this value was not logically required by a given normative system.

Type 2 ought statements, on the other hand, assert not what one ought to do in virtue of any specific reason (or the corresponding duty, obligation, moral principle, etc.), but what one ought to do all things considered. If, having applied the entire strength of one's rational faculties, one still faces a pair of obligatory alternatives, neither of which is less significant than the other, then it seems that no type 2 ought statement is forthcoming. Consequently, the worry here could be that one is following an inconsistent system of moral guidance, which should be revised and perhaps based on something more than pure deductive reasoning, just as an experiment yielding inconsistent results can be thought to be based on a defective procedure.

However, there seems to be in principle no reason to suppose that the structure of the moral domain is the same as the structure of, say, the experimental domain. As Foot points out, it is not an unfamiliar idea that the former may include an element of incommensurability (this is not to say, of course, that considerations of incommensurability were not raised in relation to the latter area as well). Perhaps the aforementioned scenarios, in which there is seemingly nothing conclusive to be said in favor of either of the jointly unsatisfiable obligations, should be recognized as containing no truth of the matter as to which action is *the* proper one, *the* morally correct one. Having said that, though, it is now crucial to investigate whether incommensurability should be treated as a friend of rationalism or as its enemy.

At this point, it might be worthwhile explicitly to unpack the term in question. By incommensurability with regard to a given set of values I mean the impossibility of reducing those values to a common normative denominator, which implies the inability to judge them according to the three standard comparative relations ("better than," "worse than," and "equally good"). The main worry here is that, in cases where the values among which a choice is to be made are genuinely incommensurable, practical reason or intellect could be seen as incapable of offering us any final guidance, that is, incapable of performing an act of comparison against a common standard. It is therefore important to look at the purported examples of such cases and see whether the difficulties about decision-making that they induce can be said to expose any deficiencies of rationalism.

Let us begin with the familiar example known as "Sophie's Choice."⁷ It involves a scenario in which a woman is forced by a concentration camp guard to choose which of her two children is to be spared and which is to be killed. Extra poignancy is added to the situation by the fact that Sophie's refusal to make a choice will result in both children being killed—a factor that provides her with an irrefutable reason to act rather than remain passive. Is

⁷ See William Styron, *Sophie's Choice* (New York: Bantam Books, 1980); Patricia Greenspan, "Moral Dilemmas and Guilt," *Philosophical Studies* 43 (1983), pp. 117-25.

this a *bona fide* case of incommensurability in morality? On a closer look, it seems that rather than being a genuine instance of a choice between incommensurable values, the scenario under discussion contains an instance of a choice between incomparable outcomes, each of which essentially exemplifies an attachment to *the same* set of values—in this case, maternal love, familial devotion, care, etc. Thus, it appears plausible to conclude that Sophie’s predicament is not a moral dilemma, but a practical dilemma—it no longer belongs to an area in which moral reasons play any action-guiding role, so it should not be taken as potentially damaging to the viability of rationalism.

A caveat might be in place here: moral reasons do not play any action-guiding role in the situation in question only if we assume that Sophie is able to bring herself to make a choice (provided that she really does not consider one of her children to be more valuable than the other). If, however, we assume her to be unable to do so⁸ (since, e.g., we conceive of her as incapable of living with herself whatever she chooses), then we might consider her rejection of the original choice as the recognition of a moral reason not to play an active part in condemning any of her children to death, a reason sufficient to trump the disvalue of carrying on her life with neither of them at her side. Such a decision would indicate that within the moral system to which Sophie adheres, it is possible to compare the worth of acceptance and the worth of rejection of the original choice with respect to the yardstick of some more comprehensive value, even if that value’s name does not figure in any commonly known moral dictionary.⁹ Such an analysis rules out the possibility of the scenario in question’s involving an instance of value incommensurability.

And yet, one might insist that a dilemma where two jointly unsatisfiable outcomes are generated by a *single* norm or by one’s attachment to a *single* value is still a moral dilemma after all. Such a claim, however, would require specifying the element responsible for making a potential resolution in such cases difficult to find. It cannot be a difficulty associated with value choice, since such a possibility is ruled out by definition. Perhaps it can be a difficulty stemming from the fact that the conflicting outcomes at hand are sufficiently different or directed at sufficiently distinct objects? In Sophie’s case, for instance, such a characterization could apply to her children.

This, I believe, is only an ostensible problem. Its appearance seems to hinge on the fact that the descriptions of such putatively problematic scenarios

⁸ In a strict sense, her inability to choose which of her children to save is a choice in itself. Likewise, if her resultant passivity is to be thought of as more than a result of being incapacitated by fear, then there is clearly a conscious mental activity behind it.

⁹ Ruth Chang, “Putting Together Morality and Well-Being,” in *Practical Conflicts: New Philosophical Essays*, ed. Peter Baumann and Monika Betzler (Cambridge, MA: Cambridge University Press, 2004), pp. 118-58.

are too coarse-grained. Take another case involving what seems to be a pair of incomparable outcomes stemming from adherence to a single value or moral principle—a conflict between fulfilling a promise made to one’s mother and fulfilling a promise made to one’s best friend. My contention is that unless the value in question can be further subdivided into, say, the value of being dependable in family dealings and the value of being dependable in dealings with friends (with one of these values trumping the other), there is no moral reason to prefer one outcome rather than another and either is equally justifiable. I take Sophie’s case to admit of a parallel solution: unless one of her children exemplifies some special moral qualities, she can justifiably choose to save either of them, even though that may not alleviate her subsequent grief and possible (emotional) regret. In both cases the crucial point is to make the description of the situation as fine-grained as one’s moral sensibilities allow. This seems to me sufficient to ensure that none of the above scenarios is capable of harming the viability of rationalism.

There are, however, other familiar dilemmatic stories, whose harmlessness might be more difficult to establish. Cases such as that of Antigone¹⁰ (who has to choose between burying her brother, thus performing duties given by gods, and refraining from doing so, thus respecting the order of her king) or that of Sartre’s student¹¹ (who is torn between going to England to join the Free French and staying with his mother and helping her to live), seem to be more likely candidates for exhibiting pairs of authentically incommensurable choices. The origin of this authenticity is the fact that the sets of values among which the heroes of the aforementioned stories must choose are grounded in obligations (or duties, principles, etc.) stemming from different sources,¹² whose lexical ordering seems implausible.

If, given such predicaments, deductive reasoning offers us no decisive push in either direction, then it appears that genuine incommensurability can threaten to render rationalist moral systems incomplete or otherwise deficient. Similar conclusions can be taken to follow, for example, from Simon Blackburn’s discussion of dilemmas.¹³ According to Blackburn, as soon as an agent finds himself in a stable quandary (that is, in a situation where one does not know how to act and where no “further exercise of thought or imagination

¹⁰ Sophocles, “Antigone,” in *The Tragedies of Sophocles*, trans. Richard C. Jebb (Cambridge, MA: Cambridge University Press, 1917).

¹¹ Jean-Paul Sartre, “Existentialism Is a Humanism,” in *Existentialism from Dostoevsky to Sartre*, ed. Walter Kaufmann, trans. Philip Mairet (New York: Meridian, 1957 [1946]), pp. 287–311.

¹² E. J. Lemmon, “Moral Dilemmas,” *The Philosophical Review* 70 (1962), pp. 139–58.

¹³ Simon Blackburn, “Dilemmas: Dithering, Plumping, and Grief,” in *Moral Dilemmas and Moral Theory*, ed. H. E. Mason (New York: Oxford University Press, 1996), pp. 127–39.

can reasonably be expected to alter this”), he has no option but to plump for one alternative. Here is how Blackburn contrasts plumping with choosing (and also with reasoning):

I say “plump” deliberately, because saying that you have to choose carries a bad implicature. Choice is a process that invokes reasons. But the reasoning is all in *before* the case is describable as a stable agent’s quandary.¹⁴ It is because the reasoning leaves no ranking of alternatives, and because this is seen to be irremediable, that there is nothing left to do but plump.¹⁵

So the worry is that in cases of stable quandary, rationalism is unable to propose any alternative to plumping, thus effectively admitting defeat. But is that really so? I believe that the answer is no, but before arguing for it, let me bring into focus another, crucial distinction, drawn from St. Thomas Aquinas, the distinction between moral conflicts *simpliciter* and moral conflicts *secundum quid*. Donagan describes the issue in question in the following informative way:

A moral system allows perplexity (or conflict of duties) *simpliciter* if and only if situations to which it applies are possible, in which somebody would find himself able to obey one of its precepts only if he violated another, even though he had up to then obeyed all of them. For reasons already given, Aquinas held that any moral system that allows perplexity *simpliciter* must be inconsistent. By contrast, a system allows perplexity (or conflict of duties) *secundum quid* if and only if situations to which it applies are possible in which, as a result of violating one or more of its precepts, somebody would find that there is a precept he can obey only if he violates another.¹⁶

The above distinction highlights the importance of retrospective evaluation of our moral lives. This, in turn, suggests a new perspective from which to analyze the apparently irresolvable moral conflicts. So perhaps Blackburn is right in claiming that in stable quandaries reason has little or nothing to offer in prospective terms, but it is plausible that it has much to offer in retrospective terms. In other words, it should enable the agent to

¹⁴ The wording here makes it somewhat unclear as to whether “stable” qualifies the agent or the quandary. However, the broader context of Blackburn’s discussion of the problem at hand makes it clear that “stable” has to qualify the quandary despite the imprecise way he states it.

¹⁵ Blackburn, “Dilemmas: Dithering, Plumping, and Grief,” p. 129.

¹⁶ Donagan, “Consistency in Rationalist Moral Systems,” p. 306.

analyze carefully and minutely the way by which he apparently ended up with two or more conflicting obligations—and having performed the said analysis, perhaps he will find out that he is actually facing a *secundum quid* conflict.

The crucial point here is that the recognition of *secundum quid* conflicts may require quite subtle reasoning. When an irresolvable moral dilemma seemingly arises through no guilt of my own (e.g., I had made several promises to attend various appointments, but my beloved aunt suddenly got sick and I feel that I have a duty to visit and comfort her, and I cannot do all of these things due to time constraints), I need to ask myself whether I have really not made a moral mistake, even though presumably it was a slight one (and hence whether I am not facing a *secundum quid* rather than a *simpliciter* conflict). Perhaps my guilt is very subtle. It might, for instance, consist in violating a general rule of temperance, saying that one should be careful with making promises and avoid burdening oneself with too many of them, knowing that one might not find enough time to fulfill them all.

Such rules, whose violation can result in an irresolvable moral conflict, can be subsumed under a general, second-order, meta-prescriptive principle of the form “One ought to act in such a way that, if one ought to do x and one ought to do y , then one can do both x and y ,”¹⁷ and incorporated as such into a viable and consistent rationalist moral system. The recognition of the importance of observing this principle highlights the retroactive role that reason has to play in an agent’s stable quandaries, where the alternatives and values to be chosen from are genuinely incommensurable.

But can we trace *every* emergence of authentic value incommensurability to our previous infractions of the meta-prescriptive principle mentioned above? It seems that if at least one of the scenarios of the sort adduced by Blackburn turns out to involve a conflict *simpliciter*, then rationalism can be accused of incompleteness after all.

I believe that at this point we have to face a clash of intuitions with regard to what we expect of rationalism and where we see its limits. On the one hand, I do not think it unreasonable to suppose that those who claim that an acceptable rationalist moral system must be capable of providing one with a solution to absolutely every moral conflict could, in principle, find some logically defensible reasons to make a specific, conclusive choice in every scenario involving the apparently incommensurable alternatives, only that such reasons might plausibly seem too far-fetched. In the case of Sartre’s student, for instance, one could claim that the student’s familial duties definitely override his patriotic duties, since his coming into existence was not conditional on the existence of independent France (or any state at all), but it was conditional on the existence of his parents, and hence he owes more to his family (*ceteris paribus*, i.e., assuming that it was not abusive, etc.).

¹⁷ Ruth Barcan Marcus, “Moral Dilemmas and Consistency,” *Journal of Philosophy* 77 (1980), p. 135.

On the other hand, as I mentioned above, such an extension of rationalism could appear unconvincing and redundant. I personally tend to agree with such reservations and think that a viable form of a rationalist moral system should acknowledge that in the situations where reason favors neither of the available alternatives, nor exposes a *secundum quid* conflict, a disjunctive solution is an acceptable option. In other words, in such situations an agent should be allowed to plump. And yet, I do not believe that the system in question should be denigrated as a “watered-down” form of rationalism. On the contrary, I consider it to be a more comprehensive, multi-level rationalism, conscious of the distinction between first-order reasons for choosing a specific outcome among those available, and higher-order reasons for choosing either arbitrarily or on the basis of non-moral evaluations (e.g., aesthetic, pragmatic, etc.) where there are no overriding first-order reasons to prefer any particular outcome.

In this connection, let me spell out more fully what I mean by “disjunctive solution.” What I have in mind is a situation in which: (1) the competing courses of action, that is, the available disjuncts, can be brought under the common denominator of a shared area of concern (e.g., morality, aesthetics, efficiency, etc.)¹⁸; and (2) neither of the disjuncts under consideration can be said to promote the value(s) characteristic of the area in question more or less than the other. What follows from the above is that there is no reason to prefer either course of action, but there is also reason not to try to shun making a choice among them, since that would result in actualizing neither of the valuable outcomes attainable in the circumstances at hand.

I think this also addresses the possible criticism that appealing to “higher-order” principles indicates that rationalism cannot handle value conflicts on its own. Such higher-order principles are, in fact, part of any well-formed rationalist moral system. All that their “higher-orderedness” means is the recognition that as soon as it is found that reason (morally) favors neither of the alternatives at one’s disposal and does not reveal a *secundum quid* perplexity, one can justifiably have recourse to extra-moral reasons in making one’s final decision. In this sense, rationalist moral systems are no different from, say, rationalist economic systems, where, as soon as it is found that there is no reason to prefer either of the alternatives at one’s disposal on the grounds of economic efficiency, it becomes justifiable to tip the balance of one’s choice by appealing to extra-economic grounds.

The above contentions should become even more justified if we compare cases involving value incommensurability with (presumably) more familiar cases of option equality. It does not seem that finding oneself in a situation

¹⁸ If this criterion cannot be met, it indicates that a given pair of ostensibly competing choices cannot be said to figure in any meaningful choice situation (or, to put it proverbially, that the choices in question are as different as chalk and cheese, i.e., too different to be compared in any sensible way). Hence, it is a mistake to think that there is any relevant choice to be made in such situations.

where reason is indifferent to the range of options available indicates any deficiency of rationality on the part of the agent (at least in a given context). After all, such indifference is part of what defines equality, and it seems too much to claim that the notion of genuinely effective reason is incompatible with the recognition of equality among certain options.¹⁹ Consequently, it appears that a consistent moral rationalist can admit that there can be situations where he is confronted with a set of values with regard to which reason remains indifferent, but whose joint actualization he still (subjectively) desires.

To sum up: the criterion of consistency that we looked at assumes that a consistent moral system, if properly followed, cannot allow for the occurrence of genuine, irresolvable moral conflicts in the actual world. Having analyzed it in some detail, can we say that it does justice to the possibilities of any viable form of rationalism? Can it accommodate cases of *bona fide* value incommensurability? In one sense it certainly can, namely, by resorting to the disjunctive solution; it is, however, very important not to equate this step with suggesting the relativist's "anything goes" solution. The rationalist, unlike the proponent of the "anything goes" approach, engages in the process of moral reasoning, aimed at confirming or disconfirming whether the situation he is faced with is one of authentic incommensurability, rather than an instance of a *secundum quid* conflict or a scenario similar to that from *Sophie's Choice*. Thus, the eventual application of the disjunctive solution requires ruling out many other, alternative diagnoses of a given predicament, and that is where reason plays an indispensable role. However, having announced at the outset that there is another criterion of consistency that I find more defensible with respect to the assessment of a given moral system, let me now conclude the present discussion and turn to its analysis.

3. The Second Criterion

The second criterion of consistency that I shall focus on (hereafter called "the second criterion") derives from the meta-prescriptive principle introduced in the previous section in order to help recognize and avoid *secundum quid* conflicts. In contrast with this principle, however, it is extended to account not only for the quandaries brought about by previous violation of some moral precept, but also for those brought about by contingent factors outside of the agent's control. This extension is achieved by shifting the viability of the rule "ought implies can" from the actual world to at least one possible world. Ruth Barcan Marcus provides the following formulation of the criterion in question:

¹⁹ For more on the relation between equality and incommensurability, see, for instance, Derek Parfit, *Reasons and Persons* (Oxford: Oxford University Press, 1984), pp. 430-31; James Griffin, *Well-Being: Its Meaning, Measurement, and Moral Importance* (Oxford: Clarendon Press, 1986), pp. 80-81; John Broome, "Is Incommensurability Vagueness?" in *Incommensurability, Incomparability, and Practical Reasoning*, ed. Ruth Chang (Cambridge, MA: Harvard University Press, 1997), pp. 67-89.

One ought to act in such a way that, if one ought to do x and one ought to do y , then one can do both x and y . But the second-order principle is regulative. This second-order ‘ought’ does *not* imply ‘can’. There is no reason to suppose, this being the actual world, that we can, individually or collectively, however holy our wills or rational our strategies, succeed in wholly avoiding . . . conflict [of obligations]. It is not merely failure of will, or failure of reason [that produces such conflict]. It is the contingencies of this world.²⁰

Further caveats with regard to my understanding of the principle “ought implies can” may be in place here.²¹ Certainly, I do not believe that refocusing this principle on possible worlds is appropriate when it comes to non-conflict cases. For instance, it is not the case that I ought to save a drowning person if I cannot swim (as trying to do so would only result in my drowning and nobody being saved), even though there is a possible world in which I can. But in non-conflict cases the question of the consistency of a given moral system does not arise at all, so there is no need to invoke the second-order “ought need not imply can” principle mentioned above. My contention is that it should be reserved for dealing with dilemmatic scenarios. In sum, I think that next to the standard, first-order precept “ought implies can,” which applies to individual moral injunctions in the actual world, we should recognize the second-order, regulative precept which holds that with regard to any consistent moral system, “ought” needs to distribute over a conjunction in at least one possible world. This last point might signify a departure from Marcus’s view, who seems to hold that ought does not distribute over a conjunction in any possible world. However, I believe that it is a plausible departure, since it appears reasonable to me to claim that if one ought to do A, and one ought to do B, and A and B do not conflict with one another, then one ought to do both A and B.

Another criticism one could raise here is that Marcus’s point is purely logical and has nothing to do with what we can reasonably expect of agents in the actual world. I agree with the first part of the preceding statement, but not with the second. It is true that Marcus’s point is theoretical in nature, but since it is offered as a recipe for tackling the issue of moral dilemmas, I do not believe that we can think of it as divorced from practical considerations. On the one hand, it provides relief, but on the other hand, it warns against resting on one’s laurels. That is, it firmly denies that morality requires the near-impossible, but it also affirms that it requires as much as possible. To expound and reiterate, the second criterion says that even if a strict adherent of a given moral system finds himself in an irresolvable moral dilemma, he should not judge the system in question as inconsistent. This is because the actual world

²⁰ Marcus, “Moral Dilemmas and Consistency,” p. 135.

²¹ As was pointed out to me by an anonymous referee.

is full of extraneous influences, which are capable of landing even the most careful agent in situations of inextricable conflict. Bearing that in mind, one should be content with the thought that the moral system one follows is able to resolve every moral dilemma in at least one possible world. However, in order to validate the claim of one's authentic adherence to a given set of principles, one should also strive to make the actual world as close as possible to the ideal possible world mentioned above.

Let us consider one concrete example that might be helpful in elucidating the difference between the diagnoses offered by the meta-prescriptive principle incorporated into the first criterion and its extended version, developed into the second criterion. I start a business with a partner, leaving half of the managerial duties in his hands and taking the rest into my own. Later, I make some commitments to my family or friends, but then I find out that my partner has made a significant blunder and I need to rush to repair it if our business is to survive. Again, the quandary of having to decide between the values of my professional and personal life *might* turn out to be a *secundum quid* conflict, since I might have violated a rule which warns against entrusting morally consequential decisions to those whom we may expect to lack the necessary competences (without at least ensuring ourselves against the potential risk beforehand).

But the same dilemma might have arisen even if I knew that my partner is the most competent man in the world. The contingencies of reality are simply too numerous and pervasive even for the most prudent and industrious person to overcome on every occasion. Thus, even for the most prudent and industrious person "ought" need not always imply "can," although his guiding principle should be to live in such a way as to preserve the above implication as often as possible.

Further illuminating observations on the rule "ought implies can" are presented by Roger Trigg.²² He finds it difficult to agree with the claim made by authors, such as R. M. Hare, according to which an important element of our moral development consists in turning informal rules of thumb into concrete, precise precepts "with their exceptions definitely laid down."²³ Such a view threatens with the assumption that every moral principle must be regimented with a *ceteris paribus* clause. As Trigg writes:

However precise the rule, it always seems possible to be able to invent a situation, however unlikely, where it looks as if we ought to break it. There are very few actions which could not be justified if the fate of the world depended on what we did. If Hare is right, this means that we should not in such situations think of ourselves as

²² Roger Trigg, "Moral Conflict," *Mind* 80 (1971), pp. 41-55.

²³ R. M. Hare, *The Language of Morals* (Oxford: Oxford University Press, 1952), p. 51.

breaking the rule. We rather modify it, so that it does not apply to that particular type of combination of circumstances.²⁴

Why should the incorporation of *ceteris paribus* clauses into particular moral precepts be considered a threat (and a threat to what)? It may be true that their introduction can preserve the classical or “actualist” interpretation of the “ought implies can” rule,²⁵ but it also undermines the very need for having clearly formulated moral principles. The point is that reality often confronts us with situations where others things are not equal, and that, given the views of people like Hare, invites the practice of inventing exceptions in every more or less troublesome context, starting with the former and gradually including more and more of the latter.

Consequently, a moral principle reduces to a summary of all the decisions made in the past in specific circumstances, which could help one in being “consistent in the future if exactly similar situations arise, but as situations very often are not exactly similar even in morally relevant ways we still have to make up our minds without any rule to guide us.”²⁶ Relying on such summaries can be acceptable for an act-utilitarian, who subjects all of his actions to the overarching principle of maximizing the impartially and quantitatively understood utility (together with all of the numerous problems surrounding its formulation and application, which we need not discuss), but not to someone who, like Hare, sincerely employs rule-based moral language, thereby committing himself to genuinely rule-based moral reasoning.

Let us recall that the crucial insight offered by the second criterion is that an occurrence of a conflict of rules should not immediately be interpreted as an indication that the normative system to which they belong is logically inconsistent. This interpretation might turn out to be correct if the rules in question prescribe doing two mutually incompatible things for theoretical reasons, that is, reasons having to do with their logical structure—for instance, if one of them is an absolute injunction to tell the truth and another is an absolute injunction not to denounce innocent people. If, however, they prescribe doing two mutually incompatible things due, broadly speaking, to problems of practical implementation, then the resulting inconsistency is most probably not a logical defect of the normative system to which the agent adheres, but an inevitable effect of the contingencies of the world. Again, according to the second criterion, for a given set of principles to be consistent, there needs to be at least one possible world in which the application of that set of principles does not yield any dilemmas. A natural further extension of

²⁴ Trigg, “Moral Conflict,” p. 41.

²⁵ By the classical or “actualist” interpretation of the “ought implies can” rule, I mean the one according to which “ought” always implies “can” in the actual world.

²⁶ Trigg, “Moral Conflict,” p. 43.

this line of reasoning is that one should aim at making the actual world as close as possible to that ideal possible world. Hence, the rules comprising the moral system of one's choice should be treated seriously, that is, kept fixed and not modifiable in the face of contingently (though irresolvably) dilemmatic situations.

Drawing once more on Foot's distinction introduced in the previous section, we can say that even though one needs to resort to a type 2 ought statement (and thus break one of the conflicting precepts) in order to overcome a dilemma, the two jointly unsatisfiable type 1 ought statements (each of which corresponds to one of the precepts in question) do not lose their force. What is the significance of their retaining this force and how does this phenomenon manifest itself? It seems that the main issue here is the importance of keeping the moral institutions constituted by the observance of the relevant rules strong and stable. Suppose, for instance, that one admits that, for the sake of getting out of an otherwise irresolvable quandary, he broke the rule of, say, promise-keeping. If such an individual realizes that to the extent that something bad happened and some sort of compensation or restitution has to be made, he can be said to respect, understand, and recognize the binding force of the institution of promise-keeping. This attitude is what crucially distinguishes the agent in question from someone who nonchalantly breaks his promises due to being totally unconcerned with acting morally.

The compensatory behavior referred to above might be thought of as prompted by feelings such as hesitation, reluctance, or disgust at the moment of breaking a given principle and regret, remorse, or guilt after breaking it, but such a picture appears to be laden with emotional overtones not at all consonant with rationalism. It is better to interpret the need to make redress for the wrongs done as indicative of rule internalization, that is, the process of embedding and solidifying one's own attitudes, beliefs, and values, which results in making them genuinely integral to one's moral behavior. This, in turn, serves to ensure that they are given serious attention whenever the agent engages in the process of moral reasoning and that they play a prominent, action-guiding role in his ultimate decisions.

Despite its merits, however, some authors propose alternatives to the above story, presumably in an attempt to save the principle "ought implies can." Hillel Steiner, for instance, argues in a rejoinder to Trigg that in the apparently problematic scenarios described by the latter, the agent should be thought of neither as breaking nor as modifying a given moral rule. Instead, he should be thought of as creating a new rule, since a dilemmatic situation confronts him with a new circumstance, and neither of the putatively conflicting rules available beforehand was formulated with the intention of dealing with such a circumstance. As Steiner writes:

[A] situation in which factual conditions corresponding to both C and C2 exist, is one in which our individual actually confronts a circumstance—namely, C + C2—which is different from either C or

C2. . . . Therefore, moral rules respectively covering what ought to be done when C or when C2, do not apply to this situation. What applies to this situation is a rule covering what ought to be done when C + C2. And this is a different moral rule, enjoying the same logical status as the other two.²⁷

But this proposal seems to parallel Hare's view and share all of its objectionable features. Harean prescriptivism conceives of moral development as a process whereby commonplace action-guiding practices are turned into formalized principles, each with its scope of application precisely spelled out. Hence, for instance, it enjoins the observance of a given rule X, but only if none of the exceptional circumstances C1, C2, C3 . . . CN obtains. Steiner's suggestion, on the other hand, requires one to include in the description of a given rule all specific, morally relevant circumstances constitutive of the range of situations that the rule in question is supposed to cover. (Consequently, one is supposed to end up with a set of injunctions of the form "apply the rule X only if all the circumstances C1, C2, C3 . . . CN obtain.") It is not difficult to notice that the two views under discussion are mirror images of one another.

Just as Hare's position threatens to impose on us an insurmountable task of finding and listing infinitely many possible circumstances which override the applicability of a given principle, Steiner's position requires us to accomplish an equally insurmountable task of specifying and listing infinitely many possible factors that might bear some moral relevance to a given principle. Potential combinations of such factors are endless, and Steiner seems to acknowledge this fact, but instead of recognizing it as a difficulty for his proposal, he enjoins us to grasp the infinite and extract the finite out of it (presuming, of course, that the rules of a normative system one adheres to should have finite descriptions):

Indeed, any one factual statement may be partially descriptive of a wide range of different circumstances, covered by a correspondingly diverse range of moral rules. Consequently, in order to know what sort of rule applies in a particular situation, it is vital to ascertain *all* the morally relevant facts about that situation.²⁸

I take it that normative rules are supposed to work prospectively, that is, the point of having them is to know how to act in future situations. They cannot fulfill this role, however, if we are to invent a new rule for every new set of circumstances that we encounter. It appears implausible to suppose that such sets of circumstances, in exactly the same form, will occur very often. If,

²⁷ Hillel Steiner, "Moral Conflict and Prescriptivism," *Mind* 82 (1973), p. 587.

²⁸ *Ibid.*, p. 588.

on the other hand, we wish to avert the above problem by specifying all of the rules of a given normative system in advance, while at the same time respecting the requirements of Steiner's proposal, then we end up with a practical impossibility. As I have already mentioned, the number of possible combinations of circumstances that one can consider is infinite, and it is impossible to adhere to a system containing an infinity of rules (or a system whose rules have infinite descriptions).

In sum, the attempts of authors such as Hare and Steiner to save the universal applicability of the principle "ought implies can" appear to lead to counterintuitive and overambitious conclusions with regard to the nature of rational moral thinking. The second criterion, on the contrary, makes very good sense of the claim that "ought" need not always imply "can" (though we should strive to ensure that this implication holds as often as possible) and that rules can sometimes be broken. It need not indicate that the system to which they belong is logically inconsistent, but it always points toward the sensible conclusion that the contingencies of this world may overcome even the most sophisticated moral logic.

4. Conclusion

I have attempted to show that the occurrence of moral dilemmas in the course of one's life need not imply that the moral system one follows is logically inconsistent, regardless of whether assessed against the first or the second criterion. In relation to both of these criteria, the emergence of dilemmas may play the important role of suggesting what corrective measures should be taken in order to avoid similar predicaments in the future.

In the case of adopting the first criterion, reflecting on an apparently dilemmatic situation can reveal a *secundum quid* conflict, an instance of misidentifying a practical conflict as a moral conflict or an instance of genuine value incommensurability. Adopting the second criterion, on the other hand, in principle enables one to make each of the above discoveries as well, but it also allows one to trace the origins of some of the irresolvable moral conflicts to the unconquerable contingencies of the actual world. This is, in my opinion, the more plausible approach to take. None of these potential findings implies an inconsistency in the set of moral principles one adheres to, but each of them offers some clues as to how to restructure one's relations with reality so that the risk of running into dilemmas is minimized.

Extremely Harsh Treatment

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1. Introduction

I shall use the following stipulative definition: One person harshly treats another if and only if the first intentionally imposes great suffering in a short amount of time on the second. Here are some examples: drilling in an unanesthetized tooth, branding with a hot iron, violent shaking, repeated beatings, car-battery shocks to the genitalia, rape by dogs, anal penetration by toilet plungers, jaw breaking by expanding mechanical instrument, sleep deprivation, sensory isolation, or the imposition of the feeling of drowning. Such treatment is more extreme than that ordinarily accompanying hazing and military basic training, although this is not necessarily the case.

This stipulative definition does not always track ordinary usage. For example, we might say that “Paul Hayes was treated harshly when he received a life sentence for a minor forgery (his third felony conviction),” and this sentence does not necessarily involve intense suffering. Some alleged counterexamples involve a misunderstanding of the definition. It might be claimed that decades ago when unanesthetized teeth were drilled for dental purposes, the treatment involved intense suffering but was not harsh treatment. However, this does not involve intense suffering being intentionally imposed.

Interrogational harsh treatment is harsh treatment that is done to gain information, usually from the person who is harshly treated. Punitive harsh treatment is harsh treatment that is done to punish someone, again usually the person who is harshly treated. Persons who are harshly treated can validly consent to such treatment and it can be imposed on someone who is not defenseless. On some accounts, although not ones with which I agree, these features distinguish it from torture.

Extremely harsh treatment is often considered unjust. On different accounts, extremely harsh treatment fails to respect persons because it infringes on an absolute right, fails to respect a person’s dignity, constitutes cruel or inhumane treatment, violates rules that rational persons would choose under fair and equal choosing conditions, or results in a person losing his agency to another.¹ Others respond that in some cases extremely harsh

¹ The notion that torture violates an absolute right can be seen in Joel Feinberg, *Social Philosophy* (Englewood Cliffs, NJ: Prentice Hall, 1973), pp. 87-88. The notion that torture doesn’t respect persons as morally autonomous agents can be seen in David

treatment is just because some individuals forfeit their moral rights against extremely harsh treatment or because it is the fair way to distribute a danger that was created by the person to be so treated.²

There might be disagreement about whether the above objections to extremely harsh treatment posit that it is a type of injustice. If injustice is understood to mean violating respect owed to persons, harsh treatment is a type of injustice. If injustice is viewed more narrowly, then my interest in this article is on, and only on, objections that are injustice-based.

In this paper, I develop an argument that is designed to sidestep these criticisms. That is, I develop an argument that almost every justice theorist can accept and that shows that in some cases justice not only permits extremely harsh treatment, but also requires it. More specifically, I argue for the following.

- (1) *Permission Thesis*: In some cases, justice permits extremely harsh treatment.

Sussman, "What's Wrong with Torture?" *Philosophy & Public Affairs* 33 (2005), pp. 1-33; Jeffrie Murphy, "Cruel and Unusual Punishments," in Jeffrie Murphy, *Retribution, Justice, and Therapy* (Dordrecht: D. Reidel Publishing Company, 1979). The notion that some punishments such as torture are cruel and inhumane can be seen in Michael Davis, "The Moral Justifiability of Torture and Other Cruel, Inhuman, and Degrading Treatment," *International Journal of Applied Philosophy* 19 (2005), pp. 161-78; Michael Davis, *Justice in the Shadow of Death* (Lanham, MD: Rowman & Littlefield, 1996), chaps. 2-3; Jeffrey Reiman, "Justice, Civilization, and the Death Penalty: Answering van den Haag," *Philosophy & Public Affairs* 14 (1985), pp. 115-48; Hugo Adam Bedau, *Death Is Different* (Boston, MA: Northeastern University Press, 1987), chap. 4. Davis explains that an inhumane punishment is shocking, and a shocking punishment is one that treats the criminal as less than a person or that can't be universalized; see Davis, *Justice in the Shadow of Death*, pp. 36-38. See his similar analysis of the wrongness of torture in Michael Davis, "The Moral Justifiability of Torture and Other Cruel, Inhuman, and Degrading Treatment," esp. pp. 167-70. Bedau fills out this notion in terms of the duty to respect a person's social, rational, and autonomous nature; see Bedau, *Death Is Different*, p. 127. The notion that torture is wrong because it involves a person's body being subject to the will in another, that is, he effectively loses his agency, can be seen in Sussman, "What's Wrong with Torture?" pp. 1-33. In the context of warfare, Henry Shue argues that torture is wrong insofar as it involves an attack on the defenseless; see Henry Shue, "Torture," *Philosophy & Public Affairs* 9 (1978), pp. 124-43.

² The former view can be seen in Stephen Kershnar, "For Interrogational Torture," *International Journal of Applied Philosophy* 19 (2005), pp. 223-41; Stephen Kershnar, "Respect for Persons and the Harsh Treatment of Criminals," *International Journal of Applied Philosophy* 18 (2004), pp. 107-108; Stephen Kershnar, *Desert, Retribution, and Torture* (Lanham, MD: University Press of America, 2001), chap. 8. The latter view can be seen in Michael Moore, "Torture and the Balance of Evils," in Michael Moore, *Placing Blame* (Oxford: Clarendon Press, 1997), pp. 726-36.

- (2) *Requirement Thesis*: In some cases, justice requires extremely harsh treatment.

I conclude by bracketing issues of whether consequentialist reasons support extremely harsh treatment and whether these reasons are relevant to state and private action. Thus, this article does not address the all-things-considered moral status of extremely harsh treatment.

2. The Argument for the Permission Thesis

a. *Relevant principles*

I begin by setting out a few principles of justice that almost all of the above theorists could accept and then show that they support both the *Permission Thesis* and the *Requirement Thesis*. These principles are closely related to Robert Nozick's argument for libertarianism in *Anarchy, State, and Utopia*, but are changed so as to avoid some of the objections to his account and to libertarianism in general.³ One principle is the following:

- (3) *Justice as Just Steps*: If individuals begin at one just state and proceed via just steps to a second state, then the second state is just.

"State" is short for "state of affairs." By a "just state," I mean "states in which no one's moral rights are infringed."⁴ A step is an act or a conjunction of acts.

The idea behind (3) follows from the notion of justice. If justice consists of individuals not infringing on moral rights, then if we start with a rights-respecting state and proceed via changes in the moral landscape none of which infringe on someone's right, then we end up with a rights-respecting outcome, that is, a just state. Note that my account is independent of the issue of what grounds moral rights.

³ Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), pp. 160-64. My account is designed to be independent of how people acquire moral rights, whether they are absolute, and whether they are undermined by the history of injustice that characterizes the current distribution of wealth and resources. The first issue can be seen in Jeremy Waldron, *The Right to Private Property* (Oxford: Clarendon Press, 1988), chaps. 5-8; Thomas Nagel, "Libertarianism without Foundations," *The Yale Law Journal* 85 (1975), pp. 136-49; and the third in David Lyons, "The New Indian Claims and Original Rights to Land," in *Reading Nozick: Essays on Anarchy, State, and Utopia*, ed. Jeffrey Paul (Totowa, NJ: Rowman & Littlefield, 1981), pp. 355-79. It is also designed to be independent of whether exploitation is an independent, deontological type of wrongfulness. For an argument that it is, see Alan Wertheimer, *Exploitation* (Princeton, NJ: Princeton University Press, 1996).

⁴ An objector might assert that justice is a property of acts, not states. In that case, a state might include a number of acts, and the state is just if the acts contained within it are just.

Given that this account of justice depends on the notion of a just step, we need an account of it:

- (4) *Just Steps as Commitment*: If two persons commit to a proposal in a correct way, then the step from pre- to post-proposal situation is just.

A commitment is a promise, consent, or other act that would change the moral rights of two or more individuals were it done in a correct way (that is, in a valid way). In filling out the notion of a valid commitment, the idea is that a commitment is morally binding when the parties give their voluntary and informed consent to it.

Consider some sufficient conditions for when a commitment to a proposal is valid. Such a commitment is valid if the parties are morally responsible agents, have sufficient knowledge, the commitment is executed and mutually beneficial, and does not reflect coercion or coercive pressure. Even more specifically, it is valid if the parties are (a) morally responsible agents, (b) sufficiently informed about the pre- and post-proposal facts, (c) prefer the post- to pre-proposal situation, and (d) execute their commitment, and (e) the post-proposal situation is mutually beneficial, (f) does not reflect coercive pressure, and (g) is not exploitative. These conditions are probably not all necessary. For example, some theorists reject the notion that commitments must be mutually beneficial.⁵

Note that “justice” is used in the specification of a sufficient condition for a valid commitment. This does not make my analysis circular, because I am not defining or analyzing “valid commitment,” but rather setting out one set of sufficient conditions for it. If “valid commitment” means “voluntary and informed consent or promise,” then this might be a sufficient condition for a just change, but not a circular condition. This assumes that ‘voluntary’ is not defined or analyzed in terms of justice. This might be the case if it is analyzed in terms of the lack of psychological pressure or, perhaps, the absence of coercion analyzed in value-free terms. If ‘voluntary’ is defined or analyzed in terms of justice, then the account is circular and the phrase “valid commitment” is misleading. My argument would then have to set out a notion of endorsement that is sufficient for justice (perhaps [a] through [g]) and then claim that some people endorse their receiving harsh treatment.

An objector, such as G. A. Cohen, might argue that an informed-and-voluntary exchange that moves people from a just state to a second state does not guarantee that the second is just or free.⁶ Cohen argues against Nozick’s

⁵ For example, Charles Fried thinks that unilateral promises are morally binding regardless of whether they are beneficial to the promisor; see Charles Fried, *Contract as Promise* (Cambridge, MA: Harvard University Press, 1981), chaps. 1-3.

⁶ See G. A. Cohen, “Robert Nozick and Wilt Chamberlain: How Patterns Preserve Liberty,” *Erkenntnis* 11 (1977), pp. 5-23.

claims that (1) whatever arises from a just state by just steps is just and (2) fully voluntary transactions are just steps.⁷ Cohen argues that such steps are not just unless one assumes that justice is not a matter of satisfying a patterned or end-state principle, which begs the question in favor of Nozick's principles. Cohen further argues that because interferences, whether the result of non-human events or voluntary exchanges, can cause equal coercive pressure on a person, such an informed-and-voluntary exchange is not sufficient for liberty. Consider, for example, when a wealthy landowner buys all of the property around a laborer's property and builds an insurmountable fence around it. This can cause as much interference or coercive pressure as would a landslide that had a similar effect. Hence, Cohen concludes, informed-and-voluntary exchanges are not obviously sufficient for justice or liberty. His argument also applies to an informed-and-voluntary promise or consent.

Cohen's argument fails if there are other reasons to reject the patterned and end-state principles. One reason is if something like the following picture is true. Justice is thought to capture the respect that is owed people in virtue of their being autonomous. This respect is filled out in terms of rights.⁸ Because these rights are justified by autonomy and because autonomy is best protected by a perimeter within which persons have complete control over their bodies and goods, autonomy justifies full capitalist rights. This can occur if people can acquire full capitalist rights in unowned goods, which then allows them voluntarily to transfer them.

Critics have attacked this picture for a number of reasons. Some critics claim that the Kantian side-constraints on which the picture rests do not exist or are not as stringent as the picture requires. Other critics argue that there is no plausible theory of how unowned goods become owned (or owned through unilateral action). Still other critics argue that even if these problems can be overcome, given that most property comes from a history of violence and injustice, such a picture is irrelevant to the actual world. A number of critics argue that this picture leaves out important moral considerations such as desert, community, and the way in which different moral principles should govern different types of goods. Responding to all of these criticisms is a book-length project. Let me concede that if any of these objections to the above picture holds, my argument is endangered.

Here is a claim about valid commitment and an example of it:

⁷ See Nozick, *Anarchy, State, and Utopia*, p. 151.

⁸ These rights are to be understood in terms of the moral analogue to Hohfeldian claims and, perhaps, powers; see Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions*, ed. Walter Wheeler Cook (New Haven, CT: Yale University Press, 1919), pp. 35-64.

- (5) *Valid-Commitment Claim*: In some cases, persons validly commit to extremely harsh treatment.

The cases in which persons might validly commit to extremely harsh treatment are cases in which they face a proposal in which extremely harsh treatment is the better of the two outcomes. Let us call such cases *Extremely-Harsh-Treatment-Commitment Cases*. Here is one such case:

Rapist: A fraternity brother, Stan, brutally rapes a drunken freshman, Sarah. Their families later discover that as young men, their fathers were friends, having served together in World War II. Given the nature of the rape, Stan is sentenced to six years in prison. All of the relevant parties—including Sarah, her family, Stan, his family, and the surrounding community—prefer to see Stan harshly treated for a short amount of time and then released. Sarah and her family want to see Stan understand the same terror and helplessness she felt because it will in some way recognize her suffering and vindicate her anger. She also doesn't think there is much to be gained by Stan's being incarcerated through much of his twenties. Stan and his family also prefer that he be harshly treated since it will allow him to move on with his life and demonstrate his repentance. The community and state government also prefer it since it promises significant cost savings.

In this case, there is nothing in principle that prevents the parties from validly committing to extremely harsh treatment. More specifically, Sarah, Stan, and the state satisfy (a) through (g). This type of case is easily generated since we simply imagine cases where a person or the state has a right to implement a just punishment or other greatly disvalued state and the person facing this outcome (roughly) gives free and informed consent to substitute extremely harsh treatment for incarceration.

An objector might claim that Sarah is likely to be so depressed or upset that she is not morally responsible for her consent to permit the substitution of extremely harsh treatment. That is, Sarah doesn't satisfy (a) through (g). It's not clear that this would be true of all rape victims. Even if it is true of all rape victims, one can imagine that her guardian might think the agreement satisfies her preferences and is in her interest. This is analogous to the way in which her guardian might grant permission for her to participate in the police investigation or to undergo surgery unrelated to the attack. With these principles in mind, we now turn to the argument for the *Permission Thesis*.

b. Argument for the permission thesis

Here is the argument for the *Permission Thesis* that, in some cases, justice permits extremely harsh treatment. The relevant cases for this thesis are *Extremely-Harsh-Treatment-Commitment Cases*:

- (P1) If individuals begin at one just state and proceed via just steps to a second state, then the second state is just.
- (P2) In some cases, individuals begin at one just state without extremely harsh treatment and proceed via just steps to a second state with extremely harsh treatment.
- (C1) Hence, in some cases, a state with extremely harsh treatment is just. [(P1), (P2)]
- (C2) Hence, in some cases, justice permits extremely harsh treatment. [(C1)]

Premise (P1) rests on *Justice as Steps*. Premise (P2) rests on the notion that *Extremely-Harsh-Treatment-Commitment Cases* are possible. Conclusion (C2) is a restatement of (C1). Let us turn to some objections to this argument.

c. Objections to the permission thesis

1. Objection #1: Reject (P1). An objector might reject (P1). She might argue that justice focuses on end-state principles (where justice requires a mathematical structure of distribution of some benefit or burden of social cooperation but is unconcerned with who gets what) or patterned principles (where justice is concerned with the distribution of some benefit or burden of social cooperation in accord with some property or properties of individuals).⁹ The objector's likely patterned principle is non-historical, meaning that it focuses on some current property (for example, a property had in the current time-slice) rather than one that refers to the past. This distinction is a little murky since one can have a current property (e.g., positive desert) in virtue of what happened in the past (e.g., he sacrificed for others). An example of an end-state principle is one that requires wealth to be distributed equally or in accord with the difference principle (where benefits and burdens are to be distributed equally except where inequality benefits the worst-off group). An example of a patterned principle is one that distributes wealth or punishment in accord with desert or need.¹⁰

⁹ This distinction comes from Nozick, *Anarchy, State, and Utopia*, pp. 150-60.

¹⁰ The Difference Principle comes from John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971), pp. 75-83. For the role of desert see Joel Feinberg, "Justice and Personal Desert," in Joel Feinberg, *Doing and Deserving* (Princeton, NJ: Princeton University Press, 1970), chap. 4; James Rachels, "What People Deserve," in *Justice and Economic Distribution*, ed. John Arthur and William Shaw, 2nd ed. (Englewood Cliffs, NJ: Prentice Hall, 1991), pp. 136-48. There are other accounts, which seem to involve hybrid principles. For example, Bernard Williams and Michael Walzer argue that some goods should be distributed according to the type of good they are. For example, medicine should be given to the sick. See Bernard Williams, "The Idea of Equality," in *Moral Concepts*, ed. Joel Feinberg (New York: Oxford University Press, 1970), pp. 153-71; Michael Walzer, *Spheres of Justice* (New York: Basic Books, 1983), p. 88 n.

One response to this objection is simply to reject these principles. For example, because it is hard to imagine that justice is unconcerned with who gets what, end-state principles intuitively seem implausible. This is especially true if rights are primarily property rights that allocate Hohfeldian elements (such as claims) with regard to particular things. Similarly, the most plausible time-slice properties are unlikely to ground justice-based claims. A mafia leader's need for a kidney intuitively seems not to ground a claim in others if he spent his early life damaging the kidneys of others as a way of collecting his loan-shark debts.¹¹ Similarly, a person who deserves a job more because he worked harder in developing his skills or sacrificed more to develop those skills than his competitors doesn't seem to have a claim to the job. This is particularly true if one of his competitors is more talented.¹²

A second response is that even if we think that these principles are part or all of justice, it's not clear that they block extremely harsh treatment. For example, desert-based theories might well allow for extremely harsh treatment. Even the Difference Principle might allow for it since basic principles chosen by rational persons under fair and equal choosing conditions might allow for such treatment. If the worst-off group is construed more broadly than those persons who are harshly treated, the deterrent effect of extremely harsh treatment might be a net benefit for them since they are often harmed by violent crime, whether directly or indirectly.¹³

2. Objection #2: Reject (P2). Objection #2a: The state acts unjustly because it infringes on inalienable rights. An objector might instead reject (P2). An objector might claim that because autonomy grounds rights, these rights are inalienable. The idea here is that since autonomy grounds rights, that same ground can't warrant the loss of autonomy-protecting rights.¹⁴ (P2) states that individuals begin at one just state without extremely harsh treatment and proceed via just steps to a second state with

¹¹ The idea for this example comes from Fred Feldman's discussion of the lunch destroyer in his "Adjusting Utility for Justice: A Consequentialist Reply to the Objection from Justice," in Fred Feldman, *Utilitarianism, Hedonism, and Desert* (New York: Cambridge University Press, 1997), pp. 154-74, esp. 158-60.

¹² I argue for this in Stephen Kershnar, "Giving Capitalists What They Deserve," *Economics & Philosophy* 21 (2005), pp. 65-87.

¹³ Also, the arguments in the literature don't rest on claims about end-state or patterned principles, and so at the very least any argument in this direction would need to be developed.

¹⁴ The idea for this objection comes from Jeffrie Murphy, "Cruel and Unusual Punishments," in Murphy, *Retribution, Justice, and Therapy*, pp. 223-49. Some opponents of torture focus on torture being an assault on the defenseless; see Henry Shue, "Torture." It is hard to see how being defenseless, as opposed to being bad at defense, is morally relevant, unless it entails the presence of protective rights.

extremely harsh treatment. However, if harsh treatment can only be arrived at via unjust steps, then the type of cases that (P2) focuses on are impossible.

So, for example, a person could not waive or forfeit a right against being lobotomized or a treatment so harsh that it reduces him to the level of an animal. Since a harshly treated person is not autonomous, at least during the period in which he is harshly treated, the right against extremely harsh treatment is inalienable. This objection is independent of whether autonomy is viewed as a set of capacities or the exercise of these capacities.

The first problem with this objection is that certain forms of extremely harsh treatment (for example, extreme sensory or sleep deprivation) need not eliminate autonomy. In fact they might enhance it by giving the attacker, during his recovery, more time and a less distracting atmosphere, via the denial of access to other persons and intoxicating substances, by which to reshape his beliefs, intentions, and perhaps also desires. Hence, this objection only rules out certain types of extremely harsh treatment.

It might be thought that extremely harsh treatment rules out autonomy because the requisite suffering is so great as to rule out self-governed thought. However, it is worth distinguishing the short-term and long-term effects of extremely harsh treatment. The two need not coincide and extremely harsh treatment might increase the likelihood of autonomous thought in the long term, perhaps by causing a person to think hard about what sort of person he wants to be.

A critic might claim that this is a breathtaking claim that presents such torment as merely a time of “time-out” (which is nevertheless expected to break down the resolve of fanatics). She might continue by noting that, by all reports, extreme sleep deprivation is an agonizing experience (that ultimately leads to death), which, like sensory deprivation, undoes the most basic capacities of self-directed thought. This description accurately describes the effects of extremely harsh treatment. However, it is still possible that the extremely harsh treatment causes the individual to reshape his life according to self-chosen principles. Perhaps it does so when an individual is recuperating and wondering how such a horror could have befallen him. Such a scenario is possible, however unlikely. If so, then the long-term effects need not involve the elimination of autonomy and it is not harsh treatment *per se* but autonomy-eliminating acts that are wrong. In any case, as I will argue for below, not every act that eliminates autonomy is wrong.

An objector might say, “Look, it doesn’t matter if autonomy is removed forever; what matters is that it is ever removed—no one has the right to remove the autonomy of another, no matter how temporary.” The issue here is why a person does not have a right to remove his own autonomy. Among the reasons might be because it violates an inalienable right that a person holds against himself, is inconsistent with proper self-respect, or turns the victim’s agency against himself. These notions are discussed below.

The more serious problem with this objection is that it misconstrues the nature of rights that are grounded by autonomy. Autonomy includes a person’s reflexive choice over whether to continue to be autonomous and, if

so, the degree to continue to be autonomous. As a result, autonomy grounds the moral standing by which a person may control the shape and continuation of his autonomous life. In other words, self-determination permits a being to decide whether to continue to be self-determining and, if so, the degree of self-determination he shall have in the future. Since autonomy-grounded rights protect the choice whether to retain these rights, the rights-protecting autonomy may be alienated.

The objector might respond that the existence of a reflexive right to give up one's autonomy is inconsistent with the respect for the value of autonomy.¹⁵ The problem with this is that it misconstrues the value of autonomy. The value of autonomy does not rest on the notion that one should have a *maximal amount of control* over one's life, where the amount of control is the product of the significance of the choices and number of choices that a person can or does make. On this account autonomy would permit a great deal of paternalistic coercion (e.g., banning cigarettes and fatty foods) as a means of increasing the duration, and therefore amount, of control over their lives. Rather, the value of autonomy has to do with *narrative control*, the ability to shape one's life according to self-chosen principles. This can allow for a decrease in the number of choices (e.g., via suicide) or a lessening of the quality of choices (e.g., via the taking of recreational drugs that dull one's thought processes), as long as it is done in accord with a person's own principles. Narrative control even allows for the choice to live with lessened or no rationality, since continued rationality might not be part of a person's life plan. This is analogous to the way in which an author is autonomous with regard to her work when she writes short stories rather than lengthy novels, even though the former involves a smaller number of choices about her characters and perhaps also less significant choices about them. *Narrative control* requires that a person be able to exercise reflexive control even when this disables or eliminates some first-order control.

Objection #2b: The state acts unjustly because trading down is inconsistent with proper self-respect. A second objection to (P2) is that if this account of justice is correct, then a similar trading-down argument can be given for using people for medical experimentation, gladiatorial contests, or as slaves. The objector might continue that the problem with the trading-down argument in these contexts and in the context of extremely harsh treatment is that there are certain kinds of treatments of oneself that a person can never validly consent to, because they are incompatible with proper self-respect, respect for one's autonomy, respect for humanity in one's person, etc.¹⁶ The

¹⁵ An analogous claim can be seen in John Stuart Mill, who argues that the principle of freedom does not allow persons to be free not to be free; see John Stuart Mill, *On Liberty*, ed. Elizabeth Rapaport (Indianapolis, IN: Hackett, 1978), chap. V, sec. 11, pp. 101-102.

¹⁶ For example, John Kleinig argues that torture undermines the very characteristics that constitute our human distinctiveness and in so doing humiliates, degrades, and

objector might state that to claim that autonomy includes a reflexive choice over whether to continue to be autonomous and, if so, the degree to which to be autonomous, begs the question against this Kantian account. The latter simply does not conceive of the moral significance of autonomy in this way. The objector continues by asserting that this account, then, holds that as a matter of logic, autonomy does not include within its scope its own elimination. This explains why autonomy does not allow people to choose to have lobotomies, kill themselves, or sell themselves into slavery.¹⁷ The objector notes that Immanuel Kant provides a similar argument. He argues that a slavery contract would result in a loss of contractual powers, thereby invalidating the contract itself.¹⁸

The problem here is that it is hard to see why autonomy is not reflexive. By “reflexive,” I mean that “autonomy can be applied to itself.” If it is reflexive, then one can autonomously sacrifice autonomy. There does not appear to be anything in the concept of autonomy that would explain this assertion unless one thought autonomy focused on an individual’s having a *maximal amount of control* over one’s life. One reason to doubt this account, as mentioned above, is that it allows for a significant amount of paternalistic control. For example, we do not respect persons if we prevent them from putting their autonomy (or, more generally, well-being) at risk by volunteering for war or to work a dangerous job. A second reason is that it seems to confuse a person shaping his life according to self-chosen principles, which is at the heart of autonomy, with the requirement that others ensure that his principles have a certain content, which is neither at the heart of autonomy nor clearly related to autonomy-based respect. Autonomy-based respect requires at most that we ensure that a person’s guiding principles are rational, not that they maximize his autonomy, capture a certain view of the good life, or have other substantive content. If this were not the case, then it is hard to see the sense in which they would be chosen by the individual herself.

The objector might claim that we ensure that a person’s guiding principles are rational if we require that the principles be ones that would be chosen by rational individuals. One guide to this is the Rawlsian notion that to respect a person as an end is to treat him in accord with principles that he and others would choose were they perfectly rational and in a fair choosing situation.¹⁹ Here the idea is that such principles would not permit an individual to trade down for extremely harsh treatment.

perverts them; see John Kleinig, “Ticking Bombs and Torture Warrants,” *Deakin Law Review* 10 (2005), pp. 615-27, esp. p. 619.

¹⁷ Mill, *On Liberty*, ed. Rapaport, pp. 101-102.

¹⁸ Immanuel Kant, *The Metaphysics of Morals*, trans. Mary Gregor (New York: Cambridge University Press, 1991), sec. 49, pp. 139-40.

¹⁹ Rawls, *A Theory of Justice*.

Another problem is that the Rawlsian approach probably allows for trading down. Allowing trading down to occur does not lessen people's equal maximal liberty, because it increases rather than decreases options. In addition, it likely improves the position of the people who will be so treated because they (reasonably) view it as a beneficial transaction. In decreasing the amount of crime, terrorism, and other destructive acts, it probably even improves the position of the worst-off group, assuming this is a group other than those who consent to be harshly treated. In short, then, Rawls's approach does not clearly capture autonomy-based respect. Even if it does, it likely permits trading down into extremely harsh treatment, because doing so is consistent with the principles that result from the Original Position.

Objection #2c: The state acts wrongly because it turns a victim's agency against himself. David Sussman argues that torture is wrong because it forces a victim to turn his agency against himself.²⁰ This explains why it is worse than other forms of brutality and cruelty:

Torture does not merely insult or damage its victim's agency, but rather turns such agency against itself, forcing the victim to experience herself as helpless yet complicit in her own violation. This is not just an assault on or violation of the victim's autonomy, but also a perversion of it, a kind of systematic mockery of the basic moral relations that an individual bears both to others and to herself.²¹

Sussman also argues that torture is wrong because it involves a person experiencing his body ceasing to be his and becoming another's:

In a sense, his body ceases to be his, to be the substance in which he expresses his own attitudes, intentions, and feelings in a way that can be meaningful for others as a form of self-expression. Since the victim cannot effectively reassert himself physically against the assault (by fighting, fleeing, or shielding himself), his body becomes the medium in which someone else realizes or expresses his agency.²²

On this account, torture results in the victim's body becoming the medium by which someone else realizes or expresses his agency. This objection to torture captures an interpretation of the Kantian notion that torture fails to respect the

²⁰ See Sussman, "What's Wrong with Torture?" pp. 28-33. A similar argument can be seen in Kleinig, "Ticking Bombs and Torture Warrants," pp. 619-20.

²¹ Sussman, "What's Wrong with Torture?" p. 30.

²² *Ibid.*, pp. 31-32.

dignity of the victim as a rationally self-governing agent.²³ Let us apply this argument to extremely harsh treatment.

The first problem with this objection is that it is not clear how this objection works in cases in which the person imposing harsh treatment seeks to impose punishment rather than use the victim to gain information. In such a case, the victim's body is not expressing anyone else's agency any more than it would be were he an incarcerated prisoner. The second problem is that in the trading-down case the victim's body, if it is expressing someone's agency, is expressing the agency of the person who is so treated. In particular, it expresses his project to avoid a harsher punishment and achieve other goals (for example, return to his family).

Third, even in the case of interrogation, it is hard to see how this argument works. If a person is his body, then saying that his body is being used against himself just is saying that he is made to do certain things to which he does not consent. It is hard to see how this varies from incarceration or other involuntary punishments. If a person is not his body, then this is no different from using other things he cares about (for example, his family's well-being, money, and reputation) to leverage someone into doing something he does not want to do. This might be objectionable, but it is hard to see what is distinctively wrong about extremely harsh treatment as opposed to other forms of rights-infringing leverage. Even if we focus on using one's body against himself, incarceration does a similar thing by confining a person's body and thereby preventing him from leaving.

Sussman might argue that extremely harsh treatment is wrong because it removes autonomy. It does so because of the difficulty of reasoning when experiencing extreme pain. If, however, the wrongness of extremely harsh treatment is filled out in terms of the removal of autonomy, then the extremely harsh treatment is wrong for the same reason that murder, involuntary lobotomies, and other reason-ending acts are wrong. This undermines Sussman's central claim that extremely harsh treatment is distinctively wrong.

Objection #2d: The state acts unjustly because the consent is not morally binding. An objector might claim that the consent in this case is not morally binding. One argument is to claim that the consent to extremely harsh treatment is invalid because it is analogous to a slavery contract and that the latter is invalid. Some philosophers argue that a slavery contract whereby a person alienates his autonomy is so irrational as to invalidate the contract. On one version of this argument, this is true because of the impossibility of proper compensation.²⁴ On a second version, the irrationality stems from the possibility of unlimited disvalue in the action that the owner might require of

²³ Ibid., p. 19.

²⁴ Jean-Jacques Rousseau, *The Social Contract*, trans. Maurice Cranston (New York: Penguin, 1968), p. 55.

the person who has abdicated his autonomy.²⁵ How one measures disvalue depends on one's theory of value and the type of value involved. If autonomy is intrinsically valuable, then the loss of infinite value would involve a comparison between a world (or other value-bearer) where the person has autonomy and one where he does not. On a third version, a contractor can't live up to his promise because it is impossible to do so.²⁶ On a variant of this third version, the promise is impossible to live up to because a person cannot transfer partial or complete control over her body to another.²⁷

Even if these arguments show that slavery contracts are invalid, and this is doubtful, the same reasons do not invalidate the consent to extremely harsh treatment. Contrary to the first version of the argument, proper compensation for some harsh treatments is possible. On one account of just compensation, for example, it is possible to provide enough compensation so that the person to be so treated (or who has been so treated) is indifferent between being so treated and compensated and receiving neither. The second version also fails. Extremely harsh treatment does not have infinite disvalue, particularly when it is limited in means and duration. In general, this version rests on a misunderstanding because unless a slavery or an extremely-harsh-treatment contract affects someone for eternity or affects an infinite number of people, it cannot have infinite disvalue. The third version fails as well. Because the person to be treated harshly need not voluntarily participate once he has consented, the concern about his living up to his promises is irrelevant.

A second argument is that the consent is invalid because it is coerced. To see why this argument fails, consider the following case:

Black Mamba: During an expedition into Africa, a wealthy scientist is bitten by a highly venomous black mamba. He is quickly taken to the house of a local doctor, who offers to sell him the doctor's only potion of mamba antivenin for the market price. The scientist quickly agrees and signs a contract. He is then given the antivenin. After a month of lying near death, the scientist recovers. He then refuses to pay, arguing that the contract is invalid because his consent was coerced.

Absent an exorbitant price that might indicate exploitation, it intuitively seems that the scientist has an obligation to pay for the antivenin even though his consent was coerced or had coercion-level pressures. If so, then either

²⁵ Arthur Kuflik, "The Inalienability of Autonomy," *Philosophy & Public Affairs* 13 (1984), pp. 284-96.

²⁶ Benedict De Spinoza, *Theologico-Political Treatise* (New York: Dover, 1951), chaps. 17 and 20.

²⁷ Randy Barnett, "Contract Remedies and Inalienable Rights," *Social Philosophy & Policy* 4 (1986), pp. 188-89.

voluntary consent is not a necessary condition for a morally valid contract or voluntariness does not require the availability of reasonable alternative actions at the time of the consent.²⁸ Either move is available in the case of the extremely-harsh-treatment contract. Either the alternative of a worse punishment makes the wrongdoer's consent involuntary, but this does not morally invalidate the contract, or the lack of reasonable alternatives, given the historical sequence that brought about this situation, is not sufficient to make his consent involuntary.

A third argument is that the consent is valid but should not be enforced by the state because its terms are unfair, exploitative, or unconscionable. The exact account of exploitation differs. On one account, a contract is exploitative when the stronger party uses his stronger position to take an unfair share of the transaction surplus.²⁹ The transaction surplus is the aggregate benefit to both parties to a contract. On some accounts, an exploitative transaction must have one or more of the following features: the transaction is to be viewed from an *ex ante* perspective, the weaker party must be desperate, and at least one party believes the contract to be unfair.

Even if this is a moral reason for the state to refuse to enforce a contract, this does not apply to the extremely-harsh-treatment contract. In some cases, the person to be so treated gains a fair share of the transaction surplus. If a person to be punished is facing a lifetime in prison and isolation from his family, then his benefit is the difference in his well-being between that state of affairs and one where he is treated extremely harshly. This gain might be considerably greater than the gain to the state or the offender's victim. If so, then the price is not unfair, exploitative, or unconscionable, because the state or the victim is not taking an unfair share of the transaction surplus. The exploitative nature of an extremely-harsh-treatment contract, then, depends on what the baseline treatment is, and this is a contingent fact that depends on the circumstances and individual involved.

The rational gain in the person to be harshly treated also distinguishes this type of case from ones in which the person to be so treated is mentally ill or making an obvious error in his instrumental reasoning. Such an error might occur, for example, if he were to contract with doctors to amputate his legs so as to improve his prospects as a panhandler.

Objection #2e: The state acts unjustly because it expresses contempt for a person. On some completely different accounts of justice, an act that is neither exploitative nor rights-infringing can express contempt for a

²⁸ There is an issue as to whether coercion and threats are moralized notions that view these entities as involving the other contractor's acting in an immoral or, perhaps, unjust manner. For example, consider Robert Nozick, "Coercion," in *Philosophy, Science, and Method*, ed. Sidney Morgenbesser (New York: St. Martin's Press, 1969), pp. 447-53.

²⁹ The idea for this account comes from Wertheimer, *Exploitation*.

person and thereby fail to respect her as a person.³⁰ In general, a behavior is expressive of an attitude or proposition just in case it exhibits that attitude or puts forth a proposition. This is probably a function of the agent's motive, intent, or the social understanding of her act.³¹ For example, where the agent is motivated by the view that the man toward whom she acts has less intrinsic value than other persons, she intends to convey that view, and that is how her act is generally understood, her act expresses contempt for him. On some accounts, this expression is independent of whether the attitude or proposition is actually conveyed to an audience on a particular occasion and on some accounts on all occasions. In the case of criminals, the contempt likely involves the notion that the criminal has less intrinsic value than do other persons.

One response here is that no such attitude is being taken toward the person being harshly treated. Rather, this is a case of respecting her choice in the context of a fair set of rules. On this account, we respect the person as an equal by respecting her decisions. This fits with some Kant-inspired justifications of punishment.³²

A second response is that the objection misconstrues justice. This is because justice focuses on the person who is acted on (that is, the person to be harshly treated), not the agent (that is, the person who imposes the treatment).

³⁰ In the context of punishment, this idea can be seen in Thaddeus Metz, "Censure Theory and Intuitions about Punishment," *Law and Philosophy* 19 (2000), pp. 491-512; Jean Hampton, "An Expressive Theory of Retribution," in *Retributivism and Its Critics*, ed. Wesley Cragg (Stuttgart: F. Steiner Verlag, 1992), pp. 1-25; Igor Primoratz, "Punishment as Language," *Philosophy* 64 (1989), pp. 187-205. In bringing up this theory, I do not mean to endorse it. My view is that, as a non-consequentialist justification of punishment, it is superfluous because it presupposes and trivially follows from the truth of non-expressive retributivism. For an argument in support of this, see Michael Davis, "Punishment as Language: Misleading Analogy for Desert Theorists," *Law and Philosophy* 10 (1991), pp. 311-22.

³¹ More broadly, this might be a function of the speaker meaning, i.e., what the speaker (or punishing body) in uttering a sentence (or imposing a punishment) intends to convey to the hearer. The speaker meaning consists of a nested set of intentions. Alternatively, this might be a function of meaning of the sentence (or punishment) itself. This distinction comes from H. P. Grice, "Meaning," *Philosophical Review* 66 (1957), pp. 377-88; H. P. Grice, "Utterer's Meaning and Intentions," *Philosophical Review* 78 (1969), pp. 147-77. A different but still Gricean analysis can be seen in Robert Nozick's discussion of the idea that punishment should express to the wrongdoer that his act is wrong and to show him its wrongfulness; see Robert Nozick, *Philosophical Explanations* (Cambridge, MA: Harvard University Press, 1981), pp. 366-74, esp. p. 371.

³² See, e.g., Herbert Morris, "Persons and Punishment," *The Monist* 52 (1968), pp. 475-501; Jeffrie G. Murphy, "Marxism and Retribution," *Philosophy & Public Affairs* 2 (1973), pp. 217-43.

The focus on the former rather than the latter provides a better explanation of what is involved in wronging a person. I think it also provides a better explanation of the non-consequentialist liberty that a person has to pursue his own projects, but I will not address this issue here. Given that it is a property of the person acted on (for example, his suffering or his autonomy) that explains why he may not be treated in certain ways, the wrongfulness of certain actions is a function of what is done to him. The attitude the agent takes toward the person toward whom he acts is relevant to judging the agent's blameworthiness, viciousness, and dangerousness, but not the act itself.³³ This can be seen in how agent-centered theories that focus on things such as the rationality of the agent's action or the intrinsic badness of his attitude *presuppose* that the treatment in question is bad or wrongful, rather than *explaining* it. That certain acts (e.g., rape and battery) fail properly to respect a person at least in part explains why desiring, intending, or willing them is wrong or bad.

Third, even if extremely harsh treatment expresses the notion that criminals have less value than others, this does not disrespect them if they do have on average less value. To see that they do, consider the following two worlds. The first consists of one million good persons. The second consists of one million rapists and murderers. In both worlds there are equal levels of average and total well-being and in the latter world the legal regime has negated the wrongdoers' future threats through behavioral conditioning (similar to that portrayed in *A Clockwork Orange*). The first world intuitively seems better.³⁴ The best explanation of this intuition and ones like it is that intrinsic value depends at least in part on the desert-adjusted value of persons having a given level of well-being.³⁵ On this account, a person's desert determines whether and the degree to which his doing well makes the world a better place. Since murderers, rapists, and other violent criminals often have negative desert, their well-being often counts for less in making the world a better place and might even make it worse.

Objection #2f: The state acts unjustly because it cannot enter into this sort of agreement even if private parties may do so. An objector

³³ The notion that nonconsequentialism is closely tied to virtue is found in Philippa Foot, "Utilitarianism and the Virtues," *Mind* 94 (1985), pp. 273-83.

³⁴ The idea for this argument and example comes from W. D. Ross, *The Right and the Good* (Indianapolis, IN: Hackett Publishing Company, 1988), p. 138.

³⁵ See Feldman, "Adjusting Utility for Justice," pp. 154-74; Thomas Hurka, *Virtue, Vice, and Value* (New York: Oxford University Press, 2001), chaps. 1-2; Thomas Hurka, "The Common Structure of Virtue and Desert," *Ethics* 112 (2001), pp. 6-31; Shelly Kagan, "Equality and Desert," in *What Do We Deserve?* ed. Louis Pojman and Owen McLeod (New York: Oxford University Press, 1999), pp. 298-314; Neil Feit and Stephen Kershnar, "Explaining the Geometry of Desert," *Public Affairs Quarterly* 18 (2004), pp. 273-98.

might claim that even if extremely-harsh-treatment agreements are valid, the state may not enter into them. This argument is based on an analogy to unconstitutional conditions. The doctrine of unconstitutional conditions asserts that there are cases in which it is unconstitutional for the U.S. government to provide a discretionary benefit in return for an individual's waiving a constitutional right.³⁶ For example, the state cannot provide a welfare benefit to a beneficiary in return for her waiving her right to free speech.³⁷ Because the Eighth Amendment protects against extremely harsh treatment, the extremely-harsh-treatment contract violates this rule because it asks an individual to waive her right against extremely harsh treatment in return for not receiving a legal punishment. The objector might claim that an analogous moral argument applies. What grounds the doctrine and its moral analogue is not clear. It might rest on the proposal being coercive, exploitative, inefficient, or lacking a proper motive.

My interest is in the moral status of such proposals, so I will sidestep the issue of whether trading down violates the U.S. Constitution. Consider the notion that the proposal is coercive. If coercion entails injustice and, for the reasons mentioned above, there is no rights-infringement, then trading down is not coercive. If coercion does not entail injustice, then again it is not clear that this invalidates the consent. In order to see this, consider that the coercion involved in *Black Mamba* did not invalidate the scientist's consent, and that case involved both great psychological pressure and a big difference in the desirability of the two options. This sort of proposal is not obviously exploitative because, as argued for above, it is not clear that the state is taking an unfair share of the transaction surplus. Even if the proposal is inefficient, and it is hard to see why this has to be the case, this is not relevant to whether the proposal and agreement are just.

The proposal might be seen as lacking a proper motive because the state is trying to do directly what it cannot do indirectly.³⁸ It is not clear,

³⁶ See *Western Union Telegraph Co. v. Kansas*, 216 U.S. 1 (1910) (Kansas tried to trade the right to do business in Kansas in return for corporations agreeing to a tax on their out-of-state assets); *Speiser v. Randall*, 357 U.S. 513 (1958) (California tried to trade a property-tax exemption to veterans in return for their signing a loyalty oath); *Insurance Co. v. Morse*, 87 U.S. 445 (1974) (Wisconsin tried to trade the right to do business in Wisconsin for corporations in return for their agreeing not to use federal courts); *South Dakota v. Dole*, 483 U.S. 203 (1986) (federal government tried to trade subsidies for highway construction to states in return for their setting the drinking age at 21); and *Lying v. Automobile Workers*, 485 U.S. 360 (1988) (federal government tried to trade food stamps for indigents in return for their agreeing not to strike).

³⁷ A similar example can be seen in Edward Fuhr, "The Doctrine of Unconstitutional Conditions and the First Amendment," *Case Western Law Review* 97 (1989), p. 107; Wertheimer, *Exploitation*, p. 123.

³⁸ On one account, this is what is going on in some of these cases; see Richard Epstein, "Unconstitutional Conditions, State Power, and the Limits of Consent," *Harvard Law*

though, that an act is wrong or unjust based on the motive from which it is done. On one account, the injustice of an act depends on what is done to an individual and does not depend on the motive. The motive is relevant to the blameworthiness of the agent, but that is a different issue. This might be because there is a conceptual distinction between wrongness and blameworthiness or because agents more directly control their actions when compared to their motives. My response might be seen as entailing that the unconstitutional-conditions doctrine is mistaken. However, the doctrine is a legal one and there are likely a range of strong, forward-looking reasons that might justify it even if justice is not one of them.³⁹

d. Conclusion

The argument for the *Permission Thesis* that, in some cases, justice permits extremely harsh treatment rests on a claim about sufficient conditions for a just state (*Justice as Steps*), a claim about one type of just step (*Valid Commitment Claim*), and a claim that it is possible that persons validly consent to extremely harsh treatment (*Extremely-Harsh-Treatment-Commitment Cases*). Since all three claims are plausible and there do not appear to be strong objections, the argument is likely sound.

Review 102 (1988), p. 6.

³⁹ There are still other objections, which are confined to footnotes as a way of conserving space. First, it might be objected that the state acts unjustly because it performs a free-floating wrong. Even if the individual doing the interrogation doesn't wrong the person being interrogated, he might still act wrongfully if he commits a free-floating wrong. An act is free-floating wrong if it is something a person should not do but that doesn't wrong any individual. Three purported types of free-floating wrongs are exploitation, indecency, and the failure to satisfy a consequentialist duty. Harsh treatment does not appear to fit into the first two types. We can ignore the third, because consequentialist duties are distinct from justice-based ones.

A second objection is that the state acts unjustly because it uses an unreliable procedure. The objector might continue that persons who engage in punitive extremely harsh treatment typically use unreliable procedures in identifying who ought to be punished for serious crimes like murder and rape and thus who would trade down to extremely harsh treatment. One problem with this objection is that it claims to show that our whole criminal justice system is unjust. This claim requires evidence. A second problem is that it doesn't show that extremely harsh treatment is wrong. Using an unreliable procedure to impose harsh treatment via, for example a lottery system, wrongs the whole community. This is independent of whether the harsh treatment itself is wrong when imposed on someone who consented to it, deserves it, forfeited his rights with regard to it, etc. This is true even if the imposition on the correct party is purely a matter of chance.

3. The Argument for the Requirement Thesis

a. *Relevant principle*

Here I argue for the *Requirement Thesis* that, in some cases, justice requires extremely harsh treatment. By “require an act or state,” I mean that “the parties involved ought to perform it or bring it about and that no one else may interfere.” The central principle here is the following:

- (6) *Third-Party Irrelevance*: If all of the parties with relevant rights validly commit to move from one just state to a second state, then as a matter of justice the parties ought to bring about the second state and third parties may not prevent their doing so.

The idea here is that justice is concerned with rights-satisfaction. When a collection of individuals all change their moral world in a way that respects each other’s rights and does not infringe on a third party’s rights, a third party doesn’t have a rights-based claim to interfere with the change. That is, they have no justice-based right to intervene. This principle is designed to be trivially true since, given that justice is filled out in terms of rights and given that all of the relevant rights-holders have, by hypothesis, no rights-based objection, it trivially follows that no one can have a rights-based objection.

b. *The argument for the requirement thesis*

The argument for the *Requirement Thesis* then follows from *Third Party Irrelevance*. Again, the relevant cases are *Extremely-Harsh-Treatment-Commitment Cases*:

- (P1) If all of the parties with relevant rights validly commit to move from one just state to a second state, then as a matter of justice the parties ought to bring about the second state and third parties may not prevent their doing so.
- (P2) In some cases, the parties with relevant rights all validly commit to move from one just state without extremely harsh treatment to a second state with extremely harsh treatment.
- (C1) Hence, as a matter of justice the parties ought to bring about the second state with extremely harsh treatment and third parties may not prevent their doing so. [(P1), (P2)]
- (C2) Hence, in some cases, justice requires extremely harsh treatment. [(C1)]

Premise (P1) just is *Third-Party Irrelevance*. Premise (P2) rests on my description of the *Extremely-Harsh-Treatment Cases*. Conclusion (C2) is a restatement of (C1).⁴⁰

Third-Party Irrelevance might be rejected by legal paternalists and legal moralists. I shall not respond to these objections here as it will take us too far afield. Also, there might be debate over who has a right involved in extremely harsh treatment. For example, an opponent of extremely harsh treatment might assert that the citizens (to whom the government should be responsive) and, perhaps, government workers have a right. The former have a right since they are the employer and what is at issue is what their workers may do. My argument is independent of this issue. If citizens do have such a right, then extremely harsh treatment is just only if they validly commit to it. If they don't, or if their rights are limited, then their rights drop out of the picture. The same is true for government workers, although it is hard to see how they might have additional claims given that they have validly consented to carry out punishment- and, perhaps, harsh-treatment-related tasks. This might limit the *Requirement Thesis* to the rare case when the citizens, the law, and the relevant parties all validly consent to extremely harsh treatment. Given the Eighth Amendment, it is not clear if this will ever occur in the United States.

The argument for the *Requirement Thesis* that, in some cases justice requires extremely harsh treatment, rests on a claim about justice-based obligations (*Third-Party Irrelevance*) and a claim that in some cases all of the parties with relevant rights validly commit to extremely harsh treatment (*Extremely-Harsh-Treatment-Commitment Cases*). Since these claims are extremely plausible, the argument is likely sound.⁴¹

⁴⁰ In this context, "commitment" refers to a promise rather than consent. This explains how a commitment produces a duty in the parties rather than merely a Hohfeldian liberty in the other party; see Hohfeld, *Fundamental Legal Conceptions*, ed. Cook, pp. 35-64. An individual has a liberty against another to do something if the other does not have a claim that she refrain from doing it. In this context, the liberty is moral rather than legal.

⁴¹ An important issue is whether a policy of extremely harsh treatment makes the world a better place and whether consequentialist considerations should be decisive in answering the question of when, if at all, the state should mete out extremely harsh treatment. For example, it's hard to see how retributivists and other Kantians could place much weight on consequentialist considerations. Here I duck the issues as to the effectiveness of extremely harsh treatment and the relevance of this issue to its permissibility. My goal has been the narrower one of showing that justice sometimes permits and requires extremely harsh treatment. The issue of its effectiveness depends at least in part on an estimate of harsh treatment's efficacy for different goals (e.g., punishment, information-acquisition), and this is a question for another day.

4. Conclusion

The commonsense view that extremely harsh treatment is always wrong because it is unjust is mistaken. In some cases, justice permits and even requires extremely harsh treatment. These cases occur when persons give free and informed consent to it because it is their best option. If justice is the sole ground of side-constraints, and I think it is, then whether the government and others should engage in extremely harsh treatment depends on whether and how often these cases occur in the actual world and the degree to which consequentialist considerations are relevant.

How a Libertarian Might Oppose Same-Sex *Marriage*

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1. Introduction

In February of 2005, an Act concerning the legal definition of *marriage* was introduced as Bill C-38 and received first reading in the Canadian House of Commons.¹ The bill provided a definition of *marriage* for the first time in Canadian law and expanded on the traditional common-law understanding of this form of union as (hitherto) an exclusively heterosexual institution. The bill's official legislative summary is as follows:

This enactment extends the legal capacity for marriage for civil purposes to same-sex couples in order to reflect values of tolerance, respect, and equality, consistent with the Canadian Charter of Rights and Freedoms. It also makes consequential amendments to other Acts to ensure equal access for same-sex couples to the civil effects of marriage and divorce.²

Though many nations recognized same-sex relationships at the time, there were only five countries that permitted same-sex *marriage*.³ In these countries, as in others, libertarians have been amongst the most vocal supporters of separating the sex of individuals from the right to enter the marriage state. While one cannot ignore the moral implications of denying same-sex couples the same rights and privileges afforded to members of

¹ Bill C-38 was introduced in the first session of the 38th Canadian Parliament on February 1, 2005.

² Parliament of Canada *LEGISinfo*, "House Government Bill C-38: An Act Respecting Certain Aspects of Legal Capacity for Marriage for Civil Purposes," 2011, accessed online at: <http://www.parl.gc.ca/LegisInfo/BillDetails.aspx?Language=E&Mode=1&billId=1585203>.

³ The Netherlands has allowed same-sex marriage since April 1, 2001, and was the first nation to do so. On January 30, 2003, Belgium became the second country to recognize legally same-sex marriage, which became law in Spain and Canada in 2005. South Africa followed suit on November 30, 2006.

heterosexual marriage, this controversy has an important *semantic* dimension that has received far less attention than it deserves. Taking the Canadian case as a concrete example of how one political region settled the matter, I shall argue that a recognition of this semantic dimension makes opposing Bill C-38, and all its kin, perfectly consistent with libertarian values: one can be a steadfast libertarian, a believer in the equality of same- and opposite-sex couples, a proponent of having same-sex partnerships recognized by the state, and yet deny, without any threat of contradiction, that same-sex couples have a right to *marry*.

2. From Libertarianism to Same-Sex Marriage

That libertarians have been strong advocates of same-sex marriage is hardly surprising given their emphasis on human freedom, a limited role for government, and their endorsement of *value plurality*—a recognition that people differ in their goals, commitments, preferences, and beliefs, and an insistence that governments should be neutral with respect to these different attitudes.⁴ Of course, freedom cannot be absolute and libertarians *do* allow restrictions. Especially significant are restrictions related to the so-called *harm principle*—a principle that expresses an individual's negative right to freedom and the specific conditions under which interference with this freedom may be warranted. In the first chapter of *On Liberty*, John Stuart Mill makes the following comments, which have since become the hymn of libertarianism:

[T]he sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. The only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinion of others, to do so would be wise, or even right The only part of the conduct of anyone, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.⁵

Under libertarianism, then, a person's negative right to freedom is guaranteed—even to the exclusion of paternalism and moralism—just as long as personal actions do not harm social institutions or non-consenting third

⁴ See Susan Dimock and Christopher Tucker, eds., *Applied Ethics: Reflective Moral Reasoning* (Toronto: Thomson, 2004).

⁵ John Stuart Mill, *On Liberty* (New York: Penguin, 1982 [1859]), pp. 68-69.

parties.⁶ Now if one connects libertarian commitment to individual freedom and autonomy, respect for multiple value systems, and the idea that governmental interference should be restricted and neutral, it becomes clear why libertarians have traditionally been strong advocates of same-sex marriage: they judge exclusively heterosexual marriage laws to be exclusionary and discriminatory, as challenging that part of conduct which concerns only the individual and over which the individual is sovereign.

Similar sentiments can easily be identified in almost all current discussions of this issue. For instance, the preamble to Bill C-38 explicitly states that the Act is meant to reflect “values of tolerance, respect, and equality, consistent with the Canadian Charter of Rights and Freedoms.” The reference to the Canadian Charter of Rights and Freedoms is not arbitrary. In fact, successful Canadian legal challenges to status quo marriage laws were often based on the Charter.⁷ Section 15(1) of the Canadian Constitution states:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.⁸

Analogous guarantees are a part of the constitutions of most other Western democracies, and challenges to (allegedly) exclusionary marriage laws have relied heavily on these guarantees. Bill C-38 also mentions *consequential amendments* to other Canadian Acts “in order to ensure equal access for same-sex couples to the civil effects of marriage and divorce.” Until very recently, same-sex couples were excluded from a host of privileges to which opposite-sex married couples are entitled, including (but not limited to):

- the right to obtain health insurance, to take bereavement leave, and to make decisions when a partner is incapacitated;
- the right of visitation in places restricted to families;
- the right to claim dependency deductions and inheritance;
- the right to claim estate and gift tax benefits;

⁶ Dimock and Tucker, eds., *Applied Ethics*.

⁷ For a brief history of the legal challenges to traditional marriage laws in Canada, see Daniel Cere, “War of the Ring,” in *Divorcing Marriage: Unveiling the Dangers in Canada’s New Social Experiment*, ed. Daniel Cere and Douglas Farrow (Montreal: McGill-Queen’s University Press, 2004), pp. 9-28.

⁸ Government of Canada, Department of Justice, “The Constitution Acts of 1867 to 1982,” 2011, accessed online at: <http://laws-lois.justice.gc.ca/eng/Charter/page-1.html#anchorbo-ga:l I-gb:s 15>.

- the right to sue for infliction of emotional distress due to injury or wrongful death; and
- the right to claim marital communication privileges.⁹

In one quick measure, Canadian legislators sought to recognize and correct what they perceived to be a blatantly inequitable state of affairs. The manner in which they decided to do so was to change the workaday definition of *marriage*, making it non-contingent upon the sex of individuals.¹⁰

3. Some Common Arguments Against Same-Sex Marriage

Despite all of the sound and the fury, however, it is worthwhile to step back and consider the libertarian argument for same-sex marriage in detail. What exactly is being claimed and why? In a fairly well known article, Adrian Alex Wellington gives us the basic structure for most such arguments:

- (1) In a libertarian society, sexual relations between consenting adults are beyond the purview of the state.
- (2) It is not possible to justify anything other than a functional account of marriage in contemporary, secular, libertarian society. Two considerations underlie this claim:

- (a) Courts have often developed functional definitions of “couple,” using questions such as: Did the parties share a bank account? Did the parties own property in common? Did the parties visit each other’s relatives? Did the parties purchase shared items? Did the parties care for one another when ill? Did the parties divide up household duties?

- (b) The functional definition of a “couple” is meant to replace other definitions that would be objectionable in a

⁹ Adrian Wellington, “Why Liberals Should Support Same Sex Marriage,” in *Applied Ethics: Reflective Moral Reasoning*, ed. Susan Dimock and Christopher Tucker (Toronto: Thomson, 1995), p. 255.

¹⁰ The association of same-sex marriage with issues of fairness and recognition was not confined just to Canadian legislators, but was widespread among academics and laity alike. When the same-sex marriage bill was first introduced in Canada, I received an email encouraging general support. The email was sent in early 2005 by a Canadian philosopher to other Canadian philosophers. It said, in part, “For some Canadians, marriage is an expression of love and commitment. For others, it is a religious sacrament; for others, it is a setting in which to raise children; for others, it is a source of companionship; for some, it is a source of tax benefit; for some, it is a means to acquire property or wealth or medical benefits; and for some, it is a means to reduce expenses. In Canadian society, there is no one single purpose for marriage, and to deny a couple the legal right to a civil marriage on the basis of their sex or sexual preference, is to deny their human rights.” The reference to *value plurality* in this message is unmistakable.

secular, libertarian society—e.g., religious, moral, teleological.

(3) If opposite-sex relationships are to be given state sponsorship, there must be rational reasons consistent with libertarian principles to deny that sponsorship to analogous relationships.

(4) On a functional account of marriage, same-sex relationships *are* analogous to opposite-sex relationships.

(5) Any rational arguments against the provision of state sponsorship to same-sex unions could only make claim to libertarian principles by reference to some formulation of the harm principle.

(6) There is no valid argument against same-sex marriage based on the grounds of harm consistent with the harm principle—including arguments that cite harm to traditional family values, to the moral fabric of society, or to the quest of gays and lesbians to achieve social legitimacy.

Therefore

(7) Same-sex marriage should be made legal.¹¹

Premise (6) is rather interesting, since it claims that opposition arguments citing damage to traditional family values, the moral fabric of society, or to the quest of gays and lesbians to achieve social legitimacy are all ineffectual and do not show that more inclusive marriage laws produce (or are likely to produce) harm in the sense specified by the harm principle.

Maggie Gallagher offers us a glimpse of what the first of these opposition arguments might look like in the Forward to *Divorcing Marriage: Unveiling the Dangers in Canada's New Social Experiment*. She asks, "What message is today's push for same-sex marriage sending to our young people?" Her answer is: "Marriage is the place where we not only tolerate people having babies and rearing children, we positively welcome and encourage it . . . Same-sex marriage will be, in effect, a public and legal declaration by governments that children do not need mothers and fathers."¹² Katherine Young and Paul Nathanson share Gallagher's conclusion, but try to substantiate their concerns more formally:

The social-science evidence is sometimes ambiguous . . . but we do know by now that two parents are better for children than one and that families with both mothers and fathers are generally better for children than those with only mothers or only fathers. We know also that biological parents usually protect and provide for their children

¹¹ Wellington, "Why Liberals Should Support Same Sex Marriage."

¹² Maggie Gallagher, "Forward," in *Divorcing Marriage: Unveiling the Dangers in Canada's New Social Experiment*, ed. Daniel Cere and Douglas Farrow (Montreal: McGill-Queen's University Press, 2004), p. vii.

more effectively than non-biological ones. That these facts are either ignored or trivialized by some advocates of gay marriage . . . says something about concern for children in our time.¹³

Young and Nathanson also hint at some detriment to the moral fabric of society, if same-sex marriage were to be legalized. "At the heart of this campaign for gay marriage is . . . radical individualism," they claim:

We are not referring to the kind of individualism that emerged in the eighteenth century and was expressed most effectively by those who wrote the American constitution. For them, individual liberty was embedded firmly in a context of communal responsibility . . . Today, individualism has come to mean something quite different, something that approaches the adage "anything goes" (as long, presumably, as no one is personally injured). The larger interests of society no longer function as constraints. And this indifference to society as a whole is made clear by those who demand gay marriage.¹⁴

The suggested link here is between same-sex marriage and a more narcissistic, self-absorbed life-style.

But perhaps most interesting of all are arguments which claim that same-sex marriage is actually a *hindrance* to the gay and lesbian cause. For example, Paula Ettelbrick contends that "marriage runs contrary to two of the primary goals of the lesbian and gay movements: the affirmation of gay identity and culture and the validation of many forms of relationships."¹⁵

¹³ Katherine Young and Paul Nathanson, "The Future of an Experiment," in *Divorcing Marriage*, ed. Cere and Farrow, p. 49. Young and Nathanson support the claim that biological parents are more effective than non-biological parents by citing Martin Daly and Margo Wilson, "Some Differential Attitudes of Lethal Assaults on Small Children by Stepfathers Versus Genetic Fathers," *Ethology and Sociobiology* 15 (1994), pp. 207-17; Martin Daly and Margo Wilson, "Violence against Stepchildren," *Current Directions in Psychological Science* 3 (1996), pp. 77-81; Carol D. Siegel, Patricia Graves, Kate Maloney, Jill Norris, B. Ned Calonge, and Dennis Lezotte, "Mortality from Intentional and Unintentional Injury Among Infants of Young Mothers in Colorado, 1982-1992," *Archives of Pediatric and Adolescent Medicine* 150 (1996), pp. 1077-83; and Don Browning, *Marriage and Modernization: How Globalization Threatens Marriage and What to Do About It* (Grand Rapids, MI: Eerdmans, 2003). For further arguments purporting to show that same-sex marriage would have an adverse effect on traditional family values, see Margaret Somerville, "What About the Children?" in *Divorcing Marriage*, ed. Cere and Farrow, pp. 63-78.

¹⁴ Katherine Young and Paul Nathanson, "The Future of an Experiment," in *Divorcing Marriage*, ed. Cere and Farrow, pp. 52-53.

¹⁵ Paula Ettelbrick, "Since When Is Marriage a Path to Liberation?" *Lesbian and Gay Marriage* 13 (1992), pp. 20-21.

Others, like Nancy Polikoff, are inclined to combine issues of gay and lesbian rights with broader feminist concerns, arguing that permitting same-sex marriage furthers neither agenda:

I believe that the desire to marry in the lesbian and gay community is an attempt to mimic the worst of mainstream society, an effort to fit into an inherently problematic institution that betrays the promise of both lesbian and gay liberation and radical feminism.¹⁶

A significant part of Wellington's effort is directed at dismantling all of these criticisms. Whether or not Wellington succeeds is not my primary concern, however, since the semantic argument I wish to recommend is quite distinct from those mentioned above. It remains to be seen, then, what (if anything) is wrong with the libertarian case for same-sex marriage.

4. Semantic versus Moral Claims

As Wellington's argument suggests, advocates for same-sex marriage have customarily invoked a number of concerns they consider relevant to the issue. Such concerns include a person's entitlement to self-determination, the right to choose with whom one shares his or her life, the injustice stemming from unequal treatment of same- and opposite-sex couples, and the alarmist attitudes of those who declare a threat to traditional family values from same-sex marriage. Notice, however, that these are all *moral* concerns, and they are certainly important: one can hardly deny that there has been, and continues to be, discrimination against gays and lesbians. Still, we may wonder whether the moral issues are really the heart of the matter.

Based solely on considerations related to the proper application of the predicate *married*, I suggest that it is possible to resolve all of the moral concerns and *still* oppose same-sex *marriage*. In fact, one can make a stronger claim: opposition to same-sex marriage is currently not merely consistent with libertarianism, but follows *directly* from libertarian values.

Suppose that a government decides to recognize same-sex unions and grant gay and lesbian partners exactly the same set of rights and privileges as their heterosexual counterparts. What do all of these rights really amount to? Do they render same-sex couples *married*? Surely, the answer depends on what the word *married* means.¹⁷ We can think of the word *married* as a two-place predicate, where

¹⁶ Nancy Polikoff, "We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not 'Dismantle the Legal Structure of Gender in Every Marriage'," *Virginia Law Review* 79 (1993), p. 1536.

¹⁷ Hence, the italicized *marriage* in the title of this article.

M: Married
x, y: variables
x M y: *x* is married to *y*.

Clearly, whether or not same-sex couples can be married depends on whether or not the proper application of the predicate **M** requires the two variables, *x* and *y*, to be of opposite sex. If it does, then the expression *same-sex marriage* is oxymoronic; if it does not, then *marriage* may be used to describe same-sex unions without difficulty. It is that simple. But however the case may be, the point to be stressed is that the proper application of the word *marriage* involves a *conceptual question of classification*, which depends entirely on the semantic properties of *marriage*. It is not, and never should be, a case for moral theorists.

Unfortunately, this point is often lost. Not only have moral issues been associated with the same-sex marriage debate, but they have been its strongest driving force. That this association is misguided becomes clear when we take as an analogous case the rampant discrimination against African-Americans during the U.S. civil rights movement of the 1950s and 1960s. Martin Luther King, Jr., one of the most celebrated figures of that era, was fighting the injustice to which he and other African-Americans were continually subjected. He was not lobbying to have a certain predicate—*Caucasian*, for instance—apply to members of his race; he was lobbying for the same entitlements to which White America was accustomed. The issues in this case *were* moral, not semantic.

By contrast, there seems to be more going on in the same-sex marriage debate than just equal rights for gays and lesbians. There is also a sense that homosexuals are asserting some sort of right to a *word*, believing, perhaps, that the word *marriage*—firmly rooted, as it is, in a long tradition of social acceptance and advocacy—will somehow bestow a stronger measure of legitimacy on their relationships, one that might mitigate age-old biases. If so, then gay and lesbian couples do not just want their unions recognized in law, but want them recognized *by a specific name*, and this highlights a side of the debate that has never been fully addressed. Time and again we hear the opposition undermine itself by focusing on the wrong issues—religious conviction, moral purity, family values—and missing the crux of the problem. Likewise we hear advocates speak of justice and equality, fairness and inclusion, and yet fail to recognize that *marriage* is a word with a particular meaning and, like any other word, the meaning of *marriage* must be determined by specific semantic properties. But perhaps the biggest victim of all is a perfectly elegant proposition that has been buried under the myriad of charges and counter-charges: *where there are semantic properties, correct classification is never a matter of moral privilege*.

Even in the philosophical literature the semantic element is often ignored. We see this in the argument for same-sex marriage given by Wellington. As it happens, this argument is invalid, since we *can* agree with all of its premises and reject its conclusion. We can grant that in a libertarian

society sexual relations between consenting adults are beyond the purview of the state and nothing but a functional account of marriage is justifiable (premises [1] and [2]); that there must be rational reasons consistent with libertarian principles to deny state sponsorship to same-sex relationships but grant them to analogous ones (premise [3]); that on a functional account of *marriage* same- and opposite-sex relationships *are* analogous (premise [4]); that any argument against state sponsorship of same-sex unions could only make reference to the harm principle, but that a valid argument meeting this condition does not exist (premises [5] and [6]). Even if we grant all of these claims, Wellington's conclusion *still* would not follow. What follows is not that same-sex *marriage* should be legal, but that (some form of) same-sex *union* should be made legal. The expressions *marriage* and *legal union* are not synonymous, though they are frequently treated as such:

A [libertarian] society is one in which the fullest possible range of options for human flourishing is to be encouraged One important civil liberty is the freedom to engage in a *state sanctioned union*. The only possible reason that a [libertarian] could have for rejecting *same-sex marriage* is that the practice would in some way violate the harm principle.¹⁸

It is obvious from this passage that Wellington uses “a state sanctioned union” and “same-sex marriage” interchangeably, and this is a serious mistake. I suggest that marriage is a particular *kind* of state sanctioned union, one that, by the current conventions of usage, require those united to be of different sex. The last sentence of the passage is also false: violation of the harm principle is *not* the only possible reason that a libertarian could have for rejecting same-sex marriage. There remain the semantic constraints I have already mentioned—those pertaining to whether or not the meaning of *marriage* makes that word applicable to unions involving same-sex partners.

5. Semantics Matter

But does *marriage* really require the parties united to be of opposite sex? How can we find out one way or the other? We might try some kind of *functional role* semantics, where the meaning of an expression is said to be equivalent to the totality of inferences that can be drawn from that expression.¹⁹ Such an approach might prove helpful in illuminating the role that *marriage* plays in the English language. We might then be in a better

¹⁸ Wellington, “Why Liberals Should Support Same Sex Marriage,” p. 240, emphasis added.

¹⁹ See Ned Block, “Advertisement for a Semantics for Psychology,” *Midwest Studies in Philosophy* 10 (1986), pp. 615-78.

position to decide whether or not *marriage* covers unions of the same sex. On the other hand, do we really have to go that far?

I think it is fair to say that the word *marriage* currently means the union of two people of the *opposite* sex. This may not have always been the case, but the history of the word is irrelevant to the argument at hand; the only thing that matters is the current meaning of *marriage* as specified by modern usage conventions. My contention is that *marriage* presently designates opposite-sex unions, though I do not deny that this may be a temporary state: the wheels of change have started to turn, and perhaps not long from now *marriage* will mean the union of *any* two people. But this is not the current situation. I have no direct proof for this claim, but must appeal to our common empirical experience in its support—our common empirical experience of how things *actually are*, not how we might *want* them to be.²⁰ If I am correct, then denying homosexuals a right to marry is no more discriminatory or unjust than denying Martin Luther King, Jr., the right to call himself *Caucasian*, and claims to the contrary must be carefully explained.

But even if this were the case, why can't the relevant authorities simply change the meaning of the word *marriage*? After all, there does seem to be precedent for this kind of power: most governments exercise some control over the word *citizen*, for example. Through Bill C-38, Canadian legislators simply extended their jurisdiction to include *marriage*. Moreover, while the state may change the meaning of a word in terms of its use in laws and judicial proceedings, it has no power to prevent people outside this context from using words in any way they choose. If the state claims that same-sex couples can marry, this will not force people who oppose this practice from refusing to use the term *marriage* in reference to such unions.²¹ So why shouldn't other democratic governments enact bills similar to C-38?

The prospect of other governments following the Canadian example is precisely what should be worrying a libertarian. The question of how languages change is a very complicated one, and we will not venture too far into it here. Suffice it to say that languages evolve much like species do—very gradually and over long time intervals—so that in most cases it becomes exceedingly difficult, if not practically impossible, to determine precisely when a word came to have the meaning it does (much less shift its subtle connotative associations). In any case, what seems reasonably obvious is that neither individuals, nor special interest groups, nor governments should have the power to impose a specific word usage by an act of law *without proper and adequate justification*.

²⁰ This is an important qualification, since one sometimes notices in situations such as these that wishful thinking (and perhaps excessive optimism) rather than careful observation of actual practices guides assertions of fact.

²¹ My thanks to an anonymous reader of this article for raising this point.

The contrary brings to mind George Orwell's *Nineteen Eighty-Four*, where a government in a futuristic society invents a whole new language, called *Newspeak*, in order effectively to control people's range of thoughts and make them conform to a new political order.²² While this may be too extreme (surely no current democracy is likely to degenerate to this level), the point should still be pressed that just as governments in libertarian societies have no business in the bedrooms of individuals, libertarian governments have no business in the *dictionaries* of individuals. And this observation applies just as strongly to words over which authorities are *perceived* to exercise some control. From a libertarian perspective, it is important in such cases to be clear on the sort of control an authority is permitted to practice and the manner in which that power was acquired. Hence, taking the word *citizen* as example, we may distinguish between the *conditions* of citizenship and the *definition* of citizenship in a given country. While a national government typically has some say over the *conditions* that must be fulfilled before an individual is deemed a full and unqualified member of its region, the *definition* of *citizenship*—insofar as this pertains to the rights and duties that come with such membership—is usually outlined in that nation's constitution. In democratic societies, constitutional amendments are implemented by a protracted process that is contingent upon the involvement and assent of multiple regions and multiple levels of law-making bodies. Such constraints are put in place *precisely* to curb the powers of a national government. Notice also that the right of a democratic government to dictate the *conditions* of citizenship is usually bestowed from the *bottom-up*, and is therefore consistent with libertarian values: libertarianism does not only recommend a limited role for government, but also requires mechanisms that ensure that the type and range of a government's mandate are determined by citizens.

Having said that, there is no evidence that a *bottom-up* process to change the definition of *marriage* has ever taken place in any of the regions that have legalized that form of union for same-sex couples. In Canada, Bill C-38 was the *first* attempt to define *marriage* in law, prior to which the word had not been the concern of legislators. The controversy that has shrouded the Canadian debate—the antagonism, resentment, and deep divisions that have surfaced immediately after the new Marriage Act was introduced—strongly suggests that the proposed change did *not* come from the bottom-up. Though marriage has legal implications, the meaning of that word is essentially non-legal; it is rooted deeply in socio-cultural practices, religious convictions, and in value systems that are both personal and shared. Small wonder, then, that legislative efforts targeting the meaning of *marriage* have been seen by many as intrusive and threatening: it is one thing for a government to set forth the *legal consequences* of choosing to unite with a partner, but an entirely different matter for a government to (*re*)define the marriage institution itself.

²² George Orwell, *Nineteen Eighty-Four* (London: The Folio Society, 1949).

A government's role may include jurisdiction over the former, but should not be assumed automatically to include the latter.

But is all of this just a tempest in a teapot? If the right of same-sex couples to unite is recognized in law and issues of fairness and equality are no longer relevant, does it really matter what we call this form of union? Would coining a new term really be all that important when modification of the existing one seems quite workable?

The short answer to the last two questions is *yes*. Whether or not legislative modification of the word *marriage* is a workable option in a libertarian society is exactly the point at issue; to assume that it is begs the question. Nor is it relevant to point out that individuals in isolation are powerless to affect the contours of a public language however they are decided—whether by an authoritarian state, a democratic state, or the mass of the people in their spontaneous linguistic interactions.²³ While it may be true that the evolution of public languages falls outside the realm of individual liberty and individual choice, it is *also* the case that public languages can easily be influenced by governments. So questions related to the nature, extent, and legitimacy of such influence are (or at least should be) of concern to libertarians.

What I am proposing is a semantic argument against same-sex *marriage*, and semantics *do* matter. I strongly suspect that this debate would not have been nearly as divisive, in Canada and elsewhere, had not the word *marriage* been at stake. If I am correct, then coining a new term to designate same-sex unions would have diminished much of the backlash. The trouble is, this controversy has never been only about fairness and equality. Just under the radar there is a battle raging on—a battle for access to the word *marriage* itself, which is considered (rightly or wrongly, I cannot say) to have inherent value. Once the moral issues have been removed, however, my proposed solution is simple: let *semantics* decide. While it might seem easier to modify the meaning of *marriage* and make it more inclusive, the question is not one of convenience; it is whether or not a libertarian government has the *right* to force such modification.

In view of these considerations, the libertarian, assuming (s)he wishes to remain consistent and agrees that governments should *not* have a free hand to manipulate language, should demand the following as far as same-sex legislation is concerned:

- (a) that an argument be made showing that there are circumstances under which libertarian governments have a right to alter meaning regardless of usage conventions;
- (b) that doing so is not inconsistent with libertarian ideals, especially those pertaining to the extent of governmental powers; and

²³ My thanks to the same anonymous reader of this article for raising this point.

(c) that same-sex legislation *is* one of these circumstances.

Needless to say, we are far from having any of these requirements fulfilled. Indeed, there is no reason to suppose that an argument satisfying these conditions is forthcoming, since, on the conception defended here, same-sex marriage can be opposed without any moral implications at all: homosexual couples get exactly the same privileges as heterosexuals, but without entitlement to the word *marriage*.

6. Conclusion

A shift in emphasis is what makes the semantic argument against same-sex marriage different. Whereas most positions for and against the right of homosexual couples to marry are expressed predominantly within a moral framework, I have claimed that the resolution of the debate lies in recognizing its semantic elements. The meaning of any word—*marriage* included—is a matter of linguistic conventions, and ultimately it is in reference to these conventions that we must decide whether or not a word is being used correctly. A consistent libertarian should resist any attempt from a government to implement laws that either restrict or expand the conventions of linguistic usage, without (at the very least) proper justification of this power and a precise description of its boundaries. If it is dangerous to have a government meddling in the personal affairs of individuals, it is at least as dangerous to give a government unrestricted control over what words mean, all the good intentions in the world notwithstanding.

None of this amounts to a denial that same-sex partners have a right legally to be united and a right to the same privileges granted to heterosexual couples. But if the current conventions of usage require those united by marriage to be of opposite sex, then same-sex unions simply cannot be designated *marriages*. We may assume that a time will come when *marriage* may be used in reference to same-sex unions, but that kind of change must come from the *bottom-up*, not from the *top-down*. Until such a change comes, invocations of human rights and equal treatment, in an attempt to *force* a wider usage of the word, should go unheeded, since national charters and constitutions have nothing to say about the proper application of predicates or the correct linguistic usage of expressions. And that is exactly how it should be.

Discussion Notes

Adam Smith on Commerce and Happiness: A Response to Den Uyl and Rasmussen

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1. Introduction

In Volume 32 of *Reason Papers*, Douglas Den Uyl and Douglas Rasmussen examine Adam Smith's views regarding commerce and happiness, making extensive reference to my earlier article on the subject.¹ The editors kindly invited me to respond to Den Uyl and Rasmussen, and I was very happy to accept because they raise some important questions that call for further discussion. I appreciate their generally sympathetic appraisal of my article, as well as their aspiration to show that Smith can be seen as a kind of forebear of the emerging literature on happiness or "subjective well-being" in economics, psychology, and other fields. In what follows I would like, first, to correct an important misinterpretation of my argument, and then to address an interesting (and thorny) question that Den Uyl and Rasmussen raise but that I did not take up in my article—namely, the question of whether the free market or the welfare state would be more likely to encourage happiness, given Smith's assumptions.

2. The Individual and Society

In my article as well as in a later book,² I attempt to resolve an apparent paradox in Smith's thought. On the one hand, Smith repeatedly and insistently claims in *The Theory of Moral Sentiments* (and, to a lesser degree,

¹ See Douglas J. Den Uyl and Douglas B. Rasmussen, "Adam Smith on Economic Happiness," *Reason Papers* 32 (Fall 2010), pp. 29-40; Dennis C. Rasmussen, "Does 'Bettering Our Condition' Really Make Us Better Off?: Adam Smith on Progress and Happiness," *American Political Science Review* 100, no. 3 (August 2006), pp. 309-18. Hereafter, Den Uyl and Rasmussen's article will be cited in the text using page numbers.

² Dennis C. Rasmussen, *The Problems and Promise of Commercial Society: Adam Smith's Response to Rousseau* (University Park: Pennsylvania State University Press, 2008), esp. chap. 4.

in *The Wealth of Nations*) that neither the pursuit nor the possession of material goods does much to make people any happier, and in fact he argues that they might jeopardize people's happiness. For Smith, "happiness consists in tranquillity and enjoyment,"³ and continually toiling and striving for ever-more material goods disturbs people's tranquility without adding much, if anything, to their enjoyment.⁴ On the other hand, Smith is almost certainly history's most famous advocate of commercial society. The question, then, is why he defends a form of society that fundamentally depends on and encourages "the uniform, constant, and uninterrupted effort of every man to better his condition" even though this "effort" appears to undermine people's happiness.⁵ What is the point of promoting the wealth of nations if everyone ends up being miserable?

I argue that the solution to this apparent paradox can be found in Smith's account of the positive *political* effects of commerce: dependence and insecurity are two of the chief obstacles to happiness, as Smith sees it, and so the alleviation of these ills in commercial society constitutes a great step forward. Complete, unalloyed happiness—the tranquility of the Stoic sage—is all but unattainable in *any* society, since it will almost always be disrupted to some degree by "the desire of bettering our condition, a desire which . . . comes with us from the womb, and never leaves us till we go into the grave."⁶ But commercial societies do tend to alleviate the great sources of misery that dominated most pre-commercial societies, namely, dependence and insecurity, through the interdependence of the market and the effective administration of justice by the government. Thus, people in commercial societies tend to enjoy more tranquillity and hence more happiness than people in other societies not because of the material goods for which they work so hard, which in fact *prevent* them from being completely happy, but rather because they are generally free from direct, personal dependence on others and because they generally enjoy a sense of relative safety. In short, money really cannot buy happiness, but liberty and security can at least prevent certain misery.

Den Uyl and Rasmussen agree with my basic point that Smith sees liberty and security as key benefits afforded by commercial society and that these benefits help to promote happiness, at least insofar as they alleviate misery (pp. 32, 36-37). Their main criticism is that my argument is subject to "the fallacy of division," meaning that I assume that what makes for a "happy" or flourishing society will also make for a happy individual (e.g.,

³ Adam Smith, *The Theory of Moral Sentiments*, ed. D. D. Raphael and A. L. Macfie (Indianapolis, IN: Liberty Fund, 1976), III.3.30, p. 149.

⁴ See especially *ibid.*, I.iii.1, pp. 50-51; III.3.30-31, pp. 149-50; IV.1.8-9, pp. 181-83.

⁵ Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, ed. R. H. Campbell and A. S. Skinner (Indianapolis, IN: Liberty Fund, 1976), II.iii.31, p. 343.

⁶ *Ibid.*, II.iii.28, p. 341.

tranquility) (pp. 31-33). This is a fallacy, however, that I believe I avoid. Contrary to what Den Uyl and Rasmussen suggest (pp. 32, 33), I never speak of a society or an economy as being “happy” or “tranquil”; these are feelings or sensations, and so can clearly be experienced only by individuals. In fact, I explicitly state that “Smith’s touchstone is the happiness of the individuals who make up a society, not some vague notion of ‘public happiness.’”⁷ What I *do* claim is that there is a key connection between certain broad features of a society—namely, the degree of security and personal independence it affords—and the happiness or tranquility of the individuals who live in that society. Again, these societal goods cannot *ensure* individual happiness, but they can at least prevent the great sources of misery that have dominated most of human history. Thus, I do not believe that “the liberty and security of a commercial order is *the same as* the tranquility of the happy individual,” as Den Uyl and Rasmussen allege (p. 32, emphasis added), or even that they are *sufficient* for the tranquility of the happy individual, but rather that they are *prerequisites* for the tranquility of the happy individual.

Moreover, I agree wholeheartedly with Den Uyl and Rasmussen’s claim that “security and freedom are not necessarily improved with each marginal increase in wealth and goods,” and thus that people do not necessarily become happier or more tranquil the wealthier they become (p. 35). A key burden of my interpretation of Smith, to repeat, was not only that money cannot buy happiness, but that the *pursuit* of material goods tends to *undermine* people’s happiness. As I argue in more detail in my book, according to Smith commercial society helps to secure the minimum preconditions of happiness by alleviating some of the greatest sources of misery, but the gains to happiness come mostly from the bottom part of the income scale and are subject to diminishing marginal returns as wealth increases—just as Den Uyl and Rasmussen suggest (pp. 35-36).⁸

Ultimately, then, the differences between my Smith and Den Uyl and Rasmussen’s Smith are not all that large. The key difference, in fact, has nothing to do with whether the things that make an individual happy are the same as the things that make a society flourish—we agree that they are not—but rather that Den Uyl and Rasmussen go much further than I do in specifying what *form* of commercial society would be best at promoting individual happiness. In my article I demonstrate in some detail that Smith saw commercial society as a significant improvement over what came before it (the hunting, shepherding, and agricultural stages of society), but I do not address the question of how different *forms* of commercial society—e.g., the free market versus the welfare state—might bear on the issues of liberty, security, or happiness. Den Uyl and Rasmussen’s own reading of Smith centers on this question, so I turn to it next.

⁷ Rasmussen, “Does ‘Bettering Our Condition’ Really Make Us Better Off?” p. 312.

⁸ Rasmussen, *The Problems and Promise of Commercial Society*, pp. 168-70.

3. The Free Market, the Welfare State, and Happiness

The relative merits of the free market and the welfare state was, of course, not an issue that Smith explicitly addressed, or even *could have* explicitly addressed, since the welfare state as we know it did not yet exist in the eighteenth century.⁹ As Samuel Fleischacker has written,

the notion that states should redirect economic resources so as to eradicate poverty had never so much as been suggested by any serious philosopher, politician, or political movement among Smith's contemporaries and predecessors. Poor *relief* had of course been around for many centuries, but that was designed simply to enable disabled and starving people to survive, not to help them rise out of poverty altogether [T]he idea that governments should institute a redistribution of wealth out of fairness to the poor was simply not on the table.¹⁰

Given the vast changes in the political landscape since the eighteenth century as well as the complex, non-ideological nature of Smith's thought, it is extremely difficult to say with any degree of certainty where he would stand on today's political spectrum.¹¹ The struggle over what stance Smith might take on various political issues began almost immediately after his death, and has rarely reached the level of consensus.

Den Uyl and Rasmussen's reading of Smith is essentially the traditional, free market reading. Their Smith would clearly rebel against the modern welfare state and its "encroachments upon individual liberty . . . in the form of high progressive taxes, the erosion of property rights, and a host of nanny-type restrictions on what people can freely do with their lives" (p. 36;

⁹ Indeed, even the free market was only a dream in the minds of Smith and a handful of French *économistes*. The reigning economic system in Smith's time was not laissez-faire capitalism—terms that Smith himself never used—but mercantilism, which Smith calls "the modern system," the system that "is best understood in our own country and in our own time." Smith, *The Wealth of Nations*, IV.intro.2, p. 428. From Smith's vantage point, "to expect . . . that the freedom of trade should ever be entirely restored in Great Britain, is as absurd as to expect that an Oceana or Utopia should ever be established in it"; see *ibid.*, IV.ii.43, p. 471.

¹⁰ Samuel Fleischacker, "Review of Charles Griswold, *Adam Smith and the Virtues of Enlightenment*," *Mind* 109, no. 436 (October 2000), p. 919.

¹¹ Many leading Smith scholars have argued as much. See, for example, Samuel Fleischacker, *On Adam Smith's Wealth of Nations: A Philosophical Companion* (Princeton, NJ: Princeton University Press, 2004), pp. 263-65; Charles L. Griswold, Jr., *Adam Smith and the Virtues of Enlightenment* (Cambridge, MA: Cambridge University Press, 1999), pp. 295-96.

cf. p. 40). There is no hint, in their account, of the side of Smith that has led to a flowering of “left-liberal” interpretations of his thought in recent years, to go along with the traditional “libertarian” reading.¹² In my view there are real arguments to be made on *both* sides of this interpretive debate, and *neither* side can claim Smith for itself alone. Thus, Den Uyl and Rasmussen’s claim that a strictly free market economy would best promote people’s happiness, given Smith’s assumptions, seems to me a bit one-sided.

Den Uyl and Rasmussen’s principal argument is that “with the right kind of economy, we might . . . achieve the highest sort of ‘happiness’ as an economy and a secondary form of happiness as individuals” (p. 38). That is, with a free market we can achieve both a continually growing economy as well as a reasonable degree of happiness for the individual, even if not the perfect tranquility of the Stoic sage. The “secondary” form of happiness that they claim individuals will enjoy in this order—which they dub “individual economic happiness”—is found not in tranquility but rather “within the nature of commercial activity itself” (p. 39). The key to this kind of happiness, they say, is “progress,” which for the individual means “working to build, create, succeed at, or otherwise pursue goals that are possible and the product of one’s efforts” (p. 40). And they claim that this kind of happiness would be undermined by a welfare state: “One would . . . expect a good deal of *dissatisfaction* in those states where individuals do not have significant roles in the management of the wealth they pursue and possess, such as in modern welfare states where so much wealth is both taxed and collectively managed” (p. 40).

Yet the sort of “individual economic happiness” that Den Uyl and Rasmussen describe—essentially, happiness as achievement—is very different from, and in some respects incompatible with, the true individual happiness—the happiness of tranquility and enjoyment—that Smith returns to again and again in *The Theory of Moral Sentiments*.¹³ Den Uyl and Rasmussen’s “individual economic happiness” seems to rest on precisely the

¹² See, for example, Fleischacker, *On Adam Smith’s Wealth of Nations*; Gavin Kennedy, *Adam Smith’s Lost Legacy* (New York: Palgrave Macmillan, 2005); Iain McLean, *Adam Smith, Radical and Egalitarian: An Interpretation for the 21st Century* (Edinburgh: Edinburgh University Press, 2006); Spencer J. Pack, *Capitalism as a Moral System: Adam Smith’s Critique of the Free Market Economy* (Aldershot: Edward Elgar, 1991); Emma Rothschild, *Economic Sentiments: Adam Smith, Condorcet, and the Enlightenment* (Cambridge: Harvard University Press, 2001).

¹³ The passage from *The Theory of Moral Sentiments* that Den Uyl and Rasmussen cite (p. 40) to prove that Smith thinks “achievement” will produce satisfaction or contentment (even if not Stoic tranquility) is drawn from a discussion of whether the morality of an action depends at all on the consequences of that action or is determined solely by the actor’s intentions, and has nothing to do with whether working, building, creating, or succeeding at things will make an individual happy. See Smith, *The Theory of Moral Sentiments*, II.iii.3.3, p. 106.

kinds of deceptions that Smith so vividly describes, such as the idea that working, building, creating, and succeeding are what will make us happy. On the contrary, Smith insists—even in *The Wealth of Nations*—that labor is “toil and trouble,” that it requires an individual to “lay down [a] portion of his ease, his liberty, and his happiness.”¹⁴ Indeed, in *The Theory of Moral Sentiments* he forcefully warns his reader that the concern with achievement and success is “the great source of both the misery and disorders of human life.”¹⁵

Moreover, Den Uyl and Rasmussen’s claim that for Smith people are necessarily happiest in a “progressive state” or growing economy is not particularly persuasive.¹⁶ It is obviously true that, all other things equal, people prefer prosperity to stagnation. Yet Smith insists that material prosperity can do little to produce true happiness, or rather that any happiness it produces will necessarily be short-lived. Immediately after defining happiness as “tranquillity and enjoyment,” he goes on to say that “the mind of every man, in a longer or shorter time, returns to its natural and usual state of tranquillity. In prosperity, after a certain time, it falls back to that state; in adversity, after a certain time, it rises up to it.”¹⁷ Once again, money itself really cannot buy happiness. Rather, Smith claims that people are more likely to attain happiness—not complete tranquility, but the level that one can reasonably hope to reach—not through material prosperity, success, or achievement, but rather through simpler and calmer pleasures such as the knowledge that one has acted virtuously and rewarding relationships with family and friends.¹⁸ These pleasures are available (though not, of course, guaranteed) in any society that provides a tolerable degree of liberty and security.

The question, then, is whether a free market society or a welfare state would do more to help (or hinder) people’s ability to realize this kind of “tranquillity and enjoyment.” Den Uyl and Rasmussen and I agree that

¹⁴ Smith, *The Wealth of Nations*, I.v.2, p. 47; I.v.7, p. 50.

¹⁵ Smith, *The Theory of Moral Sentiments*, III.3.31, p. 149.

¹⁶ Den Uyl and Rasmussen cite (p. 38) Smith’s claim that “it is in the progressive state, while the society is advancing . . . that the condition of the labouring poor, of the great body of the people, seems to be the happiest and most comfortable”; see Smith, *The Wealth of Nations*, I.viii.43, p. 99. However, this passage comes in the context of a discussion of “the liberal reward of labour” and its effect on the size of the population, and thus “happiest” here seems to mean most thriving or prosperous rather than most satisfied or content. Indeed, Smith goes on to remark that high wages often lead workers “to over-work themselves, and to ruin their health and constitution in a few years”; see *ibid.*, I.viii.44, p. 100.

¹⁷ Smith, *The Theory of Moral Sentiments*, III.3.30, p. 149.

¹⁸ *Ibid.*, I.ii.4.1, p. 39; I.ii.5.1, p. 41; III.1.7, p. 113; III.5.6-7, p. 166.

neither form of society will guarantee complete happiness, and we also agree that a sense of security and personal independence are necessary *prerequisites* for happiness. Yet I am less sure than they are that a strictly free market society would necessarily offer individuals a greater sense of security and personal independence than a welfare state. It is true that people in a free market society might feel more secure in the possession of their property, more free from intrusions by the state in the form of taxation. But it is equally possible that they would gain a greater sense of security and independence from guaranteed health care, unemployment insurance, and the like—from being less subject to the whims of the market—than they would from lower taxes.

It might be protested that such measures smack of the kind of “government intervention” that Smith so strongly opposed. However, the government interventions to which Smith objected most strongly were those designed by and intended to help the rich and powerful¹⁹; it is far from clear that he would also object to twenty-first century interventions designed to curb their influence and aid the poor and the middle class. If poverty were to cause a greater degree of insecurity and dependence among the poor than restricting markets in some way would for the population as a whole—an entirely plausible scenario—then it is quite possible that Smith would favor aiding the poor even at the cost of hampering the free market to some degree.²⁰ Once again, I do not mean to claim here that the “left-liberal” interpretation of Smith is the only one or even necessarily the most plausible one. I do think, however, that this question is more open to debate than Den Uyl and Rasmussen suggest.

¹⁹ “It is the industry which is carried on for the benefit of the rich and the powerful, that is principally encouraged by our mercantile system. That which is carried on for the benefit of the poor and the indigent, is too often, either neglected, or oppressed”; see Smith, *The Wealth of Nations*, IV.viii.4, p. 644.

²⁰ I have made this argument at greater length in Rasmussen, *The Problems and Promise of Commercial Society*, pp. 171-73.

Smith on Economic Happiness: Rejoinder to Dennis C. Rasmussen

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We would like to begin by thanking Dennis C. Rasmussen for taking the time to comment on our little piece on Adam Smith.¹ Rasmussen has a number of interesting things to say about Smith, and we have profited from them and his brief remarks on our effort. No doubt space limitations have prevented him from saying all he wanted to about issues in our article that troubled him, just as those limitations affect us to some degree in this response. Thus, even though space is valuable, we want to take time to express our sincere appreciation to Rasmussen for his comments.

First, let us deal with the end of Rasmussen's essay where we are accused of failing to refer to left-Smitheans in our analysis and of offering a "traditional, free market" reading of Smith when it comes to political economy (p. 98). This traditional reading quickly gets referred to as a "libertarian" reading, though Rasmussen does use scare quotation marks around the term "libertarian" (p. 99). First of all, we are not unaware of the left-Smithean reading. Fleischacker, for example, is mentioned in our text. Secondly, part of the point of what we were doing was to offer an account of how a free market reading might handle the very problem that Rasmussen and we are concerned to discuss—namely, Smith's apparent love/hate relationship with commerce. Finally, we thought we had a good enough left-Smithean in Rasmussen himself. Should Rasmussen want to shy away from that ideological characterization, so would we when it comes to the use of the term "libertarian" as a description of a way of interpreting Smith. Though we ourselves are libertarians, we would not read Smith as being one, even

¹ Douglas J. Den Uyl and Douglas B. Rasmussen, "Adam Smith on Economic Happiness," *Reason Papers* 32 (Fall 2010), pp. 29-40. For his discussion of our article, see Dennis C. Rasmussen, "Adam Smith on Commerce and Happiness: A Response to Den Uyl and Rasmussen," *Reason Papers* 33 (Fall 2011), pp. 95-101. Hereafter, his article will be cited in the text using page numbers.

ignoring the issue of an anachronistic application of the term when applied to Smith. It is, however, now a common left-Smithean ploy to brand all classical liberal readings of Smith as “libertarian,” as if those interpretations of Smith were ignorant of the passages that are not so easily subsumed under that ideological label. So, on the one hand, we do not read Smith as a libertarian, though we do read him as a classical liberal. On the other hand, part of our point was exactly to see what might be said within that classical liberal framework about Smith’s ambiguous attitude toward commerce. Ironically, we thought that Rasmussen’s work brought one a long way towards such a reading on both counts.

We move now to the point where Rasmussen thinks we have been most unfair to him, namely, in accusing him of committing the fallacy of division (p. 96). If one looks at the text closely, it is not exactly the case that we accuse him of this fallacy. First of all, we say he is “prone” to it or “courts” it, largely because we are uncertain about the relationship between his claims about “happiness” with respect to society as a whole (individuals collectively considered) and his claims about individual happiness (individuals considered distributively). Most of what we say, however, on the pages he cites are general logical points connected to not making the mistake of holding that whatever is said about society as a whole can be readily applied to individuals or vice versa.² In other words, if tranquility and security are necessary for social “happiness,” nothing yet follows logically with respect to what characterizes individual happiness. And if such terms are descriptive of individual happiness, we have not yet said anything about society. Even if the same terms are used for both, individuals (distributively considered) and society (individuals collectively considered), one does not thereby have license to believe they are being used in the same sense. In our text, the closest we come to *directly* accusing Rasmussen himself of committing a fallacy would be one of composition, not division, for he seems to suppose that the tranquility and security necessary for individual happiness also say something about the “happiness” of society.³ Societies which provide tranquility and security may, as Rasmussen insightfully notes (p. 97), be providing preconditions for individual happiness, but there are many societies that provide these things which neither Rasmussen nor Smith would regard as “happy.” It is thus not so much that Rasmussen commits the fallacies of composition or division as it is that he is imprecise about the nature of the relationship between the individual and society and this is due in part to a lack of clarity about the key terms of “tranquility” and “happiness.” Sometimes “tranquility” is the lack of disturbance and sometimes the peaceful mental condition of the Stoic sage. Sometimes “happiness” looks like the absence of misery while at others it looks like “tranquility and enjoyment.” We are at

² Den Uyl and Rasmussen, “Adam Smith on Economic Happiness,” pp. 32-33.

³ *Ibid.*, p. 33.

times uncertain what applies to individuals distributively considered or to individuals collectively considered and what the one may have to do with the other.

One thing the state is clearly *not* doing is providing “tranquility” in the sense that Smith means it in the passage defining individual happiness that comes in Section 2 of Rasmussen’s response to us (p. 96), that is, as “tranquility and enjoyment.” It *may* be providing some kind of happiness as tranquility, if “tranquility” is understood as simply a lack of disturbance, but presumably Rasmussen wants to say that that sort of tranquility is rather a *precondition* for happiness, not the happiness of individuals themselves. But we don’t need Smith to tell us that, nor is a lack of disturbance peculiar to commercial societies. In fact, the definition referred to by Rasmussen (p. 96) from Smith’s *The Theory of Moral Sentiments* does no work at all when it comes to thinking about what might be said about society at large, if tranquility as lack of disturbance is being used, because that passage does not use “tranquility” in that way.⁴ So perhaps Rasmussen is saying that the tranquility of a peaceful social order is a precondition for the tranquility that attends to actual happiness, which is of a completely different nature from the tranquility of a peaceful social order. Yet this in itself either does not explain what the connection is between them (since lots of states might provide peace and security) or how one moves from one to the other, if one can. Hence our perplexity over comments like “people in commercial societies tend to enjoy more tranquility and hence more happiness than people in other societies . . .” (p. 96). What kind of tranquility are we talking about here? If it’s not “relative safety” or peacefulness, then perhaps it is the freedom “from direct, personal dependence on others” that constitutes tranquility. Although this understanding too has nothing to do with the notion of happiness from *The Theory of Moral Sentiments*,⁵ and although it’s debatable whether such a condition of independence should be called tranquility, is a lack of personal dependence applicable to the happiness of individuals or to the collective alleviation of misery? Are we using the terms applicable to the description of one type of happiness to the other without providing the necessary middle step between them?

It would seem in the end that Rasmussen wants to say that happiness is a form of tranquility and pursuing commerce cannot be tranquil; hence, individuals will not be happy in commercial orders. However, by relieving misery and dependence individuals might have a chance at happiness. So collective “tranquility” makes possible a different sort of “tranquility” at the individual level, but is not the same as that tranquility. But still the question remains of what these forms of tranquility have to do with one another. For it

⁴ Adam Smith, *The Theory of Moral Sentiments*, ed. D. D. Raphael and A. L. Macfie (Indianapolis, IN: Liberty Fund, 1976), III.3.30, p. 149.

⁵ *Ibid.*

now seems to be the case that while the commercial order discourages the “tranquility” of individual happiness by making everyone pursue money and material goods, individuals considered as a whole are somehow happier because the misery index is lower. So now the question is, so what? Do we care more about tranquility considered one way or the other and why? If they are in tension, as they seem to be, have we really resolved any paradox involved in defending commercial orders on the one hand and showing their irrelevance to, or impediment to, individual happiness on the other? Clearly Rasmussen’s solution does not alleviate the tension. Rather we would appear to have a society where individuals struggle to undermine their personal happiness (because of their propensity to “better their condition”) by producing some level of political “happiness.” Unless one smuggles in a notion that one can stop at some point from trying to better one’s condition and then turn to the personal, the commercial order seems to be a form of “personal dependence” even more aggressive than the medieval guild—something Marxists have said for years. Our own endeavor, on the other hand, was to point to a solution that really does in fact solve the tension between personal happiness and commerce.

In our “Aristotelian” reading we take seriously the idea that we are beings who desire to “improve their condition” and who have a “propensity to truck, barter, and exchange.” We suppose that when human beings are allowed to exercise these aspirations and propensities they will be “happier” than when they are not. What we sacrifice in this reading is the tranquility of the Stoic sage which, as Rasmussen himself admits (p. 96), seems to have little purchase on any but a highly elite set of individuals or upon society generally. Moreover, it’s pretty clear from Smith’s discussion of Stoicism in Part VII of *The Theory of Moral Sentiments* that a certain sort of Stoic tranquility is a “miscarriage of every thing which Nature has prescribed to us as the proper business and occupation of our lives.”⁶ We would argue that the “proper business” involves precisely improving our condition and entering into commercial activity, albeit with the moderation provided by the impartial spectator. Commercial actions are not activities one engages in to relieve our misery, and then find happiness elsewhere in some other endeavor. They are the very substance of life on a continual basis: “The plan and system which Nature has sketched out for our conduct, seems to be altogether different from that of the Stoical philosophy.”⁷ Instead, nature has intended us to look to what Smith calls our “little department”—what immediately concerns us and which excites our several passions and aversions, especially with respect to those near to us. Our “Aristotelian” reading simply suggests that acting in accord with our nature in this regard is a central component of individual

⁶ Ibid., VII.ii.I.46, p. 293.

⁷ Ibid., VII.ii.I.43, p. 292.

happiness and while there might be a higher, more “sublime” form of happiness possible to human beings, it is rarely available or appropriate.

Furthermore, we hold that what Smith calls the “progressive state,” where “society is advancing to the further acquisition . . . of riches,” as noted in our text, is the happiness of society considered generally. In this respect it is possible for there to be a coincidence of happiness for individuals considered distributively and collectively. We agree with Rasmussen that wealth, *per se*, is not the same as happiness, and we would point to the very welfare state economies of the United States and Western Europe as examples of the combination of wealth and collective unhappiness. We would further agree that we do not know exactly what Smith would say were he alive to comment on contemporary ideologies. We do, however, believe that the contemporary welfare state, which is obsessed with material end states, produces the very sort of dissatisfactions and illusions that Smith claims come from investing one’s happiness in objects, though we say this for individuals collectively considered.

Our essential complaint then is not that Rasmussen advocates the tranquility that comes from Stoic contemplation, or that he commits some fallacy or other. Nor are his insights into the misery-reducing dimensions of markets, especially for the lower classes, unappreciated. Rather we do not think the paradox of commerce is much alleviated by his solution. In any case, we think the paradox is better resolved when it is precisely, *pace* Rasmussen, the *pursuit* of commercial actions that is allowed to flourish.

Disagreement between Direct and Overall Liberty: Even Less Troubling than Suggested?

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When evaluating policy reforms, a simple “liberty principle” can be invoked where only policies that are liberty-augmenting are supported. But what happens if some facets of policies are liberty-augmenting while other facets are liberty-reducing? Even when following a Rothbardian definition of liberty, the concept can become vague with unresolved issues leading to potential limitations surrounding the principle of liberty. In a recent article in *Reason Papers*, Daniel Klein and Michael Clark present areas of potential disagreement when evaluating prospective policy reforms between direct, immediate effects, and overall liberty, including direct and indirect, or secondary effects.¹ It is possible that a policy change could be directly liberty-reducing, but, overall, liberty-augmenting (or vice versa), suggesting a possible tension between the two. If such tensions exist and a reform is supposed to be evaluated based on the liberty principle, how does one choose between alternative policies?

Klein and Clark treat the liberty principle (in either variant, direct or overall) as little more than an ordering principle of given policies. Following their framework, let R represent a policy reform, the symbol $>DL$ imply a direct liberty ranking, and the symbol $>OL$ represent an overall liberty ranking. When $R1 >DL R2$, this implies that R1 ranks higher in direct liberty than R2, and if $R1 >OL R2$, then R1 ranks higher in overall liberty than R2. In this case, it is clear that the liberty principle favors R1 over R2 in both direct and overall liberty. However, some cases are not so clear. The authors are concerned when $R1 >DL R2$ but $R2 >OL R1$. When following the liberty principle, which policy reform should be chosen?

According to this way of thinking, for example, raising the minimum wage is directly liberty-reducing. However, if this one intervention prevents

¹ Daniel B. Klein and Michael J. Clark, “Direct and Overall Liberty: Areas and Extent of Disagreement,” *Reason Papers* 32 (Fall 2010), pp. 41-66. They recognize the difficulty of fully assessing any policy reform and acknowledge that many of the examples are speculative, but do not see this as a major criticism of their article. I follow this assumption as well.

more severe labor market regulations, it could be overall liberty-augmenting. The authors use this framework to analyze eleven specific areas (military actions, pollution, etc.) in which disagreement might likely occur. One of the most important areas for disagreement is coercive hazard, which occurs when government subsidizes specific behaviors or programs, making taxpayers foot the bill for risk taking. Because of government involvement in these markets, there becomes a liberty-augmenting argument for restrictions in these industries leading to possible disagreement between direct and overall liberty.

Even with such possibilities, most of the time direct and overall liberty are in agreement. When there is disagreement it is not that significant, leading Klein and Clark to conclude that such tension is “troublesome, but not *that* troublesome” (p. 65). Their framework is concerned with scope and timeframe; however, they stop short the analysis in both scope and time. What they fail to explore is how the liberty principle is also an engine for formulating relevant, focal policy reforms, or Rs. In the context of the larger discussion, the Rs are not just given by some other source, but are formulated within the discussion itself. Klein and Clark casually mention that indirect effects can span and effect other policies and future reforms, but do not include this in their formal analysis. Policies typically come bundled together, if not in direct form, in at least indirect effects. For example, the current health care reform legislation does not involve one coercive act but countless coercive acts that span across many different areas. Therefore, the framework can be expanded in scope to include R3, a vector of potential policy reforms, and the time frame can be expanded to include the long-run secondary effects from policies within R3.

When Klein and Clark find a dyad (R1, R2) for which direct and overall liberty disagree, very often the liberty principle points to further relevant policy reforms, or an R3. Once we include R3 in the dyad with (R1, R2), agreement between direct and overall liberty may be obtained. That is, for (R1, R3) there is no disagreement, and for (R2, R3) there is no disagreement. Thus, the disagreement between direct and overall liberty for dyad (R1, R2) does not force us to maintain our focus on R1 versus R2. Instead, the very disagreement may lead us to focus on a conspicuous R3 for which there is no such disagreement. Klein and Clark neglect this dimension of the liberty principle as a guide for formulating the political discussion toward better policy alternatives.

In order to provide a concrete illustration and to show how this might work, I focus on coercive hazard in financial institutions. Examples of coercive hazard within financial institutions are abundant: the Federal Deposit Insurance Corporation (FDIC), the government bailout during the savings and loan crisis in the 1980s-1990s, and the more recent bank bailouts. Suppose a new policy, R1, is proposed to allow further restrictions in financial dealings, and R2 is to keep the current level of financial restrictions in place. The argument is that since the taxpayers pay for risky financial decisions undertaken by private companies, these decisions should be restricted and regulated. Direct liberty may be reduced because of new government

regulations, but overall liberty could be increased as the restrictions may reduce an individual's tax burden in the future. However, the conversation does not have to end with (R1, R2). Through political discourse, an alternative R3 could arise (either from voter/taxpayer discontent or budgetary pressure) that includes reducing or eliminating a large portion of government regulations on financial dealings *and* not to engage in future bailouts.² In this scenario, R3 trumps both R1 and R2 as direct and overall liberty are in agreement.

This logic can be applied not only when any government subsidization is involved, but to any policy reform when it is not completely obvious that direct and overall liberty are in agreement with each other. If the proposed reform eventually leads to other policy changes, such as eliminating bad laws, any disagreement between direct and overall liberty is virtually eliminated. Klein and Clark present an interesting framework for evaluating dissent between direct and overall liberty. By extending both the time and scope of the analysis, most divergence between direct and overall liberty disappears. It is safe to say that any tension that remains, is really *not* that troublesome.³

² This alternative is similar to one proposed by David Friedman, where he argues that overall liberty is enhanced when more people avail themselves of tax-funded benefits, because it reduces general support for collectivist funding. See David Friedman, "Welfare and Immigration: The Flip Side of the Argument," Ideas Blog, April 1, 2006, accessed online at: <http://davidfriedman.blogspot.com/2006/04/welfare-and-immigration-flip-side-of.html>.

³ I would like to thank Daniel B. Klein and the participants at New York University's Colloquium on Market Institutions and Economic Processes for helpful comments and suggestions.

Critical Comment on Klein and Clark on Direct and Overall Liberty

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1. Introduction

Daniel Klein and Michael Clark's "Direct and Overall Liberty" is a welcome addition to the libertarian literature.¹ These authors force more traditional libertarians² to rethink their political economic philosophy and to delve more deeply into it than they would have in the absence of this article. Its main contribution is the distinction between what they call direct and overall liberty. Direct liberty is a "feature" or "facet" of a given act itself (p. 46). To put this into my own words, an act has or encompasses direct liberty insofar as, or to the degree that, it conforms to the Non-Aggression Principle (NAP), coupled with private property rights based on homesteading,³ along

¹ Daniel B. Klein and Michael J. Clark, "Direct and Overall Liberty: Areas and Extent of Agreement," *Reason Papers* 32 (Fall 2010), pp. 41-66.

² I count myself as belonging to this category. For a tremendously important statement of this position, see David Gordon, "Must Libertarians Be Social Liberals?" *LewRockwell.com*, September 2, 2011, accessed online at: <http://www.lewrockwell.com/gordon/gordon91.1.html>.

³ See Walter Block, "Earning Happiness Through Homesteading Unowned Land: A Comment on 'Buying Misery with Federal Land' by Richard Stroup," *Journal of Social, Political, and Economic Studies* 15, no. 2 (Summer 1990), pp. 237-53; Walter Block, "Homesteading City Streets: An Exercise in Managerial Theory," *Planning and Markets* 5, no. 1 (September 2002), pp. 18-23; Walter Block, "On Reparations to Blacks for Slavery," *Human Rights Review* 3, no. 4 (July-September 2002), pp. 53-73; Walter Block and Richard Epstein, "Debate on Eminent Domain," *NYU Journal of Law & Liberty* 1, no. 3. (2005), pp. 1144-69; Walter Block and Guillermo Yeatts, "The Economics and Ethics of Land Reform: A Critique of the Pontifical Council for Justice and Peace's 'Toward a Better Distribution of Land: The Challenge of Agrarian Reform'," *Journal of Natural Resources and Environmental Law* 15, no. 1 (1999-2000), pp. 37-69; Per Bylund, "Man and Matter: A Philosophical Inquiry into the Justification of Ownership in Land from the Basis of Self-Ownership" (n.d.), accessed online at: http://perbylund.com/academics_polsci_msc.pdf; Hans-Hermann Hoppe, *The Economics and Ethics of Private Property: Studies in Political Economy and*

with legitimate (voluntary) types of title transfer, such as trade, barter, gifts, gambling, etc.⁴ What then do they mean by “overall” liberty? This consists of direct liberty plus indirect liberty, and the latter, here, involves “any other effect that comes in the train of the reform” (p. 46), or, as I would more generally interpret this, “any other effects that come in the train of the act, whether ‘reform’ or not.”

Klein and Clark offer a splendid example to illustrate this crucial distinction of theirs:

In the case of raising the minimum wage from \$7.00 to \$9.00 per hour, the *direct* facets are the inherent coercive features of the reform and its concomitant enforcement. Indirect effects consider any other effects that come in the train of the reform. In the case of raising the minimum wage, it might be the case, for example, that if the government as currently composed failed to raise the minimum wage, voters would “punish” the sitting politicians, altering the composition of government and bringing new coercive incursions. An intervention such as raising the minimum wage, then, might be liberty-reducing in its direct features but, in relation to what would otherwise happen, liberty-augmenting in its indirect effects. (p. 46)

And why is this distinction so important? Because there is a possibility that a given act, “reform,” or change in the law, might be directly compatible with the NAP, while indirectly not. If so, there is a tension, not to say an utter incompatibility, between direct and overall liberty. In such cases, what stance should the libertarian take? This would depend upon whether or not direct or indirect liberty exerted the more powerful force.

I have two main difficulties with Klein and Clark’s article. First, I think that their concept of indirect liberty, and hence, overall liberty (which equals direct plus indirect liberty), although highly creative on their part, and even brilliantly so, is a snare for libertarian philosophy. Overall liberty,

Philosophy (Boston, MA: Kluwer, 1993); Hans-Hermann Hoppe, “Of Private, Common, and Public Property and the Rationale for Total Privatization,” *Libertarian Papers* 3, no. 1 (2011), pp. 1-13, accessed online at: <http://libertarianpapers.org/articles/2011/p-3-1.pdf>; Stephan N. Kinsella, “A Libertarian Theory of Contract: Title Transfer, Binding Promises, and Inalienability,” *Journal of Libertarian Studies* 17, no. 2 (Spring 2003), pp. 11–37; John Locke, *An Essay Concerning the True Origin, Extent, and End of Civil Government*, in *Social Contract*, ed. E. Barker (New York: Oxford University Press, 1948), pp. 17-18; Ellen Frankel Paul, *Property Rights and Eminent Domain* (Piscataway, NJ: Transaction, 1987); Murray N. Rothbard, *For a New Liberty* (New York: Macmillan, 1973); Michael S. Rozeff, “Original Appropriation and Its Critics,” LewRockwell.com, September 1, 2005, accessed online at: <http://www.lewrockwell.com/rozeff/rozeff18.html>.

⁴ Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974).

paradoxically, fatally weakens the power of the NAP, which I see as the essence of the freedom involved in libertarianism.⁵ Since I regard libertarianism as the last best hope for attaining a civilized order, I cannot with any equanimity regard a weakening of it in a positive light. Second, these authors and I disagree, sometimes sharply, as to what constitutes direct liberty itself.

With this introduction, I am now ready to launch into a detailed critique of Klein and Clark's article. I regard their article as important enough⁶ to employ the technique used by Henry Hazlitt⁷ in his refutation of John Maynard Keynes⁸: an almost line by line, certainly paragraph by paragraph, critical commentary and refutation. Section 2 is devoted to a criticism of Klein and Clark's views on positive and negative rights. In Section 3, I attempt to undermine their analysis of what I characterize as their liberty calculus. The burden of Section 4 is to counter their misdiagnosis of the libertarian who "would not kill an innocent person even if the survival of humanity depended upon it" (p. 45). I then look askance in Section 5 at their claim that "sometimes coercion is our friend" (p. 45). In Section 6 I comment on several of the cases in point offered by them to illustrate their findings. I offer some concluding remarks in Section 7.

2. Positive and Negative Rights

Klein and Clark begin by announcing that their voice is that of the "Smith-Hayek liberal" (p. 41). I have no objection to their use of the word "liberal." I am an enthusiastic supporter of their attempt to wrest back this nomenclature from the leftists who stole it from us in the first place. Indeed, they commendably use this word as a synonym for "libertarian." However, in view of devastating critiques launched at the libertarian credentials of Hayek⁹

⁵ Along with first ownership based on homesteading, and further property rights predicated upon licit title transfer.

⁶ Given the eminence of the authors in the libertarian movement, and the creativity of their thesis.

⁷ Henry Hazlitt, *The Failure of the "New Economics"* (Auburn, AL: Mises Institute, 2007 [1959]).

⁸ John Maynard Keynes, *The General Theory of Employment, Interest, and Money* (New York: Harcourt, Brace and World, 1964 [1936]).

⁹ Walter Block, "Hayek's Road to Serfdom," *Journal of Libertarian Studies* 12, no. 2 (Fall 1996), pp. 327-50; Milton Friedman and Walter Block, "Fanatical, Not Reasonable: A Short Correspondence Between Walter Block and Milton Friedman (on Friedrich Hayek's *Road to Serfdom*)," *Journal of Libertarian Studies* 20, no. 3 (Summer 2006), pp. 61-80.

and Smith,¹⁰ I fail to see how any libertarians can use these two at best fellow-traveling scholars of liberty as emblematic of this philosophy.

Klein and Clark quite properly, from their perspective, start their article by mentioning the “limitations of the classical liberal principle of liberty” (p. 41). I cannot accept, however, that they have laid a glove on this viewpoint. Another remark of theirs deserves a stern rebuke. They of course distinguish between (so-called) positive and (legitimate) negative rights. The former consist of the presumed “right” to other people’s property, of “welfare rights,” health “rights,” etc. The latter are the opposite side of the coin of the NAP: the right not to have your person, or your rightfully owned property, invaded. However, no sooner do these authors correctly identify positive and negative rights, but they proceed to undermine this vitally important distinction:

The distinction between positive and negative can be dissolved, however, by playing with “your stuff.” If you are deemed to have an ownership share in the collection of resources of the polity, the social life at large, the collective consciousness, or a divine spirit, then positive and negative liberty might dissolve into a muddle. Subscribers of positive liberty can defend, say, tax-financed government schooling by saying: No one is messing with *your* stuff, the people are simply using their appointed officers, government officials, to manage *their* stuff. No one is forcing you to remain within the polity. You are free to leave. (pp. 41-42)

A charitable interpretation of Klein and Clark would be that in this example they are merely underscoring the crucial importance of property rights. Yes, if we all own everything together (including our own bodies, which are tossed into the common pool) in some sort of ideal socialist commune, then the distinction between positive and negative rights does indeed “dissolve into a muddle.” And, perhaps, this is what they are trying to say, in a convoluted way. However, this still leaves uncorrected that hoary fallacy, “you are free here, since you may legally depart from the country.” But just because no one is preventing me from leaving does not mean that no one is messing with my “stuff.” I move to Harlem. Rents are cheap there. I am, however, mugged every day. Yet, I do not move out, even though I am “free to leave.” But, surely, the fact that I am robbed daily while in residence

¹⁰ Spencer Pack, “Murray Rothbard’s Adam Smith,” *The Quarterly Journal of Austrian Economics* 1, no. 1 (1998), pp. 73-79; Murray N. Rothbard, “Adam Smith Reconsidered,” *Austrian Economics Newsletter*, Fall 1987, pp. 5-7; Murray N. Rothbard, “The Celebrated Adam Smith,” in Murray N. Rothbard, *Economic Thought Before Adam Smith: An Austrian Perspective on the History of Economic Thought*, Vol. 1 (Brookfield, VT: Edward Elgar Publishing Company 1995), pp. 433-74.

there demonstrates that “my stuff” is indeed being “messed” with even though I remain there.

In the real world the claim that my property rights are being respected despite the fact that when I remain in the country I am forced to pay taxes, is subject to the fatal flaw of circularity. This argument assumes the very point at issue: that for some reason or other the state, composed entirely of human beings, none of whom has any more rights than I do, is justified in subjecting me to its taxation. How can this be? Not a mere majority, nor even a supermajority, would logically imply that it would be proper to override the rights of the individual.¹¹

Right now, if there are 100 individuals in society, there are 100 separate owners of each of these 100 bodies therein. Each person is the sole owner of his own body. According to Klein and Clark, however, if we apply their theory to the human person, and why ever should we not,¹² since this is by far our most important “stuff,” then the previous ordering is no longer the case. Rather, all 100 of “us” in Klein and Clark’s socialist nirvana group together own all 100 bodies, and are the rightful disposers of all of them. “We,” each of us individuals, are each in effect the owners of 1% of everyone in the group, including (what used to be considered) “ourselves.” But this is not only practically preposterous, it is also a logical impossibility. It is impractical because we would all surely die, and pretty quickly too. “We” (so to speak)¹³ would have to have endless committee meetings before “we” could undertake even the simplest of actions, to say nothing of more complex ones. What is worse, on logical grounds, it is downright *impossible* for “us” to engage in any human action, at least while conforming to libertarian principle, because, in order to do any such thing, “we” would have to give consent. But how could any of “us” do so, even if “we” all wanted to signify approval of any course of action. Ordinarily, back in the real world, we consent by verbal, written, or bodily indications (raising our hands). But under Klein and Clark’s scenario, “we” have no *right* to engage in any such action¹⁴ since “we” own only 1% of “ourselves,” of the bodies “we” inhabit, and it would be impermissible for “us” to use the other 99% of “our” bodies without the consent of at least 51% of “ourselves.” But, everyone else is in the same exact position as “we” are; they, too, logically, cannot give “us” permission to do

¹¹ Hitler came to power through a democratic process. This hardly justifies anything he did, let alone everything.

¹² The *reductio ad absurdum* is still a legitimate logical tool for determining truth and falsity.

¹³ As there are no longer any rights-bearing individuals, hence there really is no “we” either, because “we” depicts a group of *individuals*, and “we” no longer qualify.

¹⁴ We would have no right to engage in *any* action, for to do so would be to do so with other people’s “stuff.”

anything, either. So, “we” all die, for what right do we have even to inhale and exhale? The only way out of this quandary is for each of us once again to seize control of ourselves.¹⁵ But this implies that the entire scenario must be obviated. That is, we must jettison the model where the distinction between positive and negative rights collapses into a “muddle” because we cannot own our “stuff.”

Do you have a moral obligation to pay people you have not agreed to pay, just because they say they confer some benefits on you? Klein and Clark would answer in the positive, but this conclusion seems difficult to sustain, at least if we are to adhere to the tenets of the NAP. Anyone can *say* that they confer benefits on others. It is even possible that some of them actually *do* this. But it is exceedingly difficult to reconcile with the NAP any legal obligation to pay such people for these benefits. I take a shower. I undoubtedly improve the welfare of all those who come within smelling distance of me.¹⁶ But this hardly justifies my going to them, at gunpoint, and demanding payment for soap, hot water, towels, etc. Murray Rothbard’s *reductio ad absurdum* of this argument from external economies is as follows: “A and B often benefit, it is held, if they can force C into doing something. . . . [A]ny argument proclaiming the right and goodness of, say, three neighbors, who yearn to form a string quartet, forcing a fourth neighbor at bayonet point to learn and play the viola, is hardly deserving of sober comment.”¹⁷

3. The Liberty Calculus

For Klein and Clark, liberty is not a simple matter; it is highly complex. To determine whether an act is pro- or anti-liberty, we must consider *all* of its effects, and some of these may incline in one direction, others in the other. In their view:

Taxing people to wage war and dropping bombs on others are liberty-reducing in their direct aspect, but if the war topples dictators like Saddam Hussein, it might be liberty-augmenting in its larger aspect. Thus, again, we have ambiguity about whether the action is liberty-augmenting. This ambiguity arises not from ambiguity in any local fact of the action, but in “summing” over the facets . . . [W]hen some facets are reductions and some are augmentations, then it might be very difficult, even impossible, to assess the action in terms of overall liberty. (p. 43)

¹⁵ I shall drop the use of scare quotation marks around “we,” “us,” and “ourselves.”

¹⁶ Well, with the exception of those who don’t enjoy this particular odor.

¹⁷ Murray N. Rothbard, “Toward a Reconstruction of Utility and Welfare Economics,” in Murray N. Rothbard, *The Logic of Action One: Method, Money, and the Austrian School* (Cheltenham: Edward Elgar Publishing, 1997), pp. 211-54.

A sees B, who is a four-year-old boy. A takes B's candy. Then, for good measure, A kills B. For traditional libertarians, this seems to be an open-and-shut case. Indeed, it would be difficult to come up with more of a paradigm case of NAP violation. A is a thief and a murderer, and ought to be punished to the full extent of the law. According to Klein and Clark, though, A may well legally escape punishment, since B might possibly have become the next Hitler.¹⁸ If so, A may actually be a contributor to liberty, not someone who diminishes it. Therefore, A should be declared innocent, as it would be impossible to demonstrate clearly that A has diminished liberty. A is innocent until proven guilty, and there is no way that A can be *proven* guilty once we allow indirect and overall liberty to enter into the courtroom. Surely, it is not impossible that the child that A just murdered would have grown up into a Hitler.

Consider another case. C rapes D. It is somehow determined that had C not raped D, D would have been hit by the proverbial bus, and killed. According to traditional libertarian theory, C is a rapist, and this act of his was liberty-reducing, since rape is a violation of the NAP. In the view of Klein and Clark, however, all of this is turned around. C's invasive act is now liberty-augmenting, if we make the not-unreasonable stipulation that death is worse than rape. That is, D, if she had a choice between C's raping her and being hit and killed by the bus, would choose the former over the latter. One difficulty with Klein and Clark's view is that we are never in a position to know about contrary-to-fact conditionals of the sort "What would have happened to D had C not raped her?" Another problem is that justice delayed is justice denied: Just how long of a time frame do we have to take into account in order to determine whether a given act was compatible with liberty or not? Is our time horizon five minutes, hours, days, weeks, months, years, decades, centuries, millenia? There is nothing in Klein and Clark's theory that would be of help in answering this question. For example, when A killed baby boy B, we would have to wait for about fifty years or so to see whether this child turned into a Hitler¹⁹—that is, *if* we could avail ourselves of contrary-to-fact conditionals, which we cannot.²⁰

¹⁸ To insert a modicum of reality into this discussion, had the U.S. not entered World War I, that conflagration might well have ended up in a stalemate. If so, Hitler would have been a (particularly eloquent) house painter. But the U.S. did enter WWI (more bonds in the U.K. than in Germany); the Allies won. They imposed the punitive Treaty of Versailles. This led, indirectly, to the 1933 German hyperinflation, and to the rise of the Nazis. Then and only then was it that Hitler became Hitler.

¹⁹ On grounds articulated by Klein and Clark, it by no means follows that killing Hitler as a baby would promote liberty in its indirect manifestation, for there are worse mass murderers than he. Hitler, after all, was responsible for only some eleven million murders. Stalin at twenty million gets almost twice as much "credit," and Mao, who weighed in with some sixty million, almost six times as much. Possibly, the twenty-second century will bring forth a mass murderer who would put all three into the

We can endlessly multiply these weird cases. E is about to commit suicide. F saves her from this death. Later, E gives birth to, you guessed it, our man Hitler. Should F be punished for violating libertarian law? There would appear to be a case for this, since F's act of mercy reduced liberty. The authorities execute murderer G, but had they not, G would have gone out and done away with E, the mother of Hitler, who now engages in mass murder. So, were the authorities wrong in executing G, who would have performed the heroic role of ridding us of Hitler? Should these authorities, then, be punished by a libertarian court? It seems difficult to avoid these challenges, once we accept Klein and Clark's premises.

Another difficulty with all weighting systems of the sort proposed by Klein and Clark is that there are no units of measurement of liberty or freedom.²¹ Utilitarianism, too, shares this shortcoming, as there are no units of measurement of utility or happiness. In sharp contrast, there are units of measurement of height, weight, speed, distance, etc. Without an objective measure for "liberties," though, Klein and Clark's notion of indirect liberty must be seen as incoherent.

This is the practical problem with Klein and Clark's thesis. Criminals now have very unique and inventive defenses that are not open to them under classical libertarianism. They can always claim that, in terms of *direct* liberty, their act amounted to a heinous crime. However, as long as

shade. For data on these death tolls, see Robert Conquest, *The Harvest of Sorrow* (New York: Oxford University Press, 1986); Robert Conquest, *The Great Terror* (Edmonton, Alberta: Edmonton University Press, 1990); Stephane Courtois et al., *The Black Book of Communism: Crimes, Terror, Repression*, trans. Jonathan Murphy and Mark Kramer (Cambridge, MA: Harvard University Press, 1999); Thomas DiLorenzo, "Death by Government: The Missing Chapter," LewRockwell.com, November 22, 2006, accessed online at: <http://www.lewrockwell.com/dilorenzo/dilorenzo114.html>; R. J. Rummel, *Democide: Nazi Genocide and Mass Murder* (Piscataway, NJ: Transaction Publishers, 1992); R. J. Rummel, *Death By Government* (Piscataway, NJ: Transaction Publishers, 1994); R. J. Rummel, *Statistics of Democide: Genocide and Mass Murder Since 1900* (Piscataway, NJ: Transaction Publishers, 1997).

²⁰ What we would need would be two universes, otherwise identical, except that in one of them A murdered B, and in the other one A refrained from this act. Then, if the B in the second universe turned into a Hitler, then the A in the first universe would have been justified in murdering him (but perhaps it would not be murder, according to Klein and Clark, since murder is unjustified killing, and in their view, the killing of the boy in universe one would have been justified).

²¹ When I said above that it is worse to be murdered than to be raped, I was not employing measurements of liberty or freedom; I was merely stating that this is our estimate of the view of most people. It of course cannot be denied that some few individuals instead would be guided by the aphorism "death before dishonor." They would actually prefer to be killed than to be raped. Surely, though, that is a minority position.

indirect liberty points in the other direction, and outweighs the first consideration, their crime actually amounts to promoting liberty.

The bottom line is that Klein and Clark's thesis amounts to extreme skepticism. Under this theory, it is impossible ever to determine, at least at present, whether any act is a crime or not. If we take this perspective seriously, we cannot know anything at all about criminal activity until the end of time, whatever that means, for there will always be subsequent reverberations. An act that is criminal in the twenty-first century may be shown to be liberty-enhancing in the twenty-second century, liberty-reducing in the twenty-third century, etc.

Let us consider some more realistic cases. If we repeal rent control, housing values will rise, and with them so will real estate tax revenues, but the government might do evil things with its additional funding. If we legalize drugs, the state will be able to tax these substances, and perhaps violate rights with the extra financing. If we are above the Laffer point, a fall in tax rates will boost statist revenues, again to no good end. So, should libertarians oppose, or even think twice about, ending rent control, decriminalizing addictive materials, and reducing tax rates? This is Klein and Clark's very point, but as traditional libertarians, we need not fall into any such trap. Rather, we can maintain that engaging in libertarian policies is an unmitigated enhancement of freedom. And if the government uses its extra revenues to reduce liberty, as is its wont, well, that is an entirely separate act, which can then be condemned by libertarians.

4. Misdiagnosing the Libertarian Fundamentalist

In this section I attempt to counter Klein and Clark's misdiagnosis of the libertarian who "would not kill an innocent person even if the survival of humanity depended upon it" (p. 45). They are clearly appalled that any libertarian in his right mind would be such a libertarian fundamentalist.²²

The situation is a bit more complicated, however, than a pure nose-counting utilitarianism would suggest. A utilitarian simply calculates the fewest number of people who would be killed by some action. And surely, all of humanity outweighs, by far, any one innocent person.

How would a libertarian properly analyze this issue? Suppose that all-powerful Martians beam down a message to us Earthlings: Either one of us murders innocent person, E, or the Martians will blow us all up. Suppose the following response: Individual F steps up to the plate and murders E. At this point in time we hold a ticker-tape parade in praise of murderer F, who, after

²² For a critique of "market fundamentalism," see Bryan Caplan, *The Myth of the Rational Voter: Why Democracies Choose Bad Policies* (Princeton, NJ: Princeton University Press, 2007). For a defense of this position, see Walter Block, "The Trouble with Democracy: Review of Brian Caplan's *The Myth of the Rational Voter*," LewRockwell.com, August 25, 2007, accessed online at: <http://www.lewrockwell.com/block/block84.html>.

all, saved the entire Earth from destruction, whereupon we execute F,²³ who full well knows that this will be his fate; that is why he is a bit different from the ordinary murderer. Here, we can have our utilitarian cake at the same time as we eat our deontological pastry. That is, the libertarian NAP will be adhered to, given that F is voluntarily complying with it. Here, we interpret the NAP not as a prohibition of murder, but in terms of libertarian punishment theory. Libertarianism is interpreted not as the Kantian categorical imperative, “Thou shalt not murder,” but rather, as a hypothetical imperative, “If you murder, you will be subjected to libertarian punishment.” Now, it is true, the Martians can beam down a second message at us hapless Earthlings: “If you touch a hair on the head of murderer F, or in any way honor him, we will renew our threat to end the days of the third planet, and all who reside upon it.” If the Martians do this, then, of course, we are presented with the stark choice that Klein and Clark use to weaken the NAP. We can no longer attain both considerations: safety for the human race and treating murderers according to libertarian principles. However, it takes rather fickle Martians to attain this goal.

There is also a theoretical difficulty with Klein and Clark’s thesis: it misconstrues libertarianism. Let us consider the famous fifteenth-floor flagpole case. A man, call him G, falls from the balcony of the twenty-fifth floor. Fortunately for him, he lands on a flagpole at the fifteenth floor, and starts a hand-to-hand movement down to that deck, so as to get back to his initial starting position ten floors above. Unfortunately, there is the proverbial little old lady, H, on the fifteenth floor with a shotgun, who orders G to get off her property. We may assume that she was raped a week ago by a man who looks eerily similar to G. The erroneous question is, “Should G obey this demand, and drop to his death?” It is mistaken to look at the matter in this way, because there is nothing in the NAP that vouchsafes us any answer to this query. Rather, the proper question, the only licit one in this scenario, is, “If H shoots G, is she guilty of murder, or is she merely exercising her rights of self-defense over herself and her private property (the flagpole in this case)?” When put in these terms, it is clear that H is entirely within her rights, no matter how unfortunate this is for G. It is *her* property, after all. In like manner, libertarianism is simply not set up to address the question, “Should

²³ Or impose upon him whatever the proper libertarian punishment is for murder; on this issue, see Stephan Kinsella, “Punishment and Proportionality: The Estoppel Approach,” *The Journal of Libertarian Studies* 12, no. 1 (Spring 1996), pp. 51-74; Stephan Kinsella, “A Libertarian Theory of Punishment and Rights,” *Loyola L.A. Law Review* 30 (1997), pp. 607-45; Murray N. Rothbard, “Punishment and Proportionality,” in *Assessing the Criminal: Restitution, Retribution, and the Legal Process*, ed. R. E. Barnett and J. Hagel, III (Cambridge, MA: Ballinger Publishing Co., 1977), pp. 259-70; Roy Whitehead and Walter Block, “Taking the Assets of the Criminal to Compensate Victims of Violence: A Legal and Philosophical Approach,” *Wayne State University Law School Journal of Law in Society* 5, no. 1 (Fall 2003), pp. 229-54.

someone kill an innocent person if the survival of humanity depended upon it?” Rather, the only legitimate query is, “If someone does this, what is the proper response of the forces of law and order?” And, as we have seen, the answer is that he should be dealt with like any other murderer (apart from first holding a party in his honor, in this weird case).

Before ending this section, I have a word about Klein and Clark’s ploy of placing the lives of all of humanity in the balance against the NAP. Two can play that game. For example, suppose that the entire human race would perish if Klein and Clark’s thesis were true. Should they withdraw it? Well, maybe. But would this prove it to be false? Of course not. In like manner, even if the last vestige of our species would become extinct should we adopt “direct” libertarianism, that does not by one whit render this philosophy specious.

5. “[S]ometimes [C]oercion [I]s [O]ur [F]riend”

It would be difficult to come across a more curious statement than Klein and Clark’s claim that “sometimes coercion is our friend” (p. 45). Perhaps this proves that libertarianism is a *very* big tent. They offer this claim in their critique of Rothbard, who they correctly characterize as thinking “that moral and ethical truth always favors liberty over coercion” (p. 45). But nothing could more accurately reflect the libertarian enterprise than this keen insight of Rothbard’s.

Klein and Clark call upon Randy Barnett in order to buttress their view (p. 45), and in this they are very astute. Barnett, another self-proclaimed libertarian, is on record as favoring the 2003 U.S. invasion of Iraq.²⁴ Among the grounds chosen for his view is that this war really constituted defense on the part of the U.S.²⁵ Barnett need not have gone so far out on a limb as to adopt what I regard as an obviously erroneous position. Instead, just as Klein and Clark rely on Barnett’s notion of “presumptions,” Barnett could borrow a leaf from them. He could concede, if only *arguendo*, that insofar as direct liberty is concerned, the U.S. attack on Iraq was indeed a violation of “direct” liberty, but that indirect liberty is entirely a different matter. Who knows? Perhaps the U.S. invasion of Iraq and the killing of many of its citizens succeeded in eliminating a Hitler. Is this possible? Of course. And, could a twenty-first century Iraqi Hitler devastate humanity? Of course he could. Therefore, we may conclude that, at least on grounds set out by Klein and Clark, Barnett was in the right in claiming that Ron Paul’s opposition to the Iraq War cannot speak for all libertarians.

²⁴ Randy Barnett, “Libertarians and the War: Ron Paul Doesn’t Speak for All of Us,” *Wall Street Journal*, July 17, 2007.

²⁵ For a critique of Barnett, “Libertarianism and the War,” see Walter Block, “Randy Barnett: Pro War Libertarian?” LewRockwell.com, July 23, 2007, accessed online at: <http://www.lewrockwell.com/block/block79.html>.

Klein and Clark also call upon David Friedman to buttress their thesis, who claims that libertarian principles “are convenient rules of thumb which correctly describe how one should act under most circumstances, but that in sufficiently unusual situations one must abandon the general rules and make decisions in terms of the ultimate objectives which the rules were intended to achieve.”²⁶ But what are “the ultimate objectives which the rules were intended to achieve”? Surely, it is not the inability to cast judgment on *any* act, an implication of Klein and Clark’s thesis, since it is impossible to know what will be the indirect effects of anything. Nor is it the utilitarian type of calculation of “liberty” that they offer us, since the libertarian literature is replete with devastating critiques of utilitarianism.²⁷ The “purpose,” if there be any such thing, of libertarian law is to offer us a way to reduce and, hopefully, end conflict. And, certainly, using coercion to kill innocent people is no way to attain this.

Couldn’t Klein and Clark (and Friedman) offer a rejoinder by claiming that the purpose of a libertarian legal system is *in part* to eliminate quarrels over who may do just what with which property, but it *also* includes protection against threats to the entire human race? After all, if we all perish, the issue of our conflict over property rights will scarcely arise. Yes, this is a reasonable point, and may certainly be employed by Klein and Clark (and Friedman) at this juncture. However, their objection is of *very* limited value. It only applies to fickle Martians (or madmen who control enough weaponry to blow up the Earth) who purposefully want to drive a wedge between the NAP and the survival of our species. That is to say, the only defense at their disposal is this entirely implausible case.

But am I not being unfair to Klein and Clark? Is it really possible to employ such wild-eyed *reductios ad absurdum* against them? No, because I find that one of their main examples (noted above in Section 1) provides its own *reductio*:

In the case of raising the minimum wage from \$7.00 to \$9.00 per hour, the *direct* facets are the inherent coercive features of the reform

²⁶ David Friedman, *The Machinery of Freedom: Guide to a Radical Capitalism* (La Salle, IL: Open Court, 1989), pp. 172-73, cited in Klein and Clark, “Direct and Overall Liberty,” p. 46. See, though, Walter E. Block, “David Friedman and Libertarianism: A Critique,” *Libertarian Papers* 3, accessed online at: <http://libertarianpapers.org/2011/35-block-david-friedman-and-libertarianism/>.

²⁷ For example, the “utility monster,” who derives more pleasure from murdering all of us than we do from staying alive. For a critique of utilitarianism, see Hans-Hermann Hoppe, *A Theory of Socialism and Capitalism* (Dordrecht: Kluwer, 1989), chap. 7; Murray N. Rothbard, “Value Implications of Economic Theory,” in Rothbard, *Logic of Action One*, pp. 255-65; Murray N. Rothbard, *The Ethics of Liberty* (New York: New York University Press, 2002); Murray N. Rothbard, “Justice and Property Rights: The Failure of Utilitarianism,” *Mises.org*, January 25, 2010 [2000], accessed online at: <http://mises.org/daily/4047>.

and its concomitant enforcement. Indirect effects consider any other effects that come in the train of the reform. In the case of raising the minimum wage, it might be the case, for example, that if the government as currently composed failed to raise the minimum wage, voters would “punish” the sitting politicians, altering the composition of government and bring new coercive incursions. An intervention such as raising the minimum wage, then, might be liberty-reducing in its direct features but, in relation to what would otherwise happen, liberty-augmenting in its indirect effects. (p. 46)

Who knows which effect will swamp which? Raising the minimum wage *might* be liberty-reducing in its direct features? Can we not even make a definitive statement in this regard? Evidently, libertarians are precluded from so doing. Surely, if we cannot make a clear judgment about the libertarian credentials of embracing this pernicious legislation, let alone raising its level in this paradigm case of coercion, then we cannot draw *any* conclusions as to how *any* act affects liberty. If so, it would appear that libertarianism entirely disappears, since its function is to distinguish that which promotes liberty from what tears it down.

On a practical note, libertarians have sufficient difficulty agreeing on *direct* liberty with regard to such contentious issues as voluntary slavery, abortion, immigration, just to name a few—and this is in the entire absence of any worry about indirect effects. Were those taken into account as well, it would eliminate any last vestige of a coherent libertarian philosophy.

6. Cases

In this section I comment on several of the cases offered by Klein and Clark to illustrate their thesis.

a. Thoreauvian coercion

Klein and Clark state their support of the 1960 protest against racial discrimination practiced by Woolworth’s in Greensboro, North Carolina: “[S]uppose that the protesters were trespassing on private property. But their sit-in grew enormously, and the practice spread widely—surely, much of it against owners’ objections—and helped overturn governments’ coercive Jim Crow laws” (pp. 50-51).

There are some problems here. First, what is it with this opposition to “coercive” Jim Crow laws? Is not coercion at least sometimes “our friend”? If so, why not here? That is, how are we to explain Klein and Clark’s opposition to Jim Crow, and support for the protestors against these laws? Why do they not take the opposite stance? There is nothing in the foregoing incompatible with such a viewpoint. Second, why not clearly acknowledge that these sit-ins most certainly *did* take place on private property, and thus amounted to a clear and present trespass? Third, how do they know whether the Jim Crow laws promoted or reduced overall liberty? Yes, of course, at least on the libertarian grounds Klein and Clark are so anxious to reject, *direct* liberty was infringed

by Jim Crow, but what about the *indirect* aspects? Since there is no way to tell for sure what these are, on their own grounds they may not do so. Klein and Clark, moreover, do not follow their own strictures, in the sense that they completely ignore the deleterious effects of violating property rights that stem from such sit-ins. Nowadays, people sit-in for all sorts of illegitimate things, such as welfare rights and (public-sector) union rights.²⁸

Klein and Clark also support the 1971 May Day vehicular sit-in, or traffic blockade in Washington, DC. They seem to think that this violates direct liberty in that this action constitutes a trespass rights violation of “the rules the government sets for *its* property.” They continue: “If the government owns the streets and parks, and they order demonstrators to disperse, is it coercion on the part of the demonstrators not to disperse? Are they not treading on the government’s liberty-claims . . .?” (p. 51). Here again they raise an unwarranted (on their grounds) attack on “coercion.” For the libertarian, the state’s ownership of the streets is by no means a foregone conclusion.²⁹ And even for the minarchist, such a “government’s liberty-claims” would be a serious fallacy. (Klein and Clark’s claim that when the state “order[s] demonstrators to disperse” it is within its [direct] rights, does not hold up so well at this current time when demonstrators all throughout the Arab world are heroically defying exactly such demands.)

b. Coercive hazard

Klein and Clark liken “coercive hazard” to “moral hazard” (p. 52). In the latter, more-well-known phrase, this refers to the enhancement of risk-taking that stems from insurance. The former applies when the “insurance,” as in a government bailout, is extracted from tax payers. On this basis they aver that such programs and institutions as National Flood Insurance, the Small Business Administration, gambling restrictions, the welfare system, immigration, and seat belt and helmet laws, come under the rubric of their analysis. In many, if not all of these cases, they say, “the pluses (of liberalization) for overall liberty far outweigh the minuses” (p. 52). The problem is, with their skepticism, it is unclear how *any* such determination can be made.

c. Disarming or defusing private coercion

If the state imposes a curfew (which directly reduces liberty) during rioting conditions, it may well, at least sometimes, enhance freedom. Here,

²⁸ On the recent labor sit-ins in Wisconsin, see Walter E. Block, “Tapeworm versus Tapeworm: Public Sector Unions in Wisconsin,” LewRockwell.com, March 1, 2011, accessed online at: <http://www.lewrockwell.com/block/block173.html>; Walter E. Block, “The Battle of Wisconsin,” LewRockwell.com, March 9, 2011, accessed online at: <http://www.lewrockwell.com/block/block174.html>.

²⁹ See Walter Block, *The Privatization of Roads and Highways: Human and Economic Factors* (Auburn, AL: The Mises Institute, 2009).

once again, Klein and Clark come out against “coercion.” Presumably, it is no longer “our friend.” They support John Lott’s contention of “more guns, less crime,” and “think that the disagreements between direct and overall liberty in this area tend to be overestimated” (p. 55). But how do they *know* any such thing? Let us stipulate that Lott is correct,³⁰ that is, gun legalization will reduce crime. But will that enhance liberty? It all depends. On Klein and Clark’s open-ended perspective, it is possible that *more* crime will be “good” for society, for example, if some of this criminal behavior ends up with the demise of, say, the next Hitler. If Klein and Clark are going to offer their theory for serious consideration, they must accept its logical implications, which are radically skeptical.

d. Controlling pollution

On the matter of pollution, Klein and Clark state: “In some ways, a tailpipe spewing pollutants is like a shotgun spewing pellets. Restrictions on activities and technologies that have the potential to generate pollution probably ought to be deemed coercive, and the would-be pollution might also be deemed coercive. Thus again, direct coercion might augment overall liberty” (p. 55).

There are several errors in this quotation. It is not true that, “in some ways,” a tailpipe’s spewing pollutants constitutes an invasion of property rights. Rather, just like firing a gun, these pollutants constitute a paradigm case of trespass. Thus, pollution should not “probably” be considered “coercive”; it should *definitely* be considered so.³¹ If so, abstracting from the possibility of this sort of coercion’s being “our friend,” in a libertarian society such an activity would be looked upon as an uninvited border crossing. But, if I understand Klein and Clark, *stopping* this rights violation is *also* deemed “coercive.” How can this be? It is as if we were to say that rape is coercive, and so is stopping this foul practice by bashing the rapist while he is in the midst of his depredation. Surely, Klein and Clark cannot mean that the direct coercion of *pollution* might augment overall liberty. The only other option is that the direct coercion of *stopping* pollution might augment overall liberty. It is curious to find the word “coercion” being used to depict both criminal behavior, and the prevention of this self-same criminal act.

A proper analysis of pollution would be as follows:

At its root all pollution is garbage disposal in one form or another.
The essence of the problem is that our laws and the administration of

³⁰ For a deontological libertarian analysis of weapons, see Walter Block and Matthew Block, “Toward a Universal Libertarian Theory of Gun (Weapon) Control,” *Ethics, Place, and Environment* 3, no. 3 (2000), pp. 289-98.

³¹ Subject to the reservations mentioned by Murray N. Rothbard, “Law, Property Rights, and Air Pollution,” *Cato Journal* 2, no. 1 (Spring 1982), pp. 55-99.

justice have not kept up with the refuse produced by the exploding growth of industry, technology and science.

If you took a bag of garbage and dropped it on your neighbor's lawn, we all know what would happen. Your neighbor would call the police, and you would soon find out that the disposal of your garbage is your responsibility, and that it must be done in a way that does not violate anyone else's property rights.

But if you took that same bag of garbage and burned it in a backyard incinerator, letting the sooty ash drift over the neighborhood, the problem gets more complicated. The violation of property rights is clear, but protecting them is more difficult. And when the garbage is invisible to the naked eye, as much air and water pollution is, the problem often seems insurmountable.

We have tried many remedies in the past. We have tried to dissuade polluters with fines, with government programs whereby all pay to clean up the garbage produced by the few, with a myriad of detailed regulations to control the degree of pollution. Now some even seriously propose that we should have economic incentives, to charge polluters a fee for polluting—and the more they pollute the more they pay. But that is just like taxing burglars as an economic incentive to deter people from stealing your property, and just as unconscionable.

The only effective way to eliminate serious pollution is to treat it exactly for what it is—garbage. Just as one does not have the right to drop a bag of garbage on his neighbor's lawn, so does one not have the right to place any garbage in the air or the water or the earth, if it in any way violates the property rights of others.

What we need are tougher clearer environmental laws that are enforced—not with economic incentives but with jail terms. What the strict application of the idea of private property rights will do is to increase the cost of garbage disposal. That increased cost will be reflected in a higher cost for the products and services that resulted from the process that produced the garbage. And that is how it should be. Much of the cost of disposing of waste material is already incorporated in the price of the goods and services produced. All of it should be. Then only those who benefit from the garbage made will pay for its disposal.³²

Martin Anderson's analysis of pollution does not suffer from the indeterminateness of Klein and Clark's analysis. Pollution is an invasion, period. The way to deal with it is as with any other trespass.

³² Martin Anderson, "Pollution," *The Christian Science Monitor*, January 4, 1989, p. 19.

e. Restrictions to prevent rip-offs

Adam Smith counseled laws against small-denomination bank notes on the ground that people would be careless with regard to them, which would lead to fraud.³³ As a matter of direct liberty, of course, these sorts of laws would be ruled out of court. There is nothing, *per se*, in violation of the NAP to issue a note, say, for one millionth of a penny. Klein and Clark accept Smith's argument, in principle, that people would indeed not be very careful with such penny ante currency (p. 56). They demur from Smith's conclusion, though, that such notes should be legally banned on the ground that "There is a great deal of research" which indicates that such "consumer protection" laws do not work. This of course cannot be denied, but the true libertarian position would be, "Research be damned: it matters not one whit whether we would be careful or not with such bank notes. The sole concern of the law should be whether or not creating such notes violates the NAP, and, clearly, it does not."

Klein and Clark conclude this section as follows: "We believe that the direct coercion of such policies (consumer protection of whatever variety) is by no means redeemed by any indirect pluses for overall liberty" (p. 56). First, even if statist consumer-protection schemes reduce fraud, carelessness, or whatever, and thus promote wealth, this is entirely irrelevant to *liberty*. Second, with their skeptical theory, they are in no position to pronounce judgment as to whether or not liberty, in the overall sense, will increase or decrease by *any* action. Who knows which of them will be summoned forth as the result of *any* action?

f. Subsidizing against coercive taboos

Klein and Clark claim that "[a]llowing stem-cell research is in line with liberty" (p. 57). They seem to be unaware of the fact that stem cells are (potentially) alive human beings, and that it can be argued that "research" on them amounts to no less than their murder.³⁴ However, whatever the status of this practice, while "[g]overnment subsidization of stem-cell research could help to overcome cultural resistance" (p. 57), this would surely denote a diminution of liberty, at least directly. How about indirectly? According to Klein and Clark, this might not be necessary, since relaxing prohibitions of this practice might wean the public away from viewing it as a taboo. But even assuming, *arguendo*, that "research" on these potential human beings is compatible with libertarianism, it is surely offensive to that philosophy for the

³³ Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, ed. R. H. Campbell and A. S. Skinner (Indianapolis, IN: Liberty Fund, 1976 [1776]), II.ii.94, p. 324.

³⁴ For a libertarian analysis of this practice, see Walter Block, "Stem Cell Research: The Libertarian Compromise," LewRockwell.com, September 3, 2001, accessed online at: <http://www.lewrockwell.com/block/block5.html>; Walter Block, "A Libertarian Perspective on the Stem Cell Debate: Compromising the Uncompromisable," *Journal of Medicine and Philosophy* 35 (2010), pp. 429-48.

government to force taxpayers to support it. Whether this will do any good in the long run, of course, is all but impossible to say. So again, Klein and Clark's concept of indirect liberty is of no help in determining which institutions will enhance or decrease liberty.

Klein and Clark argue against subsidization on the ground that it "can put us on a path that leads ultimately to a future with less liberty . . . because the subsidization will bring governmentalization—supervision, certifications, privileges, special interests" (p. 57). But what is wrong with that, at least if we faithfully follow their line of reasoning? Perhaps "governmentalization" will lead to a reduction in the production of Hitlers. If Klein and Clark can argue that increasing the minimum wage may lead to more liberty, I can maintain, with the same logic, that "supervision, certifications, privileges, special interests" will also have this effect.

g. Taxing to fund liberal enlightenment

Klein and Clark offer us a very insightful critique of school-voucher proposals: "The basis for an (educational) institution's financing tends to affect the values and philosophy of the institution. We recognize that occasionally the government pays the piper and calls for a liberal tune,^[35] but the tendency seems to be for the government to call for other tunes" (p. 58). But this is marred by their timidity: "Liberal edification is *probably* best left to civil society and liberal means," and again: "During the eighteenth and nineteenth centuries, many liberals hoped that the right curriculum would serve to advance liberal enlightenment. . . . In hindsight, *quite arguably*, the hope was misplaced" (p. 58, emphasis added). This timidity is unwarranted, after over a century of failure of government education, except for its ability to instill statism in the populace and play havoc with math and reading skills. Here, once again, their radical skepticism disallows them from reaching virtually *any* definitive conclusion. If they cannot unambiguously reject government education as a putative libertarian institution, it is extremely unlikely that they can do so for *anything*.

h. Coercively tending the moral foundations of liberty

Klein and Clark's response to the claim that "too much liberty will lead to licentiousness and dissoluteness" is:

Regarding the conservative concerns about vice, we just don't buy this argument, at least not in the context of modern, relatively liberal^[36] societies like the United States. The mechanisms by which

³⁵ They mean by this phrase a pro-liberty tune.

³⁶ Klein and Clark use the word "liberal" throughout their article as a synonym for "libertarian." However, in this case, they appear to be using it in its modern, leftist, socialist, mixed-economy sense, for surely, they cannot believe that the modern U.S. is now a libertarian society.

allowing people to engage in “vice” leads them to cherish liberty *less than they otherwise would* never seem to be explained well. (p. 59)

One problem with their response is that the clear implication is that this is a good argument for countries that are not as progressive as the U.S. However, this means that for the backward parts of the world, Klein and Clark *do* “buy this argument,” and, thus, would favor laws prohibiting sinful behavior. Such prohibitions already exist in these nations, and with a vengeance. It is strange to find authors such as Klein and Clark supporting them. However, it can hardly be a libertarian argument that sexual, drug-related, and other capitalist acts between consenting adults should be proscribed by law in these areas of the world, or, indeed, anywhere on the planet, since they contravene the NAP.

This, moreover, is an argument cast in terms of what Charles Johnson has characterized as “thick libertarianism”³⁷: we should be concerned not only with libertarianism in its narrow or thin interpretation (the NAP, homesteading, etc.), but also with seemingly irrelevant antecedents that nevertheless promote or denigrate liberty. Right-wing libertarians fear that “sex, drugs and rock and roll,” although *part* of liberty, will nevertheless undermine it, and these freedoms should thus be curtailed, and in the name of liberty. Left wing libertarians are frightened that profit maximization, price gouging, undercutting, cartels, etc., although again *aspects* of liberty, will in any case lead to a diminution of freedom.

In contrast, I am a “thin” libertarian—very much so. I care not one whit about the antecedents of liberty.³⁸ My entire focus, as a theoretician of this philosophy, is on liberty in and of itself. Indeed, I go so far as to characterize as heroes those who both left and right “thick” libertarians see as enemies of this perspective.³⁹

Klein and Clark, in contrast to thick libertarians,⁴⁰ are not so much concerned with the preconditions of liberty. They are, in contrast, if we can

³⁷ Charles Johnson, “Libertarianism through Thick and Thin,” *The Freeman* 58, no. 6 (July 2008), accessed online at: <http://www.thefreemanonline.org/featured/libertarianism-through-thick-and-thin/>.

³⁸ Perhaps this is put too extremely. I *care* about these issues, but not to the extent of jettisoning liberty, or confusing the causes of liberty with liberty itself.

³⁹ Walter Block, *Defending the Undefendable* (Auburn, AL: The Mises Institute, 2008 [1976]).

⁴⁰ See Johnson, “Libertarianism through Thick and Thin”: “Clearly, a consistent and principled libertarian cannot support efforts or beliefs that are contrary to libertarian principles—such as efforts to engineer social outcomes by means of government intervention.” And here I agree not with the thickness of Johnson’s libertarianism, but rather, with his implicit critique of Klein and Clark.

coin a word, focused on the post-conditions: whether what occurs *subsequently* to an admittedly libertarian act⁴¹ will *also* be libertarian. And if not, will these subsequent non- or anti-libertarian acts outweigh, on the liberty scale, the initial act? In this section of their article, they concern themselves with right-wing (thick) libertarian issues—with vices such as gambling, drugs, and sex.

Are Klein and Clark correct in their argument that acts feared by conservative libertarians will lead to a lack of freedom? They express themselves on this matter as follows: “We are more inclined to believe that liberty, dignity, and individual responsibility are of a piece, and that restricting liberty in sex, drugs, and culture tends to reduce, not augment, overall liberty” (p. 59).

But this really will not suffice. Klein and Clark give the game away when they concede that “restricting liberty in sex, drugs, and culture *tends* to reduce, not augment, overall liberty” (emphasis added). This not-at-all-unreasonable statement logically implies that allowing *some* people direct freedom undermines this goal, while allowing it to others does not. If they want to be true to their thesis, namely, promoting not direct but overall liberty, they must acquiesce in the notion that sex, drugs, etc., must be limited *only* to those individuals who will not reduce overall liberty. They logically must support the prohibition to all others, but they have no inclination to do this.

Klein and Clark’s treatment of immigration is likewise unsatisfactory. They state:

While one must acknowledge that *some* of the indirect effects of liberalizing immigration are minuses for overall liberty, we are inclined to think that those facets are clearly outweighed by other facets that are pluses for overall liberty. Whether the pluses would continue to outweigh the minuses if immigration were liberalized drastically, or the borders were thrown open, might be another story. (p. 59)

What we expect from libertarian theoreticians is either support for or rejection of the right to immigrate. And indeed, (conservative) libertarians have ranged themselves on both sides of this issue.⁴² Klein and Clark are

⁴¹ In the direct sense of that word.

⁴² For opposition to fully open and free immigration, see Peter Brimelow, *Alien Nation: Common Sense about America’s Immigration Disaster* (New York: Random House, 1995); Hans-Hermann Hoppe, “The Case for Free Trade and Restricted Immigration,” *Journal of Libertarian Studies* 13, no. 2 (Summer 1998), pp. 221-33; Hans-Hermann Hoppe, *Democracy, the God that Failed: The Economics and Politics of Monarchy, Democracy, and Natural Order* (Piscataway, NJ: Transaction Publishers, 2001), pp. 159-60; Stephan Kinsella, “A Simple Libertarian Argument Against Unrestricted Immigration and Open Borders,” LewRockwell.com, September 1, 2005, accessed online at: <http://www.lewrockwell.com/kinsella/kinsella18.html>; Jared

perhaps unique in that they sit squarely on the fence on this important and challenging issue. But this is a necessary concomitant of their emphasis on indirect and overall liberty, as opposed to direct liberty. The debate over immigration between libertarians has to do with its implication for direct liberty. It is no accident that when Klein and Clark lose sight of the fact that direct liberty is liberty, period, they once again enter the thicket of indecision.

i. Logrolling for liberty

Klein and Clark come out neither in favor of nor against logrolling, but the NAP constitutes a clear clarion call against this odious practice. The NAP is unambiguous about this matter: do not violate rights (i.e., direct rights), period. If a bill includes good and bad elements, such as the so-called Civil Rights act of 1964, libertarians must oppose it. Klein and Clark correctly note that this law “had two primary features: the banning of voluntary discrimination and the extinguishing of forced discrimination. The first feature reduced direct liberty while the second augmented it” (p. 60). This clearly implies that libertarians cannot support this bill. Perhaps the politician who best exemplifies the freedom position on this issue is Congressman Ron Paul. Throughout his career he has steadfastly refused to logroll.⁴³

Pure libertarianism, as distinguished from “overall liberty,” garners support from logic. If a statement is partially true and partially false, then it is counted as false. If *any* part of it is incorrect, then, overall, it is incorrect. Consider these complex sentences, each consisting of two statements: Y: “2+2=4; 2+3=17.” Z: “The sun is a ball of flame; the moon is a ball of flame.” In both Y and Z, there is a true and a false statement. Therefore, both Y and Z, taken in their entirety, are false, and in like manner, so is the Civil “Rights” Act of 1964 incompatible with liberty. Private discrimination, whether odious or not, is compatible with the NAP; the governmental counterpart is not.⁴⁴

Taylor, *The Real American Dilemma: Race, Immigration, and the Future of America* (Oakton, VA: American Renaissance, 1998). For support of fully open and free immigration, see Walter Block, “A Libertarian Case for Free Immigration,” *Journal of Libertarian Studies* 13, no. 2 (Summer 1998), pp. 167-86; Walter Block, “The State Was a Mistake: Book Review of Hans-Hermann Hoppe, *Democracy, The God that Failed: The Economics and Politics of Monarchy, Democracy, and Natural Order*,” Mises.org, May 25, 2004, accessed online at: <http://www.mises.org/fullstory.asp?control=1522>; Walter Block and Gene Callahan, “Is There a Right to Immigration? A Libertarian Perspective,” *Human Rights Review* 5, no. 1 (October-December 2003), pp. 46-71; Albert Esplugas and Manuel Lora, “Immigrants: Intruders or Guests? A Reply to Hoppe and Kinsella,” *Journal of Libertarian Studies* 22 (2010), pp. 185-218; Anthony Gregory and Walter Block, “On Immigration: Reply to Hoppe,” *Journal of Libertarian Studies* 21, no. 3 (Fall 2007), pp. 25-42; Jesús Huerta de Soto, “A Libertarian Theory of Free Immigration,” *Journal of Libertarian Studies* 13, no. 2 (Summer 1998), pp. 187-97.

⁴³ It is not for nothing that he is known far and wide as “Dr. No.”

⁴⁴ For once, Klein and Clark focus on direct liberty in this regard, and analyze it

Since the law proscribes both, by analogy, it is false. From the point of view of libertarian law, it must be rejected. Anyone who favors the law because of its admittedly pro-liberty aspects, acts against (direct) liberty on this occasion.

j. Stabilizing the second best

God forbid that the U.S. should be “plunge[d] . . . into anarchy.”⁴⁵ Better that we should “appease public foolishness” by having “government supply . . . employment, when the people are so ignorant as to demand it” (p. 61). Klein and Clark characterize the minimum wage law as “public foolishness,” but still have no warrant to do so. According to them, “If liberal politicians try to achieve the ‘first best,’ they may fail to stabilize the second best, and end up with the third best” (p. 61). In this way, all sorts of anti-libertarian policies may be justified, such as minimum wages, government employment, etc.

Another problematic statement of Klein and Clark’s is: “We live in a stable liberal democratic polity” (p. 62). This is curious in that they throughout use “liberal” as a synonym for “libertarian”; was the U.S. in 2010 really a stable *libertarian* polity? This seems to be at least a major exaggeration. Yes, Rand Paul was elected to the U.S. Senate, and, as of the time of this writing, Ron Paul has an outsider’s chance of becoming the next President of the U.S., but one or even two swallows a summer does not make.

Consider Klein and Clark’s following claim: “Maybe the best way to advance liberalism is to affirm the norm that governmental power is not to be used to push people around” (p. 63). I confess that I am not all that interested in *advancing* liberty, at least not until we are clear as to what this *is*. But, no “maybes” about it: the best way, the *only* way, to promote libertarianism, is to affirm precisely this norm.⁴⁶ It is greatly to be regretted that Klein and Clark’s

correctly. Had they not, had they pointed to the indirect or overall liberty effects of this law, they would not have been able to reach any definitive conclusion, as is their wont on such matters.

⁴⁵ Klein and Clark, “Direct and Overall Liberty,” p. 61, quote Henry Buckle on this matter; see Henry Thomas Buckle, *Introduction to the History of Civilization in England* (London: George Routledge and Sons, 1904), p. 807.

⁴⁶ Of course, government *per se* “pushes people around.” It subjects them to (coercive) taxes and forbids any other institution to compete with it in this regard. On this issue, see Terry Anderson and P. J. Hill, “An American Experiment in Anarcho-Capitalism: The *Not So Wild, Wild West*,” *Journal of Libertarian Studies* 3 (1979), pp. 9-29; Bruce L. Benson, “Enforcement of Private Property Rights in Primitive Societies: Law Without Government,” *Journal of Libertarian Studies* 9, no. 1 (Winter 1989), pp. 1-26; Bruce L. Benson, “Customary Law with Private Means of Resolving Disputes and Dispensing Justice: A Description of a Modern System of Law and Order without State Coercion,” *Journal of Libertarian Studies* 9, no. 2 (1990), pp. 25-42; Walter Block, “Anarchism and Minarchism: No Rapprochement Possible: Reply to Tibor Machan,” *Journal of Libertarian Studies* 21, no. 1 (Spring 2007), pp. 91-99; Thomas J. DiLorenzo, “The Culture of Violence in the American West: Myth versus Reality,”

focus on indirect and overall liberty is incompatible with this brilliant insight of theirs.

k. Military actions, etc.

Klein and Clark reveal themselves as war-mongering libertarians of the David Boaz and Barnett stripe.⁴⁷ It would appear that there is hardly an instance of U.S. militarism abroad (i.e., imperialism) that does not meet with their approval. They applaud U.S. interventionism in World War II, not even mentioning the alternative theory that U.S. participation in World War I led to the rise of the Nazi regime.⁴⁸ They also support the U.S. involvement in the

The Independent Review 15, no. 2 (Fall 2010), pp. 227–39; Gil Guillory and Patrick Tinsley, “The Role of Subscription-Based Patrol and Restitution in the Future of Liberty,” *Libertarian Papers* 1, no. 12 (2009), accessed online at: <http://libertarianpapers.org/2009/12-the-role-of-subscription-based-patrol-and-restitution-in-the-future-of-liberty/>; John Hasnas, “The Myth of the Rule of Law,” *Wisconsin Law Review* 199 (1995), accessed online at: <http://faculty.msb.edu/hasnas/jtwebsite/MythFinalDraft.pdf>; Robert Higgs, “Why We Couldn’t Abolish Slavery Then and Can’t Abolish Government Now,” LewRockwell.com, August 20, 2009, accessed online at: <http://www.lewrockwell.com/higgs/higgs128.html>; Hans-Hermann Hoppe, “Reflections on the Origin and the Stability of the State,” LewRockwell.com, June 23, 2008, accessed online at: <http://www.lewrockwell.com/hoppe/hoppe18.html>; Seth King, “Daily Anarchist Interviews Walter Block,” LewRockwell.com, September 9, 2010, accessed online at: <http://www.lewrockwell.com/block/block165.html>; Stephan Kinsella, “The Irrelevance of the Impossibility of Anarcho-Libertarianism,” StephanKinsella.com, August 20, 2009, accessed online at: <http://www.StephanKinsella.com/2009/08/20/the-irrelevance-of-the-impossibility-of-anarcho-libertarianism/>; Roderick Long, “Libertarian Anarchism: Responses to Ten Objections,” Mises.org, 2004, accessed online at: <http://mises.org/etexts/long/anarchism.pdf>; Stefan Molyneux, “The Stateless Society: An Examination of Alternatives,” 2008, accessed online at: <http://www.mailarchive.com/libertarianenterprise@yahoo.com/msg02056.html>; Robert P. Murphy, “But Wouldn’t Warlords Take Over?” Mises.org, July 7, 2005, accessed online at: <http://mises.org/story/1855>; Rothbard, *For a New Liberty*; Rothbard, *The Ethics of Liberty*; Edward Stringham, ed., *Anarchy and the Law: The Political Economy of Choice* (Piscataway, NJ: Transaction Publishers, 2007); Morris Tannehill and Linda Tannehill, *The Market for Liberty* (New York: Laissez-Faire Books, 1984 [1970]); Patrick Tinsley, “With Liberty and Justice for All: A Case for Private Police,” *Journal of Libertarian Studies* 14, no. 1 (Winter 1998-1999), pp. 95-100.

⁴⁷ See David Boaz, “Save America—Bring Back Bill: Now I Have a Hazy Memory of the Clinton Years as a Sort of Golden Age,” *National Post*, January 12, 2010, accessed online at: <http://network.nationalpost.com/np/blogs/fpcomment/archive/2010/01/12/save-america-bring-back-bill.aspx>; Barnett, “Libertarians and the War.” For a critique of the former, see Walter Block, “David Boaz Is No Libertarian,” LewRockwell.com, January 14, 2010, accessed online at: <http://www.lewrockwell.com/blog/lewrw/archives/47525.html>; for a critique of the latter, see Block, “Randy Barnett: Pro War Libertarian?”

⁴⁸ For revisionists on World War II, see Harry Elmer Barnes, “A. J. P. Taylor and the

Causes of World War II,” *New Individualist Review* (Spring 1966), pp. 3-16; Harry Elmer Barnes, ed., *Perpetual War for Perpetual Peace: A Critical Examination of the Foreign Policy of Franklin Delano Roosevelt and Its Aftermath* (Westport, CN: Greenwood Publishing Group, 1966); Harry Elmer Barnes, *Pearl Harbor After a Quarter of a Century* (New York: Arno Press, 1972); Charles A. Beard, *American Foreign Policy in the Making, 1932-1940: A Study in Responsibilities* (New Haven, CT: Yale University Press, 1946); Charles A. Beard, *President Roosevelt and the Coming of the War, 1941: A Study in Appearances and Realities* (New Haven, CT: Yale University Press, 1948); Barton J. Bernstein, *Towards a New Past: Dissenting Essays in American History* (New York: Pantheon Books, 1968); John Charmley, *Churchill's Grand Alliance: The Anglo-American Special Relationship, 1940-1957* (New York: Harvest Books, 1996); Joseph S. Davis, *The World Between the Wars, 1919-39: An Economist's View* (Baltimore, MD: Johns Hopkins University Press, 1975); John V. Denson, ed., *The Costs of War: America's Pyrrhic Victories* (Piscataway, NJ: Transaction Publishers, 1997); Justus D. Doenecke, “Edwin M. Borchard, John Bassett Moore, and Opposition to American Intervention in World War II,” *Journal of Libertarian Studies* 6, no. 1 (Winter 1982), pp. 1-34; Justus D. Doenecke, “The Literature of Isolationism, 1972-1983: A Bibliographical Guide,” *Journal of Libertarian Studies* 7, no. 1 (Winter 1983), pp. 157-84; Justus D. Doenecke, “Explaining the Antiwar Movement, 1939-1941: The Next Assignment,” *Journal of Libertarian Studies* 8, no. 1 (Winter 1986), pp. 139-62; A. Whitney Griswold, *The Far Eastern Policy of the United States* (New York: Harcourt Brace, 1938); B. J. Klein, *Germany's Economic Preparation for War* (Cambridge, MA: Harvard University Press, 1969); William R. Lewis, ed., *The Origins of the Second World War: A.J.P. Taylor and His Critics* (New York: John Wiley & Sons, 1972); Leonard P. Liggio and James J. Martin, eds. *Watershed of Empire: Essays on New Deal Foreign Policy* (Colorado Springs, CO: Ralph Myles, 1976); James J. Martin, *American Liberalism and World Politics, 1931-1941: Liberalism's Press and Spokesmen on the Road Back to War Between Mukden and Pearl Harbor, 2 Vols.* (New York: Devin-Adair Publishers, 1963); James J. Martin, “Pearl Harbor: Antecedents, Background and Consequences,” in James J. Martin, *The Saga of Hog Island: And Other Essays in Inconvenient History* (Colorado Springs, CO: Ralph Myles, 1977); C. Wright Mills, *Causes of World War II* (Westport, CT: Greenwood Press, 1976); Simon Newman, *March 1939: The British Guarantee to Poland* (Oxford: Oxford University Press, 1993); Murray Polnar and Thomas E. Woods, eds., *We Who Dared to Say No to War: American Antiwar Writing from 1812 to Now* (New York: Basic Books, 2008); Ralph Raico, “Review of the book *Promised Land, Crusader State: The American Encounter with the World since 1776* by Walter A. McDougall,” *The Independent Review* 3, no. 2 (Fall 1998), pp. 273-78; Ralph Raico, *Great Wars and Great Leaders: A Rebuttal* (Auburn, AL: The Mises Institute, 2010); Sidney Rogerson, *Propaganda in the Next War* (London: Geoffrey Bles, 1938); Esmonde M. Robertson, *The Origins of the Second World War* (New York: St. Martins, 1971); Paul Schroeder, *The Axis Alliance and Japanese-American Relations, 1941* (Ithaca, NY: Cornell University Press, 1958); John L. Snell, ed., *The Outbreak of the Second World War: Design or Blunder?* (Lexington, MA: D. C. Heath, 1962); Viktor Suvorov, *Icebreaker: Who Started the Second World War* (New York: Viking, 1990); A. J. P. Taylor, *The Origins of the Second World War* (New York: Simon & Schuster, 1996 [1965]); Kemp Tolly, *Cruise of the Lanikai: To Provoke the Pacific War* (Annapolis, MD: Naval Institute Press, 2002); Jonathan Utley, *Going to War With Japan, 1937-1941* (Knoxville, TN: University of Tennessee Press, 1985).

Korean War, the U.S. invasion of Grenada, and Abraham Lincoln's war against the South as moves in the direction of overall liberty. Unhappily, they do not criticize, let alone even mention, a very large literature pointing in the opposite direction.⁴⁹

Klein and Clark do ameliorate their pro-war position, somewhat: “[T]he characteristic judgment of classical liberalism and modern libertarianism—strong presumption against militarism—is probably the right one for overall liberty. But there’s no denying that in certain circumstances military action can be both a dreadful reduction in direct liberty and a huge augmentation in overall liberty” (p. 66). But it is hard to discern any such perspective in their treatment of this subject. Their substantive treatment of all of these sorry historical episodes veers strongly in the pro-war direction.

7. Conclusion

According to Klein and Clark, “The possibility that direct and overall liberty disagree should not send classical liberals/libertarians to try to find ways around the problem. Instead, they should embrace the ambiguity as part of the movement” (p. 66). However, it seems to me that they have not so much offered limitations to the libertarian perspective as tossed libertarianism under the wheels of the oncoming bus. Although they might deny it, it is clear that there are no definitive statements a libertarian of Klein and Clark’s stripe could make. Rather, all is “ambiguity.” Even the murder of a child, which one would have thought to be a paradigm case of the violation of rights, is no such thing for them, at least not necessarily. I hope and trust they will forgive me

⁴⁹ For revisionists on Lincoln’s war of Northern aggression, see Charles Adams, *When in the Course of Human Events: Arguing the Case for Southern Secession* (Lanham, MD: Rowman & Littlefield, 2000); Thomas J. DiLorenzo, “The Consolidation of State Power via Reconstruction: 1865-1890,” *Journal of Libertarian Studies* 16, no. 2 (Spring 2002), pp. 139-61; Thomas J. DiLorenzo, *The Real Lincoln: A New Look at Abraham Lincoln, His Agenda, and an Unnecessary War* (Roseville, CA: Prima Publishing, 2002); Thomas J. DiLorenzo, *Lincoln Unmasked: What You’re Not Supposed to Know About Dishonest Abe* (New York: Crown Forum, 2006); Stanley L. Engerman, “Review of the Book *Emancipating Slaves, Enslaving Free Men: A History of the American Civil War* by Jeffrey Rogers Hummel,” *The Independent Review* 2, no. 1 (Summer 1997), pp. 129-32; David Gordon, ed., *Secession, State, and Liberty* (Piscataway, NJ: Transaction Publishers, 1998); Jeffrey Rogers Hummel, *Emancipating Slaves, Enslaving Free Men: A History of the American Civil War* (Chicago, IL: Open Court, 1996); John S. Rosenberg, “Toward A New Civil War Revisionism,” in *Interpretations of American History*, Vol. 1, ed. Gerald N. Grob and George Athan Bilias (New York: The Free Press, 1972), pp. 459-79; Joseph Stromberg, “The War for Southern Independence: A Radical Libertarian Perspective,” *Journal of Libertarian Studies* 3, no. 1 (1979), pp. 31-54; Mark Thornton and Robert B. Ekelund, *Tariffs, Blockades, and Inflation: The Economics of the Civil War* (Wilmington, DE: Scholarly Resources, 2004); Thomas E. Woods, *Nullification: How to Resist Federal Tyranny in the 21st Century* (New York: Regnery, 2010).

for not taking their advice to “embrace the ambiguity.” Rather, this comment has been an attempt “to try to find ways around the problem.”

Klein and Clark note that “liberty makes for a grammar with holes and gray areas” (p. 66). Nothing could be more true. Consider one “hole” in libertarianism, the solution of which has so far eluded me. I strive, with every fiber of my being, to find a way to justify violence against those who torture animals for the pure pleasure of doing so, as opposed to doing legitimate medical research. I realize that in a free society such moral depravity would be more severely punished with boycotts. However, I yearn, so far in vain, for a libertarian justification that would allow the forces of law and order to far more sternly rebuke such ethical monsters.

And, yes, too, there are gray areas. Let us consider the justification of statutory rape laws. We know that a five-year-old girl is incapable of giving consent to sexual intercourse, and that a twenty-five-year old woman certainly is, but what about a fifteen-year-old girl? No matter what the cut-off point, there will always be females under that age more mature than some above it.

However, such holes and gray areas are simply no reason to give away the entire libertarian store, as do Klein and Clark. At least the Rothbardian version of libertarianism, the one rejected by Klein and Clark, can unambiguously say that such perversions as the minimum wage law are a clear and present violation of the NAP. In contrast, the libertarianism of these authors is an ultra-skeptical one, where *nothing* can be said clearly and unambiguously, if we are to take them at their word.

Having unburdened myself about the negative aspects I find in Klein and Clark’s article, allow me to end this critique on a positive note. We do not have to take them at their word. They are better libertarians than the strict logical implications of their thesis imply. For example, take the minimum wage law again. Strictly speaking, Klein and Clark can have absolutely *no* view as to whether this law promotes their concept of overall liberty. It causes unemployment and it is coercive, but it is so popular with the ill-informed electorate,⁵⁰ that any administration that lowers its level, let alone eliminates it entirely, and *certainly* not any that wants to incarcerate those responsible for it, would face immediate expulsion through recall, likely ushering in, as Klein and Clark correctly say, something even worse. It is just about impossible to foretell *all* of the resulting reverberations of such a free-market policy. Strictly speaking, Klein and Clark should have no view of the liberty implementations at all, but to their great credit, they do—and these are all *negatives*, as we would expect from good libertarians with expertise in economics, such as these authors. So, happily, when push comes to shove, they embrace Rothbardian libertarianism, and find it impossible to uphold their own highly problematic thesis.

Klein and Clark also enrich our understanding of liberty. Their focus on indirect and, thus, on total liberty adds a new dimension to the classical

⁵⁰ See Caplan, *The Myth of the Rational Voter*.

libertarian concentration on direct liberty. Moreover, they challenge the analytic framework of those such as Rothbard who defend the direct NAP. For this they are to be congratulated. However, I cannot think that they have achieved their goal of casting libertarianism in an entirely new direction. But, their hearts are in the right place. Klein and Clark strive to understand and to expand the scope of liberty; their failure is one of means, not ends.

Libertarian Arguments for Anarchism

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1. Introduction

In this essay, I argue against the view that libertarianism supports anarchism. In support of this claim, I shall focus on Aeon J. Skoble's fine book, *Deleting the State*.¹ Skoble's argument is new but his strategy is not. The reason Skoble's argument fails also explains why similar arguments also fail.

2. Skoble's Argument that Libertarianism Supports Anarchism

In *Deleting the State*, Aeon J. Skoble presents a powerful libertarian argument for anarchism. Skoble argues that because libertarianism gives priority to liberty and because the state curtails liberty, libertarians must hold that the state is illegitimate.² The many interesting arguments, discussions, and examples make this book excellent. That said, Skoble's argument fails.

Here is Skoble's argument (see, e.g., pp. 47 and 69):

- (P1) If a state is justified, then it is justified in coercing individuals.
- (P2) If the state is justified in coercing individuals, then it is justified in depriving individuals of liberty.
- (C1) Hence, if the state is justified, then it is justified in depriving individuals of liberty. [(P1), (P2)]
- (P3) If the state is justified in depriving individuals of liberty, then liberty is not the most important political value.
- (P4) Liberty is the most important political value.
- (C2) Hence, the state is not justified. [(C1), (P3), (P4)]

¹ Aeon J. Skoble, *Deleting the State: An Argument about Government* (Chicago, IL: Open Court, 2008).

² A similar argument can be found in Murray Rothbard, "Society Without a State," *Nomos*, Vol. XIX (1978), pp. 191-92.

Premise (P1) follows from the definition of a “state.” On Skoble’s account, roughly, a group of individuals is a government if and only if they maintain a monopoly of force in an area and, perhaps, acquire income from taxation (p. 39).³ Note that Skoble treats “state” and “government” as synonymous. On his account, the state differs from society, which is a group of individuals who live together (p. 38). Premise (P2) follows from the notion that state coercion infringes on individuals’ rights and thus their liberty. Premise (P3) follows from two assumptions. First, if state coercion is justified, then the justification overrides liberty. Second, if something overrides liberty, then liberty is not always the most important political value. Premise (P4) follows from the definition of “libertarianism.”

3. Two Preliminary Concerns

One concern about this argument is that (P4) is undefended. Even if liberty usually outweighs other values, it still seems possible that there is some amount of another value (for example, deserved well-being) that outweighs liberty in some circumstances. For example, it is hard to believe that preventing the loss of millions of deserved units of utility does not outweigh the smallest loss of liberty. It might be that the liberty-prioritization claim only applies to the design of basic political institutions. Alternatively, in the real world, it might be unlikely that values will conflict. Skoble simply assumes libertarianism to be true, so this is not a criticism of his book, but it is a concern for the overall argument.

A second concern is whether the government might infringe on freedom as a way to maximize it. For example, consider when a state preventively detains someone based on strong evidence that he will harm someone in the future. In this case, the state infringes on someone’s right as a way of preventing him from infringing on others’ rights in the future. If freedom is filled out in terms of respected rights, then in this case the state infringes on someone’s freedom in order to increase it, albeit persons other than the one whose right is infringed. However, Skoble appears to view freedom in terms of rights and to view rights as side-constraints.⁴ If this is correct, then it is wrong to maximize liberty by infringing on it.

³ Similar definitions can be seen in Rothbard, “Society Without a State,” p. 191; Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), p. 51; Jan Narveson, *The Libertarian Idea* (Philadelphia, PA: Temple University Press, 1988), p. 219.

⁴ The notion that rights are side-constraints can be seen in Nozick, *Anarchy, State, and Utopia*, pp. 30-33; Hillel Steiner, “The Structure of Compossible Rights,” *Journal of Philosophy* 74 (1977), pp. 767-75.

4. Actual Consent versus Hypothetical and Rational Consent

A third concern is the Hobbesian-fear argument, which attempts to show that (P2) is false.⁵ This argument rests on two assumptions:

- (1) *Government is Necessary for Social Cooperation.* Hobbes argues that government protects against anticipatory violence, which prevents persons from being part of a civil society.
- (2) *Social Cooperation is Necessary for Liberty.* A civil society is necessary for persons' liberty to be respected.

Skoble argues against (1). He argues that game theory provides us with a model of rationality that suggests that the government is not a necessary condition for social cooperation. He argues that historical cases of effective non-governmental dispute mechanisms (e.g., Western cattle towns during the late 1800s, English Common Law and Law Merchant prior to the consolidation of these by the crown, the Middle Eastern merchant associations, and medieval Iceland's civil law) and incidents of peace breaking out during World War I confirm the practicality of such non-governmental routes to civil society. Elsewhere he rejects other libertarian arguments for government coercion, including arguments from efficiency (discussing Nozick on pp. 53-57), natural rights theory (discussing Machan on pp. 57-63), and contractarianism (discussing Narveson on pp. 63-67).

However, it is not clear how the Hobbesian-fear argument is relevant to the issue of government authority. A government can get rights from individuals only if the individuals stand in a special relation to the government (analogy: duties to family members), injure the government and owe compensation (right to compensation), or give a valid consent that creates a right in the government.⁶ The first two don't apply. The third focuses on actual historical sequences, not hypothetical ones as in the Hobbesian-fear argument.

Whether someone would rationally consent to something is irrelevant to whether he has done so. Consider the following lifetime amounts of well-being for the following marriage combinations. The first number is the male's; the second the female's. Assume that the coupling combination has no effect on third parties and that the parties are aware of the payoff values:

⁵ Thomas Hobbes, *Leviathan* (New York: Penguin, 1951 [1651]).

⁶ To create a right (claim) in another, an individual has to give a promise rather than consent. Consent creates either a Hohfeldian liberty or power in another. However, because the argument is traditionally phrased in terms of consent, I'll stick to this usage.

	Alice	Betty
Al	100/100	25/25
Bob	25/25	100/100

Given this payoff scheme, it is irrational for Al to marry Betty and Bob to marry Alice, but if they consent to do so (when sane, aware of the relevant facts, etc.), then they are morally bound.

5. Tacit-Consent Arguments for State Authority

We can and do consent to limit future act-options. Consider when a person validly consents to euthanasia, the Marine Corps, or to be bound to a mast (for example, Odysseus). Citizens who consent to the government close off future act-options (for example, not paying taxes), but do not limit their liberty.⁷

On rights-based libertarian grounds, the government is legitimate if and only if persons validly consented. One might argue against state authority either because most or all individuals in a relevant area haven't done so. However, Skoble does not provide much of an argument against the claim that most have done so. He says we can't assume that persons do consent from their living in an area (p. 100). But whether they understand their living there as tacit consent is an empirical question, and the mere fact we can't assume it doesn't show that they haven't do so. Here Skoble needs some sort of empirical support for his claim.

Alternatively, Skoble might claim that we can't infer consent when the expression of dissent carries an unreasonably high cost (p. 101). However, this is false. A high cost of dissent does not always invalidate consent. In order to see this, consider the following case:

Black Mamba: During an expedition into Africa, a highly venomous black mamba bites a wealthy scientist. He is quickly taken to the house of a local doctor who offers to sell him the doctor's only portion of mamba antivenin for the market price. The scientist quickly agrees and signs a contract. He is then given the antivenin. After a month of lying near

⁷ Persons can validly consent to limit their options against others. This explains what is wrong with the theory that persons cannot consent to the use of force by others. If the state is just a group of individuals who claim or have a monopoly of force in a region, then it is at least possible that persons can consent to their use of force. Consent to the use of force is distinct from consent to the right to make a reasoned decision about how to act. It is the running together of these two types of consent that underlies the famous argument by Robert Paul Wolff, *In Defense of Anarchism* (New York: Harper Torchbooks, 1970). The notion that a person can consent to the government as a hired agent can be seen in Tibor Machan, *Human Rights and Human Liberties* (Chicago, IL: Nelson-Hall, 1975), p. 145.

death, the scientist recovers. He then refuses to pay, arguing that the contract is invalid since his consent was coerced.⁸

Here the cost of not consenting is incredibly high, but that does not invalidate the consent to pay. At the very least, Skoble needs an argument that most persons have not validly consented to government authority. He doesn't provide one.

It is worth noting that on some accounts of the foundations of private property rights, conventions play a role in the acquisition of property rights to previously unowned things.⁹ So whether property is acquired via mixing labor, first possession, adding value, or some other method might be a function of the applicable social convention. If social convention plays a role in the acquisition of property rights, then it might also play a role in the transfer of rights to the government. Just as convention in the context of property binds persons who do yet exist, a similar thing might explain how governments acquire authority over a region and then how this applies to future generations via property rights.

The underlying assumption here is that unilateral acts do not by themselves create a property right in a previously unowned thing. For example, John Locke's labor-mixing argument fails.¹⁰ His argument asserts that the person who initially mixed his labor into unowned land or some other unowned object then owns it as a way of protecting his right to the labor. First, labor is an event that ceases to exist and hence there is nothing left to protect. Second, the mixing and labor are one and the same and so either nothing is mixed in or the person does not mix it in. In either case, the argument fails.¹¹ Third, even if the mixing and labor are distinct and the person mixes an object (i.e., his labor) into land, it is unclear why the person gains the land into which the object is mixed rather than losing the object.¹²

Skoble might argue that even if most persons do validly consent, a minority doesn't and this blocks government legitimacy. This might be correct if rights are absolute. If they are not, then in some cases efficiency might override rights. For example, we might think that efficiency dictates who has

⁸ This example comes from Stephen Kershnar, "A Liberal Argument for Slavery," *Journal of Social Philosophy* 34 (2003), p. 510.

⁹ For one such account, see Stephen Kershnar, "Private Property Rights and Autonomy," *Public Affairs Quarterly* 16 (2002): 231-58.

¹⁰ See John Locke, *Two Treatises of Government*, ed. Peter Laslett (Cambridge, MA: Cambridge University Press, 1988 [1690]), Bk. 2, chap. 5.

¹¹ This objection comes from Jeremy Waldron, *The Right to Private Property* (New York: Oxford University Press, 1988), pp. 184-91.

¹² This point comes from Nozick, *Anarchy, State, and Utopia*, pp. 174-75.

the burden with regard to detecting dissent. For example, consider the following case:

Trauma Victim: A woman who suffers from past trauma and out of internal compulsion gets undressed and into bed with a man, who then has intercourse with her without any knowledge that she is not willingly participating.

We might think that even though the woman acts involuntarily, the man should not be made to pay compensation or be punished because she didn't validly consent. The same is true if she acts from hypnosis, neurosurgery, or another third-party-caused autonomy-blocking mechanism. This is because efficiency dictates that she shoulder the burden of indicating dissent or at least avoiding widespread indices of valid consent.

In addition, if there are dissenters to the state, then their rights might still be overridden. Consider the following cases:

Hotwire: There is a car accident and a three-year-old black girl's arm is cut off. If reattachment surgery doesn't begin soon, she will permanently lose the arm. A bystander knows the only way to get the child to the hospital in time is to hotwire a parked car. The bystander knows the car owner and in particular that he is a member of the Aryan Brotherhood, a vicious racist organization, and would never consent to allowing his car to be used to help the girl.

Ticking Time Bomb: A terrorist plants a nuclear bomb in the middle of New York City. He plans to blow it up in the middle of the day when the city has millions of commuters in addition to its residents. He is tortured and still won't disclose its location. The only thing that will make him talk is making him witness the mutilation and killing of one son and a threat to do the same to his others.¹³

Intuitively, it seems permissible both to hotwire the car and to torture and kill the son. From this it follows that rights are not absolute (that is, they can be overridden). If they can be overridden by great costs, then the avoidance of such costs might explain what overrides dissenters' rights. It should be noted that the notion that weighty costs can override rights does not follow from the above cases, although it does cohere nicely with it.

¹³ This example can be seen in Michael Levin, "The Case for Torture," *Newsweek*, June 7, 1982, accessed online at: http://webpages.acs.ttu.edu/wschalle/case_for_torture_by_michael.htm.

6. Conclusion

Skoble and other libertarians fail to show that libertarianism supports anarchism. The focus on whether persons would rationally consent to the state misses the issue. Instead, the truth of anarchism depends on whether all or most persons actually have consented to the state. Tacit consent to the acquisition of property rights in previously unowned things provides us with a model as to how valid consent might occur. However, whether persons actually have done so is an empirical issue.

Review Essays

Review Essay: Ronna Burger's *Aristotle's Dialogue with Socrates: On the Nicomachean Ethics*, Paula Gottlieb's *The Virtue of Aristotle's Ethics*, and Eric Salem's *In Pursuit of the Good: Intellect and Action in Aristotle's Ethics*

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1. Introduction

Aristotle's *Nicomachean Ethics* (*NE*) has been commented on, translated, and discussed extensively throughout the millennia. There have periodically been surges in scholarship on the *NE* across the twentieth century, including a recent one that seems to have originated in the 1970s. The three book-length treatments under review add to this surge: Ronna Burger's *Aristotle's Dialogue with Socrates* (2008), Paula Gottlieb's *The Virtue of Aristotle's Ethics* (2009), and Eric Salem's *In Pursuit of the Good* (2010).¹ Scholarly interest in Aristotle's ethical theory has also sometimes been met with a parallel interest in wider public discourse. The current surge is no exception. In 2011 alone there have been dozens of news items citing Aristotle's ethical and political works, as well as a prominent review of Robert Bartlett and Susan Collins's new translation of the *NE*.²

¹ Ronna Burger, *Aristotle's Dialogue with Socrates: On the Nicomachean Ethics* (Chicago, IL: University of Chicago Press, 2008); Paula Gottlieb, *The Virtue of Aristotle's Ethics* (New York: Cambridge University Press, 2009); and Eric Salem, *In Pursuit of the Good: Intellect and Action in Aristotle's Ethics* (Philadelphia, PA: Paul Dry Books, 2010). For an extensive bibliography of such scholarship over the previous century or so, see Thornton Lockwood, "A Topical Bibliography of Scholarship on Aristotle's *Nicomachean Ethics*: 1880-2004," *Journal of Philosophical Research* 30 (2005), pp. 1-116.

² See *Aristotle's Nicomachean Ethics*, trans. Robert Bartlett and Susan Collins (Chicago, IL: University of Chicago Press, 2011), and the review of this translation by Harry Jaffa, "Aristotle and the Higher Good," *The New York Times*, July 1, 2011, accessed online at: <http://www.nytimes.com/2011/07/03/books/review/book-review-aristotles-nicomachean-ethics.html?pagewanted=all>. This review did not fall on an

What accounts for the interest in Aristotelian ethics? In brief, the answer seems to be interest in Aristotle's conception of virtue and responsibility. On the one hand, Aristotle's accounts of moral truth, courage, moral experience, practical reason, and our political nature all contrast sharply with the incivility and irresponsibility of American life. The issues of concern range from the recent financial crisis and the U.S. debt to home-grown terrorism and community service.³ On the other hand, some commentators find Aristotelian virtue in our midst. One, for example, finds Aristotelian magnanimity in New York's Mayor Michael Bloomberg, who plans to contribute \$30 million of his own wealth toward a New York City initiative to aid that city's underprivileged minority youth.⁴ So Aristotle remains relevant.

Burger, Gottlieb, and Salem focus to varying degrees on examining, articulating, and interpreting Aristotle's view on the best way of life for humans.⁵ Given that a large part of the historical debate over this topic revolves around whether the best human life is one of contemplation and/or moral virtue, it is unsurprising that philosophers are fascinated by it: the debate goes to the heart of the place of their vocation in the good life. In addition to this focus, the authors each also share the public's interest with how virtue ethics intersects with politics and public life. The final chapter in each of these three books in some way speaks to how Aristotle's ethical

apathetic public. See also the reader response to Jaffa's review in the letter-to-the-editor section of *The New York Times* of July 15, 2011, accessed online at: <http://www.nytimes.com/2011/07/17/books/review/aristotles-ethics.html>.

³ See, for a few very recent examples, Christopher Arps, "Does America Defaulting on Its Debt Mean We'll Need a Bailout Like Greece?" *BigGovernment*, July 28, 2011, accessed online at: <http://biggovernment.com/carps/2011/07/28/does-america-defaulting-on-its-debt-mean-well-need-a-bailout-like-greece/>; Charles P. Pierce, "The Bomb That Didn't Go Off," *Esquire*, July 21, 2011, accessed online at: <http://www.esquire.com/features/homegrown-terrorism-us-0811>; and Front Porch's Simon, "An Invitation to We the People—Pt. II," *Nassau Guardian*, July 26, 2011, accessed online at: http://www.thenassauguardian.com/index.php?option=com_content&view=article&id=11789&Itemid=86.

⁴ See Thomas Farrell, "Mayor Bloomberg's Bold New Initiative Is Magnanimous," *OpEdNews.com*, August 7, 2011, accessed online at: <http://www.opednews.com/articles/Mayor-Bloomberg-s-Bold-New-by-Thomas-Farrell-110807-227.html>.

⁵ This is Burger's and Salem's primary focus. Gottlieb does so in a more oblique way, though, since she argues that there is a lot of ground to clear before we can fruitfully engage with this topic: "It is not my intention to enter the debate about whether happiness consists merely in contemplation or also or only in ethical virtue at this juncture. . . . I think that there is an important puzzle to be solved before this debate even gets off the ground" (p. 60 n. 26). Consequently, her main focus is otherwise for a substantial portion of her book.

insights can inform our interactions in civil society and stabilize politics for the common good.

2. Burger's *Aristotle's Dialogue with Socrates: On the Nicomachean Ethics*

According to Burger, the question that inspires her analysis of the *NE* is as follows: "How is the teaching of the *Ethics* about human happiness to be understood when its speeches are interpreted in light of the deed that we can call the action of the *Ethics*?" (p. 9). Two significant assumptions underlie her question: first, that the *NE* is not easily read on its own as a "coherent whole" (p. 1) and, second, that an ironic reading of the text is required to make "the work a whole," juxtaposing the "speeches" of the *NE* with the "deed" of its argument (p. 5). She thinks that a straightforward reading of the text faces two major problems. For one thing, we would have no audience for the *NE*: those with "the that" of ethics would not need to read it because "the why" is unnecessary for them, and those without "the that" would never understand it because they have not been habituated properly.⁶ For another, there would remain a conflict between the largely "inclusive" interpretation of happiness that pervades most of the *NE* and the "exclusive" interpretation of happiness that marks *NE X*.⁷

Burger argues that her ironic interpretative strategy enables us to see several important things. The real audience of the *NE* is either someone disgruntled with the discrepancy between "the that"—our initial stock of moral beliefs—and the conflicting practices he sees around him, or else someone who is provoked out of passive acceptance of "the that" by Aristotle's puzzles (p. 4). The "deed" of the *NE* is none other than an extended dialogue with Socrates, whom Aristotle "constructs . . . as a perfect foil against which to develop a different account of virtue of character" (p. 5). The upshot of this "dialogic deed" is the conclusion that the happiness we are

⁶ At *NE* I.4.1095b7-8, the Aristotelian phrase "the that" (*to hoti*) refers to recognizing that something is true (e.g., "Murder is bad"), and "the why" (*tou dioti*) refers to understanding the justification or ultimate account for why something is true (e.g., "Murder is bad because it violates a person's right to life.").

⁷ Burger explains the exclusive/inclusive distinction in the following way: The "exclusive" understanding of happiness is "the life most singly devoted to the activity of contemplation" and the "inclusive" understanding holds that "life without ethical virtue or friendship, at the very least, could never be a good one for a human being" (p. 8). Burger is careful to avoid muddying the waters with the terminology of contemplation as a "dominant-end" in the happy life—a term introduced by W. F. R. Hardie in his *Aristotle's Ethical Theory* (Oxford: Oxford University Press, 1968) and reinforced by John Cooper in his *Reason and Human Good in Aristotle* (Cambridge, MA: Harvard University Press, 1975). She follows Fred D. Miller's reasoning that "dominant . . . is not strictly a contrary" of "inclusive," since one can have a set of inclusive goods that constitutes an end with a member of the set being the dominant good (p. 235 n. 41); see Fred D. Miller, Jr., "Book Review of John Cooper's *Reason and Human Good in Aristotle*," *Reason Papers* 4 (Winter 1978), p. 112.

seeking is dialogical activity, “what we have been doing” all along as readers and implicit dialogue partners (p. 214). Hence, the only way to avoid the conflict Burger sees in Aristotle’s “speeches”—concerning inclusive and exclusive characterizations of happiness—is for us to see that he is as much a master ironist as are Plato or Socrates.

The structure of Burger’s argument for this unusual conclusion emerges in the course of her general commentary on nearly every chapter of every book of the *NE*. She highlights numerous points of ambiguity, incompleteness, and seeming inconsistency throughout her brief summaries and commentaries on each part of the *NE*, and notes many parallels between the moves of the *NE* and similar moves in various Platonic dialogues, all of which provide a set-up for her interpretive thesis. Given that the conclusion of Aristotle’s “function argument” is that “the human good proves to be activity of the soul in accord with virtue, and indeed with the best and most complete virtue, if there are more virtues than one” (*NE* I.7.1098a16-18),⁸ it becomes all-important “what kind of virtue is being held up as a measure” (p. 34). Enter Aristotle’s “dialogue with Socrates,” which occurs in two phases in *NE* I-VI and VI-X, with Book VI serving as the crucial “turning point.”

Phase one of Burger’s argument (Chapters 1-4) explicitly begins (in *NE* III.8.1116b4-5) with Socrates holding the intellectualist thesis that “virtue is knowledge” and hence unified by reason. She argues, though, that the dialogue with Socrates implicitly begins in *NE* II, where Aristotle anticipates rejecting the upcoming Socratic view by maintaining a split between the rational and non-rational parts of the human soul. He attaches intellectual virtue to the rational part (where knowledge resides) and ethical virtue to the non-rational part (where the habituated, proper emotional disposition of the mean between two extremes resides), and describes a plurality of virtues in *NE* III-V that are beholden to sources other than reason (e.g., beauty and justice). However, by the end of *NE* VI Aristotle denies this split, because the person with *phronesis* (practical wisdom) is the one who uses reason to judge which actions hit the mean, *phronesis* is the intellectual virtue of the reasoning part of the soul concerned with determining what is good and bad for humans, and *phronesis* unifies the virtues. Aristotle’s view comes very close to Socrates’s here, but avoids collapsing into it by subordinating *phronesis* to another intellectual virtue, namely, *sophia* (contemplative wisdom) (p. 119). *Phronesis* is engaged in for the sake of *sophia*, but *sophia* is needed in order to engage in *phronesis*, for *phronesis* “would seem to require as its basis theoretical knowledge of human nature as such” (p. 117). This deep connection between *phronesis* and *sophia* seems to tether them so closely that Burger cannot help but “wonder about the sharp cut between these two intellectual virtues” (p. 123).

⁸ All translations of Aristotle’s *NE* (unless otherwise indicated) are those of Terence Irwin in *Aristotle, Nicomachean Ethics*, trans. Terence Irwin, 2nd ed. (Indianapolis, IN: Hackett Publishing Company, Inc., 1999).

Phase two (Chapters 5-7) involves two more quickly dissolved forms of resistance to Socrates's intellectualist position. First, Aristotle rejects out of hand the Socratic view that *akrasia* (incontinence, weakness of will) is impossible (at *NE* VII.3.1145b27-28). Aristotle regards it as obvious that people can know what is good and yet either act contrary to that knowledge or fail to act on it. For Socrates, if someone has moral knowledge, he will do what is good; if he does what is bad, he must be acting out of ignorance. Burger takes us through Aristotle's series of qualifications on this issue, so that before *NE* VII is done, his "appeal to practical reasoning has served, thus far, not so much to save the phenomenon of *akrasia* as to unpack the features of 'knowing' that make Socrates declare it impossible" (p. 141). This leaves Aristotle in a weakened position vis-à-vis his attempt to drive a wedge in between virtue and knowledge.

Second, and even more surprisingly, despite the conclusion of phase one, Aristotle maintains in *NE* X the clear superiority of *theoria* (theoretical wisdom) over moral virtue. Burger provides two suggestions for dealing with this apparent paradox: (1) Aristotle's lengthy discussion of friendship in *NE* VIII-IX that reveals humans to be dialogic (and hence moral/political) beings, and (2) his "reminder of the need to interpret speeches in light of deeds" (p. 212). In order to make sense of Aristotle's inconsistencies, Burger urges us to place more trust in Aristotle's dialogic action, or "deed," than his "speeches." Human happiness is nothing short of engaging in a Socratic dialogue: "This is an *energeia* of *theoria* that takes place through the activity of sharing speeches and thoughts, which is, as the discussion of friendship established, what living together means for humans; it is in that way a realization at once of our political and our rational nature" (p. 214).

Aristotle's Dialogue with Socrates is provocative and full of fascinating connections between the *NE* and the Platonic corpus. At the very least, readers will pause to reconsider the *NE*'s arguments and reflect on whether Burger's way of reading Aristotle's treatise enriches our understanding of his work in the ways she suggests and whether the act of reading transforms our moral and political self-understanding. And although Aristotle's aporetic, dialectical method keeps us in mind of the fact that he is often wrestling with the competing ideas of specific individuals, Burger places before us more sharply and fully the ways in which Aristotle resumes and critiques ethical discussions framed by Plato, his long-time teacher and conversation partner. She makes it much easier for us to contextualize these disputes by locating the source of them in various Platonic dialogues (with specific references liberally sprinkled throughout the text and the sixty-one pages of extensive endnotes).

Although Burger's overall interpretive strategy is clear and intriguing, the details of her interpretive argument are often difficult to follow, buried as they are in her general summary of and commentary on the *NE*. It would have served her project better to have focused on one or the other task, interpretation or commentary; as it stands, both tasks suffer from this divided focus. Steven Skultety notes that *Aristotle's Dialogue with Socrates* "often

reads as if it is suspended between different projects,” and Kevin Cherry concurs that an exploration of potential problems for her thesis and a fuller development of interesting points she raises are hampered by the “entanglement of [the book’s] argumentative thesis and its commentary character.”⁹ The commentary aspect of the book is generally too quick, and thus cannot do justice to the scholarly disputes surrounding the many issues that arise in the course of the *NE*. Many suggestive insights suitable for the purpose of a commentary are relegated to the endnotes where they cannot fully be developed. And despite the extensive endnotes, the range of scholarly dispute over issues such as the function argument (pp. 30-36), the nature of the human soul (pp. 41-43, 112-15, 172-73), and equity (pp. 90-91, 104), is not reflected much in the text; many seminal articles and books on those issues do not make it into the bibliography. While it is necessary for Burger to raise and comment on *some* of the dozens of issues she summarizes in order to contextualize her interpretive thesis, not all of that work was needed for interpretive purposes.¹⁰

With respect to Burger’s interpretive strategy, some have lauded it as “profound,” “magisterial,” and one that “cannot be ignored by anyone who intends to write on the *Ethics*.”¹¹ Others admire its novelty and fruitfulness, but are more critical about the way in which the strategy is implemented. Thornton Lockwood raises an important issue concerning the “Socrates problem.” Without questioning the validity of Burger’s “use of Socrates as an heuristic device for interpreting the *Ethics*,” Lockwood explains that she slides back and forth between passages where Aristotle is engaged in a dialogic “trajectory” with the Platonic Socrates and the historical Socrates, as though there were one unambiguous Socrates (the Platonic Socrates) who is the target of Aristotle’s comments.¹² Sorting out carefully “which Socrates,”

⁹ Steven Skultety, “Book Review of Ronna Burger, *Aristotle’s Dialogue with Socrates: On the Nicomachean Ethics*,” *Notre Dame Philosophical Reviews* (December 2009), accessed online at: <http://ndpr.nd.edu/news/23879-aristotle-s-dialogue-with-socrates-on-the-nicomachean-ethics/>; Kevin Cherry, “Aristotle’s Socratic Turn: Book Review of Ronna Burger, *Aristotle’s Dialogue with Socrates: On the Nicomachean Ethics*,” *The Review of Politics* 71, no. 4 (Fall 2009), p. 674. For a similar criticism, see also Tom Angier, “Book Review of Ronna Burger, *Aristotle’s Dialogue with Socrates: On the Nicomachean Ethics*,” *Philosophical Quarterly* 60, no. 240 (July 2010), p. 639.

¹⁰ Skultety points out, for example, that “in the stretch of text from pages 153-206 (nearly a quarter of the book) Socrates does not make a single appearance”; see Skultety, “Book Review of Ronna Burger, *Aristotle’s Dialogue with Socrates: On the Nicomachean Ethics*.”

¹¹ Donald Lindenmuth, “Book Review of Ronna Burger, *Aristotle’s Dialogue with Socrates: On the Nicomachean Ethics*,” *Review of Metaphysics* 62, no. 3 (March 2009), p. 639.

¹² See Thornton Lockwood, “Book Review of Ronna Burger, *Aristotle’s Dialogue with Socrates: On the Nicomachean Ethics*,” *Bryn Mawr Classical Review* (August 2009),

Lockwood suggests, would have strengthened this heuristic device. Tom Angier presses this “which Socrates” problem more forcefully than does Lockwood. He points to some places in Burger’s text where she tries to bolster her ironic reading of Aristotle with what she regards as Aristotle’s ironic reading of the Platonic Socrates. For example, when discussing Aristotle’s confrontation with the Socratic thesis that “virtue is knowledge,” Burger plays with the idea that “the virtues as *logoi* are the questions Socrates pursues through the deed of conversing . . . ; and the passion that drives his pursuit . . . is not a matter of mere speeches” (p. 128). She regards the “true understanding of human excellence” as “hidden” behind Socrates’s words and revealed in his “practice of inquiry” (p. 128). Angier objects to this “revelatory mode of argument,” finding it dubious that one could discern Socrates’s “real views” by reading them off “his (tendentiously described) ‘quest’” rather than inferring them “from his explicit arguments and claims.”¹³

Burger’s subtle attention to the deeds of the historical Socrates rather than the words of the Platonic Socrates is not the only problematic employment of irony in her book. Angier briefly notes this as well. He argues (*contra* Burger) that the fact that Aristotle’s claim in *NE* X that happiness is found in *theoria* comes after nine books arguing for the centrality of moral virtue “does not establish *irony*, especially since Aristotle’s use of continuous sequential argument is hardly hospitable to irony in the first place.”¹⁴ Taking a cue from Angier’s skepticism, I would argue further that Burger’s ironic interpretive strategy suffers from three difficulties. First, the strategy is offered largely outside of the larger context of scholarship on the *NE*. While the *NE* is challenging to translate and to understand, and various specific and general arguments are questionable or seemingly inconsistent, scholars have offered ways of resolving alleged inconsistencies in the *NE* based on a straightforward reading, especially when read in conjunction with relevant texts from the rest of Aristotle’s corpus, such as *Metaphysics*, *De Anima*, and *Posterior Analytics*. Recall that one of the claimed benefits of Burger’s approach is that it promises to resolve internal contradictions by means of her extra-textual ironic approach. One might wonder, as does Skultety, “why we should turn away from th[e] established body of scholarship.”¹⁵ Burger

accessed online at: <http://bmcr.brynmawr.edu/2009/2009-08-33.html>.

¹³ Tom Angier, “Book Review of Ronna Burger, *Aristotle’s Dialogue with Socrates: On the Nicomachean Ethics*,” p. 640.

¹⁴ *Ibid.*

¹⁵ Skultety, “Book Review of Ronna Burger, *Aristotle’s Dialogue with Socrates: On the Nicomachean Ethics*.” Just a few examples of this large body of scholarship include Anthony Kenny, *The Aristotelian Ethics* (Oxford: Oxford University Press, 1978); John Cooper, “Contemplation and Happiness: A Reconsideration,” *Synthese* 72 (1987), pp. 187-216; and Terence Irwin, “The Structure of Aristotelian Happiness,” *Ethics* 101 (1991), pp. 382-91.

assumes rather than establishes that a straightforward reading of the *NE* cannot yield “wholeness.”

Second, recall that Burger sets out to solve the supposed problem of Aristotle’s audience. However, the nature of this problem is puzzling. According to Burger, a straightforward reading of Aristotle’s key “audience passage” at *NE* I.4.1095a31-1095b12 is “comically paradoxical” because those with “the that” don’t need “the why” of the *NE* and those without “the that” are unsuitable for studying the *NE* (p. 20; see also pp. 3-4 and 21). Hence, she concludes, Aristotle’s real audience must be a different type of person and it’s to that type of person that the “dialogic deed” of the *NE* is pitched. She even alludes in an endnote to her Platonic reading on this point: “Aristotle would be looking, in that case, for an audience not unlike Glaucon and Adeimantus, who want Socrates to show them the real good of practicing the justice praised by convention” (p. 233 n. 23). However, she has read far too much into that passage. I am not denying that audience is important, nor am I denying that people like Glaucon may be part of Aristotle’s audience. The fact is, however, Aristotle is amply clear about his method and purpose at *NE* I.4, and nothing about his claims there are ironic. He explains that in beginning an ethical inquiry “from things known to us” on our way toward ethical first principles “known without qualification,” our conversation partners (often students) can begin from “the that . . . without also knowing why” those things are true. The straightforward purpose of ethical inquiry is to move us from Hesiod’s noble listener to his autonomous thinker (*NE* I.4.1095b3-12). There is no paradox here, because it’s not that once one has “the that” then “the why” is unnecessary full stop, but rather, that those with “the that” don’t need to have “the why” *in order to begin* their ethical studies. Burger has mistakenly read the passage in the former way rather than the latter.

The implications of the good life seen as an ironic Platonic-Aristotelian dialogue are far-reaching and contentious, particularly for moral education and politics, since a deliberately ironic approach to moral pedagogy might well involve deception, paternalism, and condescension. It thus makes a significant difference whether Aristotle’s approach to engaging in ethical inquiry is straightforward in nature or involves irony. Whatever suspicions students or citizens might have about ironic teachers or politicians, such suspicions are unwarranted in Aristotle’s case. He gives us explicit sign posts about what he is doing and why in a way that is up front about and sensitive to the developmental level of his audience.

Third, getting caught up in the intricacies of an ironic interpretive strategy has perhaps induced Burger to omit discussion of key elements of Aristotle’s ethical theory that distinguish it from those of his forerunners. As remarked above, how distinct Aristotle’s view is from that of Socrates will depend in part on “which Socrates” we take him to be addressing. In any event, while Aristotle’s considered view about happiness may be closer to that

of Socrates than it at first seems when specific ethical issues are introduced, his view is still different from that of both the Platonic and the historical Socrates. The texture of the good life and its pursuit will vary depending on whether one's vision of happiness is purification of the soul in preparation for an afterlife (Socrates's in the *Phaedo*), extreme self-denial for the sake of the state (Plato's Socrates in the *Republic*), or the attainment during one's natural lifespan of *eudaimonia* for oneself and those in one's larger social context (Aristotle's in the *NE* and *Politics*).

3. Gottlieb's *The Virtue of Aristotle's Ethics*

Contrary to Burger (and Salem, as discussed below in Section 4), Gottlieb engages in a straightforward reading of the *NE*. Her interpretive strategy relies on raising the profile of the "much-maligned doctrine of the mean" (p. 3) and the "nameless virtues," and showing how a fresh look at both can yield much fruit. A better understanding of the nameless virtues solves long-standing interpretive problems in the *NE* and does a better job at resolving problems in moral philosophy than utilitarianism or Kantian deontology. Ultimately, Gottlieb wants to show us a "living" virtue ethics that is a serious (and superior) competitor to rival contemporary moral theories. She accomplishes this purpose by dividing her book into two parts: "Ethical Virtue," comprising Chapters 1-5, focuses on "internal" issues of textual interpretation and consistency, and "Ethical Reasoning," comprising Chapters 6-10, applies Aristotle's virtue ethics to contemporary ethical issues.

The two linchpins of Gottlieb's project are the doctrine of the mean (Chapter 1) and the nameless virtues (Chapter 2). The doctrine of the mean has three aspects: (1) It is a doctrine of equilibrium—where one possesses a good disposition that allows one to judge rightly in any context—rather than a moderation of vices. (2) It involves a nuanced view of the relativistic and changing features of contextual choice. (3) It involves a "triadic taxonomy of different mentalities" for each virtue: the person with *phronesis* (who is in the mean state of virtue), the unscrupulous person (who is in the vicious state of excess), and the ingenuous/unworldly person (who is in the vicious state of deficiency) (p. 37). The triadic aspect of the doctrine of the mean then helps us to "locate" the nameless virtues. These virtues should be emphasized because they "deal with a most important aspect of human nature, the social," a fact whose importance re-emerges in Chapter 10 where political community and its preconditions are explored (p. 49). These virtues also avoid the common charge that Aristotle's virtues are parochial, because they are connected to universal human functioning that transcends cultures and because they help Aristotle to select particular dispositions as virtues despite the fact that his culture had not yet given them a name.

Gottlieb then challenges those who think that virtues are needed in order to correct an inherently defective human nature (e.g., Philippa Foot and Christine Korsgaard), and defends a non-remedial view of the virtues. She combines the equilibrium aspect of the doctrine of the mean with Aristotle's function argument, and argues that an individual actualizes his nature

(inherently neither good nor bad) when he exercises ethical virtue, and would need such virtues even in a well-functioning state (*polis*) (Chapter 3). Realizing that another common objection to virtue ethics is that they are groundless, she devotes Chapter 4 to justifying Aristotle's list of virtues and assessing whether additional candidates for virtues belong on the list: "If human psychology and way of life, including the fact that humans are social animals, can give one the sphere of the virtues, only the doctrine of the mean can say what the *good* dispositions in those spheres are" (p. 77). She then explains the tight connection between *phronesis* and ethical virtue that yields a "unity of the virtues" doctrine (Chapter 5). We possess the ethical virtues when our actions "involve correct reason" and are not merely "according to reason," so that *phronesis* integrates our soul by having us in "the correct intellectual disposition" (p. 106). This disposition just *is* the state of equilibrium involved in the doctrine of the mean.

Having rescued the doctrine of the mean and the nameless virtues from obscurity, ironed out some issues internal to the *NE*, and defused some criticisms that scholars have lodged against Aristotle's virtue ethics, Gottlieb applies his moral theory to moral dilemmas (Chapter 6), moral motivation (Chapter 7), the practical syllogism (Chapter 8), how educated a good person needs to be (Chapter 9), and the intersection between ethics and politics (Chapter 10). Drawing on various discussions in the *NE*, including the relativistic aspect of the doctrine of the mean, she shows how the "tragic dilemmas" ubiquitous in contemporary moral theorizing (as characterized e.g., by Michael Stocker and Rosalind Hursthouse) can be dissolved. Instead of having "dirty hands" from choosing a "lesser evil," Aristotelian moral agents can instead choose the best option from bad circumstances and retain their moral integrity. Gottlieb finds Aristotle's view, unlike Kantianism, "fundamentally humane" on this issue (p. 132). She then explains how Aristotle's view compares favorably to those of Plato, Kantians, and utilitarians with respect to how the ethically virtuous person can choose the virtues for their own sake and for the sake of happiness in such a way that choosing the virtues for the sake of happiness does not undermine choosing the virtues for their own sake. Taking a rather novel interpretation of the practical syllogism, she uses it to clarify the deep connection between ethical virtue and *phronesis* that arose in her discussion of the unity of the virtues. She does this by focusing on the first half of both the major and minor premises in the practical syllogism and maintaining that *phronesis* and the nameless virtue of truthfulness will enable the good person to read into those premises "the virtue salient to the situation at hand" (p. 152) so as to yield the proper action-guiding conclusion.

Lest Aristotle's virtue ethics sound too demanding for the ordinary good person, Gottlieb turns her attention to education and politics and shows how his moral theory is more democratic than it has perhaps sounded in the preceding eight chapters. The ethically virtuous person would need to have experience, some understanding of human psychology, some general principles, and at least an implicit understanding "that the virtues make people

function well,” but he would “not need to know a complete account of what a function is or how it relates to Aristotelian substance or essence” (p. 182). The grounding of the function argument and a full-blown understanding of Aristotelian metaphysics would be needed only by political rulers (p. 187). Gottlieb next explains that a *polis* (political community) is needed for exercising the virtues so that people have the chance to become the best they can in accordance with the function argument, a theme that harks back to the non-remedial nature of the virtues. The political context is where nameless virtues such as truthfulness and friendliness become most crucial for facilitating a smoothly functioning political process. The need to exercise the nameless virtues, she argues, tells in favor of a democratic polity where “the collective virtue and practical wisdom of the majority” can sometimes “equal or surpass” that of one or a few good people (p. 203). Since the aim of a proper *polis* is the actualized happiness of its citizens, the legislator must know what happiness is, so that we finally circle back to the issue of the best human life: “Is it contemplative and/or ethically virtuous activity?” Gottlieb’s conclusion on this matter is that trying to “rank” happy lives “makes no sense”; “What counts as a happy life depends on the particular human being who is living it, her particular abilities, and the very particular circumstances encountered in her life. Ranking happiness in the abstract, then, seems out of place. While a philosophical life might suit one person, it might be inappropriate for another, and so on” (p. 196). The legislators’ role is to create a *polis* that fosters conditions that educate people toward virtue; the selection of which kind of life is happy is left to individuals to determine.

Gottlieb’s prose is clear, and her book is accessible both to a general philosophical audience and to specialists in ancient philosophy. It’s not possible to do justice to the wide range of important topics she engages, so I shall focus on three of the most insightful contributions she makes as well as two difficulties with her account. Despite the problems I discuss below, those looking for the contemporary relevance of a naturalistic version of virtue ethics will find much of value in Gottlieb’s book.

One of the strengths of *The Virtue of Aristotle’s Ethics* lies in clarifying how the doctrine of the mean is about equilibrium rather than moderation. Untangling how one enters this state of equilibrium so as to actualize one’s nature via the cultivation of moral virtue and *phronesis* has the benefit of providing some sort of justification for particular virtues. This enables Gottlieb’s audience to understand why certain dispositions and not others count as virtues (though she could have developed more fully the justificatory dimension)—something that more intuitionistic versions of virtue ethics fail to provide, and which leads some to write off virtue ethics as being merely a form of ethical relativism. It’s true, as Gosta Gronroos notes, that the equilibrium interpretation of the mean is not entirely new.¹⁶ However,

¹⁶ See Gosta Gronroos, “Book Review of Paula Gottlieb, *The Virtue of Aristotle’s Ethics*,” *Notre Dame Philosophical Reviews* (September 2009), accessed online at: <http://ndpr.nd.edu/news/24181/?id=17607>. Other scholars who have discussed

given that this is a book intended for an audience wider than other academics and Aristotle scholars—and that a fairly common understanding of being good is to be “moderate” in satisfying one’s desires and/or vices (e.g., “I lie only a little”)—Gottlieb’s detailed elaboration of the equilibrium interpretation is welcome.¹⁷

The power of Gottlieb’s emphasis on the mean as equilibrium is augmented by its connection to her account of the non-remedial nature of the virtues. Aristotle’s version of virtue ethics is not a theory about keeping inherently wayward people in line. It is instead about cultivating one’s moral judgment in order to be able to discern what is good to do in even the most complex circumstances for the sake of one’s *eudaimonia*. Striving toward moral perfection, then, is not a painful effort to overcome one’s nature, but rather, how one actualizes one’s nature. This kind of account recognizes that humans are born incomplete—on account of being born with desires but without a fully developed rational faculty—but not inherently flawed or defective. Aristotle’s is a developmental theory that leaves a central role for moral education to play in assisting one another in the cultivation of *phronesis* and self-actualization through reasoned inquiry. Though not everyone will act virtuously—some might need to be punished for certain vices through social and/or political mechanisms—this does not make correction or punishment the primary purpose of moral and political principles. The virtues are needed at all times, including “when things [a]re going right” (p. 64).

One of the best features of Gottlieb’s book is her use of Aristotle’s theory to dissolve the supposedly intractable and ubiquitous “moral (or tragic) dilemmas” in which we get our hands (i.e., characters) “dirty” no matter what we choose. Belief in moral dilemmas is driven in large part by the deontological claim that we have absolute moral duties that either conflict with one another or with the demands of practical life. The alleged dilemma is that no one could choose to fulfill one of the duties without violating the other, or respond to practical exigencies without violating a duty, so that regrettably one must end up doing something inherently wrong. Some moral

Aristotle’s doctrine of the mean in this way include, e.g., Sarah Broadie, *Ethics with Aristotle* (Oxford: Oxford University Press, 1991), chap. 2; and Joe Sachs, “Aristotle: Ethics,” *Internet Encyclopedia of Philosophy*, July 22, 2005, accessed online at: <http://www.iep.utm.edu/aris-eth/>.

¹⁷ David Keyt objects to viewing equilibrium as a third aspect of the doctrine of the mean; he thinks that the concept of equilibrium is not found in Aristotle’s text, while the other two aspects of “location” and “relativity” are. He suggests that rather than seeing equilibrium as a third aspect, we instead see it as Gottlieb’s “interpretation of location and relativity”; see David Keyt, “Book Review of Paula Gottlieb, *The Virtue of Aristotle’s Ethics*,” *Ethics* 120, no. 4 (July 2010), p. 856. What Keyt offers is a friendly amendment to Gottlieb’s thesis that affects its presentation more than its substantive content. So Gottlieb could welcome his suggestion without any adverse effects for her overall theory.

theorists try to work their way out of deontological moral conflict by invoking utilitarianism as a way of choosing the “lesser of two evils,” but this strategy still leaves such theorists with “dirty hands.” The issue arises most acutely in Just War Theory, where the problem arises from an explicit attempt to combine deontology with consequentialism.¹⁸

Gottlieb’s way of dissolving moral dilemmas is twofold. First, she notes that many cases of so-called moral dilemmas are presented too simplistically, so that they could be dissolved by a better description of the case that is more sensitive to the full complexity of the circumstances. On this count, she suggests, virtue ethics is superior especially to Kantian deontology. This in itself, though, would only minimize the problem of moral dilemmas rather than eradicate it.¹⁹ Second, and more important, is placing moral choice in context. Gottlieb has us consider Aristotle’s case of the tyrant in *NE* III.1. It might be a bad thing “without qualification” to do some (unspecified) shameful action, but in the context of a tyrant threatening to kill your family if you don’t do the unqualifiedly shameful thing, the “most choiceworthy” action may very well be to do as the tyrant bids *for the purpose of saving one’s family*. Though one is involuntarily placed in highly constricted and undesirable circumstances, one voluntarily must choose with *phronesis* the right thing to do in that context for the sake of *eudaimonia*. There is an ultimate principle guiding all moral choices, though it might be difficult to discern which action is the right one, and any sense of regret felt is not of having done something wrong, but of having been placed in undesirable circumstances. As Gottlieb explains, the agent’s rightly chosen “action is praiseworthy, there is no stain on his character, and therefore the type of regret that amounts to self-reproach is out of place” (p. 131). Aristotle’s

¹⁸ For two prominent hybrid accounts that assume the existence of moral dilemmas in the context of Just War Theory, see Michael Walzer, “Political Action: The Problem of Dirty Hands,” in *War and Moral Responsibility*, ed. Marshall Cohen, Thomas Nagel, and Thomas Scanlon (Princeton, NJ: Princeton University Press, 1974), pp. 62-82; Michael Walzer, *Just and Unjust Wars*, 4th ed. (New York: Basic Books, 2006); and Thomas Nagel, “War and Massacre,” *Philosophy & Public Affairs* 1, no. 2 (Winter 1972), p. 123-44. Nagel articulates exactly the view that Gottlieb rejects: “Given the limitations on human action, it is naive to suppose that there is a solution to every moral problem with which the world can face us. We have always known that the world is a bad place. It appears that it may be an evil place as well”; see Nagel, “War and Massacre,” p. 144. For an excellent account of how an Aristotelian approach undermines the existence of moral dilemmas and “dirty hands” in the context of Just War Theory, see Irfan Khawaja, “‘Lesser Evils’ and ‘Dirty Hands’: A Response to Asta Maskaliunaite,” *Baltic Security & Defence Review* 10 (2008), pp. 29-52.

¹⁹ A point suggested by Gronroos, “Book Review of Paula Gottlieb, *The Virtue of Aristotle’s Ethics*”: “It is of course true that when a moral dilemma is insufficiently specified, one might wonder whether there is a way of disarming the dilemma by considering the situation more carefully. But are there any reasons to believe this always to be the case?”

virtue ethics is thus “more humane” than rival moral theories. This renders it immensely valuable not only in political contexts, but also in the lived texture of everyday life where it is possible on Aristotle’s view for people of integrity to live free of backward-looking anguish over difficult moral choices.

Though there is much of value in Gottlieb’s account, it suffers from a number of significant difficulties. As noted above in the discussion of equilibrium, Gottlieb could have developed more fully the way in which an Aristotelian virtue ethics can justify the selection of virtues in relation to the ultimate good of *eudaimonia*. She shows how Aristotle’s doctrine of the mean can “locate” a virtue where others may not have detected and named one before, but she does not provide an argument that sufficiently explains how the virtues contribute to the flourishing life recommended by Aristotle’s function argument. In other words, she has not yet provided fully objective, universal grounds for why some traits (*hexeis*) are to count as genuine virtues by contributing to the human good, while others do not.

Since Gottlieb does not always limit herself to Aristotle’s text *per se*, but also suggests directions that we can take a “living” virtue ethics, she often discusses contemporary moral theorists whose views bear some similarity to Aristotle’s. In this regard, Gottlieb’s summary dismissal of Ayn Rand’s Aristotelian-inspired Objectivism is at the very least baffling and at most a wrong-headed rejection of a straw man position (pp. 73-74 and 86-87). Gottlieb not only fails to cite Rand’s own works,²⁰ but attributes to Rand virtues such as “greed” (dismissed as vices) that Rand herself does not endorse.²¹ Among the glaring omissions from Gottlieb’s bibliography in this regard is Tara Smith’s *Ayn Rand’s Normative Ethics*.²² In addition to providing an extensive and sympathetic articulation of Rand’s ethical theory, Smith places Rand’s account of the virtues in dialogue with other contemporary moral theories (especially other varieties of naturalistic virtue ethics). It’s unfortunate that Gottlieb’s discussion of Rand is hasty and

²⁰ Gottlieb cites as the source of her understanding of Rand’s views a website of “the followers of Ayn Rand”: <http://www.aynrand.com> (p. 86 n. 26).

²¹ See Ayn Rand, “The Objectivist Ethics,” in Ayn Rand, *The Virtue of Selfishness: A New Concept of Egoism* (New York: Bantam Books, 1964), pp. 13-35, where she explicitly endorses seven virtues: rationality, honesty, independence, justice, integrity, productiveness, and pride. Arguably, she endorses a virtue of benevolence as well; see Ayn Rand, “The Ethics of Emergencies,” in Rand, *The Virtue of Selfishness*, pp. 43-49. Though she refers in her novel *Atlas Shrugged* (New York: New American Library, 1985 [1957]), p. 699, to “the utopia of greed,” both “utopia” and “greed” are obviously meant ironically.

²² Tara Smith, *Ayn Rand’s Normative Ethics: The Virtuous Egoist* (New York: Cambridge University Press, 2006). For critical discussion, see Carrie-Ann Biondi, “Critical Review Essay of Tara Smith’s *Ayn Rand’s Normative Ethics*,” *Reason Papers* 30 (Winter 2008), pp. 91-105.

uninformed, and that she did not integrate the substantial work of Rand, Smith, and others when articulating and defending Aristotle's virtue ethics.

Another difficulty (or rather, set of difficulties) with Gottlieb's account arises from how she draws out the political implications of Aristotle's virtue ethics. She is right that Aristotle's view of the naturalness of the *polis* is an expression of his non-remedial account of the virtues. She sees the virtues involved in human sociality as most actualized through wide political participation, and argues that Aristotle thus regards the majority rule of polity (*politeia*) as superior to aristocracy or monarchy: "for the more people are involved, the more various their partial vicious tendencies will be, and the more likely it will be that only their virtuous judgments will coalesce" (p. 206).²³ Aristotle regards monarchy (rule by one virtuous person), aristocracy (rule by a small number of virtuous people), and polity (rule by many free persons) to be the only legitimate possibilities for a "correct constitution," that is, one that rules for the common advantage (*Politics* III.7.1279a25-31).

However, Gottlieb's account has two problems. For one thing, as David Keyt explains, she oscillates between discussing Aristotle's conception of polity and our modern conception of democracy, ultimately arguing that some "sort of democratic society" is most supportive of human flourishing—a conclusion that Keyt regards as "a piece of neo-Aristotelianism on Gottlieb's part."²⁴ Keyt (rightly) argues that Gottlieb refuses to accept "the master's own words" of *Politics* VII, where Aristotle's best constitution is clearly stated as "a true aristocracy where all the mature citizens are men of full virtue."²⁵ Polity is to be preserved *only* when the circumstances are such that the legislator can expect no better at the time. In addition, many (though not all) Aristotelian virtues can be cultivated through non-political spheres like the family or friendships, so that a polity would not be required for all forms of human flourishing.

Gottlieb qualifies her view by pointing out how Aristotle limits what those in a polity can do: "[T]he people are not to alter the basis of the constitution or its laws and . . . they are [to] have only deliberative and judicial functions" (p. 206). This *is* Aristotle's view of what the citizens in a polity should be allowed to do, which explains why he does not put it higher on the

²³ Peter Meilaender, "Book Review of Paula Gottlieb, *The Virtue of Aristotle's Ethics*," *Bryn Mawr Classical Review* (February 2010), accessed online at: <http://bmcr.brynmawr.edu/2010/2010-02-15.html>, likens this part of Gottlieb's argument to that of James Madison in *Federalist* #51 concerning the benefits of having many factions.

²⁴ Keyt, "Book Review of Paula Gottlieb, *The Virtue of Aristotle's Ethics*," p. 859.

²⁵ Ibid. I defend a conclusion similar to Keyt's in Carrie-Ann Biondi Khan, "Aristotle, Citizenship, and the Common Advantage," *Polis* 22, no. 1 (2005), pp. 1-23, esp. pp. 12-13 and 20-23; and Carrie-Ann Biondi, "Aristotle on the Mixed Constitution and Its Relevance for American Political Thought," *Social Philosophy & Policy* 24, no. 2 (Summer 2007), pp. 176-98, esp. pp. 180-83.

scale of possible correct constitutions: the many free citizens of a polity do not have the virtue requisite for higher levels of political involvement. This qualification also indicates a problem with Gottlieb's discussion of the implications of Aristotle's political thought for the inclusivism-exclusivism debate. Recall that Gottlieb avoids the question of whether the contemplative and/or morally virtuous life is best by saying that it "makes no sense" to "rank" happy lives (p. 196), and that it is up to individuals in a *polis* to decide on an individual basis which life is best for them. However, the legislators in a polity who are responsible for the "constitution and its laws" are the very same ones whom Gottlieb earlier says need more and a higher kind of wisdom than the rest of the population. We should keep in mind that Aristotle states near the beginning of the *NE*, "while it is satisfactory to acquire and preserve the good even for an individual, it is finer and more divine to preserve it for a people and for cities" (I.2.1094b9-11). It sounds like the legislators, who possess *sophia*, live "finer and more divine" lives, and thus are happier, than others.²⁶ Hence, Gottlieb's own account seems implicitly to warrant an inclusivist interpretation of the best life (perhaps with contemplation as a dominant end), despite her explicit rejection of taking sides on this larger issue. Whether that interpretation is Aristotle's considered view is a complex and important issue, but it is one that Gottlieb does not adequately tackle.

4. Salem's *In Pursuit of the Good: Intellect and Action in Aristotle's Ethics*

Salem launches his project by setting up the tension that emerges when one juxtaposes the first nine books of the *NE*, in which Aristotle discusses the active life of moral virtue as the way to flesh out his conception of happiness, with the startling assertion part way through *NE X* that happiness is contemplation. When we are "forced to call into question the very assumption . . . that happiness lies in action rather than thought" (p. 5), how are we to understand the relationship between *theoria* (thought) and *praxis* (action, or ethical virtues plus *phronesis*)? Salem asks, "Is each of these activities to be regarded as a self-sufficient whole, independent of the other and perhaps incapable of being brought together with it within a single life? Or is the happy life a whole within which both *theoria* and *praxis* play essential parts?" (pp. 46-47). In answering these questions, the issue of "audience" plays as central a role in Salem's interpretive strategy of the *NE* as it does for Burger, though Salem offers a more moderate reading of Aristotle's irony than she does. Ultimately, he concludes that Aristotle affirms that "the happy life [is] a whole within which both *theoria* and *praxis* play essential parts." In so doing, Salem seems unintentionally²⁷ to combine elements of

²⁶ This is probably why Matthew Walker, "Book Review of Paula Gottlieb, *The Virtue of Aristotle's Ethics*," *Journal of the History of Philosophy* 48, no. 3 (July 2010), p. 398, says: "[T]o examine Aristotle fully as a virtue ethicist requires one to say more than Gottlieb does about intellectual virtues other than *phronesis*."

²⁷ I say "unintentionally," because Salem does not discuss either Burger's or Gottlieb's

Burger's and Gottlieb's views, offering a three-stage argument to reach this conclusion.

In the first stage, Salem dwells in detail on Book I of the *NE* and gleans three significant points. First, he highlights Aristotle's "full definition" of happiness, which clearly calls for an active life of virtue: "Happiness or the human good is an activity of the soul in accordance with the best and most complete virtue, in a complete life" (p. 13). Second, he points out that this emphasis on happiness as a virtuous activity clashes with a previous claim that man's distinctive function is reason: "In the final form of his definition reason is conspicuously absent. What are we to make of this?" (p. 28). Answering his own question, Salem argues that any mention of reason drops out because of the audience Aristotle is addressing: "the cultivated and active" (p. 30). He thinks that if Aristotle were to suggest at this early stage that happiness consisted in the activity of thinking, it "would run counter to human life as they understand it: it would needlessly offend the sense and sensibilities of his closest allies" (p. 29). Third, he analyzes the function argument's connection between *energeia* (activity) and *entelecheia* (completeness) in relation to how Aristotle discusses these terms in his *Metaphysics*. When something is being *what* it is, it is being-at-work-in-the-world, which is its distinctive *energeia*. *Entelecheia* is achieved when something engages *well* in its distinctive activity. For many beings, the two are indistinguishable, but in the case of humans there is "a gap . . . between being merely human and being fully human" (p. 44), and so a deep question arises about what fills the gap between human *energeia* and *entelecheia*. In so doing, Aristotle transforms the search for happiness into asking "what it would mean for me, a human being, to be fully present in the world—to be, for once, *all there*" (p. 43). In other words, we are trying to figure out the best way to exercise our agency in relation to our function (which is presumably what causes "the gap").

The second stage of the argument is guided by Salem's concern with *NE*'s audience. Since this intelligent and honor-loving audience's interests need to be taken seriously, Aristotle spends the time necessary (nine more books) to win them over to the way in which *theoria* will be involved in the best life. Salem employs this somewhat ironic understanding of Aristotle's method in the parts of his book where he discusses select portions of *NE* II-VII (Chapters 2 and 3). He considers in turn whether the virtue that will move humans from their *energeia* to their *entelecheia* is magnanimity, justice, *phronesis*, or *sophia*. In each case, he explains why the candidate virtue fails to meet the criterion of completeness. With respect to the magnanimous man and the wholly just (i.e., equitable) man, their worth is so great that no political activity they engage in could possibly yield to them their full worth or honor, and so there is no way for them to attain completeness in such activities (Chapter 2).

books in his (though he does list Burger's in his bibliography).

The failure of these first two candidates provides Aristotle with the opportunity to bring back into the picture man's distinctive function of reason and explore *phronesis* and *sophia*. Chapter 3 heightens the tension between these two intellectual virtues, with each offering weighty reasons on its behalf, though *phronesis* ends up being for the sake of *sophia*, and hence is incomplete. Though *sophia* is the last virtue standing, this does not yield the conclusion that happiness is simply a life of contemplation, Salem argues, because there are some unresolved problems here. He questions whether *sophia* can meet the completeness criterion, since while *sophia* "in itself" can "exist apart from a knowledge of human things and the human good," clearly the "wise man" cannot; "the wise man must presumably live and act among other men" (p. 120). Since the wise man must then possess the ethical virtues in order to live and act with others, making it apparent that all of these virtues "express different 'modes' of the same man" (p. 121), the question re-emerges whether he can connect his good with that of the *polis* so as "to find a true place for himself within his city" (p. 122).

In the third stage of his argument, Salem combines a largely straightforward reading of *NE X* with earlier textual hints from the *NE* as well as additional material from *Metaphysics*. Essentially, the happiest human actualizes his reason through both *sophia* and *phronesis* (and by implication of the unity of the virtues, all of the ethical virtues as well), since he attains and maintains *sophia* through *phronesis*. He also has a vested interest in maintaining a good political society and in cultivating others to be the best that they can be for two reasons: (1) doing so helps him to maintain the external conditions needed for exercising *sophia* (pp. 126-28); and (2) doing so enables him to actualize fully his nature and to behold its "being" in the world, much in the way that the benefactor, mother, and friend discussed in *NE VIII-IX* behold that which he or she has co-created (pp. 137-45). It is this second reason that illuminates the role of *theoria* (which at its root means "beholding") in the good life and explains its sudden appearance in Book X: "To study human things as Aristotle does . . . [including] the delightful recognition of 'himself' at work in those things—is to study that part of the whole which reveals most about the source of the whole. For here, too, as it turns out, there are gods" (p. 163).²⁸

Salem's argument is similar in some ways to Burger's and Gottlieb's analyses of the intersection between ethics and politics. On the one hand, he highlights the crucial role of the "unnamed virtues" in the good life, as does Gottlieb, and sees them as being useful to the happy person in both leisure and politics. For example, a good use of leisure is to engage in truthfulness, tact, and witty conversation that "reveals the character of the soul" (p. 157). On the other hand, Salem indicates the limits of truthfulness in relation to one's

²⁸ Salem here makes reference to a parallel analysis in Aristotle's *Parts of Animals* where he seconds Heraclitus's exaltation of the study of living things: "within all natural things there is present something wondrous" (645a17).

audience. To those incapable of recognizing the best man's full worth, "he will tell the truth except when speaking about himself. In this case, he will be inclined to understate the truth, to be 'ironic' about his own virtue, thus exhibiting a kind of equity in speech" (p. 157). He shares Burger's view that through the *NE* Aristotle "enacts a final resolution of the tension between *theoria* and *praxis*" (p. 161) and employs an ironic technique in order to reach his target audience, "affirming the intrinsic worthiness of the ethical life and pointing beyond it" (p. 159). Unlike Burger, though, and more like Gottlieb,²⁹ Salem thinks that for those who love *sophia*, a careful reading of Aristotle's *NE*—taken with his metaphysical and biological works—reveals an internally consistent argument for the best life.

I will not repeat here my position set out above in Section 2 for why I find an ironic reading of the *NE* generally unwarranted, but would take issue with Salem's "evidence" for thinking that Aristotle takes an ironic strategy toward his audience of "cultivated and active" men and "conceals" his definition of happiness. Salem argues that reference to reason drops out of the function argument in *NE* I only to reappear much later when the audience will no longer be scared off by it, having gone through and found wanting the honor-related virtues. I concur with Michael Pakaluk in finding problematic Salem's "evidence" for his "dynamic" or "dramatic" reading of most of the *NE*. With respect to reason's supposedly dropping out of the conclusion of Aristotle's function argument, Pakaluk poses the good question, "Why should someone latch onto the definition [of happiness], and not attend to what Aristotle had openly said three lines earlier, to justify that definition?"³⁰ Anyone reading or listening to this discussion would have followed the logical moves that implicitly place reason in the conclusion of the function argument; hence, it never drops out for an audience paying attention to the context. In addition, Aristotle reiterates at a number of places throughout the *NE* that reason plays a key role in the good life. It just takes longer to explain fully *how* reason and *theoria* are involved in *eudaimonia*, given that reason is closer to the first-principles end of the journey toward first principles than it is to us at "the beginning" of our ethical inquiry.

Pakaluk refers to the problem raised in the previous paragraph as one concerning Salem's "method." He also raises a problem for the "manner" in which Salem proffers his interpretation of the *NE* by pointing out that Salem "does not take the most basic care to support his interpretation by defending it in relation to reasonable alternatives" and that there seems to be no evidence

²⁹ I say only "more like Gottlieb" because she spends little time discussing *sophia* and explicitly dodges the issue of which kind of life is best. What Salem shares most with Gottlieb is that his account is best when it takes a straightforward reading of the *NE*.

³⁰ Michael Pakaluk, "Book Review of Eric Salem, *In Pursuit of the Good: Intellect and Action in Aristotle's Ethics*," *Notre Dame Philosophical Reviews* (April 2010), accessed online at: <http://ndpr.nd.edu/news/24324-in-pursuit-of-the-good-intellect-and-action-in-aristotle-s-ethics/>.

that Salem “has consulted scholarship on Aristotle’s *Ethics* post 1996.”³¹ Not consulting any scholarship relevant to one’s project during the fourteen-year period prior to publication of one’s project is a significant omission, but it is more problematic to ignore competing interpretations that might make more sense than one’s preferred (though implausible) interpretation. Pakaluk rightfully takes Salem to task on both counts. However, Pakaluk is unfair when he claims that Salem’s “dynamic” reading “leads him astray” to such an extent that he ends up giving “no illuminating accounts of any distinctions, classifications, lines of reasoning or arguments in *NE*.”³²

If we set aside the difficulties involved in the “manner and method” of Salem’s project, I think we find that (*contra* Pakaluk) Salem has a fairly straightforward reading of (most of) *NE* I and X that is nuanced, substantial, and superior to that of Burger or Gottlieb. On the most pressing issues of the nature of the best life and how to attain it, Salem delves deeply into Aristotle’s corpus and brings forth an insightful interpretation for us to consider. The material Salem offers at the end of Chapter 1, which enriches our understanding of the function argument by way of the concepts *energeia* and *entelecheia* found in Aristotle’s *Metaphysics*, is excellent. Locating the central issue of ethical inquiry in “the gap” between *energeia* and *entelecheia* allows us to appreciate how systematic and complex Aristotle’s developmental account of virtue ethics is. This also clarifies the general outline of ethical inquiry, which Aristotle thinks can only be fleshed out through lived experience and in conversation with “fellow lovers of wisdom” (p. 8).

The most rewarding insight that Salem offers us in *In Pursuit of the Good*, though, comes in Chapter 4 where he synthesizes his analysis of *NE* X with relevant passages from a few of Aristotle’s other works: to bring out the best in others is to see the best in oneself made concrete. For embodied intellects like us, it is essential to express reason through virtuous action so as to actualize our natures. In showing the range of solitary through social activities that the actualized, happy person could experience (as craftsman, benefactor, parent, friend, citizen), Salem provides a more complete picture than either Burger or Gottlieb of how such a person lives a whole, integrated life that manifests aspects of *theoria* and *praxis*—contemplation and moral virtue—at the same time.

5. Conclusion

Taken together, *Aristotle’s Dialogue with Socrates*, *The Virtue of Aristotle’s Ethics*, and *In Pursuit of the Good*—despite their many differences—offer us the following insights about Aristotle’s *Nicomachean Ethics*. (1) The best human life is “inclusive,” that is, it consists of

³¹ Ibid.

³² Ibid.

contemplation and moral virtue. (2) Reason—as the essential faculty by which we deliberate about, recognize, and appreciate the human good—has pride of place in the good life. (3) As physically, emotionally, and intellectually integrated beings at our best, there is no good reason to treat rationality and morality as entirely distinct sources of normativity.

Aristotle's virtue ethics, as articulated in his *Nicomachean Ethics* and understood in the context of his corpus, thus provides us with an alternative vision of the self that is at once complex and realistic, aspirational and within reach. For philosophers wanting to avoid the rationalism of deontology and the subjectivism of utilitarianism, virtue ethics promises a refreshing and plausible alternative. For citizens weary of the misdeeds of politicians and other leaders, Aristotle offers objective grounds by which they can hold their social and political leaders accountable. It's no surprise, then, that professional philosophers and laypersons alike continue to turn to Aristotle's theory when other theoretical options and ways of living fail to yield satisfactory answers to life's most important questions.

Review Essay: Paul Berman's *The Flight of the Intellectuals* and Tariq Ramadan's *What I Believe*

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1. Introduction

Neither of the books under review is a biography, but each devotes its pages to the words and deeds of a single individual. The individual in question happens to be Tariq Ramadan, Professor of Islamic Studies at Oxford University, globe-trotting political activist, media personality, author of several well-received books on Islam in the contemporary world, and human magnet for controversy.

The depictions of Ramadan we encounter in these books are a Rashomon-like study in contrasts. Paul Berman's *The Flight of the Intellectuals* effectively describes Ramadan as a moral and intellectual fraud masquerading as a liberal reformer: a crypto-terrorist, a crypto-misogynist, an excuse-maker for anti-Semitism, and an apologist for the apologists of Hitler's Final Solution.¹ Ramadan's *What I Believe* takes a predictably more benign view of its subject: dismissing the accusations made against him as the defamations of frightened hacks, Ramadan invites us, in a spirit of "open, thorough, and critical debate," to "a book of ideas, an introduction to what I believe, meant for those who really want to understand but who do not always have enough time to read and study all the books."² Needless to say, none of the ideas intended for that audience indicate the slightest sympathy for terrorism, misogyny, anti-Semitism, or genocide.

Both authors might well be wrong about Ramadan, but both cannot possibly be right. That fact gives both books a kind of semi-prurient urgency: What, one wonders, *is* the truth about Tariq Ramadan? The more-than-occasional tedium of the inquiry, however, and its uneasy similarity to gossip-mongering, prompts questions about the point of the inquest: Why all this fuss about the reputation and *bona fides* of an obscure Oxford don? Berman's book does a good job at posing these questions, but an uneven job at answering them. Ramadan's book evades more questions than it either poses or answers.

¹ Paul Berman, *The Flight of the Intellectuals* (Brooklyn, NY: Melville House, 2010); hereafter, *Flight*.

² Tariq Ramadan, *What I Believe* (Oxford: Oxford University Press, 2010), pp. 6-7.

2. *Dramatis Personae*

It's probably misleading to describe either Ramadan or Berman as "obscure," since both are about as obscure in some circles as they are famous or notorious in others. In any case, since biographies matter to the controversies discussed in both books, some back-story about both individuals may be in order.

Tariq Ramadan was born in 1962 in Geneva, Switzerland, the son of Said Ramadan and Wafa al-Banna, the latter being the eldest daughter of Hasan al-Banna, founder of the Muslim Brotherhood. Raised and educated in Switzerland, he (Tariq) earned the equivalent of a Master's degree in philosophy and French literature, and a doctorate in Arabic/Islamic Studies at the University of Geneva. Having earned his dissertation, Ramadan set out for his parents' native Egypt to study Islamic law at al-Azhar University in Cairo. He returned to Europe in the 1990s, where he published several books on the emerging character of "Western" or "European" Islam, achieving some notoriety for his views in Switzerland, France, and parts of the Arab world.

Essentially unknown in American intellectual circles until after the terrorist attacks of September 11, 2001, Ramadan rose to prominence in this country during the concerted post-9/11 quest for a "bridge builder between Islam and the West." To that end, he was invited in 2004 by the University of Notre Dame to become the Henry R. Luce Professor of Religion, Conflict, and Peacebuilding at the Joan B. Kroc Institute for International Peace Studies there. Having accepted the offer, and having shipped his belongings to South Bend, Indiana, Ramadan's visa was revoked just prior to his entry into the United States, obliging him to resign the Notre Dame position, and to take one at Oxford instead. Following a lawsuit in 2006 by the American and New York Civil Liberties Unions, Ramadan re-applied for a visa to enter the U.S., only to have this visa request denied later that year on grounds of his having provided "material support to a terrorist organization"—namely, two charities designated by the U.S. government as fundraising fronts for the Palestinian terrorist group Hamas.³

³ The relevant legal case is *American Academy vs. Chertoff* (2007), in an opinion written by the Honorable Paul A. Crotty, U.S. District Judge, accessed online at: http://www.aclu.org/images/exclusion/asset_upload_file33_33325.pdf.

A reading of Crotty's opinion suggests that the government's case against Ramadan was probably a greater threat to American national security than Ramadan's presence would have been. In a passage of stunning nonsensicality (one of several throughout the opinion), Crotty writes: "The statute [under review in the case] imposes a heavy burden: it requires Professor Ramadan to prove a negative, and to do so by clear and convincing proof. But this outcome is the direct result of the language Congress used. It is the Court's role to interpret the statute as written by Congress, not to question Congress' wisdom in drawing the line where it did" (p. 30). Since there is no such thing as the "clear and convincing proof" of a negative, the Court's assertion implies that the American judiciary lacks the authority to question a statute that demands outright impossibilities of those within its jurisdiction. For an admirable

The ironic but predictable result of these legal squabbles was to give Ramadan more publicity than he might otherwise have gotten. Established at Oxford, he published several more books on Islam, and then began a career, à la Bono and George Soros, in global political activism. In 2010, the U.S. government reversed its earlier position on his supposed terrorist connections, granting him a visa, and allowing him into the country. He has since gone on two American speaking tours, one in 2010 and one in 2011, addressing rapt and enthusiastic audiences at colleges and universities, as well as at Islamic centers around the country. While the initial enthusiasm for him in the mainstream media has recently begun to die down, the love affair with his theo-political theorizing appears only just to have begun in the academy.

Paul Berman is an American journalist with degrees in American history from Columbia University, and wide reportorial expertise in Europe and Latin America. Currently a Distinguished Writer in Residence at the Arthur L. Carter Institute of Journalism at New York University, he is the author of several books, among them a celebrated series that traces the effects of totalitarian theory and practice on the moral and intellectual life of the left. Accused by many on the left of having betrayed its values—of having become, in one derisive formulation, “the philosopher-king of the liberal hawks”—Berman’s writing is in fact firmly leftist in orientation, structured by the left’s moral and political presuppositions, and soaked in nostalgia for the glory days of the *soixante-huitards*.

To the best of my knowledge, Berman’s first skirmish with Ramadan dates to the two or three skeptical pages he devotes to Ramadan’s thought in his 2003 book *Terror and Liberalism*.⁴ By 2007, however, Berman’s skepticism had evidently turned to outright hostility, provoking what he accurately calls a “long, intricate, and not-always sweet-tempered essay” on Ramadan in *The New Republic*.⁵ The *New Republic* essay forms the core of *Flight*, to which Berman adds “some . . . historical details,” drawn “from the archival discoveries . . . of several talented historians,” as well as ruminations on “a couple of medieval texts, which bear on our own non-medieval difficulties.”⁶ In describing Ramadan as a moral and intellectual fraud,

defense of judicial review in the case, see the American Civil Liberties Union press release, “ACLU Asks Federal Appeals Court to Lift Ban on Renowned Scholar,” January 23, 2008, accessed online at: <http://www.aclu.org/national-security/aclu-asks-federal-appeals-court-lift-ban-renowned-scholar>.

⁴ Paul Berman, *Terror and Liberalism* (New York: W.W. Norton, 2004), pp. 24-26.

⁵ Paul Berman, “Who’s Afraid of Tariq Ramadan?” *The New Republic*, June 4, 2007, accessed online at: <http://www.tnr.com/article/who%E2%80%99s-afraid-tariq-ramadan>.

⁶ From the Preface to *Flight* (pages unnumbered).

Berman also manages to accuse liberal intellectuals of complicity⁷ in that fraud (hence the book's title), to praise Ramadan's antagonist Ayaan Hirsi Ali, and to criticize the same liberal intellectuals for having attacked Hirsi Ali in the first place. This is not a morally timid book, or one that shrinks from controversy.

Flight has widely been praised as a work of exemplary rigor and courage. It has also been derided, even reviled, as an object of outright contempt. In fact, Berman's book is a very mixed bag which gets about as much right as it gets wrong. What it gets right is very much worth saying. What it gets wrong, it gets badly wrong.

3. What *Flight* Gets Right

As I see it, Berman gets three important things right in *Flight*. He asks the right questions about Ramadan's generally unscrutinized rise to moral and intellectual prominence in the United States. He makes a credible case for Ramadan's complicity in the pro-Nazi past of his (Ramadan's) grandfather, Hasan al-Banna. And he correctly draws attention to Ramadan's equivocal response to a question about stoning as the (supposedly) Islamic punishment for adultery. These are not, to my mind, the most fundamental problems with Ramadan's project or career, but they are real problems, and they fully deserve the attention Berman gives them.

It's difficult to grasp the legitimacy of Berman's first point unless one revisits the smarmy public relations campaign mounted on Ramadan's behalf over the past decade, defined by the slogan that Ramadan was the best candidate for "building a bridge between Islam and the West." Though accepted in some quarters as the cutting edge of intellectual sophistication, this "bridge" metaphor actually makes very little sense. A bridge is a structure built over an obstacle to facilitate passage from one location to the other. We

⁷ "Complicity" is my term, not Berman's. As I'll use it throughout this review, "complicity" denotes any knowing and voluntary association with an immoral agent or institution that provides support for or offers agreement, approval, and endorsement of his or its immorality, whether prospectively, *ex post facto*, or in the present. I myself would endorse the view of complicity (or "sanction," to use her term) taken by Ayn Rand. See Rand's "How Does One Lead a Rational Life in an Irrational Society?" and "The Cult of Moral Grayness," in *The Virtue of Selfishness: A New Concept of Egoism* (New York: Signet, 1964), pp. 82-86 and 87-92, and her "The Psychology of Psychologizing," in *The Voice of Reason: Essays in Objectivist Thought*, ed. Leonard Peikoff (New York: Meridian, 1989), pp. 23-31. For further elaboration on Rand's view, see Leonard Peikoff, *Objectivism: The Philosophy of Ayn Rand* (New York: Meridian, 1991), pp. 276-86; David Kelley, *The Contested Legacy of Ayn Rand: Truth and Toleration in Objectivism* (New Brunswick, NJ: Transaction, 2000), pp. 19-60; and Tara Smith, *Ayn Rand's Normative Ethics: The Virtuous Egoist* (Cambridge, MA: Cambridge University Press, 2006), pp. 159-64. Rand's conception of complicity or sanction is broader than that typically discussed in the mainstream literature, where complicity is understood by analogy with the use of that term in criminal law. See, e.g., John Gardner, "Complicity and Causality," *Criminal Law and Philosophy* 1 (2007), pp. 127-41.

might, then, very charitably understand a “bridge between Islam and the West” as affording a passage to mutual understanding over the obstacle of mutual incomprehension. But the idea of a “passage” presupposes a fixed point of departure and a clear destination. Somewhat absurdly, as conceived by the putative bridge builders themselves, neither “Islam” nor “the West” satisfies this description. Instead, “Islam” denotes a multiplicity of incommensurably different things (“Islam is not a monolith”) and “the West” denotes an equally vague grab-bag of free-floating and feel-good associations. It is unclear how one builds a “bridge” between two sets of civilizational equivocations, and what exactly would be accomplished by trying. It sounds like the proverbial bridge to and from nowhere.

In any case, since Tariq Ramadan was the man for the bridge-building job, and the job itself was a moral imperative, his views were to be admired rather than scrutinized or criticized. Remarkable efforts at special pleading were made on Ramadan’s behalf, lest overly sharp criticism upset the requirements of the Islamo-Western Bridge-Building Enterprise. Much of this consisted of telling readers that Ramadan was not to be subjected to criticisms of the sort reserved, say, for right-wing Christians with similar views. Thus, according to his defenders, one was not to evaluate Ramadan’s historical books by *historical* standards, since what really mattered was his “political philosophy.”⁸ But one was not to evaluate his claims about philosophy by *philosophical* standards, since philosophers were made irrelevant by Ramadan’s “strategic calculation that embracing the political passions of the Muslim mainstream is the only way for his reformist agenda to gain any sort of credibility or traction with the Muslim audiences that really matter.”⁹ Not that one was to evaluate Ramadan’s strategic calculations in a coarsely political fashion, of course: he was an autonomous *intellectual*.¹⁰ But then, one was not to evaluate his intellectual-sounding claims in a coldly intellectual spirit, either, since he was fundamentally a populist *politician*.¹¹ Best not to evaluate Ramadan by any determinate standards at all?

⁸ Stephanie Giry, “The Faces of Tariq Ramadan,” *The New York Times*, April 1, 2007, accessed online at: <http://www.nytimes.com/2007/04/01/books/review/Giry.t.html>.

⁹ Marc Lynch, “Veiled Truths: The Rise of Political Islam in the West,” *Foreign Affairs*, July/August 2010, accessed online at: <http://www.foreignaffairs.com/articles/66468/marc-lynch/veiled-truths>.

¹⁰ Andrew F. March, “Law as a Vanishing Mediator in the Theological Ethics of Tariq Ramadan,” *European Journal of Political Theory*, accessed online at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1478910.

¹¹ R. Scott Appleby, quoted in Ian Buruma, “Tariq Ramadan Has an Identity Issue,” *The New York Times Magazine*, February 4, 2007, accessed online at: <http://www.nytimes.com/2007/02/04/magazine/04ramadan.t.html?pagewanted=all>.

It certainly seemed that way. On the one hand, Ramadan was “Europe’s leading Muslim intellectual” about whom it was legitimate to have world-historical expectations on par with Martin Luther, Copernicus, and Kant.¹² On the other hand, one was to ratchet down expectations so as to accommodate Ramadan’s “propensity for intolerance” and for speaking “out of both sides of his mouth”—intolerance and disingenuousness being the price for the best that Europe had to offer.¹³ But maybe intellectual expectations were the wrong ones to have of Europe’s leading Muslim intellectual. After all, even his most ardent defenders had described his work as “intriguing,” but “not necessarily intellectually powerful.”¹⁴ So perhaps we were to “make friends” with Ramadan, not to critique him.¹⁵ Of course, making friends with him meant muting any serious inquiries into his past. So it was enough for some to know that Ramadan was an embattled intellectual “who, in a sure sign of his moderation, has made enemies in both the Western and the Muslim worlds.”¹⁶ But one couldn’t push that principle too hard, since a literal interpretation of it might simultaneously have made “moderates” of Osama bin Laden, Saddam Hussein, and Muammar Qaddafi. (Embarrassingly enough, the author of the latter claim *had* made a moderate of Muammar Qaddafi.¹⁷) But “pushing hard” was not exactly what Ramadan’s defenders

¹² See Alan Wolfe, “Why Americans Should Welcome Tariq Ramadan,” *Chronicle of Higher Education* 51, no. 3 (September 10, 2004), p. B20; Nicholas Tampio, “Constructing the Space of Testimony: Tariq Ramadan’s Copernican Revolution,” *Political Theory* 39, no. 5 (October 2011), pp. 600-629; Paul Donnelly, “Tariq Ramadan: The Muslim Martin Luther?” *Salon*, February 15, 2002, accessed online at: http://www.salon.com/2002/02/15/ramadan_2/.

¹³ Wolfe, “Why Americans Should Welcome Tariq Ramadan,” *Chronicle of Higher Education*, p. B20.

¹⁴ Andrew F. March, “Reading Tariq Ramadan: Political Liberalism, Islam, and ‘Overlapping Consensus,’” *Ethics and International Affairs* 21, no. 4 (Winter 2007), p. 406.

¹⁵ Wolfe, “Why Americans Should Welcome Tariq Ramadan,” *Chronicle of Higher Education*, p. B20.

¹⁶ Benjamin R. Barber, “Letters: ‘Flight of the Intellectuals,’” *The New York Times*, June 4, 2010, accessed online at: <http://www.nytimes.com/2010/06/06/books/review/Letters-t-FLIGHTOFTHEI LETTERS.html>.

¹⁷ The *locus classicus* is Benjamin R. Barber, “Gaddafi’s Libya: An Ally for America?” *The Washington Post*, August 15, 2007, accessed online at: <http://www.washingtonpost.com/wpdyn/content/article/2007/08/14/AR2007081401328.html>. For a good discussion, see Jon Wiener, “Professors Paid by Qaddafi: Providing ‘Positive Public Relations,’” *The Nation*, March 5, 2011, accessed online at: <http://www.thenation.com/blog/159046/professors-paid-qaddafi-providing-positive-public-relations>. See also Barber’s response in *The Nation*, March 6, 2011, accessed online at: <http://www.thenation.com/article/159054/benjamin-barber-responds>.

were after. As one of them candidly put it, describing a “debate” he had had with Ramadan: “Perhaps I didn’t push hard enough. We agreed on most issues...”¹⁸ Such airy complacency was the predictable result of a climate of opinion in which the burden of proof was on Ramadan’s critics to make criticisms, not on Ramadan to make his case.

In light of this, Berman’s discussion of Ramadan’s rise to prominence is apt, even understated. Correctly questioning the intellectual credentials of many of Ramadan’s most prominent defenders,¹⁹ Berman writes: “Even so, a conventional wisdom had plainly convened. The conventional wisdom looked on Tariq Ramadan as a long-awaited Islamic hero—the religious thinker who was going, at last, to adapt Islam to the modern world” (p. 26). That “wisdom” was less focused on the truth of Ramadan’s claims than on bolstering the success of his project, regardless of its cogency or merits: “And so, Tariq Ramadan, by acquiring a brilliant fame and refracting its rays in one country after another, has succeeded in brightly illuminating a twin development in the world of modern ideas” (p. 26). Very well put—and compatible with the observation that none of the *modern* ideas were his.

The issue is not merely that Ramadan’s views went unscrutinized, but that there were elements in them that desperately needed scrutiny. One of them—the one that reflects the most poorly on his defenders—is Ramadan’s adamant refusal to repudiate (or even acknowledge) his grandfather’s pro-Nazi past. This issue, developed over about a hundred pages of *Flight* (pp. 27-126), involves a bit of moral and historical complexity. Ordinarily, it would be illegitimate to hold one person responsible for another person’s views, no matter how closely connected by family ties the two happened to be. Individual responsibility is a basic presupposition of moral judgment, and individual responsibility cannot be passed on by genetic means. But a person can certainly be held responsible for those of his *own* words which make him complicitous in the injustice of another, especially if those words make him complicitous in an injustice like Nazism. And one cannot, in such a case, plead immunity from moral judgment because one’s complicity involves a revered family member, the repudiation of whom would be personally or emotionally costly. It is after all Ramadan himself who insists that moral obligations trump personal or familial ties.²⁰ If family ties can’t put a person on the moral hook, they can’t get him off the hook, either.

¹⁸ Ian Buruma, “Tariq Ramadan Has an Identity Issue,” *The New York Times Magazine*.

¹⁹ I don’t mean formal academic or journalistic credentials, but credentials in the dictionary sense of the word: “that which entitles to credit or confidence.”

²⁰ Cf. Tariq Ramadan, *Western Muslims and the Future of Islam* (Oxford: Oxford University Press, 2004), pp. 86-93.

Berman makes a strong case to the effect that Ramadan is guilty of a morally significant sort of complicity with Arab Nazism. Drawing on the work of historian Jeffrey Herf,²¹ Berman points out that the Palestinian leader Amin al-Husseini not only collaborated with the Nazis prior to and during the Second World War, but was also directly involved in the Final Solution (pp. 71, 91-97). Having spent most of the war in Germany, Husseini escaped to Switzerland after the Nazi defeat, but was extradited to France and arrested there (p. 99). After a concerted Arab attempt to have him released, “the French authorities quietly permitted [Husseini] to slip away” (p. 104). On his return to Egypt in 1946, Husseini was lauded in unqualified terms by Ramadan’s grandfather, Hasan al-Banna: Berman quotes al-Banna’s sickening obeisance for Husseini in enough detail to show us that al-Banna’s admiration for Husseini included admiration for his unreconstructed Nazi past (pp. 105-7). Berman also argues, correctly, that Ramadan is equally admiring of Yusuf Qaradawi, a Muslim cleric whose various ravings Berman quotes in some detail (pp. 77-78, 92, 186-92).

Though Ramadan has explicitly opposed anti-Semitism,²² he has expressed his admiration of al-Banna in ways that evade the issue of al-Banna’s praise for Husseini’s Nazism, and ultimately put him, Ramadan, in the position of excusing it: “I put Hassan al Banna in the context of his period and his society, and I take that context into account in analyzing his objectives and the means he used to achieve them.”²³ But taking his “context into account” is perfectly compatible with condemning his pro-Nazi apologetics,

²¹ See Jeffrey Herf, *Nazi Propaganda for the Arab World* (New Haven, CT: Yale University Press, 2010). Herf’s claims have been the subject of sharp criticism by the historian Gilbert Achcar, but the issues that divide Herf from Achcar are irrelevant to those discussed in the text. As it happens, Berman’s claims about al-Banna are nicely complemented by Achcar’s work. See Gilbert Achcar, *The Arabs and the Holocaust: The Arab-Israeli War of Narratives*, trans. G. M. Goshgarian (New York: Metropolitan Books, 2009), chap. 4.

As Malise Ruthven notes (“Righteous and Wrong,” *New York Review of Books*, August 19, 2010, accessed online at: <http://www.nybooks.com/articles/archives/2010/aug/19/righteous-wrong/?pagination=false>), Berman makes some mistakes of historical fact in his discussion of post-war sympathy for Nazism, but those mistakes are irrelevant to what Berman legitimately calls the “simple and modest point” he is making—namely, Ramadan’s failure to repudiate Hasan al-Banna’s pro-Nazi legacy (pp. 112-13). Despite the blustering tone of his review, Ruthven concedes this “simple and modest point” in its sixteenth paragraph, only to ignore it thereafter.

²² See Joseph Algazy’s interview with Ramadan in “My Fellow Muslims, We Must Fight Anti-Semitism,” *Ha’aretz*, May 26, 2002, accessed online at: <http://www.haaretz.com/print-edition/features/my-fellow-muslims-we-must-fight-anti-semitism-1.44158>.

²³ Quoted in Caroline Fourest, *Brother Tariq: The Doublespeak of Tariq Ramadan* (New York: Encounter, 2008), p. 5.

which is what Ramadan refuses to do.²⁴ Having dug himself into a hole, Ramadan digs deeper: “[al-Banna’s] commitment also is a continuing reason for my respect and admiration.”²⁵ Since al-Banna was committed to making excuses for the Nazis, Ramadan’s claim suggests that his respect and admiration extends to pro-Nazi excuse-making. Digging yet deeper: “I have studied Hassan al Banna’s ideas with great care and there is nothing in this heritage that I reject. His relation to God, his spirituality, his mysticism, his personality, as well as his critical reflections on law, politics, society, and pluralism, testify for me to his qualities of heart and mind.”²⁶ If there is really *nothing* in al-Banna’s heritage that Ramadan rejects, he cannot complain when his critics infer that there is nothing in the pro-Nazi parts of it that he rejects, either.

Pressed to repudiate al-Banna and his “heritage,” Ramadan has consistently refused to do so: “[al-Banna] was living in the ‘30s and ‘40s. He was against British colonization. He built schools. He was promoting a vision. There are things with which I agree, and others, that put into context, I may disagree. But I’m not condemning him. He never killed someone.”²⁷ The first four claims might well have been made of Adolph Hitler. The last claim echoes Adolph Eichmann’s pathetic attempts at self-exoneration. All seven claims evade the fact that al-Banna had expressed praise for a member of the Third Reich who had voluntarily participated in mass murder (p. 94). We are left to believe that Ramadan may disagree with such praise (or may not), but cannot bring himself to condemn it. Again: “I will not waste my time here trying to defend myself. I have no desire or time for this.”²⁸ That gives us an indication of Ramadan’s priorities, but it doesn’t address the issue. Elsewhere, Ramadan claims that that his critics are ill-motivated, that no one has provided “clear evidence” of his equivocations, that his “detractors find it difficult to state precisely the so-called ambiguities in what I say,” and that the criticisms made against him are illegitimately genetic or racial in character.²⁹ These

²⁴ Contrast Ramadan’s evasions with Achcar’s exemplary and very different “contextualization” of al-Banna and other “reactionary and/or fundamentalist pan Islamists” in *The Arabs and the Holocaust*, pp. 56, 163-64, and generally, chap. 4.

²⁵ Quoted in Fourest, *Brother Tariq*, p. 5.

²⁶ Quoted in *ibid.*, pp. 4-5.

²⁷ Noreen S. Ahmed-Ullah, “On U.S. Speaking Tour, Once Banned Muslim Scholar Tariq Ramadan Shares His Vision of the Future,” *Chicago Tribune*, April 23, 2010, accessed online at: http://articles.chicagotribune.com/2010-04-23/news/ct-oped-0423-ramadan-20100423_1_muslim-brotherhood-muslim-scholar-american-muslims.

²⁸ Ramadan, *What I Believe*, p. 4.

²⁹ *Ibid.*, pp. 4, 15, 19.

claims are transparent falsehoods. They are not the assertions of a man interested in truth, candor, or historicity, but of one who has made dishonesty the standard operating procedure of his career as a public intellectual.

Though there is no evidence that Ramadan is himself an anti-Semite,³⁰ the fact remains that his highly generalized, in-principle condemnations of anti-Semitism do not rise to the sort of specific and explicit repudiation that al-Banna (or Qaradawi) deserve. And his positive refusal to repudiate them compounds the offense. Like Berman, I think it is fair to demand such a repudiation of Ramadan, and like Berman, I interpret Ramadan's refusal to meet the demand as a morally culpable evasion—culpability that extends to his defenders' refusal to "push" him on the issue.

Berman's third legitimate point is his discussion of the notorious "stoning debate" of 2003. The debate in question took place on French television, pitting Ramadan against Nicolas Sarkozy, then France's Minister of the Interior. Exploiting the fact that Ramadan's brother Hani had endorsed stoning women to death as a punishment for adultery,³¹ Sarkozy had asked, shrewdly, where Tariq stood on the issue. Ramadan responded that he favored a "moratorium" on the practice. Berman reproduces the ensuing conversation.

Mr. Sarkozy: A moratorium... Mr. Ramadan, are you serious?

Mr. Ramadan: Wait, let me finish.

Mr. Sarkozy: A moratorium, that is to say, we should, for a while, hold back from stoning women?

Mr. Ramadan: No, no, wait... What does a moratorium mean? A moratorium would mean that we absolutely end the application of all those penalties, in order to have a true debate. And my position is

³⁰ Given Ramadan's patent dishonesty on the topic of al-Banna, many writers, Berman included (pp. 157-69), have been tempted to accuse Ramadan of anti-Semitism on the basis of his notorious online essay, "Critique of the (New) Communitarian Intellectuals" (first published online on October 3, 2003 at Oumma.com), accessed online at: <http://www.islamophobia-watch.com/islamophobia-watch/2003/10/3/critique-of-the-new-communitarian-intellectuals.html>. But such claims are unwarranted: there is no evidence of anti-Semitism in the essay, and some truth to Ramadan's complaint that Muslim political allegiances are held to a higher level of scrutiny than Jewish ones in the European and American media.

³¹ The debate over "stoning women for adultery in Islam" is made confusing by at least five facts: (1) The Qur'an explicitly prescribes whipping rather than stoning for adultery, and does so for both men and women (Qur'an, 24:2). (2) Nonetheless, some orthodox versions of Islamic law prescribe stoning for adultery, both for men and women. (3) Despite (1) and (2), some authoritatively Islamic traditions seem to prescribe stoning for women *rather than* men. (4) All versions of Islamic law are constrained by rules of evidence that make punishments for adultery difficult to enforce. (5) "Adultery" is itself an ambiguous term. Unfortunately, Berman erroneously refers to stoning as a "Koranic" prescription (p. 213), and Sarkozy misleadingly formulates his question as one about the stoning of women, but these technical errors do not invalidate the general legitimacy of Sarkozy's query.

that if we arrive at a consensus among Muslims, it will necessarily end. But you cannot, you know, when you are in a community... Today on television, I can please the French people who are watching by saying, 'Me, my own position.' But my own position does not count. What matters is to bring about an evolution in Muslim mentalities, Mr. Sarkozy. It's necessary that you understand. (p. 214)

At this point, Sarkozy demanded an unequivocal condemnation, to which Ramadan offered the following response:

Mr. Sarkozy, listen well to what I am saying. What I say, my own position, is that the law is not applicable—that's clear. But today I speak to Muslims around the world and I take part, even in the United States, in the Muslim world...You should have a pedagogical posture that makes people discuss things. You can decide all by yourself to be a progressive in the communities. That's too easy. Today, my position is, that is to say, 'We should stop.' (p. 215)

Berman is right to find Ramadan's response culpable, but is not, I think, clear enough about why. Note first that Ramadan describes stoning as a "law" that no longer *applies*, leaving open the possibility that it once did. His claim thereby implies not that stoning is wrong, but that it is outdated—a claim that saves Ramadan from having to judge or condemn those who first promulgated the "law," arguably the Prophet Muhammad himself.³² Second, Ramadan falsely implies that if a moratorium is now imposed, he can somehow predict that a consensus against stoning *will* emerge. But there is no way to predict that, a fact he essentially concedes in his recent book *Radical Reform*.³³ In any case, he fails to acknowledge that if no consensus were to emerge, the

³² Cf. *Sahih al Bukhari*, vol. 3, sec. 50: conditions #885, accessed online at: http://www.quranenglish.com/hadith/Sahih_Bukhari/050.htm. Ramadan dances around this issue, but never directly addresses it; see Tariq Ramadan, "International Call for a Moratorium on Corporal Punishment, Stoning and the Death Penalty in the Islamic World," April 5, 2005, accessed online at: <http://www.tariqramadan.com/An-International-call-for.html>. Instead, in an assertion of incredible irresponsibility and hypocrisy, Ramadan accuses Muslims *en masse* of complicity, by virtue of their inaction and silence, in all corporal punishments undertaken in the name of Islam (ibid., p. 4). Apart from directly flouting the Qur'anic principle of strict individual responsibility before God for one's *own* actions (53:38-39), Ramadan's claim surely raises the following question: If the average Muslim is complicitous in a range of injustices by virtue of his or her *inaction and silence*, how could Hasan al-Banna be innocent of complicity in Nazism despite his *active apologetics* for Amin al-Husseini?

³³ Tariq Ramadan, *Radical Reform: Islamic Ethics and Liberation* (Oxford: Oxford University Press, 2009), pp. 4, 274-77.

moratorium would have to be lifted, and the punishments would have to resume. He also fails to make clear that if he lacks the authority unilaterally to put a stop to stoning, he lacks the authority unilaterally to demand a moratorium on it.

At a deeper level, however, we should pay close attention to Ramadan's peculiar confession: "My position doesn't count." It is hard to think of a clearer, more explicit avowal of *sacrificium intellectus* than this one sentence. In making it, Ramadan makes clear that he is not to be interpreted as the autonomous moral-intellectual agent he often claims to be, but as a political functionary, beholden to a notional set of quasi-legal constituencies that dictate what he can or cannot say. His avowal of this view fully justifies Berman's verdict, in some of the best writing in *Flight*, that Ramadan "cannot think for himself. He does not believe in thinking for himself" (p. 241). Many critics have ridiculed that claim, but none have refuted it.

4. What *Flight* Gets Wrong

Berman's book has, as remarked above, been pummeled by a small handful of zealously antagonistic critics. There is plenty in *Flight* worth criticizing, some of it discussed by some of these critics, but on the whole, the criticisms made of *Flight* are remarkably weak. Berman's critics have to a surprising degree contented themselves with misrepresenting his claims, attacking his character, changing the subject, pulling academic rank, and vehemently missing his point. Very few have, to my mind, criticized *Flight* for the things in it that most clearly deserve criticism.³⁴ As I see it, the book's weaknesses fall into two categories, which might be described as its formal defects and its substantive ones.

As to the formal defects, *Flight* lacks the clarity and grace of the best of Berman's earlier writing, and suffers on the whole from disorganization, digressiveness, and an irritating tendency to name-dropping. While the book contains a great abundance of citations to the secondary (mostly French) literature, Berman's references to this literature do little to clarify the most important issues, and often just drag the reader through pages of verbal tedium. So do his references to medieval Islamic philosophy. Problematically, he shows little familiarity with contemporary academic work in philosophy, comparative politics, or Near East/Islamic Studies from the English-speaking world, despite its relevance to his arguments. The result is a book that often ends up preaching to the converted, and sometimes seems intended to.

³⁴ Two notable exceptions to this generalization are long, mixed-verdict reviews of *Flight* in relatively obscure online journals by non-experts from outside of the academy. See Marc Tracy, "Seasonal Migration of the Intellectuals," *n+1*, September 9, 2010, accessed online at: <http://nplusonemag.com/Seasonal-Migration>; and Hussein Ibish, "Intellectual Flights and Narrative Wars," *The Common Review*, January 4, 2011, accessed online at: <http://www.thecommonreview.org/article/archive/2011/01/article/intellectual-flights-and-narrative-wars.html>.

Even when Berman is merely discussing Ramadan's books for purposes of exposition, he seems to have trouble staying on topic for long enough to explain what a given book is about, and what he thinks is going on it. It is, for example, an important question whether Ramadan's political theorizing amounts in the end to a convoluted defense of theocracy. Chapter 5 of *Flight* correctly looks for an answer to that question in Ramadan's 2004 book, *Western Muslims and the Future of Islam*, but Berman's digressive ruminations in that chapter fail to come to grips with what Ramadan is actually saying there. One gets the impression that Berman is too bored with *Western Muslims* to make sense of it, but what he offers up is a maudering jeremiad that makes no coherent point at all. What might have been a trenchant critique ends up as a lost opportunity.

Worse perhaps than the book's formal defects are its substantive ones—among them a moral high-handedness that is a serious problem in a book that places so high a premium on the imperative to pass moral judgment in intellectual life. *Flight* is littered with oversimplifications, exaggerations, double standards, innuendo, and conspiracy theorizing that undercut the moral authority that Berman might otherwise have had. He repeatedly castigates Ramadan for being a kind of crypto-terrorist and crypto-misogynist, prepared to use force against the innocent in pursuit of his theo-political aims. But one can't successfully make such claims unless one makes explicit arguments for them, and one can't make explicit arguments unless one has a clearer grasp of the distinction between licit and illicit uses of force than Berman evidently has.

Take the issue of terrorism. I don't doubt that Ramadan has a culpable sympathy for terrorism, but to make that charge stick, one has to do a better prosecutorial job of it than Berman manages in the chapter of *Flight* devoted to the task (Chapter 6). After a brief discussion of Ramadan's *Jihad, Violence, Guerre et Paix en Islam (Jihad, Violence, War, and Peace in Islam)*, and criticism of what he takes to be its equivocations, Berman levels his main charge against Ramadan: "[O]n one level, Tariq Ramadan has said more than once that he disapproves of terrorism. But there is a cost in structuring an argument on more than one level" (p. 196). The punchline? "The cost to Ramadan in all of this is a dark smudge of ambiguity, and the smudge runs across everything he writes on the topic of terror and violence" (p. 197). So Berman's objection implies that Ramadan's discussion of "the topic of terror and violence" is *complex*. But that would only be an objection if the topic were itself very simple.

The flash point here is Israel. Berman is eager to demand that Ramadan abjure the use of violence against Israel. At times, one wonders whether Berman thinks that *any* violence against Israeli civilians is "terrorism" (p. 196). He is much less eager to give serious thought as to why anyone might justifiably want to use violence against Israelis, civilian or otherwise. If Berman prefers unambiguous talk, he might reflect on the fact that the Israeli government is guilty of three decades of armed, state-sponsored expropriation in the West Bank, and that it has, as a matter of state

policy, used a combination of heavily armed civilians (a.k.a. “settlers”) and military forces to effectuate this aim.³⁵ One way of dealing with expropriation of this sort is to acquiesce in it. Another way is to resist. When the expropriation is violent, and one lacks legal recourse to respond to it, the most effective form of resistance would seem to involve independent retaliatory violence. Is all such violence terrorism?

Though his book seems by default to suggest that the answer is “yes,” Berman himself alludes elsewhere (rather cryptically) to Israel’s “crimes”—appropriately enough, since “state-sponsored expropriation” is essentially a synonym for “armed robbery.”³⁶ Doesn’t the commission of a crime like armed robbery justify violent self-defense by the victim? The answer in every jurisdiction of the United States is “yes,” and in many jurisdictions, the right of self-defense permits one to “stand one’s ground” whenever one is unjustly attacked on “ground” that is one’s own by right. What if one’s “ground” is attacked for thirty years by thousands of armed thugs who insist on the right to take it by force, and are systematically backed by military force in doing so? In a case like that, the laws of self-defense appropriate to a settled and well-ordered regime like the United States will tend to understate what self-defense really requires. John Locke tells us in his *Second Treatise* that where there is “no common superior on Earth to appeal to for relief”—and in the West Bank, there often isn’t—I may *kill* a thief who sets out to rob me.³⁷ It’s an interesting question what the exercise of such a right would look like if put into practice by Palestinian victims of Israeli expropriation. Of course, discussion of that question presupposes an inquiry into questions about rightful ownership, something that Berman seems reluctant to discuss. But an author reluctant to discuss rightful ownership in

³⁵ Geoffrey Aronson, *Creating Facts: Israel, Palestinians & the West Bank* (Washington, DC: Institute for Palestine Studies, 1987); Robert I. Friedman, *Zealots for Zion: Inside Israel’s West Bank Settlement Movement* (New Brunswick, NJ: Rutgers University Press, 1992); Idith Zertal and Akiva Eldar, *Lords of the Land: The War Over Israel’s Settlements in the Occupied Territories, 1967-2007* (New York: Nation Books, 2007). See also B’Tselem’s reports, *Land Grab: Israel’s Settlement Policy in the West Bank* (May 2002), accessed online at: http://www.btselem.org/publications/summaries/200205_land_grab; and *By Hook and By Crook: Israel’s Settlement Policy in the West Bank* (July 2010), accessed online at: http://www.btselem.org/publications/summaries/201007_by_hook_and_by_crook. For further background, see Isabel Kershner, “Israel Intensifies Training of Settler Security Teams,” *The New York Times*, August 31, 2011, accessed online at: <http://www.nytimes.com/2011/08/31/world/middleeast/31israel.html>.

³⁶ “Nazi Sheikhs,” interview with Paul Berman by Joel Whitney in *Guernica*, May 2010, accessed online at: http://www.guernicamag.com/interviews/1756/berman_5_15_10/.

³⁷ John Locke, *Second Treatise of Government*, in *Two Treatises of Government*, ed. Peter Laslett (Cambridge, UK Cambridge University Press, 1988), sec. 19 (p. 280).

the West Bank should be equally reluctant to turn “ambiguity” into a term of opprobrium in judging the use of violence in the Arab-Israeli dispute, especially after beginning his book with a paean to “the principle of moral complexity.”³⁸

Or take Berman’s discussion of the so-called French headscarf ban:

[T]he French government adopted a law mandating a dress code in the public schools, and the law ignited a fractious debate. The law banned the display of showy religious symbols in the schools. By the provisions of the law, Christian students could no longer wear large crucifixes to school and Sikh boys could no longer wear their turbans, and Jewish boys could no longer wear their yarmulkes. But everyone knew that, in the end, the law was aimed at Islamic headscarves or veils. (p. 207)

Strictly speaking, Berman offers no position in *Flight* on the headscarf ban: a dark smudge of ambiguity, we might say, runs across his writing on the subject. My best guess, on the basis of passages like this one, is that he is in favor of it:

A good many people came to think that ultimately the issue was not whether Muslim girls had a right to wear headscarves in the schools, but whether Muslim girls had the right not to wear headscarves. The purpose in proposing the law was not to crush Islam. The purpose was to transform the public schools into a zone beyond the control of an authoritarian movement. (p. 211)

Berman does not tell us whether he agrees with the “good many people,” but suppose for argument’s sake that I am a Muslim “girl” engaged in conversation with them.³⁹ I voluntarily wish to wear a headscarf in a French

³⁸ From the Preface to *Flight* (unnumbered pages).

³⁹ Though I’ll stick to “girls” in the text, it’s worth noting that some of the “girls” covered by the law are in fact adult women: the law applies to *everyone* in the French public schools, including adult staff or faculty who might wish to wear a headscarf. Berman fails to mention that one fundamental justification for the law was the supposedly “ostentatious or provocative character” of the headscarf itself. According to an authoritative legal analysis by the General Assembly of the French *Conseil d’Etat*, if Aisha and Antoinette are in an enclosed space, and Aisha wears a headscarf, Aisha is guilty of a form of *assault* against Antoinette, the headscarf presumptively signaling an implicit threat against Antoinette’s person. Apparently, the sheer presence of a headscarf violates rights, but a law compelling its removal does not. See the Wikipedia entry on “French Law on Secularity and Conspicuous Religious Symbols in Schools,” accessed online at: http://en.wikipedia.org/wiki/French_law_on_secularity_and_conspicuous_religious_symbols_in_schools. For an example of the desperate lengths to which advocates of the ban will go, see Claire

public school. My parents ratify my wish. I am now stopped by law from wearing my headscarf even if no one *at* the school has a problem with it. If I am sufficiently defiant, I will eventually be “educated” by an armed law enforcement officer who is instructed to tell me (using force if necessary) that I must take my headscarf off, because having been “forced” to wear it, I must be “liberated” from my oppression. Suppose that I respond that since I *wasn't* forced to wear it, I'm not being “liberated” at all. I'm just being coercively prohibited from wearing something that I'd like to wear. My headscarf belongs to me, and so does my head. The officer has not given me an intelligible reason for thinking that my headscarf cannot go *on* my head, except for the falsehood that I am made free by not being allowed to put it there. Why then is it that *my* rights are not “the issue”?

For all his insistence on moral unambiguity, Berman's claims on this topic are a transparent evasion. He insinuates that no Muslim girl could in fact be in the situation I've described, because no Muslim girl could ever voluntarily wish to wear a headscarf: “Islamists demanded headscarves. Schoolgirls did as they were told. Headscarves became a symbol of Islamist power” (p. 210). These clipped asseverations are supposed to convince us that every schoolgirl in France lives under a reign of Islamist terror that precludes voluntary choice. Given this, every act of headscarf-wearing is by definition involuntary no matter how strenuously a given girl makes the reverse affirmation.

Berman's argument turns on one of two claims:

- (a) Either every apparently voluntary act of headscarf-wearing in France is involuntary, despite apparent evidence of its voluntariness, or
- (b) some girls' voluntary decisions to wear the headscarf are to be overridden because *other* girls' apparently voluntary decisions to wear it are coerced.

Berman offers no evidence for (a) and no argument for (b). Apparently, it is as obvious to Berman as it was to Rousseau that when you force people to do what they don't want to do, you are liberating them.⁴⁰ He neither pauses to question the adverse effects of the law on non-Muslims, nor pauses to wonder

Berlinski, “Ban the Burqa,” *National Review*, August 2, 2010, accessed online at: <http://www.nationalreview.com/articles/print/243587>, which likens the Muslim headscarf to “Klan robes or Nazi regalia,” and makes its case against veiling on grounds that Berlinski *herself* regards as spurious, hypocritical, and “without doubt a terrible assault on the ideal of religious liberty.” The article thus invites us to believe that veiling is a greater threat to “the cause of liberty” than actual assaults on liberty based on avowed lies.

⁴⁰ Jean-Jacques Rousseau, *On the Social Contract*, ed. Roger D. Masters, trans., Judith R. Masters (New York: St. Martin's, 1978), I.7, p. 55.

about the legitimacy of a law that cynically targets one minority group by treating the rights of other groups as collateral damage. He criticizes American reporting on the French law (p. 211), but doesn't seem to notice that headscarf-wearing girls and women populate *American* classrooms without inviting the need for the sort of Ataturk-like paternalism exercised by the French government. Neither does it occur to him that by the standards of First Amendment jurisprudence, French *laicite* (secularism) is as obviously "an authoritarian political movement" as is French Islamism. Evidently, for Berman, sixty million Frenchmen really *can't* be wrong, no matter how many rights they violate.

The most unfortunate patch of Berman's book are its last two chapters, devoted for some fifty pages to the development of an ill-considered contrast between Tariq Ramadan on the one hand, and the apostate Muslim writer Ayaan Hirsi Ali on the other (pp. 243-99). In these chapters Berman insists that Hirsi Ali is as important an intellectual figure as Ramadan's defenders have claimed him to be, and that the criticisms of her made by such critics as Ian Buruma and Timothy Garton Ash are somehow problematic or even dishonest. He manages in a particularly crazed passage to equate mere criticism of Hirsi Ali with Stalinism, theocracy, mob violence, anti-Semitism, and misogyny (pp. 263-64).

I am not a fan of either Buruma or Garton Ash's journalism, but in fact, the criticisms they have made of Hirsi Ali are very mild and mostly justified, as far as they go. None of the criticisms of Hirsi Ali quoted in or alluded to in *Flight* even approximate slander (p. 263). Unfortunately, it is Berman's attacks on Hirsi Ali's critics that are slanders. The fact is, Hirsi Ali's views eminently deserve criticism.

The irony is that Berman's defense of Hirsi Ali flouts her own criterion for the evaluation of her work. Devoting page after page to the description of Hirsi Ali's sufferings (pp. 244-47, 257, 260-62) and implying that those sufferings confer authority on her arguments, he forgets that she herself rejects that approach to her work: "I would like to be judged on the validity of my arguments, not as a victim."⁴¹ Consumed by her victimization, Berman forgets how irrational some of her arguments are. He forgets that Hirsi Ali believes in a "war" against all Muslims as such, which would ideally result in their all being "crushed" (a view she has not revised in light of the Anders Breivik killings of July 22, 2011). She thinks that Muslims' free-speech rights should be violated at will, that their schools should be closed down without probable cause (or without even the need for a specific accusation of wrongdoing), and that the U.S. Constitution should be amended to facilitate the easier violation of Muslim rights.⁴² It's not hard to see why the

⁴¹ Ayaan Hirsi Ali, *Infidel* (New York: Fress Press, 2007), p. 348.

⁴² "The Trouble Is the West," interview with Ayaan Hirsi Ali, *Reason*, November 2007, accessed online at: <http://reason.com/archives/2007/10/10/the-trouble-is-the-west/singlepage>.

First, Second, Fourth, Fifth, Sixth, Eighth, Ninth, and Fourteenth Amendments would have to be abrogated or re-written to accommodate Hirsi Ali's "war," why Article VI's ban on religious tests for public office might suffer a similar fate, and why her view leads directly to recent legislative proposals to turn adherence to Islamic doctrine into a redefined form of treason.⁴³ Apparently, by Berman's lights, sharp criticism of any of this is an "unprecedented" attempt to foment an anti-Semitic, Islamo-Stalinist lynch mob.

Berman may regard Hirsi Ali as a reliable guide to Muslim-American life, but she herself candidly confesses to having too little experience of the United States to know very much about the texture of life here, cheerfully conceding that what little she knows contradicts the need for draconian restrictions of Muslim-American rights.⁴⁴ And yet she insists that those rights have to be violated all the same, in defiance of the Constitution, in defiance of common sense, and even in defiance of what she herself has claimed to learn about life in this country. Unsurprisingly, her claims about the recent backlash against Muslims in the U.S. are as presumptuous as they are uninformed: "There is," she tells us, "little evidence to suggest that such a backlash is happening, but despite this lack of evidence, the perception among Muslim immigrants persists and is fanned by radicals."⁴⁵ Apparently, Hirsi Ali's inexperience of and lack of unimpeded access to American life don't stop her from dismissing the claims of people who, unlike her, were born here, have lived here for decades, and enjoy ready access to the mosques, schools,

⁴³ See the text of Tennessee's proposed Senate Bill 1028, sponsored by Tennessee State Senator Bill Ketron, accessed online at: <http://www.capitol.tn.gov/Bills/107/Bill/SB1028.pdf>. The bill later passed in a much-amended form. For background, see Andrea Elliott, "The Man Behind the Anti-Shariah Movement," *The New York Times*, July 30, 2011, accessed online at: <http://www.nytimes.com/2011/07/31/us/31shariah.html?pagewanted=all>. See also Anne Barnard and Alan Feur, "Outraged and Outrageous," *The New York Times*, October 8, 2010, accessed online at: <http://www.nytimes.com/2010/10/10/nyregion/10geller.html?pagewanted=all>.

⁴⁴ "The Trouble Is the West."

⁴⁵ Ayaan Hirsi Ali, *Nomad: From Islam to America, A Personal Journey Through the Clash of Civilizations* (New York: Free Press, 2010), p. xv. For some contrary evidence, see Eli Lake, "The 9/14 Presidency," *Reason*, June 2010, pp. 24-29; Jesse Walker, "Forced to be Free," *Reason*, November 2010, pp. 66-70; Cathy Young, "Fear of a Muslim America," *Reason*, August/September 2011, pp. 20-26. See also the Arab-American Anti-Discrimination Committee's reports for 2000-2007 at the website of Hussein Ibish, accessed online at: <http://www.ibishblog.com>; and reports of the Anti-Defamation League, "Anti-Muslim Bigotry Intensifies in the U.S.," accessed online at: http://www.adl.org/main/Extremism/muslim_bigotry.htm.

businesses, civic organizations, community centers, neighborhoods, and homes that she judges from afar.

One of the depressing features of Berman's indiscriminate valorization of Hirsi Ali is its similarity to the PR campaign he criticizes in the rest of his book—the indiscriminate valorization of Ramadan. Like Ramadan's defenders, Berman regards criticism of his hero as a form of treason to the Cause. Like them, he is willing to overlook malfeasances of a sort that would get a less exotic person laughed off the stage. Like them, he is obsessed with "Islam," but like them, he relies for his understanding of it on a slick but unreliable media star whose illiberal political agenda he does his best to ignore. The unfortunate result is a book whose worst features tend to obscure its best ones.

5. Ramadan's *What I Believe*

It is, to be blunt, hard to take Tariq Ramadan's book seriously enough to write a review of it. Even if one makes allowances for the oversimplifications necessary to write a book for a general audience, the fact remains that this book says so little, and says it so poorly, that it gives a reviewer very little to discuss, even in the way of criticism. A cynic might be inclined to say that Ramadan, who is fully capable of writing substantive and theoretically sophisticated books, has deliberately written this one for those readers least inclined to ask probing questions about his views. Judged by that standard, the book is a success. But not by any other.

I criticize above what I call the formal defects of Berman's *Flight*, but next to Ramadan's book, *Flight* is a paragon of lucidity and style. In fact, *What I Believe* is a nearly unreadable book, whole swatches of which seem deliberately to have been written so as to defy the requirements of clarity or intelligibility. This would be bad enough in a book that describes itself as "a work of clarification" (p. 1), but it's worse in a book that claims to "present the substance of my thought beyond controversy and polemics" (p. ix). Taken literally, the latter task is impossible, and Ramadan doesn't make the least effort to live up to it. In nominal compliance with his "no polemics" rule, Ramadan attacks his critics, but refuses either to dignify them by name or to cite, describe, or summarize what they have actually said in criticism of him. His engagement with them consists either in sullen refusals to respond to their objections or well-poisoning insinuations intended to impugn their motives or character. Though widely described in the press as a "philosopher," Ramadan lacks even an undergraduate philosophy major's capacity for summarizing and responding to critical objections.

And then there is the book's problematic relationship to the realm of fact. Generally, Ramadan writes in a gauzy prose bereft of references to named individuals, dateable events, or determinate causal processes. When he does deign to discuss empirical phenomena, things go desperately wrong. Almost none of his generalizations are referenced. Almost none of his statistics have sources. Bizarre assertions are tossed off as self-evidencies, and obvious phenomena get tortuously implausible explanations. In discussing

controversial topics, his claims exemplify the dictionary definition of “tendentiousness”—front-loaded to force the unsuspecting reader to Ramadan’s conclusions, and indifferent to the most obvious objections that a better informed reader might make. A typical sentence: “After being useful to American goals in Afghanistan, [the Taliban] became everybody’s enemies as soon as the Bush administration changed their mind about them” (p. 109). It is unclear which Bush Administration Ramadan has in mind. If he means the first one, he ignores the fact that the Bush Administration cut funding to the anti-Soviet resistance (“*mujahidin*”) in 1989 and left office in 1992, and that the Taliban, one faction of an anti-Soviet resistance that included anti-Taliban factions, came to power in 1996. If he means the second Bush Administration, it is unclear how they could have “changed their mind” about a regime with which they were, from the first day of their administration, on explicitly hostile terms, and whose legitimacy as a government they refused to accept for the duration. Ramadan ignores the fact that the *mujahidin* and Taliban were distinct entities, that *any* assistance to the Afghan resistance would have assisted radical elements, and that it makes perfect sense for changes in mind to follow changes in fact. He doesn’t tell us whether he thinks that the Afghans ought *not* to have resisted the Soviets, and doesn’t venture to argue that the Americans ought *not* to have assisted the Afghan resistance. Nor does he bother to square his casual sarcasm about the Afghan resistance with his own support for the Iraqi insurgency (see discussion below), or his sympathy for the Islamist side in the Algerian civil war.⁴⁶ It seems not to matter to Ramadan how obvious these objections are: the book seems to be written for a readership incapable of thinking of them.

If the book has a thesis, it is that adherence to Islam is compatible with liberal politics. Such adherence does not, Ramadan claims, lead to theocracy, misogyny, or terrorism, as is often charged; where such phenomena have emerged among Muslims, they have done so despite, not because of, adherence to Islam. His argument turns on his adoption of what he calls Salafi reformism, a revisionist or reformist approach to the interpretation of canonical Islamic texts like the Qur’an, the various *hadith* collections (sayings of the Prophet), and the *sira* (hagiographies of the Prophet’s life). Though Ramadan summarizes this approach very briefly in the book, he suggests that if carried out thoroughly and systematically, Salafi reformism can generate a version of Islam that is friendly to (or at least compatible with) liberalism. He goes so far as to suggest that Salafi reformism can generate a conception of Islam that allows Muslims to see their Islamic identity as but one identity alongside others, including liberal citizenship (pp. 35-45).

Ramadan’s argument turns on a distinction between two species of Salafism—his own “reformism,” and “literalism,” the view of his co-religionist antagonists. The distinction is not a particularly clear one, and

⁴⁶ Tariq Ramadan, *Islam, the West, and the Challenges of Modernity* (Leicester, UK: The Islamic Foundation, 2001), pp. 278-82.

Ramadan does little to clarify it. Any two species of a common genus will bear some generic similarity to one another, so it makes no sense for Ramadan to suggest that reformism and literalism are *totally* opposed to one another. Literalist claims may involve a literal interpretation of the texts, but reformist claims will still have to involve interpretations somehow tied to the same texts: a reformist claim cannot simply indulge in flights of hermeneutical fancy or metaphorical explainings-away of literal meaning.

The main advantage of literalism is its claim of absolute fidelity to sacred texts—an obvious virtue for a theology that claims to be articulating God’s verbatim prescriptions for mankind. Ramadan’s readings conspicuously lack this virtue. He tells us that no civilization has a monopoly on the truth (p. 22), but ignores the fact that the Qur’an proclaims Islam to be a “perfect” doctrine with precisely such a monopoly (e.g., 3:104, 3:110, 5:3). He tells us to “resist the temptation to reduce one’s identity to a single dimension that takes priority over every other” (p. 37), but ignores the fact that the Qur’an repeatedly tells us to subordinate this life to the next (e.g., 2:200-202, 3:14, 3:185-86, 4:74, 6:32, 29:64, 37:61, 75:20)—from which it follows that a genuinely Muslim identity subordinates or reduces this-worldly aspects of life to a single dimension that takes priority over them. He criticizes literalists for erecting a “binary world of good and evil” (pp. 48-49), but ignores the fact that the Qur’an repeatedly does the same thing (e.g., 3:30, 3:179, 99:7-8). He accuses literalists of ahistoricity (p. 63), but ignores the fact that the canonical Islamic texts claim timeless authority as repositories of God’s eternal will (e.g., Qur’an, 3:100-109). He accuses literalists of projecting their own values onto the text, but himself projects values onto it in a language entirely foreign to it (p. 63); he thereby manages to produce a version of Islamic *sharia* so secularized that a norm counts as “Islamic”—literally, “in submission to God”—even if it makes no reference whatsoever to God (p. 57). He tells us re-assuringly that his interpretation of *sharia* jettisons “the old traditional binary categorization of the world into ‘the abode of Islam’ and the ‘abode of war’,” but gives no reason for the rejection besides the question-begging claim that “no significant organization uses those concepts anymore” (p. 51). He forgets to mention that he *himself* explicitly uses and affirms “those concepts” in an earlier book, describing capitalism as “*alam al-harb* (world of war)” and describing war-like resistance to it as Islam’s unique “field of activity.”⁴⁷

⁴⁷ Ramadan, *Western Muslims*, p. 176, with p. 248 nn. 2 and 4, the latter of which cites Qur’an 2:278-79. Ramadan’s argument here is expressed in a fashion that might well lead an incautious reader to infer that he is, in the case of capitalism, *denying* the application of the “binary categorization” described in the text. But that is a mistake, a mistake that Ramadan must surely have known incautious readers would make. Ramadan asserts explicitly that *riba* (usury) is essential to capitalism, and that the practice of *riba* puts its practitioner “at war with the Transcendent,” i.e., with God and with Islamic values (pp. 175-76). It follows that capitalism is at war with Islam. At any rate, Ramadan just tells us, explicitly, that capitalism—“the neoliberal system as a whole and the logic that underpins it” (p. 176)—is “*alam al-harb* (the world of war),” which stands in opposition to *alam al-islam* (the world of Islam). What he denies is

These hermeneutical objections are almost beside the point, however, given where Ramadan's reformism ultimately takes him. He tells us that "Islam has no problem with women" (p. 62), but discreetly avoids any sustained discussion of passages from the Qur'an that would suggest a problem, including one notorious passage that commands domestic violence against disobedient wives (4:34-35).⁴⁸ He enjoins respect for homosexuals, but concedes parenthetically that homosexuality defies "the divine project established for all human beings" (p. 103); he doesn't explain how worshipful veneration of that project is compatible with respect for those who willingly flout it, with the Qur'anic description of homosexuality as an "outrage" deserving punishment (7:80, 4:16), or with his own "reservations about homosexual couples marrying or adopting children" (p. 103). He tells us that *sharia* requires obedience to the laws of a non-Muslim polity, but (in a very convoluted and ambiguous sentence) makes this obedience conditional on what he calls the non-instrumentalization of secularism and religious neutrality by "ideologues or political trends opposed to any presence of religion" (p. 52). It's anyone's guess what this assertion ultimately means. Elsewhere, Ramadan has argued that laws only bind us when "the socio-

merely that this distinction is to be understood in geographical terms. Thus, when Ramadan asserts that "the old categories of *dar al-harb* (the abode of war) and *dar al-islam* (the abode of Islam) . . . have fundamentally collapsed and become totally inoperative" (p. 175), he does *not* mean to be denying that capitalism is at war with Islam or vice versa. He means only to claim that given the globalization of capitalist markets, the capitalist enemy has been dispersed in such a way as to be describable only in non-geographic terms. Hence the old geographic term *dar al-harb* is to be replaced by the non-geographic term *alam al-harb*. But "*harb*"—the state of war—remains a constant in both the traditional formulation and in Ramadan's supposed revision. Thus Ramadan's supposed rejection of the traditional teaching is cosmetic, not substantive, and it is precisely false to claim, as he does, that he is not using the traditional *concepts*. Inexplicably, Nicholas Tampio, in a discussion of *Western Muslims*, claims that Ramadan "provides a genealogy to denaturalize the *dar al-Islam—dar al-harb* distinction," and concludes, erroneously, that Ramadan has rejected the distinction (Tampio, "Constructing the Space of Testimony," pp. 617-19). It is unclear how one "denaturalizes" a distinction that claims supernatural authority, or what follows from the attempt to do so. In any case, Ramadan's claims on pp. 175-76 of *Western Muslims* flatly contradict Tampio's reading of the text. Tampio neither cites those pages in his discussion, nor makes any mention of their relevance to his interpretation of Ramadan.

⁴⁸ The Qur'anic word for "disobedient" is *nushuz*, which might literally be translated "uppity." Ramadan makes a half-hearted attempt to explain away the passage, but ends up with the incoherent claim that an injunction to hit wayward wives that is explicitly prescribed by God in the Qur'an somehow "contradicts Islamic teachings" (p. 3).

political context (*al waqi*)” favors their application, leaving as an open question when it is that such conditions actually obtain, if they ever do.⁴⁹

The preceding points may seem academic, but the fact is, while Ramadan defends the idea that Muslims should become active citizens in European and American politics (pp. 72-73), he also prescribes armed “resistance” to American forces in Iraq (p. 139 n.37). Having enjoined on American Muslims the view that they should side with the Iraqi insurgency against their fellow citizens, he then takes umbrage at the suggestion that anyone might ever question the loyalty of those who take his advice (pp. 38-39, 70). But siding with the enemy in wartime is about as close to treason as one gets without committing it. Indeed, it is scarcely clear how Ramadan differentiates his view from that taken by, say, Nidal Hasan, the perpetrator of the massacre at Fort Hood, Texas in November 2009. Ramadan tells us that while armed resistance against American forces in Iraq is justified, “innocents” should be spared. But what if Hasan’s point was that his victims *were*’t innocent, and could more effectively be “resisted” by killing them before they deployed? I would be curious to know what Ramadan thinks of this reasoning, assuming that a journalist can be found willing to “push” him on it.

And what of Ramadan’s position on Hasan al-Banna’s pro-Nazi apologetics? Berman’s objections on this issue were first put in print in 2007, and have been posed many times since then. Ramadan has had more than ample time to respond, but has repeatedly insisted that he has no obligation to respond, re-affirming his support for al-Banna in tendentious and convoluted prose like the following:

The Muslim Brothers began in the 1930s as a legalist, anti-colonialist and nonviolent movement that claimed legitimacy for armed resistance in Palestine against Zionist expansionism during the period before World War II. The writings from between 1930 and 1945 of Hassan al-Banna, founder of the Brotherhood, show that he opposed colonialism and strongly criticized the fascist governments in Germany and Italy.⁵⁰

These claims do not address Berman’s criticism. The question is not whether al-Banna condemned colonialism or made objections to fascist regimes. One can do both and yet still offer praise for an active participant in the Holocaust. The question is whether Ramadan is willing to condemn Hasan al-Banna’s

⁴⁹ Ramadan, “International Call for a Moratorium,” p. 5 (item #3).

⁵⁰ Tariq Ramadan, “Whither the Muslim Brotherhood?” *The New York Times*, February 8, 2011, accessed online at: <http://www.nytimes.com/2011/02/09/opinion/09iht-edramadan09.html?pagewanted=all>.

complicity in genocide. Evidently, the answer is “no.” It is unclear to me why a person incapable of such a condemnation deserves credibility as a moral or intellectual spokesman or reformer for anything, especially when he offers so little in the way of independent reason for it.

6. Conclusion

Ramadan has devoted the whole of his career to the task of defending an unapologetically theological conception of philosophy, politics, and culture. Since he is by reputation and training a philosopher, the *fundamental* questions to be asked about him are not the biographical or even political questions that Berman raises in *Flight*. They are instead philosophical: What reason is there to think that any of Ramadan’s philosophical theorizing is *true*? And what grounds has he ultimately given us for making a claim on our credence?

It’s a remarkable fact that such questions have decidedly not been at the center of discussion about Ramadan. Journalists don’t ask them because they don’t think philosophical truth is their business. Specialists in Near East Studies don’t ask them because they regard philosophical truth as being outside of their area of specialization. Practitioners of Religious Studies often avoid them because questions about truth would turn their pleasantly ecumenical discipline into an unpleasantly sectarian one. As for philosophers and political theorists, the English-speaking world is dominated by Rawlsians for whom the keyword is “public reason,” not truth. And since Rawlsian “public reason . . . neither criticizes nor attacks any comprehensive doctrine, religious or nonreligious, except insofar as that doctrine is incompatible with the essentials of public reason and a democratic polity,” the Rawlsian philosopher’s task is not to inquire into the truth or falsity of Ramadanian doctrine, but to find ways to demonstrate its compatibility with “the essentials of public reason and a democratic polity.”⁵¹ As for non-Rawlsians, they are obliged, as Robert Nozick put the point decades ago, either to “work within Rawls’s theory or explain why not.”⁵² Given that assumption, non-Rawlsians come to the discussion bearing an involuntarily heavy burden of proof: in order to discuss the truth of Ramadan’s claims, they must first explain where they stand vis-à-vis Rawls’s conception of public reason. But that seems an unrewarding endeavor.

Thus, whatever its flaws, Berman’s *Flight* brings a strange truth to light. As far as views like Ramadan’s are concerned, the Anglo-American academy is perversely structured so as *not* to encourage direct inquiries into the soundness of his arguments. It is structured to do many *other* things. It can mount a credible defense of his civil rights. It can forestall uncomfortable

⁵¹ John Rawls, “The Idea of Public Reason Revisited,” in John Rawls, *Collected Papers* (Cambridge, MA: Harvard University Press, 1999), p. 574.

⁵² Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), p. 183.

inquiries into his past, and delegitimize embarrassing questions about his views. It can enlist him in a civilizational “bridge-building” exercise, circle the wagons around his works and reputation, deride his critics, and make a Kantian or Rawlsian liberal of him. What it cannot seem to do is to demonstrate the truth of his claims, explain why anyone should believe them under that description, or just refute him outright. Nor can it focus in a sustained way on the most problematic parts of his message—or allow anyone else to do so with impunity. It cannot, in other words, treat Ramadan’s work the way it regularly treats the work of “Western” philosophers with similar views. It is a puzzling state of affairs, involving some problematic double standards. Whatever its flaws, *Flight* deserves credit for bringing the relevant phenomena to our attention, and for demanding that “the intellectuals” make better sense of them than they so far have.⁵³

⁵³ Thanks to Fahmi Abboushi, Hussein Ibish, Ibn Warraq, Aftab Khawaja, and Fawad Zakariya for helpful conversation on the issues of this review. Special thanks to Carrie-Ann Biondi for hours of helpful discussion on, and editing of, the manuscript itself. None of the preceding should be construed as agreeing with me, or can be held responsible for anything I say here.

Review Essay: Grappling with “Big Painting”: Akela Reason’s *Thomas Eakins and the Uses of History*

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Thomas Eakins made news in the summer of 2010 when *The New York Times* ran an article on the restoration of his most famous painting, *The Gross Clinic* (1875), a work that formed the centerpiece of an exhibition aptly named “An Eakins Masterpiece Restored: Seeing ‘The Gross Clinic’ Anew,” at the Philadelphia Museum of Art.¹ The exhibition reminded viewers of the complexity and sheer gutsiness of Eakins’s vision. On an oversized canvas, Eakins constructed a complex scene in an operating theater—the dramatic implications of that location fully intact—at Jefferson Medical College in Philadelphia. We witness the demanding work of the five-member surgical team of Dr. Samuel Gross, all of whom are deeply engaged in the process of removing dead tissue from the thigh bone of an etherized young man on an operating table. Rising above the hunched figures of his assistants, Dr. Gross pauses momentarily to describe an aspect of his work while his students dutifully observe him from their seats in the surrounding bleachers. Spotlights on Gross’s bloodied, scalpel-wielding right hand and his unnaturally large head, crowned by a halo of wiry grey hair, clarify his mastery of both the *vita activa* and *vita contemplativa*. Gross’s foil is the woman in black at the left, probably the patient’s sclerotic mother, who recoils in horror from the operation and flings her left arm, with its talon-like fingers, over her violated gaze.

The Gross Clinic is undoubtedly a great painting—one of the greatest in American art history—and worthy of our ongoing attention for many reasons. It is, as Elizabeth Johns explains in a 1983 study of the artist that serves as a model for Akela Reason’s new book,² a “heroic” portrait of one of

¹ Karen Rosenberg, “Deft Surgery for a Painting under the Scalpel,” *The New York Times*, July 30, 2010, p. C28. The exhibition could be seen at the Philadelphia Museum of Art, the repository for much of Eakins’s work, from July 23, 2010 to January 9, 2011. Unfortunately, the *Times* ran a picture of the *unrestored* painting with their review, an oversight that they noted in a subsequent correction.

² Akela Reason, *Thomas Eakins and the Uses of History* (Philadelphia, PA: University of Pennsylvania Press, 2010).

the artist's greatest contemporaries.³ Indeed, Gross, who achieved considerable success as one of the leading surgeons of his day, also advanced the cause of medicine. After receiving his degree from Jefferson Medical College at age twenty-three, he proceeded to translate various European texts on surgery, to teach in medical colleges around the country, and to conduct and publish research on wounds of the intestines that would prove invaluable in the treatment of injuries during the U.S. Civil War. He championed "conservative" surgery, a philosophical approach applied primarily to diseases of the limbs that favored waiting for the patient's body to heal itself and that saw amputation, the then-standard course of action, as a sign of the surgeon's failure. Gross also developed a reputation for his compassion and geniality; he bore his achievements without vanity and inspired countless young doctors in his circle. *The Gross Clinic*, then, celebrates not only the achievements of its protagonist but also America's decisive role in transforming surgery from a mechanical skill into a sophisticated practice during the nineteenth century.

The Gross Clinic also reflects Eakins's lifelong study of anatomy. A Philadelphia native, Eakins plunged into the sciences—natural history, chemistry, and physics—while still in high school. Johns informs us that students in Eakins's circle were "encouraged to supplement their scientific instruction at the high school by attending anatomical and surgical clinics in the many medical facilities"; such training was essential for the well-educated young man.⁴ Eager for additional instruction, Eakins enrolled in the anatomical lectures that were part of his drawing classes at the Pennsylvania Academy of the Fine Arts in 1862. Shortly thereafter, he studied with the surgeon Joseph Pancoast at the Jefferson Medical College, an opportunity that allowed him to attend lectures on anatomy by none other than Dr. Gross. As an art student in Paris from 1866-69, Eakins observed surgical clinics at Paris hospitals and at the École de Médecine. His anatomical studies after his return to Philadelphia led to his role as chief preparator/demonstrator for the surgeon W. W. Keen, M.D., who lectured at the Pennsylvania Academy, and to his own lessons in anatomy and dissection over the next several years.⁵ Given this larger context, then, *The Gross Clinic* transcends its ostensible subject and more broadly reflects Eakins's life-long desire to understand the human body not only from its exterior appearance but also from within. It links him to Leonardo da Vinci, Théodore Géricault, and other European Old Masters, whose preoccupation with the body drew them to extensive anatomical study.

The Gross Clinic highlights Eakins's affiliation with the European Old Masters in other ways. Gross's scalpel-wielding right hand echoes the

³ Elizabeth Johns, *Thomas Eakins: The Heroism of Modern Life* (Princeton, NJ: Princeton University Press, 1983), pp. 46-81.

⁴ *Ibid.*, p. 53.

⁵ *Ibid.*, p. 55.

brush-wielding right hand of Diego Velázquez in *Las Meninas* (1656), an allusion that implicitly raises the surgeon's work to the level of artistry. Eakins studied the Spanish masterpiece during a brief trip in December, 1869, to Madrid, where he developed a new appreciation for the power of expressive brushwork.⁶ His assimilation of the lessons of Velázquez, which Johns superbly describes in her monograph, re-emerges in the expressive brushwork of his late works, particularly in his portrait of Walt Whitman (1887) and in *William Rush and His Model* (ca. 1908).

The Gross Clinic serves as prolegomenon to Reason's study by conveying many of the key themes that she addresses: Eakins's celebration of a heroic historical figure, his sense of the importance of life study to artists and to art history, and his desire to affiliate himself with the Old Masters. Instead of rehearsing the chronological overviews of Eakins's life and work, Reason offers new interpretations of Eakins's use of historical themes to advance, as she puts it, "some of his most deeply held professional aspirations" (p. 4). She views Eakins's aesthetics as highly deliberative, a project constructed by the artist throughout his life and periodically re-shaped by his shifting identities and positions within Philadelphia society. Steeped in history during his four years at the *École des Beaux-Arts* in Paris, Eakins absorbed the values of the Old Masters and honed his sense of the importance of creating work, as the artist Cecilia Beaux put it, "outside of fad or fashion" (p. 1).

Eakins's training at the *École* also taught him that the greatest artists, including the ancients, created images of the human body not by copying plaster models but by working directly from life. Indeed, Eakins took the principle to heart. He would insist that his students at the Pennsylvania Academy—men and women alike—not only draw from models but also *serve as* models in his photographic studies of the nude. In a gesture of supreme self-confidence, Eakins himself modeled in some of the photographs. Not surprisingly, the practice generated a variety of reactions. Some praised Eakins's candor and the depth of his commitment to his subject matter, likening his motion studies to those of Eadweard J. Muybridge and praising them for their anticipation of cinema. Others, however, looked skeptically at images of the nude Eakins, particularly the one set in his studio in which he transports the inanimate body of an equally nude woman, ostensibly one of his students. Moreover, Eakins wrapped his female models' heads with dark cloths, thereby nullifying their identities, a detail that seems particularly aggressive and disturbing to the modern viewer.⁷ Still, in all of these efforts,

⁶ In a talk at the Annual Meeting of the College Art Association in 1979, Elizabeth Johns pursued affinities between the portrait of Gross and the position of the figure in Velázquez's *Portrait of Juan Martínez Montañés* (1635-36; Prado, Madrid).

⁷ Did Eakins treat his models in this way for practical purposes, that is, to focus attention more squarely on their bodies during life study, or was he driven by more personal motives? The topic has been cause for debate. For example, the contemporary

Eakins sought to prepare himself to paint what he termed “big paintings,” works that would have lasting historical value for his own reputation and for American art as a whole.

Reason constructs her study around such “big paintings”—though not the obvious ones, such as *The Gross Clinic*—and the specific ways in which Eakins used them to construct his story of American art. She begins with *William Rush Carving His Allegorical Figure of the Schuylkill River* (1876-77). As a student in Paris, Eakins had learned that sculpture, specifically High Classical Greek sculpture, represented the pinnacle of art history. Back at home, he found that most American sculptors, particularly those who sought to emulate the Greeks, had emigrated to Italy, where marble was plentiful and studio assistants were plentiful, skilled, and inexpensive. Determined to stay in Philadelphia, he needed a role model and found one in the unlikely figure of Rush. A Federal sculptor who mainly carved ships’ mastheads, Rush had fallen into obscurity; Eakins set out to re-cast his identity as an American hero. The process would entail some creative thinking, even some manipulation of historical facts. For example, although Rush would never have considered using nude models for his carvings of “allegorical figures,” Eakins pictured him working in his studio with a nude model as his reference. This little piece of fiction allowed Eakins to convey some points about the value of working directly from life—the practice, according to his Parisian mentors, of the ancients. Ultimately, Eakins hoped to fashion an artistic enfilade inhabited at one end by Phidias (the artist responsible for the major sculptural programs of the Parthenon), some of the Old Masters in the middle, and Rush at the other end.

To underscore Rush’s devotion both to his forebears and to his own work, Eakins directed the artist’s gaze not at the nude before him (an option full of lascivious implications) but, instead, at his own sculpture. Envisioning the model—again, an entirely fictitious character—took some ingenuity. Reason contrasts Eakins’s solution to the idealized (and, somewhat paradoxically, more libidinous) representations of Phryne, the model for the fourth century BCE Greek sculptor Praxiteles, painted by such nineteenth-century artists as Gustave Boulanger, Jean-Léon Gérôme, and Sir Lawrence Alma-Tadema. These distinctions reveal that Eakins fabricated a “professional and therefore chaste” view of Rush’s relationship to his (imaginary) model (p. 43). Conveyed in this light, Rush’s unblemished professionalism would make

artist Philip Pearlstein (b. 1924) recently chastised certain “postmodern art historians” who view Eakins’s nude studies as evidence of his “conflicted sexuality.” As one who has spent many years drawing and painting the nude, Pearlstein appreciates the care and attention that both Eakins and Muybridge gave to their examinations and called for them to be recognized as “among the most influential artists on the ideas of 20th-century art.” See Philip Pearlstein, “Moving Targets,” *ARTnews* 109, no. 11 (December 2010), accessed online at: http://www.artnews.com/issues/article.asp?art_id=3148.

him the logical inheritor of the view of the history of sculpture that Eakins creatively constructed.

Although Reason occasionally rehearses points, even phrases, somewhat excessively (see, for example, pages 27, 31, and 32 for iterations of the idea that Eakins “placed Rush at the beginning of a native sculptural tradition”), she greatly enriches our understanding of the social contexts of Eakins’s work. She shows how Eakins’s interest in the history of American art coincided with a broader exploration of that history in contemporary art criticism and art exhibitions. For example, the decade preceding the Rush painting witnessed the publication of Henry T. Tuckerman’s *Book of the Artists* (1867) and an increasing number of articles on the arts in *The Nation* and *Lippencott’s Magazine*. It coincided, too, with more opportunities to see and study works of American art, such as the “First Chronological Exhibition of American Art” at the Brooklyn Art Association in 1872 (although this exhibition was neither comprehensive nor chronologically structured). When considered together, the articles, exhibitions, and the Rush painting could evoke a new appreciation for the history of American art. In short, through this deliberate enterprise of illusion-weaving and historical revisionism, Eakins could re-craft Rush’s identity into that of an American Old Master.⁸

In previous essays, scholars have interrogated the place of Eakins’s “historical series” paintings—such as *In Grandmother’s Time* (1876) and *Home-spun* (1881)—within the broader context of the artist’s work. With their scenes of women seated at spinning wheels while dressed in lacy caps and gauzy gowns, they seem out of character for an artist so closely attuned to contemporary developments in the arts, especially photography. Why would Eakins paint images evocative of late-eighteenth-century America? Barbara Weinberg argues that *Home-spun* reflected “nostalgia for simpler times” and served as an antidote to the Industrial Revolution’s aggressive eradication of home manufacture.⁹ She sees the same nostalgia in Eakins’s *Arcadia* (ca. 1883), with its three nude boys, two of whom play musical pipes, in an open

⁸ For another useful perspective on this painting, one that Reason does not address in her study, see Alan C. Braddock, “Bodies of Water: Thomas Eakins, Racial Ecology, and the Limits of Civic Reason,” in *A Keener Perception: Ecocritical Studies in American Art History*, ed. Alan C. Braddock and Christoph Irmscher (Tuscaloosa: The University of Alabama Press, 2009), pp. 129-50. Here, Braddock suggests that Eakins used the white female personification of the Schuylkill River, which is distinctly more manicured in Philadelphia than the nearby polluted marshes and fisheries south of the city, as “an epitome or meta-representation of his racial ecology in art,” that is, as a means of encoding his “creative detachment from troubling social and environmental realities that were beyond the pale of representation, even for his realism”; see *ibid.*, p. 130.

⁹ H. Barbara Weinberg, “Thomas Eakins and The Metropolitan Museum of Art,” *The Metropolitan Museum of Art Bulletin* (1994), p. 25.

patch of bucolic landscape.¹⁰ Focusing on *In Grandmother's Time*, Marc Simpson addresses its “perplexing” sense of “locution.” Seen from the artist’s perspective, if the “time” represented is, indeed, the turn of the *previous* century, then the elderly woman represented would not be Eakins’s grandmother but, instead, his “great- (or great-great-) grandmother.”¹¹ Simpson also points to discrepancies in the dating of the objects represented, for while the woman wears a late-eighteenth-century dress, the spindle and toys around her date to the mid-nineteenth century. For Simpson, the conflict between the “firm figural constructions and solid placement in space” and the “purposeful indeterminacy of genre, time, and even objects portrayed” in the painting stimulates the viewer’s engagement and invites us to “provide as much of a chronological envelope as necessary” for the appreciation of the work. Ultimately, these contrasts and dislocations infuse the “historical” paintings with their sense of “vitality.”¹²

Reason offers a new perspective. She situates the works in the context of the burgeoning field of psychology and the study, more specifically, of women’s health. She argues that Eakins viewed the colonial era as an idyllic one for women, a time when they were called upon to perform stress-free domestic work. She describes the friendship that Eakins shared with two physicians, Horatio C. Wood and Silas Weir Mitchell, whose area of expertise was “mental exhaustion,” or “neurasthenia,” a condition nearly always associated with women. Wood and Mitchell championed the idea—preposterous to the modern mind—that access to education caused women to suffer psychological breakdowns, a theory that quickly led to harrowing claims about the end of motherhood and the extinction of civilization. Reason does not address the folly of these ideas or the fact that Wood, Mitchell, and their colleagues grossly idealized the lives of colonial women. (Most women of the period, especially the poor, suffered under exhausting working conditions in the home.¹³) Instead, she places them in the context of the growing interest, during Reconstruction, in the colonial period, one that culminated in the display of colonial artifacts at the Centennial Exhibition of 1876. The fact that Reason’s analysis of Eakins’s colonial revival works remains somewhat dissatisfying may be a product of what she describes several times as the “ambivalence” that Eakins himself felt about the

¹⁰ Ibid., p. 28.

¹¹ Marc Simpson, “Eakins’s Vision of the Past and the Building of a Reputation,” in *Thomas Eakins*, ed. Darrel Sewell et al. (Philadelphia: Philadelphia Museum of Art, 2001), p. 215.

¹² Ibid., p. 216.

¹³ For a brief but cogent overview of this topic, see Mary Beth Norton, “The Myth of the Golden Age,” in *Women of America: A History*, ed. Carol Ruth Berkin and Mary Beth Norton (Boston, MA: Houghton Mifflin Company, 1979), pp. 37-47.

role of women in society. For while he was, in fact, an advocate for women's education and fought to include women in his classes at the Pennsylvania Academy, he seemed, through his friendships and his "historical" paintings, to idealize more submissive social roles for women. Ultimately, the paintings, steeped in nostalgia, fail to rival his best works, that is, paintings and photographs that embody his deep-seated engagement with the complexities of the modern era.

The public revelation in 1985 of a large collection of Eakins's photographs fundamentally transformed our understanding of his work.¹⁴ These photographs revealed figures and objects (trees, boats, etc.) that reappeared, almost line for line, in Eakins's paintings. Scholars could no longer argue that Eakins imagined those painted arrangements or created them spontaneously. Moreover, infrared photographs of the paintings, which revealed extensive preparatory underdrawings, confirmed this surprising assessment. Seen together, the photographs, both old and new, proved that Eakins constructed some of his paintings by projecting and tracing forms from the photographs onto his canvases. For example, he projected several clusters of figures to create *Mending the Net* (1881). He ensured the correct placement of the figures by inscribing reference marks, sometimes as many as sixty tiny lines in a figure measuring no more than 4-3/8 inches high. He proceeded faithfully to reproduce the images in oil. While the practice had been used by some artists in the past, it had never before been detected in Eakins's work.

This scholarship serves as the point of departure for Reason's examination of Eakins's relationship to ancient art, another of his "uses" of history. The chapter entitled "Reenacting the Antique" refers to Eakins's belief that the ancient Greeks carved their sculptures—specifically, of nude figures—from life. As no drawings exist to prove this point, theorists have long offered their own ideas on the subject. Reason's strongest contribution to her study may be her introduction to this debate of the nineteenth-century French theorist and artist Horace Lecoq de Boisbaudran. Lecoq believed that the ancient artist engaged in "memory training," which is not, as it might first seem, about studying motifs—be they works of art or scenes from nature—so

¹⁴ After the death in 1938 of Eakins's wife, Susan Macdowell Eakins, Charles Bregler, one of Eakins's most devoted students, took possession of a large number of the artist's works—paintings, drawings, photographs, letters, sketches, plaster casts, and so on. His collection remained hidden until Kathleen Foster and Elizabeth Milroy discovered it in 1983. (Susan Eakins had indicated that she intended to have the items destroyed, so while Bregler's legal right to the works has been questioned, his efforts undoubtedly saved them from destruction.) For an in-depth examination of the collection, see Kathleen Foster, *Thomas Eakins Rediscovered: Charles Bregler's Thomas Eakins Collection at the Philadelphia Academy of the Fine Arts* (New Haven, CT: Yale University Press for the Pennsylvania Academy of the Fine Arts, 1997). See also the excellent examination of the relationships between the photographs and paintings in Mark Tucker and Nica Gutman, "Photographs and the Making of Paintings," in *Thomas Eakins*, ed. Sewell et al., pp. 225-38.

intently that you can mimetically reconstruct them from memory. It is, instead, about learning these motifs so well that you can recreate them according to your own visual language. (Reason would have done well to clarify this point.) The artist would begin by observing and drawing motifs based on memory; he would then transcend memory to produce a composition that is, in Lecoq's words, "original, because it comes entirely from himself" (p. 110).

Eakins studied with Lecoq at the *École des Beaux-Arts*. Although Lecoq had nothing to say about the use of photography in "memory training," his theory inspired Eakins to translate the process through his own aesthetics. After returning to Philadelphia, he acquired a camera and began taking photographs. Using the projection and inscription process described above, he put some images from photographs to use when creating his paintings. Reason sees *Swimming* (1885)—a scene of six nude men arrayed around a rocky outcropping in front of a pond—as "the fullest integration of Lecoq's theories into [Eakins's] art" (p. 90). The man at the far left, who assumes the reclining pose held by numerous figures at the ends of classical pediments, embodies Eakins's allegiance to memory; the man who dives into the pond at the far right embodies the artist's interest in the freshness of photography. The painting, then, synthesizes memory and imagination, old and new, antique and real. Unfortunately, the Academy's Committee on Instruction did not view it through this theoretical lens. They cast their more prosaic glance on the work and saw that Eakins used his students as (nude) models and then pictured himself as the (nude) swimmer in the lower right corner. Having already balked at the artist's use of nude models in the classroom, they now had sufficient cause, in February 1886, to dismiss him from the Academy.

The case of the *Crucifixion* (1880), the next praxis in Reason's study, reveals how scholars can arrive at very different interpretations of the same painting. The subject, of course, is grim and highly realistic: the figure of Jesus nailed to the Cross, his head cast deeply in shadow, his rib cage distended, his bloodied hands constricted. The rocky outcropping of the setting blatantly underscores the violence of the theme. In their work on the painting, art historians Lloyd Goodrich, Henry Adams, Jane Dillenberger, Joshua Taylor, Martin Berger, and others emphasize the peculiar absence of spiritual overtones; for example, there is no halo surrounding Jesus's head.¹⁵ Many have linked the work to the nearly concurrent—and widely influential—theory proposed by Ernest Renan, author of *The Life of Jesus*

¹⁵ An exception to this interpretation is one by David Lubin, who underscores the religious overtones of the work: "But [*The Crucifixion*] is as religious, in its own way, as Edvard Munch's *The Scream* (1893), in as much as both are *cri de coeur*, expressions of human solitude, loneliness, abandonment. This is what it means, literally, to stand alone." See David Lubin, "Thomas Eakins and the Strains of Modern Life," in *Pittura Americana del XIX secolo: Atti del convegno*, ed. Marco Goldin and H. Barbara Weinberg (Treviso: Linea d'ombra Libri, 2008), pp. 145-46.

(1863, *Vie de Jésus*), that Jesus was a remarkable preacher but not the son of God. To underscore this reading, Reason cites Eakins's view of Jesus as God's "human prophet," though not part of a Trinity. She asserts that "Eakins acknowledged Jesus's exemplary status, even while limiting his powers to the terrestrial sphere" (p. 130).

Why would Eakins choose this topic? Scholars have offered various theories. For example, Sidney Kirkpatrick argues that Eakins, who in 1880 was at a high point in his relationship with the Academy, selected a subject familiar to the Old Masters and, by extension, associated himself with them as an American "modern master." Reason provisionally accepts but is ultimately dissatisfied with this line of reasoning. In seeking to understand what *The Crucifixion*—which Eakins identified as his "best painting"—meant to him, she refocuses her interpretive lens to 1886, the year in which Eakins sent the work to the Southern Exposition in Louisville, Kentucky. In this context, it did not celebrate the artist's career within the Academy but, instead, reflected its derailment. She argues that Eakins, having recently been fired, felt "crucified" by the Directors. She notes that for the Louisville exhibition, he changed the title of the work from "The Crucifixion" to "Ecce Homo," or "Behold the Man"—in short, Behold Eakins. In an alignment that one can only view today as histrionic, if not borderline megalomaniacal, Eakins viewed himself as Jesus, a teacher who challenged orthodoxy and who suffered injustices at the hands of those who failed to understand and appreciate him. He saw his ouster as a martyrdom, a process of physically suffering for one's beliefs, and reflected it in his painting.

The final major chapter in Reason's discerning study is her examination of two of the most explicitly historical pairs of sculptures in Eakins's *oeuvre*: two bronze panels on the Brooklyn Soldiers and Sailors Memorial Arch (1891-95), the largest Civil War monument of the period, and two on the Trenton (New Jersey) Battle Monument (1893), which commemorate Revolutionary War heroes. The works are steeped not only in American history but also in the history of art, for Eakins used them to explore his affiliations with William Rush, the Federal sculptor whom he had immortalized in an earlier painting, and Phidias, the Greek mastermind behind the Parthenon marbles. He viewed these public commissions as opportunities to create, like his heroes, "enduring public sculptures" (p. 147).

Eakins cultivated his appreciation for Phidias's work in Paris through such teachers as Lecoq. As a teacher himself in Philadelphia, he encouraged his students to explore sculpture as a means to understand the "solidity, weight, and roundness of the figure" (p. 151). He teased out the inherent complexities of relief sculpture, where forms can project up to three-quarters in the round from a flat back panel. Artists working in relief must therefore grapple with the exigencies of linear perspective, vary the depths of their figures, and account for visual distortions through the perspective of the viewer, that is, someone standing on the ground below and looking up. In his characteristically diligent fashion, Eakins prepared for the Brooklyn commission by studying. Working with a collaborator, William R.

O'Donovan, on two scenes—*Abraham Lincoln on Horseback* and *Ulysses S. Grant on Horseback*—and responsible for representing the horses of both men, he searched for correct equine models. Settling on “Billy” (for Lincoln) and “Clinker” (for Grant), he took photographs and spent an enormous amount of time making wax models of the horses in the field. He seemed, at last, to envision himself as Phidias preparing to carve the frieze of the horseman in the Panathenaic Festival. He then created quarter-size models of the horses for transfer to life-size versions.

Eakins's Achilles' heel was his inability to uphold deadlines. While O'Donovan was still struggling with the figures of Lincoln and Grant, Eakins began to work on the life-size versions of the panels, that is, before he received approval for his quarter-size models. To make matters worse, he was offered, in the meantime, the commission for the Trenton monument—one scene of troops preparing for the battle and another of the Continental Army crossing the Delaware. Although Trenton required his immediate attention, he refused to set aside the Brooklyn project. He would not begin the Trenton reliefs for another seven months, well behind schedule. Reason describes the intricacies of Eakins's work on all these reliefs in detail—perhaps slightly more than they warrant, for they can hardly be described as compelling works of art. Indeed, when the Brooklyn panels were finally installed in December 1895, they received scant attention. A few press reports criticized the awkwardness of Eakins's and O'Donovan's work. Corroborating these reactions, Reason points out a major flaw in the panels: by using very high relief, both Grant's and Lincoln's bodies were truncated on the sides attached to the panels. When looking from below and from a specific angle, the viewer receives the impression that Lincoln's left arm and Grant's right have been amputated, an “unpleasant association,” Reason wryly observes, “for a war memorial, especially as the war had left so many soldiers maimed and disfigured” (p. 168).

A terracotta statue of Moses on the Witherspoon Building in Philadelphia, done in 1895-97 with Samuel Murray, his chief pupil, would be Eakins's last collaborative work and nearly his last work in sculpture.¹⁶ It is somewhat telling that Eakins was concurrently producing one of his greatest portraits, that of the brilliant American scientist Henry Rowland (1897). (The frame alone, which Eakins also created, deserves and has received much appreciative attention.) While Reason attributes Eakins's lack of success in his relief sculptures to his inability to collaborate successfully with O'Donovan and others, it may also reflect the fact that his artistic strengths and perhaps also his enthusiasm resided elsewhere—that is, in painting and, specifically, in portraits, especially during the final two decades of his life.

Readers looking for a (nearly) comprehensive overview of Eakins's life and work will want to turn to the multi-authored book published to

¹⁶ He executed a final relief sculpture, a portrait of Mary Hallock Greenwalt, which is unlocated; see Reason, *Thomas Eakins and the Uses of History*, p. 179.

accompany “Thomas Eakins: American Realist,” an exhibition that opened at the Philadelphia Museum of Art in October 2001.¹⁷ Those eager for a more intimate, informal exploration of the artist’s life will enjoy Sidney D. Kirkpatrick’s biographical study *The Revenge of Thomas Eakins*.¹⁸ Written by a documentary film producer and colored with the somewhat breathless tone of the biopic, this book provides readers with a wealth of information on Eakins the Man—for example, the fact that he was fluent in seven languages, constructed his own cameras, and studied logarithms and etymology for fun. With these and other studies readily available, Reason wisely avoids the standard, chronological overview. Instead, she puts forth a fresh theoretical construct in which to examine works that have been overlooked or insufficiently analyzed. Her study sheds new light on Eakins’s deliberate effort to construct what he viewed as a proper historical setting for the appreciation and reception of American art. Reason supports her claims with meticulous, thorough research into both the existing published literature and unpublished archives. By situating her claims so often within the context of American history, she extends the appeal of her work deep into American Studies, a field that will greatly benefit from her careful attention to details of works of art. Finally, while we still need a compelling examination of the artist’s late portraits, Reason’s study has made a superb contribution to the literature on Eakins, one that invites kindred explorations of the “uses” of history in the works of other American artists.

¹⁷ The exhibition was organized by Darrel Sewell, with the assistance of W. Douglass Paschall, and traveled to the Musée d’Orsay (February 5-May 12, 2002) and the Metropolitan Museum of Art (June 28-September 18, 2002). The book, which contains essays by Kathleen A. Foster, Nica Gutman, William Innes Homer, and others, was published by the Philadelphia Museum of Art. Although it is organized chronologically, it contains thoughtful essays on various aspects of Eakins’s life and work, such as his relationship to the Academy (by Foster), his treatment of photographs (by Mark Tucker and Gutman), and his life as a writer (by Homer).

¹⁸ Sidney D. Kirkpatrick, *The Revenge of Thomas Eakins* (New Haven, CT: Yale University Press, 2006).

Book Reviews

Euben, Roxanne L. and Muhammad Qasim Zaman, eds.
*Princeton Readings in Islamist Thought: Texts and Contexts
from al-Banna to Bin Laden*. Princeton: Princeton University
Press, 2009.

For many years now, scholarship on Islamic political thought has been praised for its timeliness. While some might consider the continued use of this trope clichéd, current events make it difficult to abandon altogether. The recent ten-year anniversary of the attacks of September 11, 2001, the demise of Osama bin Laden, and the growing unrest of the so-called “Arab Spring” remind us—if indeed we have ever forgotten—that certain forms of Islamic political thought have reconfigured “the twenty-first century geopolitical landscape in unprecedented ways” (p. 460). We are then justified in our continued curiosity about this thought and the ways it might motivate violent resistance to the institutions and values many of us hold dear.

Yet, great interest is often a catalyst for discourse that is heavy on polemic and short on substance. Over the previous ten years, much has been written about tensions between “Islam” and the “West” that oversimplifies and obfuscates. This has left many deeply confused about various strands of contemporary Islamic political thought and their relation to one another. Much to their credit, Roxanne L. Euben and Muhammad Qasim Zaman have edited a volume that will reduce, rather than perpetuate, this confusion. They have, for the most part, succeeded in producing a text that functions as “an implicit corrective to . . . reductionist generalizations . . . [and] as an explicit guide through the haze of polemic, fear, and confusion swirling around the subject of Islamism in the early twenty-first century” (p. 3).

At first glance, this book appears to be a straightforward collection of primary source material drawn from a veritable “Who’s Who” of contemporary Islamic extremists. While this sort of collection would be valuable in its own right, Euben and Zaman have given us something far more significant. As their subtitle suggests, this volume includes both texts *and* contexts, and it is the latter that mark its unique contribution. Along with an extensive essay at the beginning of the book, the editors have included 6-10 page introductions for each of the eighteen chapters. Because these chapters are themselves no more than 15-20 pages of primary source material, the editor-provided “context” makes up at least one third of this 475-page volume.

The initial essay is particularly well-crafted, substantial enough to be recommended on its own to those who want to learn more about the diversity of contemporary Islamic political thought and the complicated relationships between its various competing and overlapping strands. The primary goal of

this essay is to do that which most popular discourse on these issues fails to do: stipulate a definition of “Islamism” that has enough content to distinguish it from related movements, while remaining porous enough to leave room for significant amounts of diversity. In stipulating this definition, Euben and Zaman make three smaller arguments.

First, they contend that Islamism should be defined carefully so as to distinguish it from other strands of Islamic political thought, as well as popular terms like “Islamic extremism,” “political Islam,” “fundamentalism,” “jihadism,” and “Islamic terrorism” (pp. 3-4). According to their refined definition, Islamism refers to contemporary movements that “attempt to return to the scriptural foundations of the Muslim community” with the aim of “restoring the primacy of the norms derived from these foundational texts to collective life” in an “explicitly and intentionally political” manner (p. 4). In this sense, then, Islamism is distinguished from movements that do not limit religious authority to the scriptural foundations of the Muslim community alone, that are not primarily interested in restoring Islamic norms to collective life, and that are not explicitly and intentionally political. These include, but are not limited to, the traditionally authoritative class of Muslim religious scholars (*ulama*), the relatively recent movement of Muslim “fundamentalists” who seek to return to the beliefs and practices of the pious forebears, or *al-salaf al-salih* (Salafism), various forms of Islamic mysticism (Sufism), and the movements of Muslim modernists seeking to reform the epistemic foundations of their tradition.

At the same time, Euben and Zaman argue that Islamism should not be distinguished so sharply from these movements as to ignore their historical and ideological affinities. They argue, for example, that the “Salafi orientation is an important part of the genealogy of both modernism and Islamism” insofar as “Salafis [also] insist on deriving their norms directly from the Islamic foundational texts . . . unmediated by the medieval schools of law” foundational to the discourse of the *ulama* (p. 19). Similarly, many of the prominent Islamists excerpted in the text have what they refer to as an “ambivalent” relationship with both Sufism and the clerical establishment (indeed, many are themselves members of that very establishment). Thus, what seems to set Islamism apart is the unique way themes from each of these movements are woven together, along with a seemingly unwavering commitment to “the public implementation of the *shari’a* [Islamic law]” through the “agency of the state” (p. 11).

Finally, and perhaps most importantly, the editors argue that this definition of Islamism leaves room for diversity on three important issues about which popular discourse assumes Islamists are in agreement. More specifically, Euben and Zaman hope to show that Islamists hold a range of positions on the relationship between Islam and democracy, the role of women within the movement, and the permissibility of using violence to achieve one’s goals (p. 1). That is to say, contrary to popular belief, the “Islamist movement cannot simply be characterized as violent, antidemocratic, and oppressive of women” (p. 29). Instead, “the chapters in this volume suggest

that what makes Islamist politics distinctive (if not *sui generis*) is the claim to recuperate an ‘authentic Islam’ comprised of self-evident truths purged of alien and corrupting influences, along with an insistence on remaking the foundations of the state in its image” (p. 27).

The remainder of the book is designed to reinforce this argument. Both the selection of texts and their organization serve to illustrate the “regional breadth, gender dynamics, and political, theoretical, and theological complexity” of contemporary Islamism (p. 1). Of the eighteen chapters, two excerpted texts were written by women, four cover works by Shia Islamists, and at least eight were written by formally educated *ulama*. Six of the thinkers they selected are Egyptian, but Afghanistan, India, Iran, Iraq, Lebanon, Morocco, Pakistan, Palestine, Qatar, Saudi Arabia, and the Sudan are also represented. Rather than organizing these excerpts chronologically or geographically, Euben and Zaman choose to group them by theme “to bring into view the web of concerns animating Islamists, as well as the polyvalent conversations across history and culture in which they participate” (p. 2).

In order to achieve this goal, the book is divided into five parts. The first, entitled “Islamism: An Emergent Worldview,” introduces the reader to the works of Hasan al-Banna, Sayyid Abul a’la-Mawdudi, Sayyid Abul-Hasan Ali Nadwi, and Sayyid Qutb. Part II, “Remaking the Islamic State,” excerpts texts of Ayatollah Ruhollah Khomeini, Muhammad Baqir al-Sadr, Hasan al-Turabi, and Yusuf al-Qaradawi about the nature of the Islamic state and the place of democracy therein. Part III addresses the theme of gender in Islamism, and includes portions of texts from two female Islamists, Zaynab al-Ghazali and Nadia Yassine, as well as the Iranian cleric Murtaza Mutahhari. “Violence, Action, and Jihad” is covered in Part IV, with excerpts from the works of Muhammad Abd al-Salam Faraj, Umar Abd al-Rahman, Muhammad Hussein Fadlallah, Hamas, and the Taliban. The volume ends with a discussion of “Globalized Jihad” as evidenced by the statements of Osama bin Laden and the final instructions of Muhammad Ata al-Sayyid.

As noted above, Euben and Zaman ought to be praised for their willingness to introduce their readers to contemporary Islamic political thought in all of its complexity. Moreover, the collection of texts they have assembled in this volume should be required reading for all who hope to understand the historical and ideological lineage of contemporary Muslim political unrest. Nevertheless, the volume is not without its weaknesses. Indeed, it is precisely its ambition—“to make visible the heterogeneity of Islamist arguments and ideas”—that creates unresolved difficulties, leaving the work vulnerable to critique (p. 5). Euben and Zaman hope that a Wittgensteinian definition of ‘Islamism,’ which stipulates “family resemblances” rather than fixed attributes, will reinforce their argument about its heterogeneity. Yet, the imprecision of their definition leads to problematic distinctions, a questionable selection of sources, and a decidedly incoherent “thematic” organization.

The editors are aware that their initial definition of ‘Islamism’ is vague, but hope that its complexity will be brought into “sharp relief by way

of contrast with several other Muslim orientations” (p. 5). I have already noted that the chosen points of contrast with Islamism include the orientations of Muslim modernists, *ulama*, Salafis, and Sufis. Yet, the contrasts that are drawn do more to obscure than clarify their preliminary definition; in all four cases, we learn that there are many Islamists who actually *embrace* these orientations, undermining the significance of the initial contrast. Although Euben and Zaman introduce these contradictions intentionally, in order to illustrate the “difficulty of distinguishing between Islamism and other religious, intellectual, and political trends in terms of neat characterizations, of grand, translocal generalizations,” they leave the uninitiated reader genuinely confused about even the most basic features of the phenomena about which they are reading (p. 27). While their resistance to “neat categories” (which I take to mean non-overlapping categories) and “grand generalizations” is to be applauded, I can think of no reason why this resistance should have prevented them from providing a carefully delineated stipulative definition in this case.

The closest they come to doing so is when they argue that “*More than anything else*, Islamists seek to implement Islamic law through the agency of the state” (p. 11, emphasis mine). Following through on this definition, they go on to argue that “it is only when the Salafis . . . begin striving . . . for a new *religio-political order* that they can be said to join the ranks of the Islamists” (p. 22, emphasis mine). Yet, even here, with the one feature that defines Islamism “more than anything else,” Euben and Zaman are willing to muddy the waters. This is most evident in their selection of texts, many of which include works by Muslims who have explicitly been opposed to movements that seek to impose *sharia* via the enforcement mechanisms of the state. Thus, for example, “Islamists” like Sayyid Abul-Hasan Ali Nadwi in India and Muhammad Hussein Fadlallah in Lebanon have actually defended political systems that make room for the pluralistic religious communities of those two countries (pp. 109, 391). Similarly, at least two of the Islamists excerpted in the section on Islamism and gender seem to have more interest in *da’wa* (evangelism) at the *societal* level than in promoting the legal institutions necessary for a properly functioning Islamic *state* (pp. 275-315).

Thus, in their attempt to leave their definition of Islamism “porous,” the editors seem to have stripped it of any discernible structure. Though their introduction claims that their definition provides “enough grounds to broadly distinguish [Islamists] from other activists, intellectuals, and orientations in the Muslim public sphere,” one would be hard pressed to name these grounds after completing the volume in its entirety (p. 27). Although part of the problem here is theoretical, it is equally a practical difficulty. Given that the primary goal of this volume is to highlight the diversity of Islamists on a number of core issues (democracy, gender, and violence), Euben and Zaman often let those concerns govern their selections, sacrificing definitional consistency in the process. Had they been more restrictive in their definition, they may have found it difficult to secure sufficiently complex texts on these subjects. Similarly, their desire to highlight the extent to which Islamism cuts

across regional, sectarian, and gendered lines make it difficult for them to avoid a collection of theoretically disjointed texts.

These problems also manifest themselves in the organization of the material. While there is nothing intrinsically problematic about the “thematic” structure of the book, the selection of themes, and the texts that would be identified with each, is curious. Despite their explicit disavowal of chronological organization, the editors devote the first section of the book to the “Emergent Worldview” of Islamism. As might be expected from such a title, the works of the *earliest*, and arguably most influential, Islamists are included here. Similarly, the final section, “Globalizing Jihad,” is nothing more than a unit devoted to the most *recent* manifestation of Islamism in the works of al-Qaeda. The primary problem with these explicitly chronological “themes” is that they make the placement of texts in the *actual* thematic sections seem more significant than they actually are.

While it is immediately clear why the works of Hasan al-Banna are included in the first section, the placement of Qaradawi in the section on the “Islamic State” and Fadlallah in the section on “Violence, Action, and Jihad” is anything but self-evident. Indeed, had the editors selected different texts from each thinker, their placement could easily have been switched without altering the structure of the book. Yet, to the average reader who is unfamiliar with either Qaradawi or Fadlallah, the current organization suggests that the former is best known for his work on the Islamic democracy and the latter for his arguments about Islamic terror. Perhaps more importantly, similar sorts of misunderstandings are bound to arise with respect to *every* thinker excerpted in these thematic sections, for many of the same reasons.

Although Euben and Zaman never claim that their book would provide a comprehensive introduction to each of the thinkers excerpted in their volume, a slightly different organization could have avoided some of these problems. Given their stated goal of highlighting diversity, their move toward a thematic organization makes sense. Yet, the volume would have been far more successful had they selected fewer thinkers and included excerpts from the work of each on all of the chosen themes. This could have been organized so that each thinker would reappear in every thematic chapter, or so that each theme would reappear in chapters devoted to individual thinkers. Either way, such an approach would have helped readers better understand the range of issues individual Islamists have addressed, as well as the complex relationship *between* these issues within unified bodies of thought.

Most importantly, however, this simple shift in organizational structure might have prevented many of the theoretical problems outlined above. As it is currently organized, many of the most important (and prolific) Islamists are included within the first and last sections; this then encourages the editors to “reach” for additional texts to make their case for diversity on the issues of democracy, gender, and violence. The problem with this reaching is that it often leads them to make room for thinkers and texts that break the mold of their “preliminary” definition of Islamism. If, on the other hand, they

had limited themselves to a small number of particularly significant thinkers, they could have produced a volume that highlighted the diversity of Islamist positions on these issues without undermining the very coherence of the category.

Despite these problems, this volume continues to warrant a strong recommendation. Whether one considers their definition of Islamism useful, or their selection and organization of the primary sources coherent, Euben and Zaman have produced an indispensable collection of texts. Scholars will be thrilled to discover that many of their most cherished sources have been distilled and compiled into a singular reference book; teachers will find a text that is both comprehensive and flexible enough to be used in numerous courses; and students of all ages will be thankful for a volume that makes many of these primary sources accessible for the first time.

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Palmer, Tom G. *Realizing Freedom: Libertarian Theory, History, and Practice*. Washington, DC: Cato Institute, 2009.

As presented by academic philosophers and economists, libertarianism can seem otherworldly, a clever but impractical exercise in utopian theorizing. As presented by journalists and in popular culture and electoral politics, libertarianism can seem more a sensibility than a system of thought, a set of policy preferences and cultural attitudes which despite their piecemeal practicability and influence, add up to something less than a coherent philosophy. The great strength of Tom G. Palmer's work is that it combines the intellectual muscle of the academic theorist with the broad appeal of the journalist and the realism of the policy maker. Palmer is neither a pie-in-the-sky ideologue nor a muddleheaded popularizer, but a principled thinker sensitive to both the indispensability and the limits of theory. He is the sort of libertarian writer non-libertarians (and us ex-libertarians) need to take the most seriously. Ample evidence for this judgment is provided by the academic and popular essays collected in *Realizing Freedom*. Whether expounding his brand of libertarianism, applying it to concrete issues, or responding to critics of libertarianism, Palmer is unfailingly clear and interesting, even when one is inclined to disagree with him. He is also sometimes acerbic, sometimes witty, and sometimes both at once. (His targets are usually asking for it.)

Like Robert Nozick and Murray Rothbard, Palmer grounds his libertarianism in a doctrine of natural rights. Unlike too many rights theorists (libertarian and otherwise), though, Palmer's understanding of rights is deeply informed by the history of rights theory, and in particular by knowledge of the complex historical circumstances under which the notion of natural rights evolved. Specifically, he emphasizes the Aristotelian approach to ethics in light of which Scholastic natural law theorists developed the notion of a natural right, and the role played in hammering out the content of natural rights by the medieval debate between Pope John XXII and the Franciscans over property, and by the late Scholastics' teaching on the moral status of the conquered American Indians. In general, Palmer insists upon testing moral theory against concrete human experience. He very effectively criticizes egalitarian philosophers like G. A. Cohen and Michael Otsuka for resting their arguments on undefended intuitions, bizarre and unrealistic thought experiments, and studied inattention to historical fact.

Palmer is also keen to emphasize that at the heart of the freedom that libertarians value most (or ought to value most) is the rule of law and the stability it provides. This rules out not only Saddam Hussein-style despotism but also the rights theories of Ronald Dworkin and Joseph Raz (which would allow rights to be overridden if some allegedly compelling collective interest

would be served thereby) and the redistributive schemes of egalitarians like Otsuka (which would entail the constant upsetting of property titles in order to maintain equality). But it also requires that government, while it needs to be strictly limited, nevertheless be strong enough to enforce the legal framework without which stable rights are impossible. (Palmer is no anarchist, nor does his preference for market solutions lead him to reduce all human relations to market relations.)

With all of this, even an unreconstructed Thomist (like me) is bound to agree warmly. There are, however, some weaknesses in Palmer's position, especially where he seeks to move beyond the case against big government and arbitrary power—a case a conservative could (and should) endorse—to affirm a strictly libertarian conception of rights and freedom. Like other libertarians, Palmer is sometimes too quick to think that identifying potential practical dangers in some non-libertarian view, or possible bad motives on the part of those who endorse it, suffices to discredit the view itself. In particular, his treatment of the notion of “positive liberty” or “substantive freedom” (which Palmer attributes to Plato, T. H. Green, and Amartya Sen) suffers from this defect. The idea of positive or substantive liberty is that freedom is valuable to the extent that it enables us to realize some end (of a moral sort, say) that is itself truly valuable. Palmer rightly points out that such a conception of freedom is politically dangerous insofar as it can be used to justify the tyrannical imposition on others of the questionable moral opinions of intellectuals and anyone else who happens to hold the levers of power, in the name of promoting “real” freedom.

But that the idea of “substantive freedom” can be abused and may be difficult safely to implement at the level of public policy does not entail that there is nothing of importance in it. Indeed, as the Catholic moral theologian Servais Pinckaers emphasizes, the philosophical premises from which moral theorists like Aristotle and Aquinas proceed—premises with which Palmer himself appears to sympathize, given the support they provide for a doctrine of natural rights—lead precisely to the conclusion that freedom in the fullest sense is “freedom for excellence,” that is, freedom to realize the ends set for us by natural law, and toward the pursuit of which the will is itself directed by its nature.¹ By contrast, the turn in modern thinking about freedom toward an emphasis on mere freedom from external constraints (what Pinckaers calls “freedom of indifference”) followed upon the nominalist revolution of William of Ockham. And given its denial of a universal human nature, nominalism is arguably destructive of the very possibility of an objective moral order, including any objective foundation for a doctrine of natural rights.

What Palmer fails seriously to consider, then, is the possibility that the very ends for which natural rights exist (at least on a natural law view) might entail limitations on those rights. To take only the most obvious

¹ See Servais Pinckaers, *The Sources of Christian Ethics* (Washington, DC: Catholic University of America Press, 1995).

example, if the reason I have a natural right to my life is that such a right is a necessary precondition of my fulfilling the ends the natural law has set for me, then it is hard to see how I could have a natural right to commit suicide. (Indeed, not only Thomists, but also non-Thomistic natural law theorists like Locke would deny that we can have such a right.) And in general, if the very point of natural rights is to safeguard our pursuit of what is good and obligatory for us under natural law, it is hard to see how we could have a natural right to do something that is *inherently* wrong or bad. Of course, that does not entail that government should always prevent us from doing what is inherently wrong or bad for us; there may be practical and indeed moral reasons why it should not do so. The point is that it is hard to see how an *absolute, in principle* prohibition on such government action, of the sort libertarians tend to insist upon, could be grounded in a natural rights theory that derives rights from our obligations under natural law, as the Scholastic and Lockean theories praised by Palmer do.²

It is also important to emphasize that there is more than one way in which a government might try to promote a substantive conception of freedom. Commanding certain positive actions—say, requiring citizens to attend church services on pain of fines or imprisonment—would (we can agree with the libertarian) surely be tyrannical. But it is hardly obvious that it would also be tyrannical to promote virtue in an entirely *negative* way, such as (for example) by keeping heroin use illegal—a policy which does not force anyone to *do* anything, but merely keeps a certain course of immoral action off the table. Again, none of this by itself implies that it really is, all things considered, either possible or advisable for government to promote any particular conception of positive freedom, even by merely forbidding certain actions rather than requiring any. That is a separate issue. The point is that the theoretical and practical issues are more complicated than Palmer seems to realize. One can endorse Palmer's objections to egalitarian redistribution and to any totalitarian, Plato's *Republic*-style enforcement of virtue, and still—for all Palmer has shown—consistently opt for a limited-government, market-friendly brand of conservatism rather than Palmer's thoroughgoing libertarianism.

In other ways, too, the philosophical foundations of Palmer's position might be more carefully developed. In the course of expounding and endorsing Locke's thesis of self-ownership, Palmer also appears to endorse Locke's account of personal identity. Now, as Palmer notes, Locke grounded

² Obviously, this raises all sorts of questions that I cannot address here. I develop and defend an Aristotelian-Thomistic approach to natural rights in general and property rights in particular in "Classical Natural Law Theory, Property Rights, and Taxation," *Social Philosophy and Policy* 27, no. 1 (2010), pp. 21-52, reprinted in *Ownership and Justice*, ed. Ellen Frankel Paul, Fred D. Miller, Jr., and Jeffrey Paul (New York: Cambridge University Press, 2010), pp. 21-52. I discuss Locke's approach to natural rights (and criticize it from an Aristotelian-Thomistic point of view) in my book *Locke* (Oxford: Oneworld Publications, 2007).

personal identity in continuity of consciousness: In Locke's view, I am the same person as my ten-year-old self because I have conscious memories of doing what my ten-year-old self did. Locke thus breaks the connection between personal identity and bodily identity, as his famous example of the prince whose consciousness is transferred into the body of a cobbler illustrates. Nevertheless, Palmer asserts that "Locke identified the person with an animated body" (p. 66), on the grounds that Locke's argument in the *Second Treatise* presupposes that the body is essential to the person. Palmer does not seem to recognize, much less resolve, the contradiction (or at least tension) that exists in Locke's position.

Nor is this merely a question of Locke exegesis. If personal identity really does reside in continuity of consciousness and has no *essential* connection to any particular body, then it would seem that a person's body is not, in the strict sense, a part of the person *himself*. But in that case a "continuity of consciousness" theory of personal identity would seem to entail that the body is an external resource analogous to land, water, and other natural resources, title over which is at least in principle no less disputable than title over these latter resources. The potentially (and radically) unlibertarian implications of this result should be obvious. In general (and as I have argued at length elsewhere), the content of rights claims, including the content of a claim to a right of self-ownership, crucially depends on what theory of personal identity one adopts.³ Yet though Palmer is evidently aware that not every theory of personal identity is compatible with the rights theory he favors, he does not pursue the issue in sufficient depth to show that even his own conception of personal identity is compatible with his approach to natural rights. The most he does is to emphasize that the conception he favors would make a person's body essential to the person himself. But does this mean that he would reject Locke's "continuity of consciousness" approach after all? Would he endorse some variation on a bodily continuity theory instead? Or would he opt for a mixed approach? And how would the theory that results avoid the dissolution of the very notion of the self (and with it, it seems, any notion of self-ownership) that writers like Derek Parfit argue follows upon the standard modern approaches to the issue? We are not told.

All the same, it is to Palmer's credit that he at least recognizes—as too many moral and political philosophers do not—that issues in moral and political philosophy cannot neatly be disentangled from controversies in metaphysics. (Indeed, in addition to his remarks about personal identity,

³ See my "Personal Identity and Self-Ownership," *Social Philosophy and Policy* 22, no. 2 (2005), pp. 100-125, reprinted in *Personal Identity*, ed. Ellen Frankel Paul, Fred D. Miller, Jr., and Jeffrey Paul (New York: Cambridge University Press, 2005), pp. 100-125. I argue there that only an Aristotelian-Thomistic hylomorphic conception of personal identity could plausibly ground a right of self-ownership, though I also suggest that the natural law moral theory that follows from an Aristotelian-Thomistic metaphysics rules out the extreme claims about self-ownership many libertarians would make.

Palmer comments on the relevance to moral theory of the dispute between Aquinas and the Averroists over the unity of the intellect!) This is of a piece with the nuanced and historically informed approach to politics which, as I have said, characterizes his work in general. Other moral and political theorists could profit from the example Palmer sets in *Realizing Freedom*.

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Bernstein, David E. *Rehabilitating Lochner: Defending Individual Rights against Progressive Reform*. Chicago: The University of Chicago Press, 2011.

David E. Bernstein, Foundation Professor at the George Mason University School of Law, has long been regarded as the nation's leading authority on the much-maligned 1905 U.S. Supreme Court decision, *Lochner v. New York*. His new book, *Rehabilitating Lochner: Defending Individual Rights against Progressive Reform*, is the culmination of his years of scholarship on the case. I give Bernstein's book the highest compliment one scholar can pay to the work of another: I learned a lot from reading it. Indeed, after finishing Bernstein's book I will no longer think of *Lochner* the way I used to—as the apogee of the Supreme Court's activist defense of the capital class—and I will certainly teach the case differently than I have in the past.

Rehabilitating Lochner is intellectual history in its highest form. Bernstein, a prolific libertarian legal scholar, states in the Introduction that "*Lochner* is likely the most disreputable case in modern constitutional law discourse" (p. 1). He adds that "What history can tell us is that the standard account of the rise, fall, and influence of the liberty of contract doctrine is inaccurate, unfair, and anachronistic" (p. 6). He devotes the remainder of his book to substantiating this remarkable claim, and he succeeds marvelously.

Chapter One explores the rise of liberty of contract, a constitutional law doctrine that guarantees individuals and corporations the right to enter into formal agreements without government interference. The doctrine is widely understood as the linchpin of laissez-faire economics and free market libertarianism. Bernstein demonstrates in the chapter that the doctrine was not created from whole cloth by an activist, politically motivated Supreme Court, but rather traces to the foundational principle of American constitutionalism: that, above all else, the purpose of government is to protect—not infringe upon—every individual's natural rights. Bernstein documents his claim by detailing the development of a "substantive" interpretation of due process of law both before and after the U.S. Civil War. He credits state courts, not the U.S. Supreme Court, with pioneering the notion that legislation can sometimes be so arbitrary and oppressive as to be inconsistent with due process. Bernstein's original insight in the chapter, however, is that the liberty of contract doctrine was not first and foremost a judicial attack on class legislation. Bernstein writes: "When *Lochner* reached the Supreme Court in 1905, class legislation challenges had ceased to be a significant threat to labor legislation. *Lochner* itself explicitly focused on the right to liberty of contract, and relegated the more egalitarian concerns raised by the ban on class legislation to an oblique aside" (p. 16).

Chapter Two is devoted to the *Lochner* litigation itself, a decision in which the nation's highest court invalidated, on Fourteenth Amendment due process grounds, a New York law that limited the number of hours bakers could work to ten per day and sixty per week. Bernstein chronicles how those who have pilloried *Lochner* over the years do not understand what the litigation was actually about. He points out, for example, that the bakers' union that championed the lawsuit was at least as interested in driving small bakeshops that employed recent immigrants out of business as it was in protecting the health of bakery workers. What impressed me most about the chapter, however, are the sources that Bernstein cites in support of his reading of the dispute: the *Baker's Journal* and *The National Baker*, to mention two particularly relevant periodicals of the day that modern critics of the decision have overlooked. And while *Lochner* is frequently lampooned by these same modern critics as the epitome of legal "formalism," Bernstein shows that the opposite is true and that the Court based its decision on real-world data regarding the health of bakery workers rather than on legalistic dogma. He likewise illustrates that the decision was applauded by the newspapers and law journals of the day, which is again contrary to modern accounts that portray it as out of step with its times.

Chapter Three, a discourse on the sociological school of Progressive jurisprudence that mounted the initial attack on *Lochner*, finds Bernstein excoriating several luminaries of American law. Roscoe Pound, the dean of Harvard Law School, and Oliver Wendell Holmes Jr., the most strident dissenter on the Court that decided *Lochner*, come off particularly poorly. For example, Bernstein includes Pound in a group of legal elites whose support for sociological jurisprudence "often masked a political agenda that favored a significant increase in government involvement in American economic and social life" (p. 41), while Holmes is revealed to be an egomaniac with an "obvious and self-proclaimed disdain for facts" (p. 46).

Bernstein's decision to include a separate chapter on sociological jurisprudence makes perfect sense because, as he puts it, "To fairly assess the liberty of contract doctrine in historical context ... one must consider the contemporary practical alternative: the constitutional ideology of liberty of contract's Progressive opponents" (p. 40). That "practical alternative" could not be more unappealing to anyone committed to American individualism—the libertarian ideal of a legal and political system dedicated to protecting individual rights. As Bernstein makes clear in this chapter, proponents of sociological jurisprudence such as Pound and Holmes cared little about individuals, committed as they were to so-called majoritarian solutions to what they perceived as the shortcomings of private decision-making.

Chapter Four, "Sex Discrimination and Liberty of Contract," and Chapter Five, "Liberty of Contract and Segregation Laws," are, in my judgment, the two strongest chapters of a consistently strong book. Bernstein demonstrates in those chapters that the supporters of *Lochner* were far more protective of the rights of women and minorities than were *Lochner*'s Progressive critics. With respect to women's rights, Bernstein documents

how the Progressive defense of legislative restrictions on women's place in the workforce turned on "paternalistic" arguments that "appealed to contemporary sexism" (pp. 60, 64). Famed Progressive Attorney Louis Brandeis, Holmes's future collaborator on the Supreme Court, was a particularly aggressive practitioner of paternalistic and sexist attitudes, including in what came to be known as the "Brandeis Brief," a memorandum submitted to the Court that insisted, via sociological "evidence," that women were not physically capable of working the same number of hours as men. Those opposed to the Progressive program, in contrast, invoked *Lochner's* conception of liberty of contract as the legal justification for permitting women to compete in the workplace on an equal footing with men.

Turning to the rights of African Americans, Bernstein illustrates in Chapter Five that it was the Progressive opponents of *Lochner*, rather than the conservative proponents of the decision, who consistently practiced racial discrimination. Of course, modern critics of *Lochner* claim otherwise. Yale Law School's Bruce Ackerman, for one, insists that the majority opinion in *Plessy v. Ferguson*, the infamous 1896 Supreme Court decision upholding racial segregation on railroad carriages, had a "deep intellectual indebtedness to the laissez-faire theories expressed one decade later in cases like *Lochner*" (p. 73). Bernstein demonstrates that this view is incorrect because it rests on a flawed reading of both *Plessy* and *Lochner*, and also neglects the 1917 case of *Buchanan v. Warley*—a decision that *invalidated* the residential segregation law of Louisville, Kentucky as inconsistent with the due process clause of the Fourteenth Amendment. Bernstein writes:

In short, the conventional story that the Court's pro-liberty of contract decisions are somehow linked to the toleration of segregation in *Plessy* and other cases cannot withstand historical scrutiny. Indeed, the opposite is the case. When the Court deferred to "sociological" concerns and gave a broad scope to the police power, as in *Plessy*, it upheld segregation. When, however, the Court adopted more libertarian, *Lochner*-like presumptions, as in *Buchanan*, it placed significant limits on race discrimination. (p. 86)

Chapter Six is devoted to a topic that has received a lot of attention from constitutional law scholars over the past decade or so: the Supreme Court precedents that served as the foundation for the explosion of civil liberties decisions in the modern era. Bernstein reveals that here, too, the conventional wisdom is incorrect—that conventional wisdom being that Progressive opponents of *Lochner* had an expansive view of civil liberties and proponents of *Lochner* were hostile to them. Bernstein focuses in this chapter on the decisions the Court issued in the first third of the twentieth century regarding education, eugenics, and freedom of expression in order to substantiate his reading of constitutional history. His discussion of the pro-private education opinions of perhaps the most notorious bigot ever to sit on the Court, Justice James McReynolds, is particularly striking. By voting to

declare unconstitutional on substantive due process grounds the Progressive attempts to hamstring private education, Bernstein insists, McReynolds was protecting racial and ethnic minorities, despite his personal animus for them. Bernstein characterizes McReynolds's jurisprudence in these cases as nothing less than a rebuke against statist Progressive ideas about educational reform. As McReynolds himself put it in one of the cases, "the child is not the mere creature of the state" (p. 96).

Holmes, the darling of the Progressive movement, is made to look like a monster in the eugenics cases. In *Buck v. Bell* (1927), for example, he infamously quipped, "Three generations of imbeciles are enough" (p. 97), an opinion about which he later boasted to a friend, "One decision that I wrote gave me pleasure, establishing the constitutionality of a law permitting the sterilization of imbeciles" (p. 98). Bernstein makes plain that Holmes was not alone in his outrageous views. Professor Fowler V. Harper, for one, included *Buck v. Bell* on a list of encouraging "progressive trends" in the law (p. 98). With regard to freedom of expression, the area of constitutional law with which Progressives are most closely associated, Bernstein describes how "Progressive defenses of freedom of expression relied on utilitarian considerations, and not on freedom of expression as a fundamental individual right" (p. 99). In short, they were majoritarians, not libertarians, and they turned to the Court only because they thought free speech served the interests of the majority at the time.

Chapter Seven addresses *Lochner* in the modern era. By definition, this chapter covers material with which most readers are familiar, in particular the Warren Court's landmark privacy decision, *Griswold v. Connecticut* (1965), and the Burger Court's 1973 abortion rights case, *Roe v. Wade*. Bernstein reminds readers that, Justice William O. Douglas's protestations for the *Griswold* majority notwithstanding, both *Griswold* and *Roe*, not to mention the Court's recent pro-gay rights decision in *Lawrence v. Texas* (2003), all trace to *Lochner*. Bernstein also explains how modern conservative opponents of the *Griswold-Roe-Lawrence* line of cases, such as Robert Bork, are the intellectual offspring of the Progressives who preceded them—and hence hostile to a strong judicial role in protecting individual rights—while modern liberal supporters of that line of cases, such as Laurence Tribe, owe much to prior judges and scholars who embraced *Lochner* (although they try very hard to deny it). Bernstein once again turns the conventional wisdom on its head. He is correct, however. Indeed, I always mention to my constitutional theory students that modern libertarians such as Randy Barnett, Richard Epstein, and Bernstein himself have more in common with modern liberals than they do with modern conservatives in viewing the Constitution as requiring aggressive judicial protection of individual rights from overreaching by the majoritarian political process.

Bernstein concludes *Rehabilitating Lochner* with a summary of what he calls the "modest" conclusions of his book (p. 126). Those conclusions are found on pages 126-27, and they are in reality far from modest. Bernstein has done nothing less than explode the myth of *Lochner*, a decision that any pro-

liberty student of American constitutional law should embrace. This is a book that should reshape the way constitutional law is understood for years to come. Whether it will or not depends on how sincere the liberal professoriate that dominates American legal education is about getting constitutional history right. The “blurbs” on the dust jacket to Bernstein’s book are an encouraging sign that at least several luminaries are sincere. Jack M. Balkin of Yale Law School, William E. Nelson of New York University School of Law, and Mark V. Tushnet of Harvard Law School—liberals all—commend Bernstein for authoring a transformative book about a much maligned Supreme Court decision. They should be applauded for doing so, and Bernstein should be applauded for writing the book.

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Afterwords

Does Islam Need a Reformation?

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One of the common refrains in commentary about the Islamic Middle East, especially in the decade since the terrorist attacks of September 11, 2001, is that Islam needs a Reformation. This analogy with the Protestant Reformation in sixteenth-century Europe is intended to suggest that a similar movement within Islam would counter the fundamentalism of Islamic extremists, strengthen religious freedom, and lead to something like the separation of church and state.

Salman Rushdie, target of a death edict from Ayatollah Khomeini for his *Satanic Verses*, puts it this way: “What is needed is a move beyond tradition—nothing less than a reform movement to bring the core concepts of Islam into the modern age, a Muslim Reformation to combat not only the *jihadi* ideologues but also the dusty, stifling seminaries of the traditionalists, throwing open the windows of the closed communities to let in much-needed fresh air.”¹ Robin Wright, a journalist who writes frequently about the Middle East, describes Iranian philosopher Abdolkarim Soroush as the Martin Luther of Islam, “shaping what may be Islam’s equivalent of the Christian Reformation.”² Soroush rejects the fundamentalism of the ruling mullahs, advocating democracy and a fuller scope for reason in religion. Some Islamic reformers see themselves in the same light. Saudi activist Mansour al-Nogaidan, for example, says, “Islam needs a Reformation. It needs someone with the courage of Martin Luther . . . Muslims are too rigid in our adherence to old, literal interpretations of the Koran. It’s time for many verses—especially those having to do with relations between Islam and other religions—to be reinterpreted in favor of a more modern Islam.”³

¹ Salman Rushdie, “Muslims Unite! A New Reformation Will Bring Your Faith into the Modern Era,” *The Times of London*, August 11, 2005, accessed online at: http://www.timesonline.co.uk/tol/comment/columnists/guest_contributors/article553964.ece.

² Robin Wright, “An Iranian Luther Shakes the Foundations Of Islam,” *The Guardian*, February 1, 1995, quoted from *The Los Angeles Times*, January 1995, accessed online at: http://www.dr.soroush.com/English/News_Archive/E-NWS-19950201-1.html.

³ Mansour al-Nogaidan, “Losing My Jihadism,” *Washington Post*, July 22, 2007,

The historical analogy, in other words, is that modernist, tolerant, reformist Muslims are to the fundamentalists as the Protestants of the Christian Reformation were to the medieval Catholic Church. The call for an Islamic Reformation presumes that the theocratic rulers of Iran and Saudi Arabia—and the would-be theocrats in al-Qaeda, Hezbollah, and the Muslim Brotherhood—are the counterparts of the medieval Catholic Church, and that reformers who oppose them are the contemporary equivalents of Martin Luther, John Calvin, and other Protestant reformers.

Such claims are nearly the opposite of the truth. In fact, it is the Islamists *themselves* who most resemble the early Protestants. Those who employ the analogy are seeing the Reformation through the lens of later developments: the growth of religious freedom and tolerance that culminated in the Enlightenment two centuries later. While the Reformation played a limited and indirect role in that development, it was certainly not what the Protestant leaders intended. They called for a return to the spirit and practices of the early Christian community, without the formal organization or intermediation of the Church—just as Islamists call for a return to the simple faith of Muhammad and the “rightly guided caliphs” who followed him in the seventh century. Like the Protestant reformers of the sixteenth century, Islamists today are fundamentalists. The Protestants wanted to abandon the edifice of scholastic thought, the efforts by Catholic theologians and philosophers to make sense of the religion, and return to a literalist reading of the scriptures—just as Islamists want to bypass the edifice of learned interpretation in “the dusty, stifling seminaries of the traditionalists” in favor of reliance solely on the Qur’an. In philosophical terms, both Protestantism and Islamism represent movements away from the values of reason, the pursuit of happiness in this world, and political freedom. In short, the Islamic world does *not* need a Reformation. The problem is that it’s having one now. What it needs is an Enlightenment.

On the eve of the Protestant Reformation, the Catholic Church presided over the spiritual life of Western Europe. It had survived the fall of the Roman Empire and separated from the Eastern Orthodox Church. Its domain now included Spain, from which Muslims (and Jews) had recently been driven. The Church was a wealthy institution, owning vast properties throughout Europe. Though formally distinct from the political states, it wielded a great deal of de facto temporal power.

The Church also presided over the intellectual life of Europe. Its monasteries and universities were centers for education, preservation of manuscripts, and active debate on philosophical and scientific as well as theological issues. In the thirteenth century, scholars had rediscovered the works of Aristotle, thanks largely to Latin translations from Arabic versions. Aristotle’s views on nature, man, knowledge, and ethics were a massive

accessed online at: <http://www.washingtonpost.com/wp-dyn/content/article/2007/07/20/AR2007072001808.html>.

intellectual challenge to Christians, since they were secular, based on reason, and man-centered, with virtuous happiness as the highest moral aim. Here was a thinker who was obviously capable of profound insight and powerful reasoning. Moreover, the Christian West had had Aristotle's logical works for centuries; they had learned their methods of analysis and disputation from him; and now they discovered that his vision of the world was radically different from theirs.

Though the Church was initially hostile, it did allow discussion of Aristotle's works. Thomas Aquinas put together a synthesis of Aristotelianism and Christianity that the Church could accept. Aquinas's outlook was a radical departure from the views of Augustine, which had previously dominated Christian thought. Whereas Augustine holds that all knowledge, even of the natural world, depends on trust in God, Aquinas holds that our faculties of sense-perception and reason are sufficient to give us knowledge of this world, and that philosophical reason is necessary as an independent adjunct to faith even in matters of religion. Whereas Augustine claims that life in this world is a vale of tears, a brutal initiation for entrance to Heaven, Aquinas holds that happiness in this life is both possible and worthy as a goal. Whereas Augustine teaches that human nature is inherently corrupt, and that we are totally dependent on God's grace for our salvation, Aquinas holds that salvation depends on both grace and man's free will to choose the good, act virtuously, and perform good works.

By the time of the Reformation, this synthesis had become a new orthodoxy within the Church. But the Church did not entirely suppress debate, at least within the universities, and some thinkers went even farther than Aquinas in defending reason over faith.⁴ The Protestant reformers objected to every element of the Thomistic synthesis and sought a return to Augustine's outlook. The flash point of Luther's opposition to the Church was the sale of "indulgences," that is, payments to the Church to ensure a fate no worse than purgatory for oneself or one's loved ones. Luther's critique of indulgences, the main topic of his *The Ninety-Five Theses*, is normally interpreted as an objection to a corrupt practice, a kind of spiritual protection racket. But Luther's objection goes much deeper. He rejects the notion that any worldly power could affect God's choice to save or condemn people.

Luther's doctrine of *sole fides* holds that salvation comes solely through faith in God and Jesus Christ. As historian of religion David M. Whitford puts it:

Instead of storehouses of merit, indulgences, habituation, and 'doing what is within one,' God accepts the sinner in spite of the sin.

⁴ On the other hand, throughout this period, the Church *did* sanction punishment of popular heresies, and, in reaction to the Protestant Reformation, became much more intolerant, using the Inquisition and other means to inhibit dissent.

Acceptance is based on who one is rather than what one does. Justification is bestowed rather than achieved. Justification is not based on human righteousness, but on God's righteousness—revealed and confirmed in Christ For Luther the folly of indulgences was that they confused the law with the gospel. By stating that humanity must do something to merit forgiveness they promulgated the notion that salvation is achieved rather than received.⁵

In short, Luther opposes any notion of earning salvation by good works. Calvin goes even further. His doctrine of predestination holds that God has chosen the elect—those who are to be saved—regardless of merit, and that no human action can alter that choice.

Luther, Calvin, and other Protestants reject the notion that the Church must intercede between man and God. Luther holds that every man is his own priest, relating directly to God without any middleman. In aid of this view, Protestants supported the translation of the Latin Bible into vernacular languages so that ordinary people could read it, and some were burned at the stake for their efforts. This is one of the reasons the Reformation has been seen as a movement toward individualism. But the fundamental rationale was not to promote individual autonomy. It was to promote another of Luther's doctrines: *sola scriptura*. Luther and other reformers wanted to reject the interpretation of Christian doctrine by Catholic scholars and priests and return to the original scriptures as authoritative.

Even when it rests on faith-based premises, the interpretation of texts and the attempt to explain away apparent contradictions is an exercise of reason. That exercise was a hallmark of Catholic scholastic thought. The Protestants wanted to bypass reason and achieve a transparent understanding of scripture, based on a literal, fundamentalist reading. At its deepest level, this goal was motivated by hostility to reason. "Reason is the devil's greatest whore," Luther writes.⁶ If one abandons reason, however, and relies entirely on faith and authority, there is no possibility of reconciling disputes. Inevitably, the Reformation produced a plethora of conflicting doctrines, which led to wars of religion in the century following Luther, Calvin, and their contemporaries.

These wars were one factor that led to the Enlightenment's spirit of tolerance. But the Protestants themselves were not advocates of tolerance. Luther sought to have the German princes in his region adopt his version of Christianity as a state religion. Calvin, in Geneva, instituted theocratic rule,

⁵ David M. Whitford, "Martin Luther," *Internet Encyclopedia of Philosophy*, June 30, 2005, accessed online at: <http://www.iep.utm.edu/luther/>.

⁶ Martin Luther, "Last Sermon in Wittenberg," [January 17, 1546], cited in Martin E. Marty, *Martin Luther: A Life* (New York: Penguin Books, 2004), p. 177.

with Christian morality enforced by law and blasphemy a capital offense. While the wars of religion created an incentive for toleration as a way to end the bloodshed, it is unlikely that this would have led to any lasting condition of religious freedom without other, independent historical factors: the growth in individualism through trade, art, and other developments; the simultaneous development of science, which showed the power of reason; and the arguments of philosophers, like Francis Bacon and John Locke, who broke the hold of theology over secular thought.

Islam has never had a single institution comparable to the medieval Church. Its “clergy” were the imams in local mosques, judges of Islamic law, and scholars in universities such as al-Azhar in Cairo. Known as the *ulama*, they were steeped in study of the Qur’an, of the *hadith* (words and actions of Muhammad), and of the endless commentaries and commentaries upon commentaries produced by previous generations. They were the religious establishment against whom Islamists rebelled, as Protestants had rebelled against the Church. As Emmanuel Sivan notes, the leadership of Islamist groups is “composed for the most part of university students and modern professionals, autodidacts in religious matters.”⁷ Osama bin Laden, for example, was certainly not of the *ulama*, yet he claimed the authority to issue *fatwas* (rulings on Islamic law), just as Luther claimed the autonomy to post his *The Ninety-Five Theses* against the Church. In recent decades, the Internet has made it possible for lay Muslims to learn and discuss Islamic doctrine outside the establishment in the same way the printing press enabled the spread of Protestantism in Luther’s day.

Islamists are not reacting against an Aristotelian strain in Islam. There has been no such strain since the days of Averroes in twelfth-century Spain. The Islamists are reacting against the Enlightenment modernism of the West, which they see as a threat to Islamic culture, but their call for a return to an imagined purer state of Islamic society is analogous to the Protestant goal of freeing Christianity from the worldly compromises and the scholasticism of the Church. The philosophical content of Islamist theory is likewise similar to that of the early Protestants.

There is, first, the opposition to rational inquiry. Islamists are happy to import Western technology, but not the underlying scientific spirit of open inquiry that produced it. Sivan reports that “the radicals voice the all-too-expected complaint that the teaching of science, though not openly critical of religion, is subverting Islam quite efficiently, precisely by being oblivious to it.”⁸ Speaking of his opposition to the United States (the “Great Satan”), Ayatollah Khomeini said, “We are not afraid of economic sanctions or

⁷ Emmanuel Sivan, *Radical Islam: Medieval Theology and Modern Politics* (New Haven, CT: Yale University Press, 1985), p. 56.

⁸ *Ibid.*, p. 6.

military intervention. What we are afraid of is Western universities.”⁹

Islamists also oppose the worldliness of Western life, the pursuit of happiness, prosperity, and pleasure. Sayyid Qutb, an Egyptian theorist of *jihad*, was repelled by what he saw as the materialism of American life during his studies here in the 1940s. “In what he saw as the spiritual wasteland of America,” writes Lawrence Wright in a *New Yorker* profile, “he re-created himself as a militant Muslim, and he came back to Egypt with the vision of an Islam that would throw off the vulgar influences of the West. Islamic society had to be purified, and the only mechanism powerful enough to cleanse it was the ancient and bloody instrument of jihad.”¹⁰ Qutb became a leader of the Muslim Brotherhood in Egypt and was executed in 1965—but not before his works had made him one of the most influential Islamist thinkers.

Islam includes the doctrines of predestination by God’s will and man’s need to submit to God’s commands. Islamists, like the Reformation Protestants, typically hold extreme versions of these views. And the submission must be political as well as personal. The imposition of *sharia*, in order to enforce morality, as Calvin’s theocratic rule in Geneva sought to do, is a central goal.

Islamism is only the latest call for a return to the original vision and purity of Islam; there have been waves of such reform movements throughout the history of the religion. The same is true for Christianity; the Protestant Reformation of the sixteenth century had many predecessors. Both religions were predicated on faith in a transcendent God and the hope of salvation in a life to come. That mystical foundation necessarily conflicts with any effort to understand the world by reason, or to seek one’s happiness in the world, or to enrich the world with the secular values of civilization. In the nature of the case, “reform” will, by rationally defensible standards, be a regression. The most we can expect is that such movements will shake things up and inadvertently lead to progress.

Will that happen with Islam? Will Muslims find and embrace their Enlightenment? Let us hope that they will—and that their transition from Reformation to Enlightenment will be shorter and less bloody than it was in Europe.¹¹

⁹ Ayatollah Ruhollah Khomeini, quoted by Daniel Pipes, “There Are No Moderates: Dealing with Fundamentalist Islam,” DanielPipes.org, Fall 1995, accessed online at: <http://www.danielpipes.org/274/there-are-no-moderates-dealing-with-fundamentalist-islam>.

¹⁰ Lawrence Wright, “The Man Behind Bin Laden,” *New Yorker*, September 16, 2002, accessed online at: http://www.newyorker.com/archive/2002/09/16/020916fa_fact2.

¹¹ This article was first published in a slightly different form in *The New Individualist* (Spring 2011), accessed online at: <http://www.atlassociety.org/tni/islam-reformation>.

The Arab Spring: “Why Exactly at this Time?”

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“Why exactly at this time?” Such is the classic question raised by conspiracy theorists—with apparent nervousness, offering the most surreal interpretations—the moment any remarkable event occurs in the Arab or Islamic world. Though I did not expect to live long enough to witness it, what has truly been remarkable during these days of the Arab Spring—popular, peaceful, civil, and urban uprisings against despotic Arab regimes—has been that the parties which have rushed with intense anxiety and unmistakable panic to take refuge in conspiracy theorizing have been the despotic regimes themselves. Conspiracy theorizing was decidedly *not* indulged in by the masses themselves—masses which we intellectuals had always thought of as enamored, sometimes to the point of dementia, of conspiracy theorizing, and as the prisoners of their naivete and oversimplifications.

The contrast was particularly remarkable after the incessant efforts of the tyrannical and coercive regimes that had worked so hard to present themselves as the loci of the most rational, enlightened, inclusive, patriotic, and civilized tendencies in Arab societies plagued by sectarian, ethnic, tribal, and regional divisions, divisions that had always reinforced their backwardness and anachronism. The usual assumptions about enlightenment and backwardness were suddenly upended by the popular uprisings from Tunisia to Yemen, Egypt, Syria, Bahrain, Libya, and so on. Now we saw those very “enlightened” Arab regimes, at the moment of truth, clinging mechanically, repetitively, and neurotically to the lie of a “conspiracy,” and persisting against all odds with the Kafkaesque absurdities of their delirious logic—the logic contained in the original question, “Why exactly at this time?”

The Arab Poet had a ready answer to that question: “Exactly at this time because it is in the nature of such regimes’ tyranny to render the people ‘incapable of avoiding evil until it afflicts them,’ and ‘incapable of handling their affairs save through make-do measures.’”

Naturally, this answer neither uncovers any real conspiracy, nor offers any serious or even semi-serious answer to the question, “Why exactly at this time?” What it merely does is to vilify the autonomy of the insurgent and sacrificial masses, casting insidious doubt on their capacity for self-

government, and offering some twisted insinuations as to its mental, political, and patriotic capacities. The suggestion is that secret, nefarious wills and covert, harmful intentions lie behind the mass uprising, the essence of which is unknown, while the danger to the nation and its unity from this uprising are beyond comprehension, except by the “trustworthy hands” preserving the old regime and its security, state, and authority. The result is to weld the requirements for the preservation of a tyrannical regime with the requirements of the people’s security, so that the survival of the one depends inextricably on that of the other.

But the masses of protesters, dissidents, and rebels among the people of the Arab Spring had another sort of answer to the question, “Why exactly at this time?” No answer to the question was more eloquent than the outcry provoked by the young lawyer who trembled with elation as he wound joyfully through the streets of the Tunisian capital: “The Tunisian people are free!” It was an outcry followed throughout the world, in sound and in image. In other words, the Jasmine Revolution came at this exact time because the Tunisian people are free, and not because they were the victims of any conspiracy. Not that that answer diminishes the eloquent response of the old Tunisian gentleman we all saw on television, tugging at his gray hair, and expressing regret for the years he had lost: “We grew old, we grew old for this historical moment”—a moment that came too late both for us and for him, but fortunately came before it was too late for everyone.

There was also a third eloquent answer, in sound and in image. “Why exactly at this time?” Because the people wanted to overthrow the regime oppressing them in order jointly to save the nation and the people—and not in submission to the dictates of the foolish and belittling conspiracy asserted by the likes of President Ali Abdullah Saleh of Yemen, according to whom the mass uprising was hatched at the White House and directed from Tel Aviv.

Some have argued that the Arab Spring uprisings in Tunisia, Egypt, Yemen, Bahrain, Syria, Libya, and elsewhere are a continuation of the popular Islamic Revolution in Iran against the Shah’s tyranny (1979), or perhaps an imitation of the overwhelming popular democratic movement that toppled the military dictatorship of Suharto in Indonesia (1997-98), or an extension of the millions-strong Lebanese Cedar Revolution of 2005, which purged Lebanon of the bitter tutelage of Syrian military domination, or an imitation of the Green Movement in Iran, opposing the fraud of its presidential “elections,” guaranteeing victory for the regime’s candidate Ahmadinejad (2009). Others mention in this regard the massive peaceful, popular movement that toppled Philippine dictator Ferdinand Marcos and his wife Imelda in 1986, in favor of a new and more acceptable democratic rule.

These assumptions and hypotheses, while entirely respectable, give insufficient attention to the Damascus Spring of 2000 in its specifically Arab context.^[1] It is the Damascus Spring which represents, in my opinion, the

[Eds.: ¹ See Sadik J. al-Azm, “The View from Damascus,” *New York Review of Books*, June 15, 2000, accessed online at: <http://www.nybooks.com/articles/>

“theoretical introduction” and initial peaceful “dress rehearsal” for the later explosion of slogans, demands, complaints, appeals, aspirations, and sacrifices that arose during the Arab *intifadas* of 2010-2011. The pioneering precedent in the Arab context derives from the Damascus Spring because the collective slogans, demands, and protests invoked by the popular Arab uprisings from Tunisia to Yemen to wounded Libya were all present, in a very sophisticated manner, in the political, reformist, and critical documents issued by the Movement for the Restoration of Civil Society in Syria during the brief Damascus Spring. These documents were the subject of public democratic discussion through a wide range of lectures, seminars, debates, fora, and meetings which dominated Syria during that period, offering a wide variety of theses, competing views, criticism, and journalistic ferment. The hope was that the new youthful leadership of Syria would participate in this lively and refreshing activism, and make its contribution through debate toward forming an inclusive form of public opinion concerning Syria’s need for immediate remedies, intermediary reforms, and political solutions for the more distant future. For example, the Statement of the 99 Intellectuals (Charter 99, Damascus, September 30, 2000) and the Founding Document of the Committees for the Revival of Civil Society, known as the “Document of the One Thousand” (Damascus, January 2001), as well as the Statement of the Forum of the Supporters of Civil Society (Damascus, August 2002), all deal accurately with and concisely diagnose the issues, dilemmas, difficulties, and gaps that caused Tunisia, Egypt, Libya, Yemen, Syria, and Bahrain to rise up in the name of freedom and dignity in 2010-2011.

It is true that none of the aspirations of the Damascus Spring came to fruition. Indeed, quite the opposite: the authorities suffocated the Spring’s discussions gradually, killing them off before any of its flowers could blossom. The Damascus Spring was suppressed because it explicitly brought light to the accumulating crises in the country without having had a hand in creating them; because it explicitly touched on the stagnation and gridlock which plagued the Syrian regime, without having had a hand in bringing them about; and because it responded clearly to the general deterioration of Syrian society, without having produced any of it. The great strength of the Damascus Spring consisted in its having reacted to intractable problems in the knowledge that its participants were *not* responsible for having brought them about.

For these very reasons, and “exactly at this time,” precious blood has been shed in Syria’s cities, towns, and villages, not because the protesting

[archives/2000/jun/15/the-view-from-damascus/](http://www.siu.no/eng/Front-Page/Global-knowledge/Issues/No-1-2006/A-View-from-the-East-Sadik-al-Azm/). See also Torgeir Norling, “A View from the East: Sadik al-Azm,” *Global Knowledge* 1 (2006), accessed online at: <http://www.siu.no/eng/Front-Page/Global-knowledge/Issues/No-1-2006/A-View-from-the-East-Sadik-al-Azm/>; and Juliette Terzieff, “Whither the Damascus Spring? Syria Steps Up Crackdown on Reformers,” *World Politics Review* (May 23, 2007), accessed online at: <http://www.worldpoliticsreview.com/articles/794/whither-the-damascus-spring-syria-steps-up-crackdown-on-reformers.>]

masses have been implementing a nefarious foreign plot to undermine the stability and strength of their country, but for precisely the reverse reason. The fear is that there is a policy of official, willful blindness about all of this, and that a security-based solution will consistently be sought for each protest and demonstration, treating its peaceful, popular demands as subversion, rebellion, treachery, and betrayal. This has deepened an already deep rift between the ruling regime and Syrian society from which there is no escape in the foreseeable future. Policies that drive this divide will lead to generalized sectarian strife and factionalism that wax and wane in cycles of concealed repression and outward explosion.

The current Arab Spring *intifadas* have been called “youth revolutions” and “high-tech revolutions” on account of their reliance on such instant communication and electronic information technologies as mobile phones, laptop computers, satellite television, the Internet, or even more specifically, Facebook, Twitter, and You Tube—technologies geared to monitoring events moment by moment, around the clock. This enormous qualitative shift has played a decisive role in favor of the insurgent people, and has helped strengthen the movement’s character as skillful, well-informed, and fundamentally peaceful, educated in the latest achievements in communications technology, information exchange, and the social transmission of knowledge. At the same time, this technological shift has put the old Arab regimes and their security apparatuses in an awkward position, as they lack the techniques by which to deal with the emerging situation, except to seek cover in the supposed uniqueness of each Arab country, asserting the illegitimacy of what is happening in *this* Arab country as against the possible legitimacy of what is happening in *that* one. Suddenly, each despotism insists that *it* is the *sui generis* exception to the rules that govern its Arab neighbors. And so, each official Arab government spokesman claims that Egypt cannot be likened to Tunisia, that Libya cannot be likened to Egypt or Tunisia, that Syria is neither Tunisia, nor Egypt, nor Libya....

And yet the fact is, in these revolutionary times, Egypt was never more similar to Tunisia, Bahrain, and Libya. Just as the insurgent citizen of Bahrain wants reform that provides him with a constitutional monarchy and a Prime Minister who is appointed not by the Royal Palace but by the actual balance of forces in the political arena, so the insurgent Egyptian and Syrian citizen wants, in his turn, a reform that provides him with a genuine constitutional president of a republic, a Prime Minister who is not appointed by Presidential fiat, but by the democratic political processes of his or her country. The truth is that Arabs have never felt their political affinities—the similarities in the challenges they face and aspirations they share—as keenly as they have today. Nor have the police states of the Arab world ever been as similar as they have been during the Arab Spring, unified in their commitment to despotism and oppression.

A note of caution ought to be made about the desire to reduce the Arab Spring’s revolutions, especially those in Tunisia and Egypt, merely to the use of high-tech communications. It is *people* who make revolutions and

intifadas. It is people who demonstrate, protest, object, and sacrifice, using whatever technology is available to them. It is true that the youth constitute the largest demographic in the Arab population, so it is no surprise that the *intifadas* of our people now tend to be revolutions of young men and women, and likewise unsurprising that they use modern technologies to bring them about—just as previous revolutions and uprisings made use of the audio cassette, radio, transistor, newspaper, pamphlet, and newsletters. (During Nasser’s times, there were the “Voice of the Arabs” radio broadcasts; even messenger pigeons were at times used to achieve revolutionary goals.)

But we ought not to let the fascination with technology obscure the real character of the present uprisings. The youthfulness of the uprisings broke radically with the deep-rooted Arab tradition, which requires the emergence of charismatic leadership behind which the revolutionary masses march, charismatic leadership being the necessary condition for the achievement of revolutionary goals. This time, the “charisma” of the revolutionary moment has shifted from the usual fixation on a single or unrivaled leader, to the flow and diffusion of the assembled masses in many Tahrir Squares across the Arab world, making their assembly itself the true charismatic locus of revolution and change. This important development is certainly new for us Arabs and for our modern socio-political history.

For this reason, and perhaps for the first time, the various “Tahrir Squares” of Tunisia, Cairo, Sana’a, Manama, and Benghazi were characterized by intense civil participation by women, and by the visible presence of children—both boys and girls—and this in extremely conservative societies and cities. In addition, the demonstrations were characterized by innovative forms of aesthetic and other expression—various forms of art, music, performances, plays, dances, balloons, prayers, satire, sarcasm, and graffiti. Generally, this found joyful expression, despite the wholesale use by the entrenched regimes of aggressive thugs, deadly militias, indiscriminate repression, and live ammunition. There was, despite this, something of a carnivalesque spirit and practice in the packed squares of the Arab Spring, something certainly unheard of in modern Arab political history. Such innovative youthful phenomena were foreign to the usual mode of Arab political protest, which had previously inclined to the severely cruel, the intensely grim, and the immensely angry, as expressed by aggressive screaming, conflagrations of books, flags, and other objects, attacks on foreign embassies, and constant threats of violence and intimidation. In fact, most of the uglier manifestations of violence were confined, for the first time, to the despotic regimes themselves and their agents of repression—thugs, militias, and “trustworthy hands.” The “mark” one saw on their faces bespoke servile prostration, venality, and blind loyalty.

In fact, the regimes behaved with great cunning in adopting narrow, destructive, and self-interested domestic policies whose basic objective was the destruction of all prospects and possibilities for civil society. Typically, they confronted the population with an irresolvable trilemma: *either* (1) allow the continuation of the despotic regimes, with their martial law, their

permanent states of emergency, and their security apparatuses; *or* (2) accept the dark rule of Islamic fundamentalism, out to cancel modern history in the name of God's *hakmiyya* (divine sovereignty), and eager to impose the Islamic form of martial law called Islamic *sharia*, with its notoriously brutal penal code; *or* (3) accept the inevitable vertical disintegration of our societies along sectarian, ethnic, regional and/or tribal lines, with all that this means in terms of discord, strife, and war. The point was to restrict the possible options so as to force on the population a politics of "the lesser evil"—option (1) being the presumptively least evil of the three.^[2] The goal was to force the people's submission to the despotic status quo, whatever the cost. Brother Leader Colonel Muammar al-Qaddafi took this further by adopting a kind of Samson option: either *me . . . me . . . me . . .* and my family and children remain in power, or I bring the Libyan national temple down on our heads.^[3]

The charismatic moment of the Arab Spring uprisings exhibited a high degree of maturity that succeeded in transcending the alarmist scenarios promoted and put into practice by the entrenched Arab regimes. The popular *intifadas* transcended this disabling trio of options—transcended it *in principle*—through their transparent civility, collective citizenship, open patriotism, tolerant humanism, and nascent democracy. In fact, the very effort required to transcend the evil options, along with the work carried out on behalf of the animating values of the popular movement, contained within them the capacity to bind together the pre-national loyalties, sects, allegiances, and regionalisms that still divide Arab society. This same political energy should also provide the capacity to deal properly with democracy and its constitutional and electoral mechanisms so as to prevent any elected majority from turning once again into a power-monopolizing tyranny intent on imposing yet another despotism on the country. The political minority's right to exercise its role as a democratic opposition, and its right to reconstitute itself democratically into a new ruling majority, have become permanent features of Arab political psychology. This energy should likewise help to secure greater empowerment for civil society, as well as the rules and conventions for participating in it; to ensure the expansion of the civil state, along with the neutrality of its agencies, posts, regulations, and procedures (including the principles of the separation of powers and independence of the judiciary); to guarantee a minimum level of respect for human rights, for both male and female citizens, and all of their personal and public rights, chief

[Eds.: ² Cf. Anthony Shadid and David D. Kirkpatrick, "Promise of Arab Uprisings Is Threatened by Divisions," *The New York Times* (May 21, 2011), accessed online at: <http://www.nytimes.com/2011/05/22/world/middleeast/22arab.html?pagewanted=all>.]

[Eds.: ³ The original version of this essay was written and published before Qaddafi's death in rebel hands on October 20, 2011. The exact circumstances of Qaddafi's death remain unclear as of November 2011.]

among them the rights of conscience, thought, belief, expression, and the right to worship or not to.

As my wife Iman put it to me, if glory goes to the youth Muhammad al-Bouazizi for sparking the Jasmine Revolution in Tunisia by immolating himself (and not others) in protest, and if glory goes to the Egyptian youth Khalid Said, who died under torture after the notorious security services arrested him before the spark of the uprising moved to the roundabouts and squares of Egypt, then surely the glory of sparking the Syrian *intifada* goes to the boys of Dera'a who had their nails pulled out and palms burned with fire after being arrested.[⁴]

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