

REASON PAPERS

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Symposium: Tara Smith's *Judicial Review in an Objective Legal System*

Hercules and Narragansett among the Originalists —Timothy Sandefur
What Is the Law? A Response to Sandefur —Tara Smith

Symposium: Part II: Douglas J. Den Uyl and Douglas B. Rasmussen's *The Perfectionist Turn*

Responsibility, Respect, and Justice: Skepticism about Metanorms —Billy Christmas
The Need for Metanormativity: A Response to Christmas —Douglas Den J. Uyl and Douglas B. Rasmussen

Articles

Psychological Egoism and Self-Interest —William Irwin
Wilt Chamberlain Redux: Thinking Clearly about Externalities and the Promises of Justice —Lamont Rodgers and Travis Joseph Rodgers

Book Review

Karen Liebreich's *The Black Page: Interviews with Nazi Film-Makers* —Gary James Jason

Afterwords

You've Got Mail: Teaching Osama bin Laden's "Letter to the Americans" —Irfan Khawaja
The Fountainhead Play: Taking a Stand on Ideas —Robert Begley

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REASON PAPERS

Vol. 39.2 – Winter 2017

Editorial	—Carrie-Ann Biondi and Shawn Klein	6
Symposium: Tara Smith’s <i>Judicial Review in an Objective Legal System</i>		
Hercules and Narragansett among the Originalists		
	—Timothy Sandefur	8
What Is the Law? A Response to Sandefur	—Tara Smith	37
Symposium: Part II: Douglas J. Den Uyl and Douglas B. Rasmussen’s <i>The Perfectionist Turn</i>		
Responsibility, Respect, and Justice: Skepticism about Metanorms		
	—Billy Christmas	48
The Need for Metanormativity: A Response to Christmas	—Douglas J. Den Uyl and Douglas B. Rasmussen	60
Articles		
Psychological Egoism and Self-Interest	—William Irwin	69
Wilt Chamberlain Redux: Thinking Clearly about Externalities and the Promises of Justice	—Lamont Rodgers and Travis Joseph Rodgers	90
Book Review		
Karen Liebreich’s <i>The Black Page: Interviews with Nazi Film-Makers</i>	—Gary James Jason	105
Afterwords		
You’ve Got Mail: Teaching Osama bin Laden’s “Letter to the Americans”	—Irfan Khawaja	108
<i>The Fountainhead</i> Play: Taking a Stand on Ideas	—Robert Begley	118

Editorial

Various issues in moral, legal, and political philosophy dominate the contributions to this issue of *Reason Papers*. There are also a few forays into arts, culture, and pedagogy. Our issue opens with a symposium on Tara Smith's book *Judicial Review in an Objective Legal System*.¹ The primary purpose of her book is to clarify the role that judicial review should serve within a proper (i.e., objective) legal system in order to make sure that *law* governs. Along the way, she challenges several prominent legal theories. Timothy Sandefur agrees with Smith that law should be normatively anchored and that most of today's legal theories are problematic, but he argues that she dismisses too quickly certain versions of them. He makes a case that there is more legitimate room for historical understandings and creativity in the law than she allows for. Smith counters that Sandefur's depiction of law is a shifting target, which undermines the ability of judges to uphold the Rule of Law.

A second symposium continues a lively authors-meet-critics exchange over Douglas Den Uyl and Douglas Rasmussen's book *The Perfectionist Turn: From Metanorms to Metaethics*.² Billy Christmas first summarizes Den Uyl and Rasmussen's project: they provide a moral grounding for a liberal political system, without imposing any particular vision of the good. Such a political system offers "a *metanormative* obligation to respect each person's sphere of authority over their lives, or in other words, their respective rights to liberty" (p. 49). Christmas is skeptical, though, that metanorms are needed for justifying respect for rights, for such norms constitute a flourishing life rather than being just an instrumental precondition for flourishing. Den Uyl and Rasmussen are wary about Christmas's rejection of the need for metanorms. They argue that such a move blurs the line between the concrete, individual level of ethics and the abstract, general level of political life, thus hazarding the legislation of morality.

Some issues in moral and political philosophy are perennial. William Irwin revisits one such issue: psychological egoism. He not only defends the unpopular view that psychological egoism is tautologically true in an "interesting and nontrivial" way, but also that "altruism is an impossible ideal" (p. 69). Much hangs in this argument on conceptual clarity. Irwin specifies what he means by self-interest and altruism, disentangling them from

¹ For a review of this book that appeared in a previous issue of *Reason Papers*, see Carrie-Ann Biondi, "Tara Smith's *Judicial Review in an Objective Legal System*," *Reason Papers* vol. 38, no. 1 (Spring 2016), pp. 182-89.

² For Part I of this authors-meet-critics exchange, see the four-article Symposium on *The Perfectionist Turn* in *Reason Papers* vol. 39, no. 1 (Summer 2017), pp. 8-64.

similar concepts, and defends an expanded view of the self. Lamont Rodgers and Travis Joseph Rodgers revisit the Wilt Chamberlain example made famous by Robert Nozick.³ They focus on unseating Gordon Barnes's claim that libertarians such as Nozick and Eric Mack have failed to defend the historical entitlement theory of justice that drives the Wilt Chamberlain example.

Irfan Khawaja's contribution interestingly blends Mideast politics, rhetoric, and pedagogy. His main focus is pedagogical, carefully setting out the parameters of what constitutes "dialectical excellence" (p. 108) and finding that his teaching experience reveals the abysmal failure of students to manifest this complex set of skills. The test case comes with how well—or poorly—students are able to understand, analyze, and reflect on Osama bin Laden's craftily composed "Letter to the Americans."

Contributions by Gary James Jason and Robert Begley remind us of how powerful art is. Jason reviews a fascinating book by Karen Liebreich that is based on a series of interviews she did in the 1990s with Nazi film-makers. This gives us a chilling glimpse into the Nazi propaganda machine's use of that medium. Begley takes us in a more uplifting direction by lauding director Ivo van Hove's recent four-hour stage production of Ayn Rand's epic 1943 novel *The Fountainhead*. He delves into the details of how this play heroically dramatizes the importance of ideas, providing a welcome respite from the cynicism and naturalism on offer in much of today's theater.

We hope you find this issue's thought-provoking articles as stimulating as we do.

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³ Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), pp. 161-64.

Symposium: Tara Smith's *Judicial Review in an Objective Legal System*

Hercules and Narragansett among the Originalists:
Examining Tara Smith's *Judicial Review in an Objective Legal System*

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1. Is There Really Such a Thing as Law?

Tara Smith's *Judicial Review in an Objective Legal System*¹ has given us an exceptionally powerful argument about the role of the courts in a free society—one which I suspect may be too powerful for its own good. Since the advent of “judicial restraint” or “judicial minimalism,” the legal profession has become so intensely skeptical of the kind of philosophical rigor Smith advocates that it has become a point of pride among some to reject the very possibility of legal theory.

In 2012, J. Harvie Wilkinson, Chief Judge of the Fourth Circuit Court of Appeals, published *Cosmic Constitutional Theory*, the thesis of which is that there is no such thing as valid legal theory; that pretensions to the contrary are hocus-pocus designed to empower a cadre of powerful judges at the expense of democracy, and that the only rescue for the “inalienable right of self-government” is for judges to defer to the decisions of the elected branches at virtually all imaginable cost.² That “inalienable right of self-government” is the

¹ Tara Smith, *Judicial Review in an Objective Legal System* (New York: Cambridge University Press, 2015). Hereafter, all references to this book will be cited parenthetically in the text. Smith's book was the focus of an Author-Meets-Critics session of the Ayn Rand Society, at which I presented an earlier version of this article, in January 2017 at the Eastern Division meeting of the American Philosophical Association.

² J. Harvie Wilkinson, *Cosmic Constitutional Theory: Why Americans Are Losing Their Inalienable Right to Self-Government* (New York: Oxford

only right to which Wilkinson devotes substantial attention,³ and on it he builds his theory—yes, *theory*—that courts should subordinate themselves to the will of the people democratically expressed . . . except when they should not. This sounds flippant, but it is in fact what he argues. He acknowledges that constitutional protections for freedoms of speech or religion give courts ground for invalidating legislation that intrudes on these freedoms,⁴ thus recognizing (in theory—yes, *theory*) constraints on democracy. However, as those constraints are themselves democratically imposed—since the people can make and unmake the Constitution—this is really only a manifestation of the will of the majority itself, and thus not really a constraint on the majority at all.

That is also part of the argument Publius makes in *Federalist* 78, but unlike Publius, Wilkinson recognizes no limit whatsoever on the power of the majority, because in his view any such limits would be so much “theory,” and would therefore embody only the subjective personal preferences of whoever enunciates the theory. How, then, is the will of the majority a legitimate principle of rule? Is that not itself a “theory”? Wilkinson provides no answer. He takes it as a given that the majority’s power is legitimate. Nor does he explain why this theory—yes, *theory*—is immune from his universal condemnation of legal theory as such. Taken to its logical limit, Wilkinson’s argument is anti-intellectualism *per se*. It is a revival of the ancient Greek skepticism of Cratylus, who, Aristotle tells us, was so rigorous in rejecting the validity of any assertion of truth that he “finally did not think it right to say anything but only moved his finger, and criticized Heraclitus for saying that it is impossible to step twice into the same river; for he thought one could not do it even once.”⁵

University Press, 2012).

³ This is, of course, not a right at all, but a delegated power. The authors of the Declaration of Independence and the U.S. Constitution rejected the proposition that any person or any majority could have a *right* to govern others; see Timothy Sandefur, *The Conscience of the Constitution* (Washington, DC: Cato Institute, 2014), pp. 1-13.

⁴ Wilkinson, *Cosmic Constitutional Theory*, p. 78.

⁵ Aristotle, *Metaphysics*, in *The Basic Works of Aristotle*, ed. and trans. Richard McKeon (New York: Random House, 1941), pp. 745-46.

I dare say this would be considered tame by the standards of the crude Positivism that dominates the legal academy today. Consider, for instance, Orin Kerr, whose positivism is so absolute that he believes even rules of legal interpretation exist only by fiat. At one point, he even claimed that “If the Supreme Court . . . adopted the canon that statutes must be read to encourage absurdity, then I would change my interpretation of the statute accordingly.”⁶ This statement is at once logically incoherent and revealing of the nature of positivism. It is incoherent because the difference between “absurdity” and its opposite is a *natural* one, not one that is or can be dictated by a court, so that Kerr’s claim that the anti-absurdity rule derives its validity from the court’s command, is question-begging. (It would only make sense if the court also promulgated an entire system of logic to define “absurdity,” explain how lawyers should distinguish it from non-absurdity, and justify the court’s authority to promulgate such a system.) It is revealing because it indicates how the crude positivist thinks law is essentially a command.

To the Positivist—which is to say, most of the legal community today—law is a command from a superior to an inferior. We, the citizens, are the inferiors, and the will of the majority is the superior. Why the majority, rather than a king? Why a constitutional majority, rather than a contemporary legislative majority? Positivists have no answers to these questions, except the question-begging answer that that’s just the way the majority prefers it. But that answer is not only question-begging, it is also, as H. L. A. Hart explains, essentially a rejection of the proposition that there is such a thing as law *at all*.⁷ There is no difference, then, between law and a threat of force.

Positivism cannot provide an account of lawfulness. To say, “The will of the duly constituted authorities is the law” begs the question when one asks, “What makes these authorities ‘duly constituted’?” If the promulgation of a bill according to *procedural*

⁶ Orin Kerr, “‘Kerr’s Inconsistent Positivism’: A Response to Sandefur,” *The Volokh Conspiracy*, December 6, 2010, accessed online at: <http://volokh.com/2010/12/16/kerrs-inconsistent-positivism-a-response-to/>.

⁷ H. L. A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1961), chap. 2. Hart considered himself a Positivist, but in *The Concept of Law*, he not only thoroughly refutes the idea that law is a command, but also provides a rough blueprint for secular natural law theory.

rules is sufficient to make that bill *law*, regardless of its content, then on what basis do we evaluate proposed rules of promulgation? Why should the Positivist obey what the Supreme Court says about statutory interpretation, instead of what a psychic or a madman or a terrorist says?

The answer, according to a *non-Positivist*, is that authority is duly constituted because the procedural rules are *themselves* in accord with pre-political normative standards that are objectively valid.⁸ The Positivist cannot make that argument. For him, rules are simply the will of the governing power, so there can be no difference between “duly” constituted authority and someone who just pretends to be duly constituted. All claims to rule are ultimately arbitrary; there is no fact of the matter, no principle of political legitimacy. His only available answer is: force. The stronger party’s will is law. This, indeed, is what Jeremy Bentham and Oliver Wendell Holmes, Jr., hold.⁹ They do not claim, as they cannot, that the stronger party’s will is more *legitimate* or *true* or *right* than the will of the weaker party. No claim to authority *ever* has such legitimacy in their eyes—it’s just that one side destroys the other or physically compels his surrender, and then proceeds with its arbitrary rule.

The Positivist is thus forced to admit that he would even subscribe to an absurd result—a result that declared that up is down and that Thursdays are actually Wednesdays and that the earth stands unmoved and the sun orbits around it—if the Court were to command that.¹⁰ But where does the Supreme Court get its power to confer such legitimacy? Is it not equally arbitrary to recognize *the Court*, and not a psychic or a madman or a terrorist as the duly constituted authority? To

⁸ That was the Founding Fathers’ justification for majority rule; see James Madison, “Sovereignty,” in *The Writings of James Madison*, vol. 9, ed. Gaillard Hunt (New York: G. P. Putnam’s Sons, 1910), pp. 568-73.

⁹ See my discussion in Timothy Sandefur, *The Permission Society* (New York: Encounter, 2016), pp. 12-19.

¹⁰ Positivism, writes Hadley Arkes, *The Return of George Sutherland* (Princeton, NJ: Princeton University Press, 1994), p. 223, “might have been fitted out with the pretensions of legal theory, but it reduced to the performance of Woody Allen’s dictator, who simply proclaimed that ‘from now on, all girls under sixteen are over sixteen.’ Promulgation is all. When the law is not tested for its substance, but merely for its enactment, any order may claim the standing of law.”

do so must either be a quiet recognition that there is, *in fact*, some normative principle of legitimacy, or it must be a purely personal, arbitrary decision on one's part—a decision that has no foundation in anything but itself. The Positivist denies the former possibility. Consequently, for him, the law is whatever the duly constituted authority says, and we know it's duly constituted because the Positivist arbitrarily decides to recognize it as such.

Generally speaking, though, courts themselves do not regard their role in this way. In the Positivist's view, a court decision is correct for no other reason than that it is the decision of the court. There is no correct answer to legal problems, only the orders of the duly constituted authority—that is, of the court itself. Thus the U.S. Supreme Court was right—*had to be right*—when it decided *Bowers v. Hardwick* (1986), and the Supreme Court was right—could not be otherwise than right—when it decided *Lawrence v. Texas* (2003).¹¹ And yet, in *Lawrence*, the Court said that *Bowers* was “not correct when it was decided.”¹² But that cannot be, since *Bowers* was a decision of the Court. Yet *Lawrence* *must* be right, because it, too, was a decision of the Court! This Cretan Paradox—or what Christopher Green calls the “WTDIWD [wrong the day it was decided] problem”¹³—plagues any pure Positivist.

To appeal for a moment to non-normative, Positivist criteria: note that courts themselves typically do *not* regard themselves as making law by pronouncement. They view their job as resolving disputes by applying both legal and pre-legal principles of right and wrong, logic and illogic, sense and nonsense, with which the positive law must comply. Reading statutes absurdly is not just wrong because courts say so; courts believe it is wrong to do so because it is irrational, arbitrary, impracticable, and therefore not law. And they are correct about that. Again, if a court's say-so is the law, then the fact that courts say they do not make law by mere say-so must itself be law.

¹¹ *Bowers v. Hardwick* (478 U.S. 186 [1986]); *Lawrence v. Texas* (539 U.S. 558 [2003]).

¹² *Lawrence*, p. 578.

¹³ Christopher Green, “Constitutional Truthmakers,” *Notre Dame Journal of Law, Ethics, and Public Policy* (forthcoming), *Social Science Research Network*, January 17, 2017, abstract accessed online at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2901157.

There is an even simpler way to refute the claims of the crude Positivist. Imagine a statute that declared, “This is not a statute,” or that was just a jumble of incoherent letters, or that required and prohibited the same act. Would it be valid? To answer “No” is to recognize that there are at least *some* principles—natural principles—that limit the power of the courts, whether they choose to admit it or not. The U.S. Constitution itself reflects this fact because, of course, it contains no definition section, so that we are forced to consult something outside of its four corners—including at a minimum what Publius called “the nature and reason of the thing”¹⁴—if we are to understand and apply its terms.

In fact, there is a still easier way to refute the pretensions of Positivism’s anti-theory theory. I have noted Kerr’s statement that if the Court were to prescribe a rule of interpretation, he would be bound to follow it. Let us assume that that is so. The Constitution of the United States *does* prescribe rules of interpretation, at both the beginning and the end. At the beginning, it explains that the Constitution was written “to secure the blessings of liberty.” At the end, it explains that “the enumeration of certain rights in this Constitution shall not be construed to deny or disparage others retained by the people.” These lines indicate that the Constitution fits neatly within the classical liberal principles of the American founding: that people have certain natural rights which the constituted authorities must respect. Even assuming Positivism’s premise about obeying interpretive instructions, then, the Constitution itself instructs us to apply it as a natural rights document.

2. Originalism and Objectivity about the Promise of the Law

The most popular rival to Positivism—although it shares many of its weaknesses and is arguably a species of Positivism—is Originalism. Originalism is an attempt to avoid the dangers of subjectivity and so-called “judicial activism.” If the specter haunting the courts is the judge who uses “interpretation” as an excuse to impose his personal preferences on the law,¹⁵ Originalism aspires to

¹⁴ Alexander Hamilton, “*Federalist* No. 78,” in *The Federalist*, ed. Jacob Cooke (Middletown, CT: Wesleyan University Press, 1961), p. 526.

¹⁵ Edward G. White, *The American Judicial Tradition*, 3rd ed. (New York: Oxford University Press, 1988), chap. 13.

provide a methodology that will give us objective definitions of legal terms and keep judges out of messy disputes about values.

Much work by Originalists has been fruitful. However, its broader claims are what Daniel Dennett has called “deepities”¹⁶: what is true about them is obvious and uninteresting, and what is interesting and not obvious about them is untrue. To the extent that Originalism counsels us to consult the context and the constitutional structure, that is true but uncontroversial (or should be), whereas what it says about the nature of language is false. Smith effectively demonstrates that Originalism turns out not to be objectivity—a picture of what the law actually *is*—but “*inter-subjectivity*” (p. 160): a picture of what a specified group of people *thought* the law to be. Originalist scholars often do give us good reasons why those people came to the conclusions they did, but then it is *those reasons* that really have weight with us, not the fact that those people found such reasons compelling.¹⁷ And then that isn’t really Originalism, because nothing about it is necessarily rooted in the *origin* of the law.

Lawrence Solum has provided the most thorough argument in defense of Originalism.¹⁸ He distinguishes between *normative* and *semantic* Originalism. The normative Originalist claim is that we are obligated to abide by the meaning that the authors of the document (or their audience) would have given its terms. The semantic Originalist claim is that the nature of language is such that the words in a text *can only have* that meaning that was understood by its authors or their contemporaries. In his words, “the semantic content of constitutional provisions is fixed at the time of framing and ratification.”¹⁹

¹⁶ Daniel Dennett, *Intuition Pumps and Other Tools for Thinking* (New York: Norton, 2013), chap. 12.

¹⁷ This is one reason that even non-Originalists employ what appear to be Originalist arguments at times—disputes over what the founding generation thought about a constitutional text are often covers for disputes over what the text in fact means.

¹⁸ Lawrence Solum, “Semantic Originalism,” *Illinois Public Law Research Paper* No. 07-24 (2208), abstract accessed online at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120244.

¹⁹ *Ibid.*, p. 2.

The normative Originalist claim is easily rejected, I think, by the old adage, “The past is a foreign country.”²⁰ We are under no more obligation to follow the meaning intended by past generations than we are to abide by the interpretation of a domestic statute by a foreign government. True, courts do sometimes cite foreign precedent, but they do so only because they find the reasoning in those precedents persuasive, not because they are obligated to follow those precedents. Likewise, we may find a past generation’s interpretations of a law persuasive, but if so, it is because the arguments they mustered are persuasive, not because of the historical fact that the persons mustering those arguments happened to be the founding generation. This is why courts are free to overrule their own wrongly decided precedents. In fact, I would argue that they are *obligated* to do so, because judges take an oath to support the *Constitution*, not the rulings of previous courts. When a past court ruling diverges from the correct interpretation of the Constitution, it is the court’s duty to follow the latter, not the former.

The semantic Originalist claim seems stronger: that because of the nature of language, what a statute says is *and can only be* what its authors and their contemporaries believed it to say. Smith rejects this argument, in favor of the Objectivist theory of concepts. In her view, language expresses concepts which themselves reflect real meanings in nature. Those meanings do not change, although our understandings of them can. When our understanding of nature broadens, we should follow reality, not our previously enunciated understandings of it.

One attractive feature of this argument is that it recognizes the possibility that the authors of a text might be mistaken about what it means. It is possible, according to her argument, that everyone in 1792 or 1868 thought the word “liberty” would not include, say, the freedom to engage in consensual sexual intercourse with a member of the same sex—and that, *in fact*, it does include that freedom, and therefore *Lawrence* was rightly decided and *Bowers* wrongly decided all along. Certainly, any argument that purports to be objective should recognize the possibility that the authors of a document can be wrong about its meaning. There is a *fact of the matter* about what the statute says, independent of what we or anyone else might think about it. It seems impossible for Originalism to account for the possibility that a statute’s authors or ratifiers could have been wrong about its meaning, because

²⁰ This saying originated in L. P. Hartley’s novel *The Go-Between* (Bloomsbury, UK: Hamish Hamilton, 1953).

it has just that meaning that the authoritative source chooses to give it, no more or less.²¹

One avenue for criticism here is that there is a difference between law and other kinds of texts. In fact, law is not a text at all. Law is a promise—a mutual relationship between the rulers and the people, pursuant to which the parties agree that certain things will be done under certain circumstances.²² Often, people write down these promises, and much of what we call interpretation consists of determining what exactly the promise is, given either some dispute over the language in which it is memorialized or some unforeseen state of facts. But it is not *necessary* to a promise or a law that they be written down, and even when they are, the promise, not the words on the paper, is the law. The written words, whether in a constitution, a statute, a precedent, a contract, or other written matter of legal significance, are only *evidence* of the law.²³ The law itself is an abstraction—a promise or proposition—which can be determined even in the absence of written materials. That suggests that whatever the correct epistemological answer to the question of what or how a

²¹ Solum suspects that Originalism can survive this criticism (“Semantic Originalism,” p. 95). He holds that the “core insight of Originalism” is “that semantic content is fixed at the time of utterance” (p. 56). But this raises the paradox that either meaning is “fixed” at that time because of the action of some authoritative meaning-conveyer—in which case, anything that he or she chooses to “fix” is *ipso facto* the law—or it is “fixed” at that time because the nature of law is such that fixation just is a part of law, in which case this is actually a claim about the objective nature of law, rather than a claim about public understandings or intentions or “the notion of original public meaning” (p. 59). In the latter case, Solum’s claim might be true or false but, again, does not seem distinctively *Originalist*.

²² Lon L. Fuller, *The Morality of Law*, 2nd ed. (New Haven, CT: Yale University Press, 1969), pp. 19-27.

²³ As Lord Justice Mansfield observed in *Jones v. Randall* (98 Eng. Rep. 954, 955 [1774]), “it is admitted that the contract is against no positive law; it is admitted that there is no case to be found which says it is illegal; but it is argued, and rightly, that, notwithstanding it is not prohibited by any positive law, nor adjudged illegal by any precedents, yet it may be decided to be so upon principles; and the law of England would be a strange science indeed if it were decided upon precedents only. Precedents serve to illustrate principles, and to give them a fixed certainty. But the law of England, which is exclusive of positive law enacted by statute, depends upon principles.”

statutory text means, there are other considerations involved when a court must determine what the law is.²⁴

If law is a promise, then we face different constraints when we try to discern the meaning of a statute than there are when we try to interpret a literary text or a scientific journal article. If we are interpreting a scientific journal article, our effort is to understand with precision the nature of the phenomenon being described. Ambiguity and rhetorical effects are accordingly minimized. If we are reading a literary text, we try to find the most thorough, evocative, and integrated meaning in the text. Our approach to ambiguity and rhetoric might therefore be wholly different. If we are trying to determine the contours of a promise, then considerations of fairness and notice apply, which might influence our reading in different ways. That is why there are traditional rules of interpretation and construction in the law, which do not exist, or not in the same form, in science or literature. Scientists have no counterpart to “construe against the drafter” or “*ejusdem generis*,” or the parol evidence rule, just as the law has no counterpart to the noble scientific tradition of publicly admitting one’s mistakes.²⁵ Some interpretations of a text that might be plausible as a matter of scientific or literary interpretation would be *unfair* if adopted as a matter of law.

This quality of fair play in interpretation is what led Ronald Dworkin to argue for the “chain novel” theory of legal interpretation: that the role of the judge is “to find, in some coherent set of principles about people’s rights and duties, the best constructive interpretation of

²⁴ This brings to mind Jed Rubenfeld’s distinction between intentions and commitments; see Jed Rubenfeld, “The Paradigm-Case Method,” *Yale Law Journal* vol. 115 (2006), pp. 1990-92. A commitment obliges, while an intention does not. Intentions are subject to change when circumstances change, while a commitment binds us even in changed circumstances, unless we have specified otherwise: “The point of a commitment is to impose a future obligation on the self to take (or not take) some action even if doing so runs contrary to later preferences” (ibid., p. 1991). We can form commitments even without realizing it, based on repeated behavior giving rise to settled expectations. See, e.g., *Burns v. North Chicago Rolling Mill Co.* (65 Wis. 312 [1886]). This is even truer when speaking of intergenerational laws like the 200-year-old Constitution.

²⁵ For an attorney to admit publicly his past errors would often violate the rules of legal ethics. In fact, lawyers are ethically obligated *not* to be objective much of the time. It is the job of the court, not the lawyer, to be objective.

the political structure and legal doctrine of [the] community.”²⁶ An even better image is given by Lon Fuller, who likens the judge’s task to a person trying to tell a funny story he has heard from another:

The “point” of the story, which furnishes its essential unity, may in the course of retelling be changed. As it is brought out more clearly through the skill of successive tellers, it becomes a new point; at some indefinable juncture the story has been so improved that it has become a new story. In a sense, then, the thing we call “the story” is not something that is, but something that becomes; it is not a hard chunk of reality, but a fluid process, which is as much directed by men’s creative impulses, by their conception of the story as it ought to be, as it is by the original event which unlocked those impulses. . . . The statute or decision is not a segment of being, but, like the anecdote, a process of becoming.²⁷

Let us put some meat on these bones with a hypothetical example: Suppose that a statute written in ancient days makes it illegal to catch “fish” in a certain place. Suppose further that at the time it was written, it was widely believed that dolphins are fish. We now know that dolphins are not fish but are mammals, but nobody has bothered to update the statute. A fisherman is arrested one day because he caught a dolphin. He now pleads before the court that he should be found not guilty for this reason.

The Originalist would say that the fisherman should be convicted, because at the time the statute was written, it was believed that dolphins would be covered. On the other hand, I believe that Smith would answer that the fisherman should be acquitted, because *in fact*, dolphins are not fish, and what matters is what the statute says, not what its authors believed it to say. Yet this conclusion would be overhasty, because the law is not the *text*, but the *understanding* that the text is meant to represent or to memorialize. The understanding was that it covered dolphins, and only accident or inattention—or the fact that people thought the statute adequate—has left the text of the

²⁶ Ronald Dworkin, *Law’s Empire* (Cambridge, MA: Harvard University Press, 1986), p. 255.

²⁷ Lon L. Fuller, *The Law in Quest of Itself* (Boston, MA: Beacon Press, 1966), p. 9.

statute unchanged despite scientific discoveries about fish and dolphins. If we assume the fisherman were somehow alone in knowing that dolphins are not fish and also knew that the public generally believed the statute would cover dolphins, it would be unjust to let him escape punishment merely on account of a technicality that has nothing to do with the reasons for which the promise was formed. On the other hand, if he caught the dolphin in the innocent belief that the statute did not apply—because he knew that it referred to fish and dolphins are not fish—then it seems even more unfair to convict him.

This may seem like a fanciful example, but something like this in fact happened to me. Some years ago, I litigated a case in California challenging the constitutionality of a licensing law for pest control workers. One strange aspect of the law was that it only applied if the pest control worker was dealing with pigeon infestations. Someone suggested, in all seriousness, that I make the following argument: The birds colloquially called “pigeons” in California are actually not pigeons (which are of the genus *Patagioenas*) but are technically rock doves (of the genus *Columba*). Could I not argue that the statute did not apply to my client, because it referenced “pigeons” and he was only dealing with “rock doves”? Needless to say, that argument would have risked sanctions, precisely because everyone knows that the statute, in referring to pigeons, meant this specific type of animal, and it would be unfair to the body politic for a court to rule that the statute had all along been referring to the wrong bird.

In cases that involve terms like “liberty” or “property,” the potential for unfairness is proportionately increased. Witness the “judicial takings” cases, in which courts have told property owners that—surprise!—as a matter of law, they never owned their property to begin with, and therefore are owed no compensation when the government takes it.²⁸ It seems unfair for a court to tell a property owner that, notwithstanding the general consensus at the time of a law’s passage that it would not include X, in fact it *does* include X, because we have come to realize that this is what the text of the statute means.

In the ordinary world of contracts, property, and criminal law, there are many rules, including the rule of lenity, statutes of limitation,

²⁸ See, e.g., Justice Antonin Scalia’s dissent from denial of *certiorari* in *Stevens v. City of Cannon Beach* (510 U.S. 1207 [1994]), and the opinion of the Court in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection* (560 U.S. 702 [2010]).

and adverse possession, designed to avoid the unfairness of interpreting laws in ways that alter the layout of rights and responsibilities that the parties either contemplated beforehand or have come to embrace. And Smith acknowledges that “[e]ager as an objective court might be to correct unwarranted legal practices, given the deviant precedents and associated expectations that have taken root, it would be unjust to do so by shock treatment, abruptly eradicating policies that people have organized their affairs around and have reasonably come to rely upon” (p. 267).

Yet at the same time, she is resolute that “[w]e must not allow legitimate concern for [settled expectations] to distort our reasoning about what *is* constitutional,” and that however familiar and long-standing an unconstitutional practice, it cannot change the meaning of the law (p. 267). And in distinguishing between the law and “[p]eople’s *understanding* of the law,” she criticizes Dworkin’s chain-novel theory (and, presumably, Fuller’s anecdote theory) on the grounds that they view the law as “ever in-progress; it has no fixed identity.” Under Dworkin’s approach, she argues, “the ultimate root of legal authority” would be “not the Constitution or written law, nor even the principles reflected in that law,” but “judges’ ideals *coupled with* those received legal materials” (p. 193).

I think this critique fails for two reasons. First, it is not true that according to the Dworkin or Fuller models, the law has no identity. A thing that is in the nature of becoming rather than being—a process—does have identity: fire, for instance, or life, or a performance of *Hamlet*.²⁹ Second, Smith seems on occasion to conflate the written text, which is only evidence of the law, with the law itself. She appears to be arguing that the “sovereign” should be “the Constitution or written law.” But according to our Constitution, it is the *people* who are sovereign, not the Constitution; the people, after all, promulgate the Constitution, and choose judges to interpret and apply it. The law is not the written Constitution—of which there is no single, definitive text—but the meaning that the words specify.

A variation on Fuller’s anecdote example may make the point clearer: nobody would deny that *Hamlet* exists and has identity. There is such a thing as *Hamlet*; it is not *The Three Little Pigs*—even though *Hamlet* is *not* the written text (in fact, there is no authoritative text of *Hamlet*) or any single performance of it. *Hamlet* is a play—an enacted

²⁹ Aristotle, *Metaphysics*, in *The Complete Works of Aristotle*, ed. and trans. McKeon, p. 732.

story—a process of which any single performance is only evidence.³⁰ If asked, who is the “sovereign” in this analogy? I answer, the audience and the actors, working together, who present and accept (or reject) any particular performance of *Hamlet* as being true to the genuine article.³¹ Unlike Smith, I see nothing shocking in a model that sees judges as “play[ing] the analogous role” and thereby “making the law” (p. 193). A better way of viewing it is that when judges (or presidents or members of Congress) act out the parts assigned to them by the Constitutional “play”—and when citizens act in compliance with contracts, or tort or property law—they are *performing* law.

Perhaps this confusion is resolved by Smith’s distinction, in her passages addressing Dworkin, between “the overt, readily accessible . . . meaning [of the statute] that has a definite identity,” on the one hand, and “the practical effect that will result from the judiciary’s ruling about a law’s semantic meaning,” on the other hand (p. 194). Her point is that the behavior of courts is not the law—the law is the instructions by which courts (and all of us) are supposed to behave. That is correct. But the *text* is not the *instructions*, either. The text *describes* the instructions. The *law*, not the text, is the instructions. That is why courts can recognize scribes’ errors, and apply rules such as “interpret the statute to give effect to all its provisions” or “avoid absurd results.” The law is the stage directions, which even in *Hamlet* are sometimes missing from the text or are only present by

³⁰ In the initial draft of this article, I said that *Hamlet* is *not* any particular performance of *Hamlet*, but is “that ideal thing which the perfect performance, were it possible, would enact.” Smith rightly pointed out that this seemed to reflect a Platonic conception of the nature of law. That is not, however, what I had intended to say. Instead, *Hamlet* is not any particular performance of *Hamlet*, but is that experience produced when and while the instructions of the playbook are followed, just as baseball is that thing that occurs when the rules of baseball are followed by the requisite number of players. I am not analogizing law to *Hamlet*, but to the stage directions and lines which, if followed, result in a performance of *Hamlet*.

³¹ This analogy is important, I think, because the law has a historical and philosophical kinship with dramatic performance. Trials are, in a sense, dramatic recreations of real events for the benefit of a jury, which renders a verdict just as an audience renders its decision after the recreation of the events in a play. Ayn Rand’s *Night of January 16th* takes dramatic advantage of this kinship.

implication.³² Smith is right that if we think law is the behavior of courts, then that deprives the law of meaning and makes the courts sovereign. The *statute* is not the law, however; the *meaning* of the statute is the law. That meaning is described and prescribed by the text, as well as by implicit factors that control how the text is to be interpreted (just as it is implied that the characters in *Hamlet* who are given lines are capable of speaking them³³). But the understanding of the text can change, and it is then *that understanding*, not the text, that is the law. To take another Shakespearean example, few would deny that the balcony scene in *Romeo and Juliet* is a part of the play and that any performance of *Romeo and Juliet* would be lacking without it. Nevertheless, the text contains no stage directions, does not specify the presence of a balcony, and is not separated from the previous scene.³⁴

I am not as squeamish as Smith is about describing legal reasoning as a *creative* enterprise. In her view, for a judge to act as a creator of law amounts to “overrid[ing]” the law (p. 198). I’m not so sure. Law, of course, need not be written down. Rules not expressed in statutes, or only afterward memorialized in statutes, are still law, as for instance common law tort rules or the principle of equitable tolling. A statute, let us say, specifies a limitations period for bringing suit, but also prescribes an administrative exhaustion requirement—a person must ask the government to review its procedures before he can file his case. Suppose he submits that request and the limitations period

³² This is common with Shakespeare. For example, in the climactic sword fight, the First Folio provides virtually no stage directions. We are left to infer from the following lines that Hamlet has struck Laertes with his sword:

Ham. One.

Laer. No.

Ham. Judgement.

Osr. A hit, a very palpable hit.

This is an obvious inference, perhaps, but an inference nonetheless.

³³ Again, this may seem a silly example, but Synetic Theater in Washington, D.C., regularly performs “silent Shakespeare” in which the actors dance, pantomime, and grunt versions of the plays; see James Bovard, “A Silenced Shakespeare in Washington,” *Wall Street Journal*, July 13, 2015. In my view, this is simply not Shakespeare.

³⁴ Sylvia Morris, “Romeo and Juliet’s Balcony Scene,” *The Shakespeare Blog*, March 24, 2014, accessed online at: <http://theshakespeareblog.com/2014/03/romeo-and-juliets-balcony-scene/>.

expires before the government completes its review. May he still file suit? Equitable tolling is the principle that the limitations period should be paused or “tolled” so that the person does not suffer because the government takes too much time in the pre-lawsuit review process. Courts regularly apply equitable tolling where statutes are silent on the matter. Are they “creating” the law by doing so? Yes, and they do so in part by consulting broader principles of public policy and the judges’ own views about the fairness of a particular situation.

This does not mean that the law lacks identity, so long as the judges make their decisions within the objective boundaries of the concepts involved. The same is true of tort rules: Is it negligence for a property owner to fail to warn of a known danger on his land? Should the answer depend on whether the law wants to discourage trespassing? Finding that trespassers are owed a lesser duty than invitees are, falls within the boundaries of the objective definition of the concept of negligence—even though the judges in answering the question are *creating* the law of negligence.

Smith argues that this is not the same thing as creating the law, but only “the explicit articulation of that which is implicit in a rule or of that which can be logically derived from a rule” (p. 196). But a judge who fashions a new rule of equitable tolling or synthesizes a tort law doctrine from prior precedents is engaged in a creative act as much as the scientist who formulates a theory or a poet who writes a sonnet. A truly brilliant solution to a legal problem, such as Chief Justice John Marshall’s decisions in *Fletcher v. Peck* (1810) or *Dartmouth College v. Woodward* (1819),³⁵ does just this. Marshall cited virtually no authorities in these cases, and the outcomes were not logically entailed by the relevant text, which was that no state shall make a law that impairs the obligation of contract. There would have been nothing non-objective about him ruling that the term “contract” only refers to agreements between private parties and not to charters or patents. Marshall’s rulings, though, fashioned ingenious solutions to those problems that certainly fell within the objective meaning of the term “contract.”

Judges are even more creative in cases where there is no relevant text, as in the equitable tolling or tort law examples. True, common law lawyers have usually preferred to speak of judges *discovering* or *finding* law than creating it, but a scientist who fashions

³⁵ *Fletcher v. Peck* (19 U.S. 87 [1810]); *Dartmouth College v. Woodward* (17 U.S. 518 [1819]).

an intellectual model by a process of deduction and induction is certainly *creating* it. Perhaps what he does is best described in a passage from *Areopagitica*, where John Milton writes of scholars who strive to “unite those dissevered pieces which are yet wanting to the body of Truth. To be still searching what we know not, by what we know, still closing up truth to truth as we find it (for all her body is homogeneal, and proportionall) this is the golden rule.”³⁶

3. Can the Law Change without the Words Changing?

The point is that law is always a combination of reason and fiat,³⁷ of explication and creativity, and when a judge goes wrong in fashioning a new legal rule or applying an old rule to new circumstances, the wrongness is in the lack of fit or inconsistency of that rule with the law, not in the creativity itself. This might seem a semantic difference, but Smith places a great deal of weight on the purported distinction between application and creativity when it comes to judges, and criticizes judges who “override” the law and act as creators. In my view, the judicial function rightly understood does encompass the creation of law, and *any* decision that is wrong as a matter of legal reasoning “overrides” the law, even if it is not creative. A judge who honestly misreads a statute’s terms and misapplies it—say, fines the defendant \$100 when the statute only authorizes a \$50 fine—“overrides” the law. The fault is in the error, not in the “creativity.”

While a statute certainly does not change based on settled expectations, the *commitments* that the language is meant to memorialize *can*, even without a change in the text. We know from everyday life—as well as from such contract law principles as “course of performance”³⁸—that promises can be changed by circumstances, even if there is no writing to memorialize those changes. What counts is the *promise*, not the memorialization; the letter of the statute is not the law. The law is the abstract proposition that the letter is meant to

³⁶ John Milton, *Areopagitica*, in *Areopagitica and Other Prose Works of John Milton*, ed. C. E. Vaughan (Minneapolis, MN: Dover Thrift Editions, 2016), p. 30.

³⁷ Lon L. Fuller, “Reason and Fiat in Case Law,” *Harvard Law Review* vol. 59 (1946), pp. 376-95.

³⁸ *Hobbs v. Massasoit Whip Co.* (158 Mass. 194 [1893]).

convey. If that abstraction changes, then the law has changed, even if the meaning of the writing has not. To return to my “performance” analogy: It seems to me that the balcony scene is a part of *Romeo and Juliet*, just as standing during Handel’s “Hallelujah” chorus has become a part of the *Messiah*, and the famous thirty-two *fouettés* in the *pas de deux* of *Swan Lake* have become a part of *Swan Lake*, even though these agglomerations have no textual mandate. Audiences have come to regard them as so much a part of the originals that it would seem strange—*inauthentic*, even—to say they are not a part of these performance works. That is, although the texts of these works have not changed, the commitments they represent to audiences and performers have.

James Madison believed that the Constitution can change likewise, at least to some degree. In explaining why he signed the bill to recharter the Bank of the United States, despite having earlier opposed the Bank on constitutional grounds, he explained that, in his view, legislative precedent deserves respect just as judicial precedent does, in expounding the Constitution. Legal precedents are respected if and when they are reasonable, and because they keep society stable and predictable:

[I]f a particular Legislature, differing in the construction of the Constitution from a series of preceding constructions, proceed to act on that difference, they not only introduce uncertainty and instability in the Constitution, but in the laws themselves; inasmuch as all laws preceding the new construction and inconsistent with it are not only annulled for the future, but virtually pronounced nullities from the beginning.³⁹

It is generally better, he argued, to rely upon an interpretation of the Constitution “which has the uniform sanction of successive legislative bodies, through a period of years under the successive varied ascendancy of parties,” than to embrace an interpretive method that allows “the opinions of every new Legislature, heated as it may be by the spirit of party, eager in the pursuit of some favourite object, or led astray by the eloquence and address of popular statesmen,

³⁹ James Madison, “Letter to Charles Jared Ingersoll (June 25, 1831),” in *The Mind of the Founder: Sources of the Political Thought of James Madison*, rev. ed., ed. Marvin Meyers (Hanover, NH: Brandeis University Press, 1981), p. 391.

themselves, perhaps, under the influence of the same misleading causes,” to alter the understanding of the nation’s fundamental law.⁴⁰ Because the National Bank had existed for twenty years, had been sanctioned by Supreme Court rulings, and had obtained “the acquiescence of all the local authorities, as well as the nation at large,” it would have disrupted the nation’s settled expectations for Madison to have vetoed its recharter.⁴¹

Is this to endorse Bruce Ackerman’s theory of “constitutional moments”?⁴² I honestly don’t know. The risk, of course, is that, as Michael McConnell says, “the criteria for constitutional moments become so malleable that almost any significant popular movement addressed to a constitutional issue will suffice.”⁴³ It is difficult to deny that in some cases, settled expectations about the content of a law or legal system can diverge from the actual meaning of the written text, and become so entrenched that the difference between the objective *content* of the text and the *settled expectations* regarding that law becomes irreparably blurred. If it would be unjust to disrupt these settled expectations, what is that other than to say that the law itself has changed? Law is, after all, nothing but settled expectations plus justice. Smith herself acknowledges that “whether a legal system exists in a given area” is a “non-normative matter of fact”; she rejects the proposition that an unjust law is no law (p. 89 n. 2).

Rather than endorsing the “constitutional moments” theory, what I think Madison recognized is that notwithstanding the fact that a constitution is written down precisely to resist alteration, it is nevertheless true that public acquiescence in unconstitutional behavior can legitimize that behavior to such a degree that disputing its constitutionality afterward becomes too much for the law to bear. (This is a point that Smith recognizes; see pp. 261-62.) At that point, it seems senseless to insist that it is nevertheless not law. This is a familiar notion to us; we find it throughout the law in principles of repose or

⁴⁰ Ibid., pp. 392-93.

⁴¹ Ibid., p. 393.

⁴² Bruce Ackerman, *We the People: Foundations*, vol. 1 (Cambridge, MA: Belknap Press, 1991).

⁴³ Michael McConnell, “The Forgotten Constitutional Moment,” *Constitutional Commentary* vol. 11 (1994), p. 142.

adverse possession. So while one might be tempted to say that, in the event of a conflict between the legal text and the public's understanding of that text, the text ought to prevail, the law already rejects this in at least some instances.⁴⁴

However, if the law is an abstract promise that can change even in the absence of written evidence, then the commitments that constitute the law might evolve to the point where they are not only different from, but perhaps contrary to, the text's objective meaning.⁴⁵ This is why the question "Is a dolphin in fact a fish?" is different from the question "Given that the statute committed us to a prohibition on fishing, and has always been enforced with regard to dolphins in the past, and we now know that technically it wouldn't apply to a dolphin, nevertheless does the law still apply when a fisherman catches a dolphin?" Smith treats the first question as an epistemological one and the second as one of practical statesmanship: given settled expectations and the nature of the commitments involved, what is the best way to restore a misunderstanding that has arisen over what is and is not legal? Courts already do this.⁴⁶ I am arguing that these two questions cannot always be *qualitatively* distinguished, just because law is a commitment, and commitments, unlike other objects, can change depending on our expectation about their content. Perhaps this is a

⁴⁴ This is not to endorse the Burkean concept of "prescription" in full, but to recognize that the American constitutional order is based on the British common law, but only as far as is consistent with the natural rights of man. Our Constitution's "sole authority" is *not* "that it has existed time out of mind" (Edmund Burke, in *The Works of Edmund Burke* [London: George Bell and Sons, 1890-1906], vol. 6, p. 146), but our law does presume that "it is with infinite caution that any man ought to venture pulling down an edifice which has answered in any tolerable degree for ages the common purposes of society, or on building it up again without having models and patterns of approved utility before his eyes" (*ibid.*, vol. 2, p. 334).

⁴⁵ For instance, in the Eleventh Amendment cases.

⁴⁶ Courts have at times announced a constitutional rule, but applied it only prospectively, where the immediate application of the rule would disrupt settled expectations. See, e.g., *Turken v. Gordon* (223 Ariz. 342, 351-52 [2010]); *Kearney v. Salomon Smith Barney, Inc.* (39 Cal. 4th 95, 130 [2006]); *Ex Parte Archy* (9 Cal. 147, 171 [1858]).

manifestation of the fact that law always straddles the boundary between “is” and “ought.”⁴⁷

The best response to these objections may be that while the law is a promise, it is a unique type of promise, developed behind a unique kind of veil of ignorance: a promise which is going to be made binding on future generations we do not know. Justice therefore requires that we take special care to minimize subjectivity and protect the rights of the innocent as much as possible.⁴⁸ In order to achieve that goal, we adopt rules of thumb that straddle the boundary between epistemology and political philosophy, between linguistic interpretation and the normative considerations of individual rights. The rule of contractual interpretation that we construe contracts of adhesion strictly against the drafter, for example, is meant to protect parties against surprises. The U.S. Constitution is the ultimate contract of adhesion, and we accordingly use interpretive rules to protect the innocent, such as the rule of lenity in criminal law. Smith’s argument for objective interpretation—that the fisherman who catches the dolphin should be acquitted—gives effect to this commitment to impose the risk of surprise on the government rather than on the citizen.

The perfect illustration of this comes from a case that does, in fact, involve fish.⁴⁹ In *Yates v. United States*,⁵⁰ the Supreme Court ruled that a law forbidding the destruction of a “record . . . or tangible object,” did not apply to a fisherman who destroyed a fish he had caught illegally, which he did to conceal his crime. The question before the Court was whether a “fish” is a “tangible object” for purposes of the statute. Fish are obviously tangible objects, but the Court ruled that given the context, including the history of enforcement as well as

⁴⁷ Fuller, *The Law in Quest of Itself*, pp. 8-9.

⁴⁸ Randy Barnett, *Restoring the Lost Constitution* (Princeton, NJ: Princeton University Press, 2004).

⁴⁹ While this article was in press, the Ninth Circuit Court of Appeals decided in *Makah Indian Tribe v. United States* (873 F.3d 1157 [9th Cir. 2017]), that where a treaty with two Indian tribes referred to “fish,” that term encompassed sea mammals also, because “the [tribes] (and possibly even the [federal] commissioners) understood the Treaty to protect [the traditional practices of] whaling and sealing.” *Ibid.*, p. 1166.

⁵⁰ *Yates v. United States* (135 S.Ct. 1074 [2015]).

traditional interpretive rules designed to protect individual rights—particularly, the rule of lenity—the statute did not apply. That conclusion, said the Court, would ensure “that criminal statutes will provide fair warning concerning conduct rendered illegal.”

4. What Would Judge Narragansett Do?

Smith addresses the question of what a judge committed to her vision—Hercules, if you will, or Judge Narragansett⁵¹—would do in today’s legal system, which is in so many ways contrary to any reasonable reading of the constitutional text. She argues that a “contextual application of objectivity . . . would counsel a gradual transition back to a fully objective application of the relevant law” (p. 267). While there is “no pain-free path back to objective law” from today’s situation (p. 268), judges should gradually restore objectivity, guided by the legal system’s overall purpose of protecting individual rights. This means putting an end to the rational basis test, among other things. But I think there are a few devils in the details that are overlooked by focusing on relatively easy questions like the rational basis test.

First, it remains to be explored how, in these hard cases, the judge’s interpretive task relates to broader values such as the protection of individual liberty. This is complicated by the relationship in Smith’s view between a text’s linguistic meaning and the *legally acceptable* meanings of that text *qua* a component in a politically legitimate legal system. She argues that “[t]he proper understanding of *any discrete element* of the legal system rests on an understanding of the system’s overarching substantive mission” (p. 226, emphasis added). Thus, a judge should, when interpreting any particular segment of the law, also view it holistically and interpret it in order “to advance its principal, overarching purpose,” which is the protection of individual rights (p. 226). In other words, *linguistic* interpretation is cabined by moral and political values so that there are some interpretations of texts that “might be . . . valid . . . were those words used in different contexts,” but can “not be . . . valid understanding[s] of the provision *as law*, that is, as genuinely carrying the authority of law,” because they offend the underlying values of the legal system.⁵²

⁵¹ The latter is Ayn Rand’s ideal judge, depicted in her novel *Atlas Shrugged* (New York: Random House, 1957). Hercules was the name Dworkin gave his ideal judge; see Dworkin, *Law’s Empire*, p. 239.

⁵² Tara Smith, “Originalism, Vintage or Nouveau: *He Said, She Said Law*,”

This is problematic because most of a judge's interpretive tasks are at too fine a level for a broad framework of values to be much help. On the other hand, when it *is* helpful, *it*, and not the linguistic interpretation, does the real work. When a judge is asked to decide what is chicken⁵³ or what is a boat,⁵⁴ moral and political values will at best play a minor role. When asked to decide what qualifies as "property" or "liberty" under the Fourteenth Amendment, moral or political considerations will overwhelm linguistic ones. This suggests that Smith's recommendations give judges little guidance in important cases, considering the broad generality of many of the applicable moral and political principles,⁵⁵ and the fact that "a proper understanding of a legal system's mission does not dictate a single, uniquely acceptable set of rules by which a legal system can serve that mission," but "permits a certain range of acceptable alternatives" within which "officials enjoy discretion in adopting the exact rules by which the system will operate" (p. 54).

How, then, would Judge Narragansett interpret the commerce clause? That clause grants Congress power to regulate commerce with foreign nations, among the several states, and with the Indian tribes. Putting aside relatively easy cases such as *NFIB v. Sebelius* (2012) (easy because it simply asked whether to expand federal authority beyond what existing precedent permits),⁵⁶ this is not an area where Smith's prescriptions help. The objective meaning of "commerce among the several states" is commercial intercourse across state lines, but that is no help in a case like *Baldwin v. G.A.F. Seelig, Inc.* (1935), which asked whether a state law imposing a minimum price for milk could be applied to an in-state dealer who acquired the milk wholesale in another state, had it shipped into the state, and then sold it retail in

Fordham Law Review vol. 82 (2013), p. 625 and n. 18.

⁵³ *Frigalment Importing Co. v. B.N.S. International Sales Corp.* (190 F. Supp. 116 [1960]).

⁵⁴ *Lozman v. City of Riviera Beach* (133 S. Ct. 735 [2013]).

⁵⁵ Cf. Ayn Rand *Philosophy: Who Needs It* (New York: New American Library, 1982), p. 4: "political philosophy will not tell you how much rationed gas you should be given and on which day of the week—it will tell you whether the government has the right to impose any rationing on anything."

⁵⁶ *NFIB v. Sebelius* (132 S.Ct. 2566 [2012]).

the original packages in which it was shipped.⁵⁷ The breadth of federal authority over interstate commerce certainly has *implications* for individual liberty, but only indirectly so, and there may be cases where broader federal authority would actually protect individual liberty better.⁵⁸

Indeed, it is not even clear how Judge Narragansett would decide a case like *National Labor Relations Board v. Jones & Laughlin Steel* (1937), which upheld the constitutionality of federal regulations of wholly intra-state commercial transactions, on the theory that doing so was necessary and proper to preventing disruption of the inter-state economy.⁵⁹ If Congress has the enumerated power to regulate commercial transactions that cross state lines, and also to pass laws necessary and proper to effectuate its enumerated powers, it is difficult to see why Judge Narragansett would not uphold the constitutionality of the Act on this theory. True, that is an expansive interpretation, but that is not *necessarily* a bad thing in terms of individual liberty, and it appears to fall within the “broad range” of answers that objective moral values permit. Certainly *Jones & Laughlin Steel* contradicts the original understanding of the Clause’s meaning, but it is not clear that it violates either Smith’s linguistic or political principles.

On the other hand, what about cases in which the Constitution itself is contrary to individual liberty? Smith writes: “The legitimate authority of the law (of a particular legal system as a whole) naturally

⁵⁷ *Baldwin v. G.A.F. Seelig, Inc.* (294 U.S. 511 [1935]). It will not do to say that the judge should simply strike down the New York law for violating freedom of contract or other individual liberties. That was not the question presented in *Baldwin*, and would have been the sort of “sudden imposition of radical changes in the application of law” that Smith views as unjustified (p. 269).

⁵⁸ For instance, in cases involving the Federal Arbitration Act, which requires states to respect the decision of contracting parties who agree to submit disputes to arbitration, notwithstanding state law to the contrary. See, e.g., *AT&T Mobility v. Concepcion* (563 U.S. 333 [2011]); *Preston v. Ferrer* (552 U.S. 346 [2008]). While this certainly preserves the freedom of contract, it is debatable whether the Act is within Congress’s authority when applied to intra-state agreements, as Justice Clarence Thomas argues in his dissent in *Allied-Bruce Terminix Companies, Inc. v. Dobson* (513 U.S. 265 [1995]).

⁵⁹ *National Labor Relations Board v. Jones & Laughlin Steel* (301 U.S. 1 [1937]).

constrains . . . what any particular provision of its written expression could genuinely mean” (p. 89). Elsewhere, she says, “Every aspect of a legal system is to be . . . operated in ways that advance that system’s reason for being”—that is, the protection of individual rights—and “[t]he authority of the law can extend no further than that. This entails that the identity of the law can extend no further than that. And this entails that the exercise of judicial review . . . can extend no further than that. Objectivity demands that a court treat nothing other than that as carrying legal authority” (pp. 248-49). Yet, as noted above, she rejects the proposition that an unjust law is no law, and argues that the job of judges is both to make “the most sense of the law that they find” and to “draw on the philosophy that is *in* the law, but not inject their own” (p. 238). This seems contradictory. If the law’s legitimacy constrains its possible linguistic meanings, what should a judge make of a constitutional provision that violates individual liberty, or does so by implication, and thus has no claim to legitimacy?

The intricate perversity of slavery law provides many fascinating examples: If a slave is charged with a crime, can her master be compelled to testify that she confessed to him that she committed the crime?⁶⁰ Or is that confession privileged? Or is it hearsay? Can an insolvent master free his slaves to the damage of his creditors?⁶¹ If he tries to, and the deed of manumission is later found invalid, are the slave’s children born during that interval of freedom born enslaved or

⁶⁰ *Sam v. State* (33 Miss. 347 [1857]) (finding communications by slave to master are not privileged). Thomas Cobb takes the position that a slave’s confession should be privileged; see his *An Inquiry into the Law of Negro Slavery* (Philadelphia, PA: T. & J. W. Johnson & Co., 1858)—the only pro-slavery legal treatise published, and which was intended as volume one of a two-volume set, but which Cobb never completed before dying in Confederate service at the Battle of Fredericksburg. Cobb there argues: “The [slave] is bound, and habituated to obey every command and wish of the [master]. He has no will to refuse obedience, even when it involves his life. The master is his protector, his counsel, his confidant. He cannot, if he will, seek the advice and direction of legal counsel”; thus, “[e]very consideration which induces the law to protect from disclosures confidential communications made to legal advisers, applies with increased force to communications made by a slave to his master” (p. 272).

⁶¹ *Allen v. Negro Sharp* (8 G. & J. 96 [1835]).

free?⁶² I cannot imagine how Judge Narragansett would answer these questions.

Let us consider a simpler example: the fugitive slave clause. Smith seems to say that if the Constitution contradicts the underlying principles of justice, then even Judge Narragansett is required to enforce it—as Justice Joseph Story did in *Prigg v. Pennsylvania* (1842),⁶³ despite his opposition to slavery—because “[w]hile it is true that proper law must itself be philosophically justified, this does not erase the difference between philosophical justification and legal justification” (p. 199). But is Judge Narragansett also supposed to say that while this provision, as a non-normative matter of fact, means that slaves shall be returned to their masters, it nevertheless imposes no *normative duties* because it violates individual rights? Smith writes that “a legal system’s moral authority” is what “provides the context necessary for understanding *individual laws’ legitimate meaning*. A ‘meaning’ that exceeds the scope of a legal system’s authority could not be valid.”⁶⁴ Being more specific, she writes that an interpretation of a specific legal provision that violates underlying moral values “could not be a valid understanding of the provision *as law*, that is, as genuinely carrying the authority of law,” even if “[i]t might be a valid understanding of the very same sequence of words, were those words used in different contexts.”⁶⁵

Presumably, therefore, Judge Narragansett must enforce the fugitive slave clause, but simultaneously announce that it is philosophically unjustified, and therefore that it is not “a legal system that *should* be respected” (p. 89). Perhaps he would reason that even while the obligation to deliver up fugitive slaves might be the correct understanding of the sequence of words appearing in that clause, it cannot be a valid understanding of that clause *as law* because it exceeds the scope of a valid legal system’s objective authority. Thus he is simultaneously required to acknowledge that the clause means what it obviously says—that fugitive slaves are to be delivered up—because

⁶² In *Union Bank of Tenn. v. Benham* (23 Ala. 143, 154-55 [1853]), the court found that the children were free.

⁶³ *Prigg v. Pennsylvania* (41 U.S. 539 [1842]).

⁶⁴ Smith, “Originalism, Vintage or Nouveau,” p. 625.

⁶⁵ *Ibid.*, p. 625 n. 18.

it is part of a larger constitutional compromise that was intended to placate the slave states, but at the same time that he *cannot* ascribe that meaning to the clause *as law*—that he cannot read it to justify the return of fugitive slaves—because the “legal system [can] not be interpreted as sanctioning activities that the government lacks the basic authority to engage in” (p. 89).

Even if there is no contradiction here, this would surely be a radical ruling, one that would disrupt settled expectations. Smith tells us, though, that “[s]ometimes, big change needs to happen . . . according to the fundamental principles of the legal system’s authority,” and that “we need radically to reverse our course, at times” (p. 268). If the Rule of Law is not an end in itself, but “valuable for a practical reason, namely, to help protect individual rights” (p. 266), then why would Judge Narragansett *not* be justified in simply refusing to enforce slavery laws at all, damn the Rule-of-Law consequences, because such laws lack moral authority? That was the position taken by some anti-slavery constitutionalists, and there is much to be said for it.⁶⁶ But the strongest criticism of it—the one adopted by, among others, the *Dred Scott* Court—is that this interpretation ignores the context that gives the constitutional provisions regarding slavery their meaning.⁶⁷

Or is he constrained to resign? That may seem logical, until we reflect on how many morally outrageous and non-objective laws there are on the books today, and how pervasive their consequences are in our legal system. Smith argues that “the only end that courts should ‘aspire’ to is accurate, objective interpretation of the Constitution and the specific moral judgments it finds therein; nothing more, nothing less” (p. 237). However, the Constitution of 1787 was infamously ambiguous regarding its moral judgment of slavery, in that it seemed simultaneously to endorse and to repudiate it. It called slaves “persons,” for example, refusing to use the word “slave,” but at the same time mandated the return of these “persons” who are elsewhere

⁶⁶ Randy Barnett, “Was Slavery Unconstitutional Before the Thirteenth Amendment? Lysander Spooner’s Theory of Interpretation,” *Pacific Law Journal* vol. 28 (1997), pp. 977-1014.

⁶⁷ As Harry V. Jaffa observes: “Never has the doctrine of original intent been stated with greater perspicuity” than by Chief Justice Roger Taney in the *Dred Scott* case; Harry V. Jaffa, *Original Intent and the Framers of the Constitution: A Disputed Question* (Washington, DC: Regnery, 1994), p. 14.

entitled to due process of law. If Smith's argument only works in an ideal, objective legal system, then it would seem useless to us today, swamped as we are in so much that falls short.⁶⁸

5. Conclusion

I think Smith is right that the act of legal interpretation relates to practical statesmanship in that the judge must consult fundamental normative principles, as a compass is necessary for navigation.⁶⁹ In controversial cases, the court must decide not only what the constitutional commitment is, but whether that commitment is justified. The answer will depend on both rules of interpretation and principles of political legitimacy.

On the other hand, Smith argues that in ordinary cases where courts are asked to interpret terms like "commerce among the several states," they are not bound by historical understandings, because their task is to determine what the text *says*, not what people thought it said. On this point, I am not entirely persuaded because in my view, the court's task is not to determine what the text says, but *what the law is*—a question to which the text is relevant, but not always dispositive. The *law* is an abstraction that must be proved—and not just proved, but placed within a comprehensible story about what our society is and means. White puts the point well: "At some point," he writes, "any appellate judge . . . confronts the paradox that judging is ideological, and because it is ideological it requires in its practitioners' efforts to show that the ideological position being advanced in a given case is a position based on sources external to its author, a position that others with different preconceptions can share."⁷⁰

But those "different preconceptions" cannot be so extreme that the resultant "sharing" is impossible. The fact is, it is not possible to have a constitution for "people of fundamentally differing views," as Justice Holmes claims in *Lochner v. New York* (1905).⁷¹ The search for

⁶⁸ Smith seems to suggest this when she writes: "Bear in mind that I am describing the proper method of review in an objective legal system" (p. 235). What, then, about a system with manifold non-objective, or even objectively evil, elements?

⁶⁹ Sandefur, *The Conscience of the Constitution*, pp. 16-22.

⁷⁰ White, *The American Judicial Tradition*, p. 367.

⁷¹ *Lochner v. New York* (198 U.S. 45, 76 [1905]).

such a thing—including the recent hope that some interpretive method can be found which will circumvent contentious arguments about fairness and justice—is ultimately a snipe-hunt.

Smith is exposing the fact that the debate over Originalism versus the Living Constitution is a proxy war for a clash over the moral and political values undergirding our constitutional system—or, to be more precise, that Originalism consists of both a misguided quest for value-free constitutional solutions and a noble search for objectivity, which Originalism ultimately cannot satisfy. The benefit of Smith’s book is that she clarifies that objectivity cannot be separated from values, that the effort to attain objectivity by ejecting references to “ought” is misguided.

Alas, for the legal community to admit that would require it to be open about the role of broader normative principles in the law—just what it is loath to do. As Carlton Larson puts it: “Invoking ‘natural rights’ in a modern law school is about as persuasive as citing Cotton Mather’s treatise on witchcraft.”⁷² We are fortunate that Smith is unashamed to say that liberty is in fact a good; that rights in fact exist, and that governments act justly only when they respect those rights and, ultimately, serve human flourishing. But today’s legal culture, in seeking to pretend that it is “value free” and above it all, sees such claims as this as proof that the author should simply be ignored.

⁷² Carlton Larson, “The Declaration of Independence: A 225th Anniversary Re-Interpretation,” *Washington Law Review* vol. 76 (2011), p. 711.

What Is the Law? A Response to Sandefur¹

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Timothy Sandefur's lengthy article raises an array of issues.² I've decided to go for depth over breadth and focus primarily on the question: What *is* the law? Law is what judges are supposed to uphold, after all, and we seem to have some serious differences over this.

What is the law? Is it, as Sandefur claims, a promise? An abstraction? An understanding? A process? A becoming? At different stages, he characterizes it as all of these things.

Sandefur writes:

[I]t is not *necessary* to a promise or a law that they be written down, and even when they are, the promise, not the words on the paper, is the promise. The written words . . . are only *evidence* of the law. The law itself is an abstraction—a promise or proposition—which can be determined even in the absence of written materials. (p. 16, emphasis his)

¹ An earlier version of this article was presented in January 2017 at an Author-Meets-Critics session of the Ayn Rand Society held during the Eastern Division meeting of the American Philosophical Association. The focus of the session was my book *Judicial Review in an Objective Legal System* (New York: Cambridge University Press, 2015). This article retains the character of oral remarks delivered under time constraints, most notably in the select choice of topics addressed, the relative brevity of its treatments of these, and its informal style and tone.

² Timothy Sandefur, "Hercules and Narragansett among the Originalists: Examining Tara Smith's *Judicial Review in an Objective Legal System*," *Reason Papers* vol. 39, no. 2 (Winter 2017), pp. 8-36. Hereafter, all references to this article will be cited parenthetically in the text.

Contrary to Sandefur's first claim, I think that it is necessary that a law be written down. For a legal system of any size, we must write down the rules so as to make them objectively knowable by all the people governed by them. Such writing is important for providing advance information about the rules, that is, fair notice. Indeed, the last part of Sandefur's same sentence suggests why: "the promise, not the words on the paper, is the promise."

That claim is plausible, I submit (not necessarily true, but plausible), "*When it's you and me, Greg* [Salmieri, who chaired the panel where this paper was presented]," because we've known each other a long time, fairly well, and can read between the spoken lines. That is, people who know each other very well can sometimes "get" things being communicated without saying them aloud; they can understand what is being said or promised. They don't need to spell everything out.

Not so with people one is less familiar with or with mere acquaintances. This wouldn't be the case between me and everyone on this panel, for instance—between me and Tim or me and Mark (who I have previously met only a few times), let alone between any of us and all the conferees at this convention, or between us and our legislators in Washington.

It's true that "*Between you and me*" (imagining two close friends), an appeal to precise statements can sometimes be a copout, a way to weasel out of a commitment of what you *had* promised, had given me every reason to believe I should expect, *and* what you had in fact intended. Not so with a legal system, however. I never met the people who ratified the Constitution, or the Second Amendment, or the Fourteenth, or my current Senators or Governor. Here, it isn't "personal" and laws' meaning isn't identically "understood" by both sides. It can't be, and cannot reasonably be expected to be for the millions of people subject to these laws. This is why formalities that include requiring a written statement of laws make sense. Formalities are appropriate—indeed, imperative—in order for laws to be understood objectively and to govern objectively.³

³ It is exactly where people are least likely to understand one another that reliance on formalities can be most useful. When players in pickup neighborhood football games frequently play together, for instance, they don't need to re-announce their rules (about foul lines, penalties, rushing the passer, etc.) at the start of every game. When they mix with others whom they play with less regularly, however, such statements are necessary.

Let's also look at the second part of Sandefur's claim in the above passage: "The written words . . . are only *evidence* of the law. The law itself is an abstraction. . . ."

Here, I would say: Yes and no. Yes, law is an abstraction in this sense: There's a rule that we (the relevant lawmakers) want to make, and these words (voted into law) are our best attempt to make it. What is true is that those two things aren't identical; they don't necessarily match. That is, lawmakers' words might not do a good job of expressing the rule that they have in mind and mean to convey. Given that, however, an important question emerges: What, then, is the law? Is it the ideas in lawmakers' minds? Or the rules that they wrote and the laws they enacted? That which they put on paper and formally approved?

My thought is: When it comes to law, part of what makes a law *the law* is its having been put on paper, including the words being used to state the rule. Without that step, what is in lawmakers' heads isn't law. Their ideas, intentions, and convictions, however clear and strong they may be to them, are not the law of the land.⁴ As Article 6 says: "This Constitution . . . shall be the Supreme Law of the land."⁵

The answer, then, to the question "What, then, is the law?" is that the law is not what is in their heads.⁶ The law is what's on paper.

Separately, also note that for the purposes of a proper legal system, what constitutes objectivity depends, in part, on the needs of the people governed, those who will be bound by the law.

⁴ Note that Sandefur himself observes that law reflects a combination of reason and fiat (p. 24).

⁵ U.S. Constitution, Article VI. Note, too, that this gives the lie to Sandefur's claim that the people are sovereign: "according to our Constitution it is the *people* who are sovereign, not the Constitution; the people, after all, promulgate the Constitution, and choose judges to interpret and apply it" (p. 20, emphasis his). Indeed, recognition that the people's will is not supreme seems implicit in Sandefur's argument in Section 1 of his article that judicial deference to majority will is not consonant with the Rule of Law.

⁶ Indeed, who "they" are becomes a question: The "promise"-makers? the "promise"-enforcers, that is, the courts? Sandefur later gives the courts a lot of leeway, suggesting that their ideas are critical. Either way, once the law is severed from its written expression, we need a clear account of its new residence. Where are people to look to find it?

Thus, if *that* is our alternative, I would stand by the written word. Yet at the same time, words on paper do not have meaning and cannot have meaning apart from authors' thoughts; words cannot signify, entirely independently of such thoughts.⁷ Nonetheless, it doesn't follow from that that the words' meaning *just is* the thoughts in some men's heads, that the *law* just is the thoughts. Written text's objective meaning depends, in part, on word users' beliefs and intentions, but it is not reducible to those beliefs and intentions. It is not simply *one and the same thing* as those beliefs and intentions. "Dependent on" does not mean "the equivalent of."⁸

Now consider this passage in Sandefur's article:

[P]romises can be changed by circumstances, even if there is no writing to memorialize those changes. What counts is the *promise*, not the memorialization; the letter of the statute is not the law. The law is the abstract proposition that the letter is meant to convey. If that abstraction changes, then the law has changed, even if the meaning of the writing has not. (pp. 24-25)

Consider: "If that abstraction changes." What does this mean? What is it for an abstraction to change? Change how? In what ways? Does it mean that a majority of lawmakers have changed their minds about what rules they want to have govern? Or, alternatively, something akin to their new knowledge of biology shuffling classifications of certain mammals and fish? Or something else? And isn't the answer likely to make a difference to whether "the meaning of the writing" has changed (as Sandefur denies)? Because one might be inclined to think, at least initially, that if the meaning of the abstraction changes in *certain* ways, then the meaning of the writing *has* changed. For instance, with what the word "fish" refers to. More exactly: If how we understand what a particular (written) rule *does* has changed, then we understand its meaning differently than we previously had. That is, seemingly, its meaning *has* changed.

Even more basically, however, what this probing of Sandefur's claim should help us to realize is that *meaning* doesn't in fact change.

⁷ This is a major qualification, which I explain in depth in my *Judicial Review in an Objective Legal System*, particularly in my critique of Textualism.

⁸ For a much fuller explanation of these and associated points, see *ibid.*, pp. 151-62 and 165-75.

A dolphin is what it is. It is our *understandings* of meaning that can change—our understanding of phenomena in reality and correlatively, of the meaning of words, of the referents of those words—of the nature of dolphins, fish, mammals, or (in more typically contested legal concepts) of “persons,” “speech,” “searches.”

Obviously, my claims here depend on a broader epistemological theory, including an account of the meaning of “meaning” (some of which I elaborate in the book). For now, the take-away is that I’d re-characterize the situation described by Sandefur. What has taken place is that our understanding of *the* meaning of the law has changed. This is why objective judges may enforce this newer understanding without thereby being guilty of changing the law.

Next, consider Sandefur’s claim that “the understanding of the text can change, and it is then *that understanding*, not the text, that is the law” (p. 22). Let’s look at this carefully: “The understanding of the text can change.” Yes. “[A]nd it is then *that understanding*, not the text, that is the law.” No. I reject the claim in its *entirety* (as a package) because it frames the alternatives in an erroneous way.

My contention (maintained throughout the book) is that the text has no meaning apart from men’s understandings. So it is not that a new, revised understanding trumps the meaning of *the text*, as if that text had a meaning apart from people’s understandings. It doesn’t. It never did. There *is* no meaning nestled inside words, hidden like a nut within a shell, which passively rests there, independently of the thinking of human beings. Meaning is a manmade phenomenon.⁹

Let’s move on to other aspects of our differences about what the law is. Sandefur charges that my critique of Ronald Dworkin’s view that the law is “ever in-progress” fails for two reasons (p. 20). On the first, I think he misunderstands my point. Sandefur writes, “A thing that is in the nature of becoming rather than being—a process—does have identity,” and he offers examples to support this (fire, life, a play performance) (p. 20). I agree, but I didn’t deny that a process can have an identity. My claim is that at any given time, *the law* is not a “process” and is not a “becoming.” It is a rule (or set of rules) with a

⁹ It may be worth pressing some questions about exactly what Sandefur means by a “text’s meaning” here. When he claims that when the understanding of a text changes, it is no longer the text that is the law, what exactly is it that he is rejecting? What alternative is he differentiating his view from? In other words, what was it (or what would it be) for the text to be the law? The text, in some non-understood way? What would that consist of?

definite, knowable identity. It is a fixed rule, enacted to govern until such time as it may be altered through legally authorized means. Obviously, we have processes for changing laws, and some laws themselves may specify and require that certain processes be followed in order to effect certain results—for example, “If you want a marriage license, you must do thus and such”—but a law is not a process.

Bear in mind also that “fixed” does not mean immutable. Having a fixed identity *at time t* does not mean that that identity might never be different. (A redhead can dye her hair black and no longer be a redhead.) My point was that a law conceived as “*ever* in-progress” (à la Dworkin) would have no knowable identity for the people subject to it.

Sandefur’s second charge is meatier, namely, that I “conflate the written text, which is only evidence of the law, with the law itself” (p. 20). “Conflate,” of course, is fightin’ words to a philosopher, so I may be overly defensive here, but let me try to be clear-eyed. I should also say that *some* of our differences in this terrain are about rather fine distinctions.

One question for Sandefur: If the written text is merely evidence of the law, then what is the law? What does it consist of? That needs an answer. Sandefur claims that it is something more than what’s on paper, but the question is: What? *Intentions*? *Beliefs* about what our government rules should be? Something else? And for any of these: Whose? The intentions or beliefs of legislators? Of judges? Of future judges or future legislators? The wishes of the people, who sometimes espouse changes in law before legislators do? (Think about the evolution of many people’s thoughts about gay marriage.) It’s also worth asking: *Any* such beliefs or intentions, be they enlightened or retrograde? Liberal or racist?

In a nutshell: What *is* this “something more”? If it is the law, we need to know what it is. Surely, the fairness and notice that Sandefur touts as elements of promises (p. 17) demand this.

These questions for Sandefur aside, what about his charge about my view? *Am* I confusing the written word with the law? I agree that the written text and the law aren’t identical in the specific sense that the meanings of words (of noises, scratchings, pixels configured on a screen) always depends on certain of the surrounding thoughts of the speaker and audience. The words “show me your hand,” for example, mean different things in a doctor’s office and in a poker game.

Again, meaning is not reducible to words. Yet throughout my account in the book, I've understood and defended the meaning of written law in a more robust way than Sandefur portrays. That is, his charge of a conflation presupposes a thinner, intrinsicist notion of written text's meaning than is mine. Such a thin notion *would* need to be supplemented by a thicker, more "human" sense of meaning, and thus create two different senses between which one might equivocate. In other words, if you mistake my position by shaving it of what I've said about objective meaning—that it depends on ideas as well as physical markings—then I may seem to hover between two different senses of 'meaning'. But in fact, I never embrace the thin, intrinsicist view that "words *by themselves* signify" that such a conflation requires.¹⁰

Let's return to Sandefur's larger claim: Law is an abstraction. Yes, it's an abstraction in the sense that it reflects a conceptual level of thinking on the part of human beings who make a law. It isn't a proper name, like "Spot" for this dog or "Baltimore" for this city. Yet law is not an abstraction *in the particular way that Sandefur seems to have in mind*—as something floating "above" the law as a vague, shifting, indeterminate "something." (Above the law that we're told about, that is, which is specified in writing and was formally approved.)

At times, it sounds like the law (in Sandefur's view) is a Platonic form, such as in his reference to *Hamlet* as an analogue to the law, and then identifying *Hamlet* with "that ideal thing which the perfect performance, were it possible, would enact."¹¹ The law is like that, Sandefur holds: an unrealizable something. Recall also from the first quoted passage above that "[t]he law . . . can be determined even in the absence of written materials." How? In the absence of written materials, I seriously wonder: How?

Sandefur invokes James Madison as supporting a more forgiving conception of law—specifically, the idea that we should sometimes respect legal precedents, despite believing them mistaken (mistaken, by the standard of the Constitution) for the sake of stability

¹⁰ For more on intrinsicism, see my *Judicial Review in an Objective Legal System*, pp. 41-42, 158-60, and 240-43.

¹¹ [Editors' Note: Smith is here responding to the original version of Sandefur's article, as delivered at the conference. Sandefur has amended his claim in the published version in order to address Smith's concerns; see Sandefur, "Hercules and Narragansett among the Originalists," p. 21 n. 30.]

and predictability (p. 25). However, the quotation that he cites from Madison portrays the alternative as surrender to political passions and heated legislative agendas.¹² This is misleading, for the alternative that I have defended is quite different. It is simply: adherence to the Constitution, properly understood.

The problem with obedience to precedent is simple: Repetition of a mistake—of a misinterpretation—does not alter its being a misinterpretation.¹³

Also notice that the choice of examples makes a big difference to how reasonable Sandefur's view seems. The Madison case involved re-charter of the Bank of the United States and, on reading it, one may easily think, "Okay, yeah, whatever *that* has to do with anything." In other words, the stakes, what hinges on this, seem remote. Suppose, instead, that Madison was speaking of a law governing Southern miscegenation laws, or the treatment of Jews, Japanese-Americans, or Muslims. In these cases, the fact that a legal action at odds with precedent would "introduce uncertainty and instability" (Madison's words, quoted by Sandefur, p. 25) seems hardly so intolerable a price to pay.

My principal contention is: What a judge should *not* do is pretend—pretend that the Constitution is something other than what it is. He should not wink at departures from the Constitution, renege on his sworn responsibility to uphold it.

At one point, Sandefur worries that perhaps he has gone too far: He wonders whether the view that he is defending is a kind of Living Constitutionalism (p. 26).¹⁴ Does it run the risk that "the criteria

¹² Sandefur speaks of (and the internal quotation here is from Madison) an "interpretive method that allows 'the opinions of every new Legislature, heated as it may be by the spirit of party, eager in the pursuit of some favourite object, or led astray by the eloquence and address of popular statesmen, themselves, perhaps, under the influence of the same misleading causes,' to alter the understanding of the nation's fundamental law" (pp. 25-26).

¹³ I address the value of stability in law in my *Judicial Review in an Objective Legal System*, pp. 122-24, and appropriate considerations when overturning precedent in *ibid.*, pp. 265-70.

¹⁴ Sandefur's reference to "Constitutional moments" is an allusion to the theory of Bruce Ackerman, a leading proponent of Living Constitutionalism. See Bruce Ackerman, *We the People: Foundations*, vol. 1 (Cambridge, MA: Belknap Press, 1991).

. . . become so malleable” that almost any significant groundswell of popular support will suffice to constitute a change of the law?¹⁵ Here, I submit, the problem is not that the criteria of lawfulness will now be *too* malleable. That ship has sailed. Rather, the problem is that Sandefur doesn’t have criteria left. Once one says that the law is “our understanding” rather than the objective meaning of the text (p. 18) and that the law is what “everyone knows” (about pigeons, about takings, you name it) (p. 19), one has got no standard by which to hold claims of legality to account. One has relinquished the basis for identifying anything as a “departure” or a “violation.” These are strong charges, but in principle, I think, this is what one has committed to.

A few final words on dolphins (which Sandefur updates with discussion of pigeons and rock doves) (p. 19). Basically, Sandefur asks: What if a law restricting “fishing” was meant—intended—to include dolphins and was originally understood that way, but strictly, no longer does, because of our contemporary knowledge that dolphins are not fish (contrary to what was thought at the time the law was enacted)? Also imagine that we, today, still want it to include dolphins and think of it as including them, “but nobody has bothered to update the statute” (p. 18). Wouldn’t it be ridiculous, he asks, for a court to release a person who was arrested for violating the law by having caught a dolphin? After all, “the law is not the *text*, but the *understanding*” and “[t]he understanding was that it covered dolphins, and only accident or inattention . . . has left the text of the statute unchanged” (pp. 18-19, his emphasis).

Three points very briefly, in response.

One: If and when what certain terms are understood to refer to has changed, we should update the law to reflect that (be it a law about fish, pigeons, pollutants, whatever). Insofar as the published law is what is broadcast, announced as “the law, the rules,” it would be unjust to hold people to something other than that. For there to be a second, *secret* meaning that is legally enforced—hidden, unspoken, but “understood”—brazenly violates the elementary Rule of Law prescription that a legal system tell people what the rules are.

Two: I sympathize with not wanting people to get off on technicalities—more exactly, with not wanting people deliberately to

¹⁵ He is quoting Michael McConnell, “The Forgotten Constitutional Moment,” *Constitutional Commentary* vol. 11 (1994), p. 142.

exploit a seeming technicality.¹⁶ But notice Sandefur's assumption (in the sentence following the above quoted passage): "Assuming the fisherman knew this, . . ." That is a major assumption. Indeed, it seems to beg the question.

Laws are written (and should be written) so that everyone subject to them can know the rules. Imagine a variation on the case Sandefur has offered. Suppose, instead, we are considering a fisherman who is just off the boat from Vietnam. This person studiously informs himself of all the laws about fishing because he wants to ensure that his activities are legitimate. But, unlike the man Sandefur imagines, he does not understand that the fish spoken of in the law *really* means fish *and a few other things*. Nor does he have any knowledge of the background conventions of how laws are applied in this country; he innocently believes that the published laws are the relevant rules he must comply with.

My claim is that it *would* be unfair to prosecute him for catching something that the law didn't tell him he couldn't catch. (That is, for an action that the law had not declared forbidden.)

Here again, the choice of example colors the complexion of Sandefur's broader conclusions. In a particular case, our being cavalier about the law might seem harmless, but the principle involved is not. If we contemplate a fine for a canny, conniving fisherman who we imagine is knowingly "playing" the system, we're inclined to go along with convicting him ("Get the bastard!") and think it okay to treat the law as looser than what is written. Also, it is easy to think, "Fines and fish? No big deal." If we imagine certain other sorts of victims of unstated laws, however, or laws whose stakes are larger, our sympathies may well fall in other directions.

The deeper point (regardless of sympathy-tugging examples) is that a legal system's reliance on what "everyone knows" is dangerous. And it is wrong. Bear in mind that it is a legal system we're talking about; it governs many people and it governs them *by force*.

Accordingly, and this is point three: My view is that lawmakers should say what they mean—if sometimes, simply by adding clauses such as "and birds commonly called pigeons but actually belonging to the genus *Colomba*."

¹⁶ What constitutes a technicality, and exactly what we mean by that term in the legal realm, are themselves legitimate and significant questions that I leave aside here.

Is my position likely to secure victory in court next week? No. But that's not what I was attempting to offer—a playbook for winning cases in contemporary conditions. Sandefur is confident of what “we all understand” and casually dismisses mere “accident or inattention” or the fact that “nobody has bothered to update the statute.” My thought is: When we are talking about law—about force—we should bother. If we aspire to a just legal system, we have a responsibility to bother.

**Symposium: Part II: Douglas J. Den Uyl and
Douglas B. Rasmussen's *The Perfectionist Turn***

Responsibility, Respect, and Justice: Skepticism about
Metanorms¹

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1. Introduction

*The Perfectionist Turn*² represents the next stage in Douglas Den Uyl and Douglas Rasmussen's project of grounding a liberal political order in neo-Aristotelian perfectionist ethics. Their previous book, *Norms of Liberty*,³ frames the fundamental question to which their project provides a neo-Aristotelian answer. "Liberalism's problem," they claim, is that it needs to avoid promoting any particular form of the good life, while carrying normative weight.⁴ Without a normative basis, there is no reason to comply with a liberal order. Den

¹ This article is a slightly modified version of a paper presented at the American Association for the Philosophic Study of Society at the Eastern Division Meeting of the American Philosophical Association, January 5, 2017. I thank the audience at the session for useful discussion, and especially thank Doug Den Uyl and Doug Rasmussen for their reply to my remarks. I also thank Jason Lee Byas for useful comments on a previous draft of this article.

² Douglas J. Den Uyl and Douglas B. Rasmussen, *The Perfectionist Turn: From Metanorms to Metaethics* (Edinburgh: Edinburgh University Press, 2016). Hereafter, all references to *The Perfectionist Turn* will be cited parenthetically in the text.

³ Douglas J. Den Uyl and Douglas B. Rasmussen, *Norms of Liberty: A Perfectionist Basis for Non-Perfectionist Politics* (University Park, PA: Pennsylvania State University Press, 2005).

⁴ *Ibid.*, chap. 5.

Uyl and Rasmussen's previous work develops their distinctive approach to politics and defends it against other political applications of perfectionist ethics, such as communitarianism and conservatism. *The Perfectionist Turn*, however, compares their neo-Aristotelian basis for liberalism with other such bases, such as the capabilities approach and public reason.

Den Uyl and Rasmussen ground our political obligation to respect each other's right to liberty in a more basic responsibility to strive to perfect ourselves as rational, social, flesh-and-blood creatures. They do so by identifying what is common to each of our distinct forms of human flourishing, namely, self-directedness. Since preserving the possibility of self-directedness is a necessary (though insufficient) condition for any normative conduct whatsoever, we have a *metanormative* obligation to respect each person's sphere of authority over their lives, or in other words, their respective rights to liberty.

I am skeptical of the need to invoke a metanormative framework in order to explain our obligations to respect individual rights. I will defend the view that within the context of the individualistic perfectionism that Den Uyl and Rasmussen defend, respect for rights, while preserving the possibility of flourishing within society, is also *constitutive* of the flourishing of the rights-respecter. Fulfilling the content of metanorms is therefore already part of what it means to flourish, and hence the normative framework we started out with.

My skepticism about metanorms applies as much to *Norms of Liberty* as it does to *The Perfectionist Turn*. However, the present work, inasmuch as it offers new resources with which to understand their ethical framework, also offers resources with which to express my skepticism about the need for metanorms. Den Uyl and Rasmussen begin the book by locating their metaethics within a framework of responsibility rather than a framework of respect. As I argue here, however, a framework of responsibility can explain how respect for persons is constitutive of the good life, and hence, why respecting the rights of others is as well.

2. Responsibility and Respect

Den Uyl and Rasmussen take a responsibility-based account of metaethics in opposition to the respect-based account that is prevalent in the contemporary literature (pp. 4-30). This roughly correlates with what has been parsed as ethical pushes rather than pulls,⁵ or what Den

⁵ Robert Nozick, *Philosophical Explanations* (Cambridge, MA: Harvard

Uyl elsewhere parses as supply-side rather than demand-side ethics.⁶ This pre-modern approach to ethics (and I do not say that pejoratively) frames ethical conduct primarily in terms of what kinds of actions cultivate one's own goodness as a person and as an individual, rather than primarily in terms of what is owed to others out of a basic respect for persons.

Den Uyl and Rasmussen work through rival accounts of the connection between ethics and liberal politics that start from frameworks of respect (pp. 96-168). What is found to be endemic to these approaches is an attempt to arrive at political principles (or procedures for selecting among principles) through an understanding of our real or imagined negotiations as persons mutually owed and owing a debt of respect, which in one way or another overly formalize our ethical reasoning. As socially embedded, material creatures, deriving ethical reasons from abstract or hypothetical models leaves us without normative push, whereas "[t]he force of an ethical proposition should come from reality itself, not the formal structure of the rule" (p. 88). That reality is what Den Uyl and Rasmussen refer to as one's "nexus" (pp. 33-64). One's nexus is one's existence within a material and social context, a culmination of our circumstances, preferences, talents, relationships, potentialities, etc. As such, it is necessarily left out of any formal deliberation or contractualist procedure.

The move from a framework of respect to one of responsibility does not, as one might think, lead to a crude egoism in which all of our reasons for acting are self-regarding at the expense of being other-regarding. Our own goodness is constituted by the incorporation of a variety of goods and virtues into one's life, many of which are essentially social. It is part of one's nature as a social and rational being to recognize, and appropriately act on, the value of personal relationships and other social goods. Most, if not all, of these kinds of goods require one to value others for their own sake and not merely as instrumental to external goals. The sociality that is imputed to our flourishing therefore means that the framework of responsibility does not *preclude* valuing others intrinsically, and hence, of respect being a basis for ethical action.

University Press, 1984), pp. 499-570.

⁶ Douglas Den Uyl, "The Right to Welfare and the Virtue of Charity," *Social Philosophy & Policy* vol. 10 (1993), pp. 192-224.

What is distinctive about a framework of responsibility, then, is not its stark contrast with a framework of respect, but its grounding that very respect in what is expressive and constitutive of what it means to cultivate one's own goodness. Respect for persons then becomes not a cost to be balanced or traded-off against self-interest, but one among many aspects of one's self-interest to be integrated into a harmonious composition of goods and virtues. Therefore, while our reasons for ethical action might often include respect for others, that respect is not a primitive ethical pull. Rather, it is grounded in the ethical push of being responsible to our own humanity.⁷

It is from the sociality of flourishing that the question of politics becomes unavoidable. We need to live among others in order to flourish, so what can a framework of responsibility tell us about how the political order ought to be structured?

3. The Move to Metanormativity

Den Uyl and Rasmussen reject the political perfectionism that is embraced by other ethical perfectionists.⁸ Their reasons for doing so are internal to their account of individualistic perfectionism (pp. 33-64). I will briefly give an overview of those reasons.

They hold that flourishing is agent-relative: everything that is good is good *for* some agent. There is not what is good for humanity outside of what contributes to the flourishing of its constituent individuals at any given time (pp. 34-37). Moreover, flourishing is *inclusive* of the goods that contribute to it (pp. 38-41). Goods and virtues are not valuable as mere means to eudaimonia, but rather, they *constitute* eudaimonia when they are brought into harmony with each other. The way in which different goods and virtues must be brought into harmony is a function of one's personal nexus. Therefore, the way

⁷ I leave the possibility open that while respect for persons is not primitive in moral theory, it may be primitive in moral psychology. We may recognize that we ought to respect others (which we should) prior to recognizing that this is good for us (which it is). Den Uyl and Rasmussen make a similar distinction themselves when they warn against conflating the basis for "one's *constructing* a judgment about what is good or ought to be done with that judgment's *constituting* what is good or what ought to be done" (*The Perfectionist Turn*, p. 274).

⁸ Alasdair MacIntyre, *After Virtue*, 2nd ed. (Notre Dame, IN: University of Notre Dame Press, 1984); Alasdair MacIntyre, *Whose Justice? Which Rationality?* (Notre Dame, IN: University of Notre Dame Press, 1988).

in which each individual flourishes is thoroughly individualized (pp. 41-42). This brings us to the most important aspect of individualistic perfectionism: that it is self-directed (pp. 51-52). The fact that our flourishing is individualized means that the choices we make between different goods and which character traits to develop, must be taken *by us*. We must employ practical reason in balancing different goods in light of our nexus. This process of reasoning is what *individualizes* the generic goods out there in the world and actually *incorporates* them into one's eudaimonia. Being free to employ and develop one's practical reason is a necessary, though insufficient, condition of living a truly self-directed and therefore flourishing life.⁹

In order to have even the possibility of flourishing, we must be free to choose between projects. Forced enrollment into others' projects, without the right of exit, blockades our self-directedness and therefore our flourishing. Political regimes that enroll everyone into "shared" enterprises, then, are not an option. We must always have a right of exit; we must always have the freedom to choose. This does not mean that shared enterprises cannot contribute to our flourishing; there are shared and common goods that enable us to flourish in communion with our fellows. What it does mean is that the common good does not really count as a good unless we incorporate it into our flourishing through free choice, as a result of self-directed, practical reason. What constitutes an individual's good cannot be known in advance, but must be discovered through an active process of practical enquiry.¹⁰

⁹ "Practical reason is the intellectual faculty employed in guiding conduct, and practical wisdom is the excellent use of practical reason. Practical wisdom is, however, more than mere cleverness or means-end reasoning. It is the ability of individuals at the time of action to discern in particular and contingent circumstances what is morally required. It involves the intelligent management of one's life so that all the necessary goods and virtues are coherently achieved, maintained, and enjoyed in a manner that is appropriate for the individual human being. It is *the* intellectual virtue of a neo-Aristotelian conception of human flourishing"; Douglas B. Rasmussen, "The Importance of Metaphysical Realism for Ethical Knowledge," *Social Philosophy & Policy* vol. 25 (2008), p. 79, n. 91. Also, on the centrality of practical reason to a flourishing life, see Douglas J. Den Uyl, *The Virtue of Prudence* (New York: Peter Lang, 1991).

¹⁰ There is an intriguing analogy here between the role of the individual's practical reason in pursuing the good, and the role of the individual's economic subjectivity in pursuing economic value as described by the

Traditional communitarian and perfectionist forms of politics are thus out. So what are we left with? Den Uyl and Rasmussen first examine those theories that attempt to untether political philosophy from what John Rawls called *comprehensive doctrines*,¹¹ that is, substantive ethical views of the good life (Chapter 3). They find that the views of Rawls, Martha Nussbaum, and Amartya Sen smuggle in comprehensive doctrines through a particular definition of respect (in Nussbaum) and in what counts as reasonable (in Rawls and Sen). Thus, untethering seems to have been a failure. They then examine other varieties of anti-perfectionist politics that embrace tethering (Chap. 4). Gerald Gaus¹² and Stephen Darwall¹³ both attempt to establish a *social* or *second-person* morality—in other words, a framework of respect—that is not grounded in a framework of responsibility. The problem here is that the social rules they derive lose any normativity for us, since they are unconnected to our own flourishing and, hence, our own particular *telos* (“purpose” or “end”).

My sketch of Den Uyl and Rasmussen’s analysis of each of these varieties of anti-perfectionism is necessarily cursory. My intention, however, is that it highlights just what is needed for an anti-perfectionist politics actually to have some normative bearing on us—and hence illuminates what Den Uyl and Rasmussen are trying to do. What is needed for the development of a plausible anti-perfectionist

Austrian school of economics. While the former implies that the good life of all citizens cannot be imposed, the latter implies that the economy cannot be centrally planned. Indeed, this parallel is explicitly borne out in the penultimate chapter, under the unapologetically Randian title, “The Entrepreneur as Moral Hero”; Den Uyl and Rasmussen, *The Perfectionist Turn*, pp. 284-319.

¹¹ John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993); John Rawls, “Justice as Fairness: Political not Metaphysical,” *Philosophy & Public Affairs* vol. 14 (1995), pp. 223-51; John Rawls, *Justice as Fairness: A Restatement* (Cambridge, MA: Harvard University Press, 2001).

¹² Gerald Gaus, *The Order of Public Reason: A Theory of Freedom and Morality in a Diverse and Bounded World* (Cambridge, MA: Cambridge University Press, 2011).

¹³ Stephen Darwall, *The Second-Person Standpoint: Morality, Respect, and Accountability* (Cambridge, MA: Harvard University Press, 2006).

politics is the identification of something which each agent has a moral stake in, which is not simply one of the substantive constituents of a particular person's eudaimonia. The political order must therefore not be goal-directed, but nonetheless tethered to our goal-directed perfectibility. It cannot be goal-directed because this would engender the "moral cannibalism" of communitarian and perfectionist politics.¹⁴ Yet it must be tethered to our perfectibility because that is the source of all normativity. For us to be obliged to comply with the political order, it must somehow be linked with our *telos*.

What is it that we all have a moral stake in that is not simply a particular good? The answer is self-directedness. A prerequisite to our goal-directed behavior is that we can direct ourselves toward any goals whatsoever. Therefore, we each have a stake in the maintenance of a political order that protects the possibility of our respective self-directedness (p. 156). The content of political rules, then, is a set of individual rights against interference, rights to negative liberty. We each have a moral stake in upholding those rights, and hence ought to comply with their correlative duties. But how is it that we can normatively be compelled to follow a set of political rules and its attendant duties, if they do not guide us toward our ultimate end, namely, eudaimonia? If these duties are not directed toward our own perfection, then why ought we to fulfill them?

The key to understanding the normativity of political rules, Den Uyl and Rasmussen argue, is in rejecting "equinormativity." Equinormativity is the idea that there can be only one type of reason for ethical conduct. Den Uyl and Rasmussen reject that in favor of the concept of *metanormativity*. Political rules can be normative for us in virtue of the fact that their universal acceptance is a prerequisite for our flourishing among others. Discharging our metanormative obligations does not contribute to our flourishing, yet as flourishers we must do so in order to protect the possibility of flourishing.

4. Double Justice in Jeopardy

In much of contemporary political philosophy, "justice" refers to our legitimately enforceable obligations, which can typically be formalized in such a way as to be universally and determinately applicable to all agents. The content of metanorms may be identified with the content of justice in this sense: call this justice₁. However, there is also the interpersonal virtue of justice which embodies our

¹⁴ Den Uyl and Rasmussen, *Norms of Liberty*, pp. 85, 95, and 272.

interpersonal obligations more generally (in other words, not just the “political” or enforceable ones): call this justice₂. The cultivation of the virtue of justice₂ is constitutive of our flourishing and explains, in part, how a framework of responsibility grounds respect for persons. Being responsible to our social, rational nature means treating other rational agents as such: respecting their choices, honoring their legitimate expectations, etc. If it were the case that all that is required of us by metanorms (justice₁) is already included in justice₂, then our political obligations would already be included in our ethical obligations. That is, a good person would be a just person in the sense of justice₁, and there would be no need to reject equinormativity and invoke metanormativity.

Den Uyl and Rasmussen believe that justice₂ cannot perform the role required of justice₁ because justice₂ is directed at particular persons. As a virtue, it is developed and practiced in accordance with practical reason, which takes account of the concrete circumstances of one’s relationship with those to whom one treats justly. All of the contingent circumstances that are included in one’s nexus, which include the facts about those to whom one is just₂, must be reflected upon in order to know what is required by justice₂ in any given instance. Justice₁, however, provides an ethical basis for our *political* obligations to each and every person, regardless of personal circumstances. Den Uyl and Rasmussen acknowledge that there may be functional *overlap* between justice₁ and justice₂, but maintain that justice₁ is not exhausted by justice₂.

Den Uyl and Rasmussen make an analogy with sports to illustrate the point: flourishing is analogous to playing baseball well. However, in order for there to be a game in which there is the possibility of us all playing well together, there must be rules we all follow that are distinct from what it means to play well. The rules of baseball are justice₁, while the virtue that guides successful and skillful play is justice₂ (as well, perhaps, as other virtues).¹⁵ This analogy illustrates well what the *function* of justice₁ is. However, it seems to me that it also serves to highlight just how it is that the content of justice₁ is already included in justice₂.¹⁶ While one can follow the rules

¹⁵ Ibid., p. 228.

¹⁶ One need not reject the normative contribution of justice to the just agent in order to recognize its metanormative function: that it ensures the possibility of persons with diverse forms of life to flourish. Geoffrey Plauché makes this point explicitly in his *Aristotelian Liberalism: An Inquiry into The*

of baseball without playing with any particular excellence (and analogously, one can fulfill the requirements of justice₁ without living a fully flourishing life), one cannot play baseball with any particular excellence without following the rules. When one breaks the rules occasionally, this will take away somewhat from one's excellence as a player. Yet when one breaks the rules systematically, one is a thoroughly bad player; one is not fulfilling even the minimal requirements for playing well. Someone who follows the rules of baseball, but plays poorly, is a better player than someone who shows up for the game but does not follow the rules.¹⁷ The disposition to play well *subsumes* the disposition to follow the rules.

The need to reject equinormativity and invoke metanormativity is avoided when one recognizes that justice₂ includes justice₁. This becomes even clearer when one considers what this means in concrete terms. Justice₂ requires that we not violate any other agent's right to liberty. How could we ever engage in virtuous interpersonal relations, if we failed to respect that right? When we violate someone else's

Foundations of a Free and Flourishing Society (Ph.D. dissertation, Louisiana State University, 2009), pp. 62-63. Roderick T. Long, "Why Does Justice Have Good Consequences?" *Alabama Philosophical Society Presidential Address*, October 26, 2002, accessed online at: <http://praxeology.net/whyjust.htm>; David Schmidtz, *Functional Property, Real Justice* (Berlin: European Liberal Forum, 2009); and David Schmidtz, "Property and Justice," *Social Philosophy & Policy* vol. 27 (2010), pp. 79-100, also argue that the requirements for mutually beneficial social coordination are part of what makes justice a virtue. Adam J. Tebble argues, though, that epistemic uncertainty about how to achieve a diverse range of goods is crucial to the virtue of justice; see Adam J. Tebble, "On the Circumstance of Justice," *European Journal of Political Theory* (2016), accessed at online first DOI: 10.1177/1474885116664191. The virtuousness of justice ought not be strongly separated from its social utility.

¹⁷ It might be thought that systematically breaking the rules means that the player is not playing badly, but just is not playing baseball, he is playing something else, or nothing at all. That is a fair characterization, but it would be wrong to draw from that conclusion that he is not a bad baseball player. Analogously, it would be wrong to conclude that if one violates justice₁, one is not a bad person, one just simply is not playing the moral game. If one shows up to a baseball match, accepts a role on the team, steps onto the field of play, one enters the game. If one proceeds to break all of the rules, one is a bad player. As moral agents, we are always in the field of moral play—breaking the rules is immoral. When you are a person, amorality is immorality.

liberty, we use her as a mere means to our own ends. Respect for others means recognizing their status as moral agents and treating them as conversation partners to be engaged with on the basis of rational discourse, not coercion. Rational and social beings use language, not violence, to interact.¹⁸ Respect for rights represents the formal core of what is required by justice₂ and all of the other interpersonal virtues. No virtuous social interaction is coercive, whatever else it might be.

The worry that Den Uyl and Rasmussen might have with this is that it appears to collapse politics into ethics, thus taking away the distinctive political character of respect for rights: justice₁ is owed to everyone and anyone, regardless of concrete circumstances.¹⁹ In order to know one's obligations of justice₁ to a particular person, we need not know *who* they are, only *what* they are, whereas in order to know one's obligations of justice₂ to a particular person, one needs to reflect upon the concrete circumstances of one's relationship: who they are and who you are.

The political nature of justice₁ comes from the *generality* of its directedness, as opposed to the *particularity* of the directedness of justice₂. However, the generality and hence the political character of justice₁ is not lost in its subsumption into justice₂. Regarding respect for individual rights as a *necessary* condition for virtuous interpersonal relations means that it is the formal core of all potentially good social relations. While our political obligations of justice₁ are directed

¹⁸ Roderick T. Long, *Reason and Value: Aristotle versus Rand* (Washington, DC: The Objectivist Center, 2000), pp. 49-50.

¹⁹ Well, almost regardless. In circumstances where the possibility of social cooperation breaks down entirely, the need for metanorms evaporates; see Douglas J. Den Uyl and Douglas B. Rasmussen, *Liberty and Nature: An Aristotelian Defense of Liberal Order* (La Salle, IL: Open Court, 1991), pp. 144-51; cf. Ayn Rand, "The Ethics of Emergencies," in Ayn Rand, *The Virtue of Selfishness: A New Concept of Egoism* (New York: Signet, 1964); Roderick T. Long, "Eudaimonism and Non-Aggression," *Bleeding Heart Libertarians*, April 30, 2013, accessed online at: <http://bleedingheartlibertarians.com/2013/04/eudaimonism-and-non-aggression/>; Roderick T. Long, "Hungering and Thirsting After Righteousness: Eudaimonism and Modified Rothbardianism versus Public Reason," *Bleeding Heart Libertarians*, May 12, 2013, accessed online at: <http://bleedingheartlibertarians.com/2013/05/hungering-and-thirsting-after-righteousness-eudaimonism-and-modified-rothbardianism-versus-public-reason/>.

generally at everyone and anyone, they are only ever fulfilled on the basis of actual interactions with flesh-and-blood individuals. We always discharge duties of justice₁ alongside, to some extent, duties of justice₂.

Another worry might be that without invoking metanormativity, we cannot explain the *enforceability* of justice₁. Enforceability is what makes it political and the basis for a legal framework. Justice₂ is a virtue and hence, as with the other virtues, cannot be coerced or enforced.²⁰ So if justice₁ is part of justice₂, how is it enforceable? In fact, understanding our obligations of justice₁ as part of justice₂ clarifies rather than obscures the ground of their enforceability.

As Roderick Long argues, while the enforceability of rights is usually seen as the purview of strictly deontological theories, a plausible account of it can be given within a neo-Aristotelian framework.²¹ For it to be true that a duty is enforceable, it needs to be the case that persons ought to be forced to comply with it, and when they do not comply, that others ought to use force to make them comply. To abstain from using force against those who violate one's liberty would be to *undervalue* oneself as a flesh-and-blood being.²² One's capacity to pursue the good in accordance with one's own reason is the most central thing for one's flourishing, so if one fails to protect that when it is threatened, one acts imprudently. To fail to protect one's freedom, where protection is feasible, is a vice, whereas to defend oneself with proportional force is a virtue. If it is the case that we *ought* to defend liberty, this is functionally identical to one's

²⁰ Cf. John Tomasi, "Individual Rights and Community Virtues," *Ethics* vol. 101 (1991), pp. 521-36.

²¹ Roderick T. Long, "The Irrelevance of Responsibility," *Social Philosophy & Policy* vol. 16 (1999), pp. 118-45.

²² There are of course cases where a person can use her liberty in immoral ways, so it may not always be the right thing for her to enforce her right to liberty in such cases. However, it would always be wrong to interfere with a person's defending her liberty, since this would be to disrespect her as a moral agent with her own decisions to make. While there are cases where persons ought not enforce their rights, it is always the case that we ought not interfere with their enforcing their rights. Not all exercises of rights are good, but all violations of them are bad. Thanks to Jason Byas for pressing me on this point.

right to liberty, and hence justice₁, being enforceable. Understanding justice₁ as part of justice₂, and thereby as constitutive of the good life, renders a plausible understanding of its enforceability, and hence accounts for its political nature.

5. Conclusion

A framework of responsibility ought not be regarded as an alternative to a framework of respect, but rather as the proper grounds for a framework of respect. Being responsible to our natures—as rational, social, flesh-and-blood creatures—implies that our social relations ought to have a particular character. Any ethical or political theory that does not provide a proper metaethical grounding for respect for persons in the *telos* of the one doing the respecting, fundamentally lacks normativity. The subsumption of respect into responsibility helps to explain how our metanormative obligations are subsumed into our normative ones. A necessary condition for our social relations being just—in the sense of the virtue of justice—is that each party recognize the other’s sphere of moral agency and does not interfere in her acting in accordance with her own practical reason. The virtue of justice necessarily includes justice in the metanormative sense. Den Uyl and Rasmussen are right to stress the metanormative function of the individual right to liberty as well as the fact that rules enabling people to live different sorts of good lives can be grounded in considerations of the good. However, the idea that metanormativity is a kind of normativity, is one I must resist.

The Need for Metanormativity: A Response to Christmas

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Douglas B. Rasmussen
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We would like to begin by thanking Billy Christmas for his excellent comments¹ on our book *The Perfectionist Turn*.² For one thing, he admirably summarizes our position. Consequently, his criticism is direct, to the point, and fair. Additionally, and perhaps because of that accurate account of our position, his main criticism is substantive and important. Our response, therefore, is not so much in the spirit of rebuttal as it is in the spirit of clarification and development of our views.

As we understand Christmas's main criticism, it is that metanorms can be subsumed under a robust understanding of the virtue of justice without having to be a separate category of norms. Both Christmas and we understand moral norms within the neo-Aristotelian framework. Hence, Christmas holds that the morally conscientious actor will respect basic, negative individual rights (that is, the freedom of others) as a matter of exercising the virtue of justice without there being, in effect, two types of justice—one for living up to metanorms (his “justice₁”) and the other for living up to a traditional understanding of the virtue of justice (his “justice₂”).³ In other words, as part of

¹ Billy Christmas, “Responsibility, Respect, and Justice: Skepticism about Metanorms,” *Reason Papers* vol. 39, no. 2 (Winter 2017), pp. 48-59.

² Douglas J. Den Uyl and Douglas B. Rasmussen, *The Perfectionist Turn: From Metanorms to Metaethics* (Edinburgh: Edinburgh University Press, 2016) (hereafter *TPT*).

³ Christmas, “Responsibility, Respect, and Justice,” pp. 54-55.

treating people fairly, giving them what they deserve, and the like, one as a matter of course also respects their rights as determined by what we call metanorms. We thus do not need a distinct metanormative conception of justice; we just need justice.⁴

To begin with, it is important to recall that metanorms, for us, are a kind of ethical norm. If they were not, there would be no moral legitimacy to the liberal order which we defend. Put another way, metanorms are a part of the eudaimonistic teleological framework that gives shape to all moral norms. So, although we hold that metanorms are of a different type than perfectionist norms, both are understood to be justified in terms of the same general moral framework.⁵ In this respect, Christmas is correct to say that, at some level of abstraction, there must be a measure of sameness for both metanorms and perfectionist norms. Both are *types* of ethical norms, though they are, for us, functionally different. As we argue in *NOL*⁶ and in *TPT*,⁷ it is the nature of the circumstances—and the agents who act within them—that determines the appropriate type of norm. In the case of metanorms, they arise because of our need for a certain structure to the social-political order. Perfectionist norms (such as the virtue of justice) arise because we need to have some guidance about how to live well.

⁴ See Douglas B. Rasmussen and Douglas J. Den Uyl, *Norms of Liberty: A Perfectionist Basis for Non-Perfectionist Politics* (University Park, PA: Pennsylvania State University Press, 2005) (hereafter *NOL*), pp. 160-63, for an account of and need for two senses of justice: metanormative justice and normative justice (which we cash out in terms of the virtue of justice).

⁵ Hence, Christmas is mistaken to suggest that we do not provide “an ethical basis for our *political* obligations to each and every person, regardless of personal circumstances” (“Responsibility, Respect, and Justice,” p. 55). Yet, as we shall see, it is by no means necessary to suppose that all of the ethical principles generated by individualistic perfectionism must function in the same way or manner. Not all norms that develop from such an ethics need have perfection as their aim. Indeed, what motivates such thinking is the supposition that all ethical norms are of the same type or have the same function, which we call “equinormativity.” See Rasmussen and Den Uyl, *NOL*, pp. 33-41.

⁶ Rasmussen and Den Uyl, *NOL*, pp. 83-84 and 268-73.

⁷ Den Uyl and Rasmussen, *TPT*, pp. 33-64 and 89-94.

What follows from the above is that the morally “perfected” individual will, as part of her moral perfection, act in such a way as to respect the rights and freedoms of others while at the same time being fair, deserving, and the like. For such an actor, the two dimensions would be seamless. She would not, as a matter of ethical practice, separate out her adherence to metanorms from any other exhibition of the virtue of justice. It does not, however, follow from this that there is no difference in functionality between ethical norms.⁸ The excellent baseball player also seamlessly integrates his obedience to the rules of baseball with his playing the game well. The problem is not one of noting the intentionality of the agents. The most desirable state of affairs would be one where the agent does not separate out the types of norms, but integrates both.

Metanorms are, in a way though, norms for which obedience to them provides no moral credit, because whether one appreciates them or not, one can be held to follow them.⁹ Indeed, whether one follows them blindly or integrates them fully into one’s life as a virtuous human being makes little difference. The difference between those two actors is that the integrated one has reflected upon the value of the metanorms and deserves credit for such reflection, but not because of the obedience to the norms themselves. That is because *the norms are not designed for self-perfecting the individual*, even if the self-perfected individual recognizes and benefits from their contribution to her perfection. Rather, they are designed for making that self-perfection possible, when living among others, by protecting the possibility of self-direction.¹⁰ The difference just described also

⁸ See Rasmussen and Den Uyl, *NOL*, pp. 301-3.

⁹ This is not an altogether new idea. See, e.g., Adam Smith, *The Theory of Moral Sentiments*, ed. D. D. Raphael and A. L. Macfie (Indianapolis, IN: Liberty Fund, Inc., 1976), II.ii.I, pp. 5-7. Also, in one of her descriptions of individual rights, Ayn Rand states that they are “the link between a moral code of a man and the legal code of a society, between ethics and politics”; Ayn Rand, “Value and Rights,” in *Readings in Introductory Philosophical Analysis*, ed. John Hospers (Englewood Cliffs, NJ: Prentice-Hall, 1968), p. 381.

¹⁰ Self-direction should not be confused with autonomy in either the Kantian or Millian sense. For us, self-direction is simply “the act of using one’s reason and judgment upon the world in an effort to understand one’s surroundings, to make plans to act, and to act within or upon those surroundings”; Rasmussen and Den Uyl, *NOL*, p. 89.

identifies the modes of applicability of the norm, with metanorms being universal, impersonal, and basically exceptionless.¹¹ Perfectionist norms, by contrast, which include the virtue of justice and which exercise practical wisdom, tend to be general, personal, and subject to judgment.

One way of seeing the difference between the two norms is to recall our discussion in *NOL*¹² of James Madison's comment on what would not be needed in a society of angels. For Madison, we establish laws because we are not all angels; the implication is that a society of angels would not need laws. They would act virtuously toward one another. A world filled with Christmas's moral actors would be such a world of "angels." Each time one of these "angels" approaches another, he would seek to respect the other's "rights" and "freedom" because he recognizes the inherent goodness of doing so. However, as we note in our discussion of this issue, a society of angels who act with the best of motives and understanding would still need metanorms to define what it means to respect another's freedom, person, and property. Within the framework of moral perfectionism itself, they would seek to establish norms that do not speak to anyone's particular perfection precisely so that everyone could get on with their perfection! The nature of social-political life is such that universal, impersonal rules concretizing the meaning of freedom, property, and the like, are needed for one to engage fully in perfective acts of respecting others. As much as we hold to the idea that natural rights can be discerned, we are under no illusions that they are not subject to interpretation, specification, and variance in specific social settings, despite their universalistic nature. Property rights are a good example of common law working out a number of particulars that a civil law

¹¹ A metanormative principle is an "ethical principle that is not used to provide guidance in the pursuit of self-perfection because it does not consider the particular situation, culture or nexus of persons [T]his ethical principle is transcultural, transpersonal, and universal"; *ibid.*, pp. 272-73. See also note 22 below. Finally, we hold that ethical concepts or principles arise from confronting practical problems in human living and thus have different functions and ranges of applicability. For a discussion of the range of applicability of metanorms (individual rights), see Douglas B. Rasmussen and Douglas J. Den Uyl, *Liberty and Nature: An Aristotelian Basis for Liberal Order* (La Salle, IL: Open Court, 1991) (hereafter *LN*), pp. 144-51.

¹² See *ibid.*, pp. 333-38.

order may not endorse, yet in each of these different social orders, the idea of respecting people's rights might still be secured.¹³

In general, then, Christmas wishes to make a lot out of his claim that "[t]he disposition to play well *subsumes* the disposition to follow the rules."¹⁴ This claim is meant to indicate that the distinction between metanorms and perfectionist norms is not needed. However, in the Aristotelian tradition, "distinct" does not mean "separable." As noted above, the intention of the actor to follow the rules does not require a motivation separate from the one of being moral. Christmas's deepest claim in this regard seems to be that *because* one is mandated by the Aristotelian tradition in ethics to live well, one's pursuit of that end will automatically include respecting people's rights because it is a form of living well.¹⁵ It is perfectionism, though, that drives one's following these "metanorms," not the other way around, as Christmas seems to think we claim. But it does not follow from this that respecting rights is simply a constituent of one's pursuit of the self-perfecting life or a form of living well. Furthermore, and to emphasize another point noted above: "The simple fact is that respecting rights, although certainly a matter of following an ethical principle, is neither the essence of the moral life nor particularly a noteworthy accomplishment of moral perfection."¹⁶

Apart from what we say above about intentionality and the Aristotelian framework, we should note, as we do in *NOL*, that metanorms are a function of what we call "liberalism's problem." That is, they arise in response to a specific situation, namely, having to create a social-political order that protects the possibility for self-directed activity. While motivated by self-perfection overall, liberalism's problem nonetheless does not issue in a concern for anyone's self-perfection directly. It is the combination of social life and pluralism of values¹⁷ that forces upon us the need for rule-like

¹³ See *ibid.*, pp. 103-6, for a discussion of this issue with respect to property rights.

¹⁴ Christmas, "Responsibility, Respect, and Justice," p. 56.

¹⁵ See Rasmussen and Den Uyl, *NOL*, pp. 66-69 and 265-68, for a discussion and analysis of this sort of claim.

¹⁶ See *ibid.*, pp. 287-88.

¹⁷ See *ibid.*, pp. 271-73, for a full discussion of liberalism's problem and the criteria for solving that problem. See also Den Uyl and Rasmussen, *TPT*, pp.

metanorms. However much the perfected individual may wish to respect rights, this requirement for social-political order is not primarily about the intent to encourage such respect (though it is an added benefit if it does), but rather to define spheres for obedience to a specific set of rules with the general function of protecting liberty of action. What is concretized here is not just a need to obey these *types* of rules, but also the pressing need to identify specific rules for specific contexts. As actual rules, they (should) make no reference to anyone's own circumstances, interests, or aspirations. It is conceivable that one might come to regard some of these specifically established rules as roadblocks to one's particular aspirations.¹⁸ Thus, however true it might be that the perfected individual recognizes the value of the rules that define rights-respecting conduct, that recognition does not imply that the specific rules are of direct benefit to her own specific aspirations at any given moment in time. That is what we mean when we say that metanorms are only of indirect benefit¹⁹ to the individual.

89-94.

¹⁸ See Rasmussen and Den Uyl, *NOL*, pp. 244-50, for discussion of this issue.

¹⁹ To repeat, this benefit refers to something specific, namely, that the open-ended natural sociality of an individual, combined with the agent-relative, individualized, and self-directed character of human good, gives rise to the need for finding a solution to liberalism's problem. In effect, finding such a solution can be understood as the political-legal expression of the common good for the social-political order. See Douglas J. Den Uyl and Douglas B. Rasmussen, "The Myth of Atomism," *The Review of Metaphysics* vol. 59 (June 2006), pp. 843-70; and Douglas B. Rasmussen and Douglas J. Den Uyl, *LN*, pp.162-65. Also, in this regard it is helpful to note the following account of the common good by Ayn Rand: "It is only with abstract principles that a social system may *properly* be concerned. A social system cannot force a particular good on a man nor can it force him to seek the good: it can only maintain conditions of existence which leave him free to seek it. A government cannot live a man's life, it can only protect his freedom. It cannot prescribe concretes, it cannot tell a man how to work, what to produce, what to buy, what to say, what to write, what values to seek, what form of happiness to pursue—it can only uphold the principle of his right to make such choices It is in this sense that 'the common good' . . . lies not in *what* men do when they are free, but in the fact *that* they are free"; Ayn Rand, "From My 'Future File,'" *The Ayn Rand Letter*, no. 3 (September 23, 1974), pp. 4-5 (first emphasis added).

At a certain level of abstraction, the metanorms could be said to be of direct benefit, but that claim is at such a level of abstraction that no reference is being made to the individual *as an individual*, but only to a generic good—however necessary and important that may be to the individuals to whom it applies. Hence, these metanorms—that is, ethically sanctioned moral rules that define the terms for social living consistent with the requirement of equal freedom—are functionally different from other principles of moral conduct that are of value to one’s own nexus²⁰ in practice. Christmas might respond by saying that all moral norms are like this, that is, that the moral norms concerning, say, courage or generosity also make no reference to the individual. However, it is important to note that these latter types of norms are meant to be employed rather than followed as metanorms are meant to be. *Employment necessarily invokes one’s individuality; following does not.*²¹

We can better see this last point once we realize that if all norms were like metanorms²²—which would be the result if equinormativity²³ were true—then all norms would be in most respects deontic-like, contrary to the nature and spirit of the Aristotelian tradition. It may be no accident that Immanuel Kant wants moral

²⁰ The set of circumstances, talents, endowments, interests, beliefs, and histories that descriptively characterize an individual; see Den Uyl and Rasmussen, *TPT*, p. 54.

²¹ “Employing” requires the use of practical wisdom and all that this involves, while “following” does not—at least in the sense that the only standard that conduct must meet is to conform to the metanormative rule. There can be questions regarding what in certain contexts following a metanorm involves, but these questions do not require a consideration of an individual’s nexus. Indeed, one of the reasons for metanorms is to treat people the same without giving preference to one form of individuality over another.

²² That is, if all ethical norms were universal, impersonal, exceptionless, and not for attaining good or avoiding evil for individuals or specific groups. For an account of how our metanormative approach to rights is different from Kant’s, see Rasmussen and Den Uyl, *NOL*, pp. 51-62. We indicate this difference in part in *NOL* by using “transpersonal” instead of “impersonal” to describe metanorms, but for purposes of this article we have chosen neither to take up a discussion of this difference nor adopt this usage.

²³ Equinormativity is the assumption that all ethical norms are of the same type or have the same function. See note 5 above.

norms to be “legislative,” but with few exceptions, such is not the case in the Aristotelian tradition.²⁴ Rather, ours is an ethics of principles, not rules, where judgment and weighting of values predominate. In our version of such an ethics, much comes down to the individual nexus (and use of practical wisdom) where legislative pronouncements are even less likely to be found. We are not bothered by normative claims that do not transfer from one person to another. For this reason, not only are metanorms not subsumed under ordinary perfectionist norms, but it would be a serious problem for morality if they were. That is because part of the point of such norms is to lose the individuality so necessary for perfective acts.²⁵

Another major strand of Christmas’s argument concerns the idea of enforceability. He considers that our response might be that we want metanorms to allow for enforceability of norms, unlike what would be allowed with perfective norms. With some norms being enforceable while others not, we would keep ethics from collapsing into politics. His response to us is that we can give an Aristotelian perfective account of metanorms (justice₁), so we do not need an account for metanorms in addition to what is used for justifying any other moral norms.²⁶ Though perhaps differing in detail, we have already admitted to a limited degree that both types of norms have to be understood within the Aristotelian tradition. Yet, as also noted, such an admission does not in any way imply sameness of functionality. We might, however, add to Christmas’s own account of

²⁴ On this point, see the Introduction and Chapters 1 and 2 of Den Uyl and Rasmussen, *TPT*.

²⁵ See our discussion of whether individual rights really are about individuality, in the Afterword of *ibid.*, pp. 329-31.

²⁶ It should be added, at least in passing, that this response still does not address the issue of enforceability. The problem for Christmas’s position remains: If all norms that result from an ethics of self-perfection are of the same type and have the same function—namely, promoting individual self-perfection—it is by no means clear how there can be a principled basis for determining which norms will be legally enforced and which will not, let alone how that principled basis could be individual rights. This may be a reason why the Aristotelian tradition is often mired in perfectionist politics. In this regard, it should not be forgotten that the central concern for *NOL* is how to provide a basis for non-perfectionist politics (individual rights) within the context of a perfectionist ethics.

the reasons for justifying and explaining metanorms as Aristotelian norms. Something he does not mention, but which is central to our account, is that these norms emerge from a recognition of the *nature* of social and political life; they are not simply a function of considering one's own nature, as is largely the case in Christmas's account. It is precisely this point that gives rise to enforceability, since we cannot arrive there by looking at the individual's *telos* alone.²⁷

We hope that these comments have been helpful in clarifying our position, and we are once again grateful to Christmas for his remarks. We should conclude by emphasizing that insisting on equinormativity runs into the danger of making morality "legislative," thus failing to give a proper central place to individuality. This tendency occurs because one cannot fail to be tempted to say the same thing to everyone, if metanormative-type rules are considered paradigmatic and all norms are of only one type.

Such rules will become paradigmatic because the realization of the difference in context between the types of norms will be lost by the requirement of equinormativity itself. While it is conceivable that when this loss of context occurs, one could lose the universality and impersonality aspects of metanormative rules and end up with perfectionist norms alone, the more likely outcome is one where perfectionist norms get treated as we would describe metanorms, namely, as legislative. That outcome is more likely because it is easier to socialize such norms than to consider all of the nuances of individual perfectionism. We want to insist upon the distinction between norms and metanorms precisely to protect the fundamentality of the individual in ethics against moral socialism.

²⁷ See *NOL*, pp. 206-22. Furthermore, human beings are naturally social. Their self-perfection cannot be achieved independently and apart from others. Accordingly, a concern for one's own self-perfection requires continued reflection upon the nature and conditions for social life in its most open-ended sense. Individualism is not atomism; see *ibid.*, pp. 141-43 and 270-71.

Articles

Psychological Egoism and Self-Interest

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1. Introduction

In this article I defend an unpopular, some might say discredited, position: psychological egoism, the thesis that we are always ultimately motivated by self-interest.¹ In the course of this article we shall see that people may be mistaken about what really is in their self-interest.² We will also see that people commonly rationalize the choice of a present good that turns out not to be in their self-interest. Perhaps most surprisingly, we will see that, thanks to the merging of self and other, I can see another's interests and my own as forming a larger whole.

I will argue that, understood properly, psychological egoism is conceptually, tautologically true, but that it is nonetheless interesting and nontrivial. Indeed, psychological egoism implies an important truth that is often obscured in moral discourse, namely, that pure altruism is an impossible ideal. Christianity and Immanuel Kant have bequeathed to us a legacy of impossible expectations. In the Christian "economics of salvation" we are called on to sacrifice for others with the promise of heavenly reward.³ However, on at least some interpretations of Christianity, it is not just the act of sacrifice that matters. If your motive for personal sacrifice is to gain heavenly

¹ Joshua May, "Egoism, Empathy, and Self-Other Merging," *The Southern Journal of Philosophy* vol. 49 (2011), p. 25.

² There may also be cases in which several alternatives appear to be equally in one's self-interest. In such cases one must force a fallible decision.

³ For more on the economics of salvation, see John D. Caputo, *Hoping Against Hope: Confessions of a Postmodern Pilgrim* (Minneapolis, MN: Fortress Press, 2015), pp. 39, 61, and 72.

reward, then you are acting selfishly. Your actions must be motivated by love of God. However, as John D. Caputo puts it, “It is impossible to love someone who threatens infinite punishment if you don’t and promises infinite rewards if you do.”⁴ Influenced and inspired by Christianity and the power of reason to discover duty, Kant gave his own impossible ideal in his call for the good will, the will which follows duty apart from all other motivations.⁵ While not all Christians and perhaps not even Kant himself believe it is necessary to achieve this kind of pure motivation, it is put forth as a moral ideal. Following Kant, Arthur Schopenhauer and other secular philosophers have argued that an action only has moral worth if its motivation is purely altruistic.⁶

In rejecting the ideal of pure altruism, I argue that we always ultimately pursue self-interest. To be clear, this does not mean that we are, or should be, unconcerned with others. One can still be guided by prudence in concern for others, layering concern for others on top of the foundation of self-interest. As we shall see, rational, enlightened self-interest is quite different from selfishness, the narrow form of self-interest that involves disregard for others.⁷ In contrast to selfishness, self-interest more broadly construed usually involves considering others. As Robert Olson says, “A selfish man is simply one who fails to take an immediate, personal satisfaction in the well-being of others.”⁸

⁴ Ibid., p. 72.

⁵ Immanuel Kant, *Groundwork of the Metaphysics of Morals*, trans. and ed. Mary Gregor and Jens Timmermann, rev. ed. (Cambridge, UK: Cambridge University Press, 2012), Ak 4:393 and 397.

⁶ Arthur Schopenhauer, among others, sees an action as having genuine moral worth only when it is purely altruistic; see his *On the Basis of Morality*, trans. E. F. J. Payne (Indianapolis, IN: Hackett, 1995), p. 143.

⁷ Neera Kapur Badhwar argues that self-interest can be the motivation of a moral act, but she does not make the clear distinction between self-interest and selfishness; see her “Altruism Versus Self-Interest: Sometimes a False Dichotomy,” *Social Philosophy and Policy* vol. 10 (1993), pp. 90-117.

⁸ Robert G. Olson, *The Morality of Self-Interest* (New York: Harcourt, Brace, & World, 1965), p. 38.

The difficulty in speaking of “self-interest” is that it has such a negative connotation (for some people) that it might as well be the same as “selfishness.” “Selfishness,” too, has an unduly negative connotation, but it would not be worthwhile, *pace* Ayn Rand, to try to rehabilitate the word “selfishness.”⁹ In fact, we might as well keep it as a narrow, extreme form of self-interest. We are all ultimately self-interested, but we do not need to be selfish if by “selfish” we mean self-interested in a way that is inconsiderate of others. The irony is that it is not usually in our self-interest to be selfish, because when we are selfish, other people are offended and often retaliate. As we shall see, enlightened self-interest takes all of this into account.

2. I Always Do What I Want

The first step in arguing for psychological egoism is to note that the *I*, the ego, is inescapable. The word “egoism” itself suggests that the subject is primary. The *I* can never do what the *I* does not want to do. Alas, the illusion that a person can do, and perhaps ought to do, what that person does not want to do in the interest of others is a mainstay in philosophical discourse. Michael Slote, for example, worries, “If there is no such thing as (human) altruism, then the altruistic demands of most social codes and most moral philosophies may be deeply undermined,” and he scolds defenders of psychological egoism for “show[ing] precious few signs of recognizing and regretting the destructively iconoclastic direction of their views and arguments.”¹⁰ I, for one, do recognize that psychological egoism is destructive and iconoclastic, but those are not reasons to deny a philosophical truth. As I shall argue below, embracing enlightened self-interest can alleviate Slote’s concerns about negative consequences.

Of course, why the *I* wants to do *x* is often complex. People believe what they think is true, and people do what they want to do. It does not make sense to say, “I believe the cat is on the mat, but I do not think it is true.”¹¹ If you did not think it was true, you would not

⁹ Ayn Rand, “Introduction,” in Ayn Rand, *The Virtue of Selfishness* (New York: Signet, 1964), p. vii.

¹⁰ Michael Slote, “Egoism and Emotion,” *Philosophia* vol. 41 (2013), p. 316.

¹¹ G. E. Moore, “Moore’s Paradox,” in *G. E. Moore: Selected Writings*, ed. Thomas Baldwin (London: Routledge, 1993), pp. 207-12.

believe it (at least not anymore). Likewise, it does not make literal sense to say, “I do not want to exercise, but I am now going to exercise.” This, however, sounds more reasonable and less contradictory than the claim about the cat, the mat, belief, and truth. We can have competing desires. We can want and not want to do the same thing at the same time in the sense that our emotions and intellect may be in conflict. For example, a prudential, rational decision to do something unpleasant, like exercise, may override a strong emotional desire for something with more short-term pleasure, like lying on the couch. So it can make non-literal, hyperbolic sense to say “I do not want to do this at all” and yet do it in the next moment. But what is being expressed, in the exercise example, by “I do not want to do this at all” is that there is no emotional desire to do the action. The subsequent action attests, however, that there is a strong rational desire, which in this case trumped the emotional desire.

In *Human, All Too Human*, Friedrich Nietzsche says, “No man has ever done anything that was done wholly for others and with no personal motivation whatever; how, indeed, should a man be *able* to do something that had no reference to himself, that is to say lacked all inner compulsion (which would have its basis in personal need)? How could the ego act without the ego?”¹² The buck has to stop somewhere. It stops with the ego.¹³ The ego ultimately does what it wants to do; it is foundational. At the ultimate level, why you want to do something for someone else is because *you* want to. Thus, all actions are ultimately rooted in the desire of the ego to do what it wants. The “my own-ness” of the action, the desire that motivates it, makes it egoistic and self-interested, just not necessarily in an ugly, selfish way.

Joel Marks argues:

What we do is always an action, and an action is always motivated, and another name for motivation is ‘desire’. Thus, even a moralist who always strove consciously to do the right thing, even when this meant acting in opposition to other

¹² Friedrich Nietzsche, *Human, All Too Human*, trans. R. J. Hollingdale (Cambridge, UK: Cambridge University Press, 1986), sec. 133.

¹³ I take Nietzsche to be a psychological egoist at the time of *Human, All Too Human*. Guy Elgat disagrees in his “Nietzsche’s Critique of Pure Altruism—Developing an Argument from *Human, All Too Human*,” *Inquiry* vol. 58 (2015), pp. 308-26.

things she would much rather be doing, would, in the last analysis, be doing what she wanted to do, simply in virtue of being motivated to do the right thing.¹⁴

Marks believes that we always do what we want to do, but he also believes that what we want to do is not always what we perceive to be in our self-interest. That sounds reasonable at first, but it raises a question: If it is not in my perceived self-interest, then why do I want to do it? The easy answer is, “For the benefit of someone else.” However, that raises the question: “Why do I want to benefit someone else?” The answer then comes down to “because I want to,” and that desire may be bound up with love, guilt, duty, or what have you. But if I am doing it because I want to, then that is tantamount to acting out of self-interest. Clearly, I am acting out of an interest, and just as clearly that interest is my own. My loves, guilts, and sense of duty are my own, and I act to address them. Addressing them is my self-interest. I cannot act purely out of love, duty, or anything else. Foundational or ultimate egoism is inescapable. Foundational or ultimate or pure altruism is impossible because it would require what is impossible: doing what I ultimately do not want to do.¹⁵ This is important to recognize because it dismantles an impossible ideal that sets people up for perpetual failure and the feelings that attend the failure.

To be clear, we should not equate egoism or self-interest with hedonism. For example, when you make a sacrifice to help your child, this does not necessarily mean that you are doing something you will enjoy or feel great pleasure in, but it does mean that you are choosing to do what you ultimately want to do. Satisfying that most basic desire is tantamount to serving self-interest as we have articulated it. Self-interest cannot be defined solely in terms of pleasure, happiness, or even advantage, but only in terms of desire to make a person’s life go best.

Talk of sacrifice calls to mind the well-worn example of the soldier who throws herself on a grenade to save her friends. This example is typically offered as a counterexample to disprove psychological egoism. The counterexample is ineffective, however,

¹⁴ Joel Marks, *Ethics without Morals: A Defense of Amoralism* (New York: Routledge, 2013), p. 27.

¹⁵ I use “foundational altruism,” “ultimate altruism,” and “pure altruism” synonymously.

because it could be that, seeing the opportunity, the soldier decides she would not be able to live with allowing her friends to die.¹⁶ Or it could be that she sees this as a moment of glory that will allow her memory to live on. Or it could be that she believes there will be a heavenly reward, and so she will benefit after all. What is impossible is that the soldier does something that she does not want to do. In other words, an ultimately altruistic motivation is impossible.

Of course, it is possible that the soldier throws herself on the grenade automatically, without time for deliberation. A single case, like this, may appear purely altruistic on the surface, even though it is actually rooted in a larger habit or pattern that is self-interestedly motivated in its adoption and continuation. Often, we do not have time for conscious deliberation, but instead are moved by habits. When we do something out of habit and without deliberation, it does not count as an action. Some habits we do not choose to develop. However, the habits we do choose to develop are habits we believe will lead to our best interest overall.¹⁷ In this case, out of self-interest, the soldier may have developed the habits of acting bravely and protecting comrades. These may seem like odd habits or virtues to cultivate in support of self-interest, but that is only if we conceive of self-interest as crass and selfish.¹⁸

By way of comparison with the soldier, consider that planting a tree whose shade I will not live long enough to enjoy might seem devoid of self-interest—but it is not.¹⁹ I take personal satisfaction in the

¹⁶ Slote, “Egoism and Emotion,” p. 327, argues that avoiding feelings of guilt and desiring to be liked are neither egoistic nor altruistic, but rather occupy a space between egoism and altruism. I disagree. The motives in such cases may be a blend of egoism and altruism such that the prevailing tone is rather neutral, but the ultimate motive will always be egoism.

¹⁷ Cf. Olson, “Morally valuable acts of self-sacrifice are explained as exemplifications of habit-patterns themselves deliberately cultivated for the promotion of self-interest” (*The Morality of Self-Interest*, p. 35).

¹⁸ See Peter Railton, “Alienation, Consequentialism, and the Demands of Morality,” *Philosophy and Public Affairs* vol. 13 (1984), pp. 134-71. Railton develops the position of “sophisticated consequentialism” in which the agent does not “bring a consequentialist calculus to bear on his every act” (*ibid.*, p. 153). For its similarities to Railton’s view, the egoism I am positing might be called “sophisticated egoism.”

¹⁹ This example is inspired by Nikos Kazantzakis’s *Zorba the Greek* (New

thought of the shade that the tree will provide. Of course, the defender of altruism might want to say that to count as altruistic, an act does not have to be purely, that is, 100%, for another person; it just has to be done more for the other person than for yourself. What that means is unclear, though. Does that mean it benefits the other person more than it benefits oneself? On that consequentialist account, it is trivially true that I do altruistic acts all the time. Or does it mean that I am doing the action partly for myself but I am doing it more for someone else? How could that be? Doing something for someone else is like feeling someone else's pain, metaphorically possible but literally impossible. It is impossible for me literally to feel another's pain or joy. I can only feel my own pain or joy in response to my own perception of their pain or joy. If I consciously decide to do something, it is because I have decided that, all things considered, this is what I want to do.²⁰ Thus, I am ultimately doing it for myself, even though it may benefit someone else much more and even though it may cause me harm. So, yes, it is possible, and indeed common, to consider others in choosing one's actions. If consideration of others is all we mean by altruism, then yes, altruistic elements can be layered on top of an egoistic foundation.

3. The Critique of Pure Altruism

Mark Mercer says, "It seems a mere tautology that it is never intentional of an agent that she takes a course of action she finds less attractive than another course of action she believes open to her."²¹ Though it is a tautology to say that everyone pursues self-interest in this way as we have defined it, it is a tautology that bears repeating against those who would obscure it. Sometimes, a tautology is not obvious to everyone. That everyone acts in self-interest may be tautological when understood in a certain way, but so is $6/3 + 6/3 = 4$. There is an ontological relationship between egoism and action, but that does not mean there is a semantic identity. Just as it is worth

York: Simon & Schuster, 1952).

²⁰ This is akin to the position that Shane Courtland defends in his "Lomasky on Practical Reason: Personal Values and Metavalues," *Reason Papers* vol. 29 (2007), pp. 83-104. Courtland writes, "The key to personal value is that the end is perceived as being of value simply because it is the agent's own" (ibid., p. 83).

²¹ Mark Mercer, "In Defence of Weak Psychological Egoism," *Erkenntnis* vol. 55 (2001), p. 228.

pointing out the ontological identity of water and H₂O because they are not semantically identical, so it is worth pointing out the ontological identity of egoistic action and intentional action because they are not semantically identical. That is, just as some primitive people may not realize that water is H₂O, so plenty of people do not realize that intentional action is ultimately egoistic.²² As we have seen, the tautology is not trivial because highlighting it frees people from the tyranny of the impossible ideal of pure altruism.

It might be objected, though, that the tautology does not really deliver egoism. Thus, W. D. Glasgow asks:

Is it really feasible then, for the egoist to adopt the obvious, and nowadays popular, solution, namely, that his doctrine expresses a conceptual truth? This means that any action, properly so called, must always conform to at least one condition: it is in accordance with what the agent considers to be his own interests. This, however, is a purely formal condition. Consequently, there is no logical limit to what he might consider to be his own interests. So it is possible for an individual to identify his own interests with those of other people: he might value other people's interests as much as, or more than, his own. But if psychological egoism as a conceptual truth allows this possibility, where is the egoism? To treat it as a conceptual truth is indeed to destroy it.²³

The mistake in Glasgow's description is that it is not possible to value other people's interests as much as or more than one's own. The interests of others can be merged with one's own, but as a part of one's interests they will never be greater than the whole of one's interests. The egoism remains. It simply is not the ugly or selfish egoism that some want to impute to psychological egoism.

A story told about Abraham Lincoln supplies a prime example of unselfish egoism. In the midst of defending psychological egoism in

²² These are all points that Joel Feinberg misses in his discussion of psychological egoism and tautology in his "Psychological Egoism," in *Reason and Responsibility*, ed. Joel Feinberg and Russ Shafer-Landau, 10th ed. (Belmont, CA: Wadsworth, 1999), pp. 495-96.

²³ W. D. Glasgow, "Broad on Psychological Egoism," *Ethics* vol. 88 (1978), p. 368.

discussion on a coach, Lincoln asked the driver to stop so that he could rescue some pigs. When his discussion partner suggested that Lincoln's actions disproved his theory, Lincoln responded that the truth was quite the opposite, that he took the action for himself. Lincoln reportedly said, "I should have had no peace of mind all day had I gone on and left that suffering old sow worrying over those pigs. I did it to get peace of mind, don't you see?"²⁴ What can you say to Lincoln? That he was not serious? I take Lincoln to be serious, and even if he was not, I would be serious in saying the same thing. Can you say to Lincoln that he is overanalyzing things? Perhaps. But, speaking for Lincoln, I would say that you are not analyzing things deeply enough.²⁵ Can you say to Lincoln that he is missing the point, that the very fact that the pain of the pigs upsets him shows that he is ultimately motivated by concern for others?

This last is the response that Bishop Joseph Butler would have given. Butler argues that it must be the case that, sometimes, we are motivated ultimately by the desire to help others. In such cases we do not act in order to attain satisfaction. Rather, it is in the fulfillment of

²⁴ James Rachels, *The Elements of Moral Philosophy*, 4th ed. (New York: McGraw-Hill, 2003), p. 69; see also Feinberg, "Psychological Egoism," p. 496.

²⁵ Mercer says, "from the psychological egoist's perspective, those who deny psychological egoism have not earned the comfort their attitudes bring them. There is something disturbingly pollyannaish about thinking that people can on occasion set their preferences and plans, their wants and desires, their likes and dislikes, aside, and something viciously distasteful in the idea that it is ever appropriate that they should. To cling to the view that entirely selfless actions are both possible and, sometimes, just what is called for, is not so much to think that people really are capable of right action for the right reasons as it is to refuse to grow up, to refuse in principle to take pleasure in the world as it is, and to enjoy one's own contingent personality. What is admirable in the person who sacrifices his life in assisting others is not that he acted rightly despite his inclinations, but rather that he was so strongly inclined to be concerned for others. Perhaps it is true that sometimes psychological egoists display a knowingness of the inner recesses of the human heart that gets annoying, just as those who think selfless altruism possible can be insufferably smug and self-righteous, though there is nothing in either position that makes it inevitable that its partisans will be annoying or insufferable. Still, it seems to me, if cynical knowingness is a risk taken by those who would put away childish things, it is very much a risk worth running" ("In Defence of Weak Psychological Egoism," p. 235).

that desire to help others that we find satisfaction.²⁶ As Wayne Johnson captures it:

Butler argues that while we do get satisfaction when the object of our desire is attained, this does not show that it was the resulting satisfaction itself which we desired. The Psychological Egoist mistakenly believes that we want to do something because of the satisfaction we will get from doing it. Butler maintains the reverse; we get satisfaction from doing something because we wanted to do that thing. We did not help the injured child in order to get the satisfaction which followed; rather, we gained satisfaction from helping an injured child because what we desired was help for the child, not our satisfaction.²⁷

Butler, though, simply gets it backward in his understanding of human psychology. As Scott Berman argues:

It is wrong to suppose that a human *could* want some external object for its own sake because in order for a human to want some particular external object at all, she must be able to integrate her beliefs about what's best given her circumstances into an initially indefinite thought-dependent desire for what's best given her circumstances.²⁸

As Berman highlights, the view that we inherit from Butler, namely, that humans can want objects or states of affairs completely apart from themselves, is misguided. What is more, this view is pernicious because it sets us up for failure in meeting Butler's Christian ideal of selflessness every time we look deeply into the motivation for our actions.

²⁶ Joseph Butler, "Sermon XI," in *Fifteen Sermons Preached at the Rolls Chapel*, in *British Moralists: 1650-1800*, ed. D. D. Raphael, vol. 1 (Indianapolis, IN: Hackett, 1991), pp. 365-66.

²⁷ Wayne G. Johnson, "Psychological Egoism: Noch Einmal," *Journal of Philosophical Research* vol. 17 (1992), p. 256.

²⁸ Scott Berman, "A Defense of Psychological Egoism," in *Desire, Identity, and Existence: Essays in Honor of T. M. Penner*, ed. Naomi Reshotko (Edmonton: Academic Printing and Publishing, 2003), p. 146.

Speaking in terms of first-order and second-order desires, Johnson likewise exposes the mistake in Butler's reasoning:

Any first order desire must be accompanied by the second order desire of self-love before an action would be reasonably undertaken. This second order desire clearly involves a motive which is either self-regarding or has a self-referential stimulus. Thus Butler fails to demonstrate that we are not aiming at our happiness when we act on a first order desire.²⁹

Of course, it may not be our happiness, but rather something else in our self-interest, that we are pursuing.³⁰ Butler discusses the situation in which a person pursues revenge even though it will ultimately leave the person himself worse off.³¹ This would seem to suggest that Butler is correct in arguing that we sometimes ultimately want something external to us for its own sake, in this case the harm done to another person through revenge. This is not correct, however. Rather, the person seeks revenge in order to satisfy a desire that he cannot bring himself to ignore. He thus considers pursuit of revenge to be in his self-interest; it is a desire that he ultimately endorses. He recognizes that scratching that itch will leave a scar, but concludes that scratching the itch is nonetheless what he wants to do. He would prefer that it leave no scar, but he is irrationally overcome with the emotional desire to scratch the itch despite the inevitable scar.

Clearly, I am not suggesting that everyone always coldly calculates what will be in their self-interest. The decision-making process is usually much more subtle, and can even be self-deceptive. Indeed, motivation is often so influenced by biochemistry that we do not ourselves know why we do the things we do; it is not always completely transparent to us what our motives are. And, of course, not

²⁹ Johnson, "Psychological Egoism," p. 257.

³⁰ Peter Nilsson does a fine job of showing what is wrong with Butler's argument, and then he uses Butler's argument as the basis for a better argument against psychological hedonism. I am not convinced by Nilsson's argument against psychological hedonism, but in any event the argument does not refute the broader view that I argue for, namely, psychological egoism. See Peter Nilsson, "Butler's Stone and Ultimate Psychological Hedonism," *Philosophia* vol. 41 (2013), pp. 545-53.

³¹ See Butler, "Sermon XI."

everything we do follows from deliberation. Rather, some things we do from unthinking habit. Indeed, lots of our mental activity is unconscious. For example, we may eat something believing that we have chosen to eat it because it is good for us, when the deeper reason is that, without our knowing it, the item contains caffeine, which we find stimulating. Likewise, we may think we are choosing to do something because it will help someone else, when in fact the deeper motivation is that we desire the feeling that will accompany the release of oxytocin upon helping the other person. If kicking old ladies produced oxytocin, we would see a lot more of that behavior. But evolution has made it so that helping others, particularly kin and those in close proximity, produces oxytocin. This is not to say that we always consciously intend to produce a helper's high with the release of oxytocin, but it is nonetheless foundational to our motivation—we would lose the desire to help if there were no good feelings that resulted.

Some may be troubled that, by this reasoning, psychological egoism is unfalsifiable.³² This should not be troubling, however, because we are considering a conceptual claim, not an empirical claim. The thesis of psychological egoism is a tautology, and tautologies are not falsifiable. No one has yet devised an experiment that can conclusively settle the matter empirically.³³ For that reason, the focus of this article is on the conceptual claim. The value of exposing the

³² Hun Chung, "Psychological Egoism and Hobbes," *Filozofia* vol. 71 (2016), p. 202.

³³ C. Daniel Batson has devised experiments that he believes disprove psychological egoism; see C. Daniel Batson, "Altruism and Prosocial Behavior," in *The Handbook of Social Psychology*, ed. D. T. Gilbert and S. T. Fiske, vol. 2 (Boston, MA: McGraw-Hill, 1998), pp. 282-316. On the other side, Robert Cialdini has done experiments to show the possibility of psychological egoism; see Robert B. Cialdini, "Altruism or Egoism?: That Is (Still) the Question," *Psychological Inquiry* vol. 2 (1991), pp. 124-26. See also Robert B. Cialdini et al., "Reinterpreting the Empathy-Altruism Relationship: When One into One Equals Oneness," *Journal of Personality and Social Psychology* vol. 73 (1997), pp. 481-94. For discussion of Batson and the extent to which his experiments do not disprove psychological egoism, see Steven Stich, John M. Doris, and Erica Roeder, "Altruism," in *The Moral Psychology Handbook*, ed. John M. Doris and the Moral Psychology Research Group (Oxford: Oxford University Press, 2010), pp. 169-201.

tautology to the light of day, as we have seen, is to free us from the impossible ideal of pure altruism.

4. It's All about Self-Interest

From an objective standpoint, self-interest is what would make a person's life go best.³⁴ To see why we inevitably act in our perceived self-interest, consider that the question "Why act in my self-interest?" is baffling, almost nonsensical. The answer is "Because it is in your self-interest." As in the case of the revenge-seeker, people may be mistaken about what really is in their self-interest, but not whether they have a good and ultimate reason to act in their self-interest.³⁵ The details of self-interest will vary considerably from one individual to the next and even for the same individual across time; one size does not fit all. Self-interest is not strictly identifiable with pleasure or happiness or advantage.³⁶ Rather, self-interest is a matter of what will make one's life go best. Of course, a lot can be learned from empirical study to offer generalizations about what will typically maximize pleasure, well-being, happiness, satisfaction, or whatever may be aimed at as constituent of self-interest. Still, the things we take satisfaction and pleasure in are not completely under our control. I enjoy walking the dog, but this enjoyment is not chosen. My wife does not enjoy walking the dog, and this is not chosen either. I walk the dog for the pleasure and satisfaction in doing so, even though that pleasure and satisfaction are related to the pleasure and satisfaction the walk brings to the dog. I am not ultimately doing it for the dog but for myself.

We have an objective self-interest in any given situation, even if we do not know with certainty what it is and even if (like the exact number of stars in the universe) it is impossible to know it, practically speaking. An all-knowing being could know my objective self-interest with certainty, even if I cannot. My objective self-interest is a

³⁴ There is an objective answer to what would make the person's life go best, even though there is no universal, objective formula for what makes life go best for all humans.

³⁵ Cf. David Copp, "The Ring of Gyges: Overridingness and the Unity of Reason," in *Self-Interest*, ed. Ellen Frankel Paul, Fred D. Miller, Jr., and Jeffrey Paul (Cambridge, MA: Cambridge University Press, 1997), p. 105.

³⁶ Cf. Mark Mercer, "Psychological Egoism and Its Critics," *The Southern Journal of Philosophy* vol. 36 (1998), p. 558.

metaphysical fact no matter how epistemologically elusive it may be. We can specify some things that will almost certainly be against most people's objective self-interest, for example, shooting heroin with an HIV-infected needle.³⁷ But even examples such as this will have exceptions. After all, if one already has AIDS and a heroin addiction, then in some circumstance it may be in one's self-interest to shoot heroin with an HIV-infected needle.³⁸

The individual will not always be the best judge of what will make her life go best, that is, what her objective self-interest is. The revenge-seeker, for example, may convince herself that the immediate pleasure of taking revenge is objectively in her self-interest, whereas her friend can see that it is not. It is a common feature of human action that we hyperbolically discount future costs in favor of present desires. As a result, people are often no better at resisting present desires in the name of prudence than in the name of morality.³⁹ That is, we may rationalize and convince ourselves that something is in our objective self-interest when it is not.

Kant gives the example of a shopkeeper who passes up the opportunity to cheat a customer not out of a sense of duty, but because he realizes it is not in his self-interest to cheat the customer.⁴⁰ Acting in self-interest is not necessarily the same as acting prudently; self-interested motivation is inevitable, whereas prudence is not. All actions are ultimately self-interested, but not all actions are prudent in the sense of being wise, practical, and well-considered. Kant's shopkeeper may have been both self-interested and prudent, but a different shopkeeper who rationalized that it was somehow in his self-interest to cheat the customer would have been self-interested but probably imprudent. Like the first shopkeeper, he did what all of us do, which is that he did what he perceived to be in his self-interest, although it was probably not prudent and may ultimately turn out not to have been in

³⁷ Kelly Rogers, "Beyond Self and Other," in *Self-Interest*, ed. Paul, Miller, and Paul, p. 5.

³⁸ Of course, such a person may well have taken actions against his self-interest that led to contracting HIV and developing a heroin addiction, but not necessarily.

³⁹ Cf. David Schmitz, "Self-Interest: What's in It for Me?" in *Self-Interest*, ed. Paul, Miller, and Paul, p. 121.

⁴⁰ Kant, *Groundwork*, Ak 397.

his objective self-interest. Of course, yet another shopkeeper may have been both prudent and self-interested in cheating a customer. Much depends on the particular circumstances.

5. The Sacrifice Bunt and the Last Doughnut

Does the concept of sacrifice make sense under psychological egoism? Yes, but only in a limited sense. One can still sacrifice for one's children, even sacrifice one's life. All that one cannot do is what one does not want to do. Joshua May asks, "Does it not seem, for example, that your motivation to promote the well-being of your children, say, isn't instrumental to any other desire to benefit yourself?"⁴¹ I may be perceived as a monster for saying so, but no. Indeed, my children are a good example of what psychologists mean by the merging of self and other.⁴² As Robert Cialdini et al. say, "Our view [is] that the perception of oneness with a needy other generates empathic concern and that the experience of empathic concern generates the perception of oneness. However, it appears to be oneness and not empathic concern that mediates help."⁴³ C. Daniel Batson disagrees with Cialdini's interpretation, claiming that the experiences of oneness that Cialdini speaks of are metaphorical.⁴⁴ Slote disputes Batson and offers another interpretation, saying, "There is no reason to call them metaphorical, and it makes more sense to interpret them as invoking or involving qualitative identity, oneness, or sameness rather than numerical."⁴⁵

I disagree. The oneness is not merely a metaphor, nor is it a matter of equivocation such that the oneness is qualitative rather than numerical. Actually, it is a matter of perception. Thanks in part to

⁴¹ May, "Egoism, Empathy, and Self-Other Merging," p. 25.

⁴² Cf. Courtland's discussion of metavalues and personal identity, "Lomasky on Practical Reason," pp. 93-100.

⁴³ Cialdini et al., "Reinterpreting the Empathy-Altruism Relationship," p. 489. See also Jon K. Maner et al., "The Effects of Perspective Taking on Motivations for Helping: Still No Evidence for Altruism," *Personality and Social Psychology Bulletin* vol. 28 (2002), pp. 1601-10.

⁴⁴ C. Daniel Batson, *Altruism in Humans* (New York: Oxford University Press, 2011), p. 159.

⁴⁵ Slote, "Egoism and Emotion," p. 327.

human evolution, I see my children's interests and my own as forming a larger whole—call it the team's interests. Just as a baseball player may sacrifice bunt to move a runner over for the good of her team, so will I do something for the good of my team by helping my children. The bunter is sacrificing ultimately for her own well-being inasmuch as she regards the team's well-being as an important part of her own well-being. Likewise, *mutatis mutandis*, for my sacrifices for the benefit of my children and our team. Those are only for the cases where my own self-interest in doing something for my children is not more naked and apparent. To be clear, the perception of oneness is largely involuntary, although it can sometimes be cultivated. A team may be as small as two members, and the perception of oneness applies not just to an abstract entity, the team, but to particular members of the team as well.

The foregoing analysis is not meant to endorse group selection. Quite the contrary, it is meant to endorse the theory that genes, not individuals or groups, are the basis of evolutionary selection. Evolution has inclined us to favor those nearby because they are most likely to be kin who share our genes. Thus, potentially experiencing oneness with those nearby, seeing them as members of a team, enhances the prospects of survival for our genes.

So altruism, in the pure sense of acting for others *with no concern for oneself*, is impossible. If I freely perform an action, then it is because I prefer to perform that action, even if I am mistaken in thinking that it is in my objective self-interest. Altruism is possible only in the limited, impure sense of acting with concern for others. But the interests of others are never wholly separable from our own interests; we will be affected positively in benefiting others. The more obvious negatives may grab our attention, but there are always positives as well. As Nietzsche says, “anyone who has really made sacrifices knows that he wanted and got something in return.”⁴⁶ Continuing along this line of explanation, Ayn Rand says, “If a man who is passionately in love with his wife spends a fortune to cure her of a dangerous illness, it would be absurd to claim that he does it as a ‘sacrifice’ for her sake, not his own.”⁴⁷ On a more mundane level, it is

⁴⁶ Friedrich Nietzsche, *Beyond Good and Evil*, trans. Walter Kaufmann (New York: Vintage, 1989), sec. 220.

⁴⁷ Ayn Rand, “The Ethics of Emergencies,” in *The Virtue of Selfishness*, pp. 44-45.

in my interest to treat my wife well. If I simply selfishly do what I want whenever I want without regard for her wishes, I will ultimately alienate her, and in doing so act against my own objective self-interest. If I leave the last doughnut for my wife, the negatives are obvious: my immediate desire and hunger go unsatisfied. But there are possible positives, less obvious and direct. My wife may appreciate my thoughtfulness and reciprocate. So it makes sense that we generally make sacrifices for people in close proximity to us rather than people far removed from us; the benefits are more likely to come our way. As Nietzsche says, “Egoism is the law of perspective applied to feels: what is closest appears large and weighty, and as one moves farther away size and weight decrease.”⁴⁸

Along similar lines, Adam Smith considers a hypothetical earthquake in China that kills one hundred million people. Smith says that the typical European would express sorrow and melancholy upon hearing the news. He adds, however:

The most frivolous disaster which could befall himself would occasion a more real disturbance. If he was to lose his little finger to-morrow, he would not sleep to-night; but, provided he never saw them, he will snore with the most profound security over the ruin of a hundred millions [sic] of his brethren, and the destruction of that immense multitude seems plainly an object less interesting to him, than this paltry misfortune of his own.⁴⁹

There is a ready explanation for this. Those people are not on his team, except in the vaguest, most extended sense in which they all belong to the human team. This typical European would be more disturbed by the loss of a single person in his family or, for that matter, by the prospect of the loss of his little finger. Of course, the world has become smaller since Smith’s time, thanks to media and communication technology. We now see vivid images of suffering people around the world, and we forget distant suffering less easily than we did in Smith’s time. We may thus be inclined to aid people suffering in

⁴⁸ Friedrich Nietzsche, *The Gay Science*, trans. Walter Kaufmann (New York: Vintage, 1974), sec. 162.

⁴⁹ Adam Smith, *The Theory of Moral Sentiments*, ed. D. D. Raphael and A. L. Macfie (Indianapolis, IN: Liberty Fund, Inc., 1976), III.I.46.

distant lands, but the suffering of those nearby still tends to pull harder at our heartstrings. Some would say that we should cultivate a sense of oneness with the whole human team. Perhaps, but that oneness would not come easily, and the emotional consequences might be too much for most people to bear.

6. Fictional Case Studies

To illustrate the argument thus far, let us consider two fictional examples. Jordan Belfort, as portrayed in *The Wolf of Wall Street*, is a caricature of the egoist, concerned with his self-interest in only the most narrow and unenlightened sense. He is ready, willing, and able to lie, cheat, and steal to get sex, drugs, and money. He has some good times, but predictably he meets a bad end, losing his money, his wife, and his freedom. It is unfortunate that when most people think of egoism, they think of someone like Jordan Belfort. Extreme cases of the foolish, selfish pursuit of self-interest exist, but so do cases like Azarya, the Rebbe's son in *36 Arguments for the Existence of God*.⁵⁰

Secretly, Azarya no longer believes in God and wants to leave the isolated community of Hassidim in which he has been raised. However, just as he is about to make the decision to leave the community and become a mathematician, Azarya receives news that his father has died. Azarya is now faced with a heart-wrenching decision: Should he continue on his path, leaving the community to become a mathematician? Or should he return to his community who value him above all others as next in line to be the Rebbe? The community will be devastated if he leaves them now. If his father had not died, perhaps other arrangements could have been made, but now that is not possible. Azarya cannot bring himself to leave. Unlike Belfort, he cares for people and his community. On the psychological egoist's interpretation, it is no longer in Azarya's objective self-interest to leave the community. He would not be able to live well with the guilt from disappointing his community. Performing a sacrifice bunt, Azarya gives up his chance to swing for the mathematical fences and returns to give happiness to the team, the community of which he will always feel a part. Of course, we do not know what happens after the action of the novel concludes, and someone might interpret Azarya's decision differently. Perhaps it will turn out that he was mistaken about his objective self-interest. Perhaps his decision will cause him deep

⁵⁰ Jordan Belfort, *The Wolf of Wall Street* (New York: Bantam Books, 2008); Rebecca Newberger Goldstein, *36 Arguments for the Existence of God* (New York: Vintage Books, 2010).

unhappiness, making him ineffective as the Rebbe and community leader.

7. The Pursuit of Self-interest

The preceding fictional examples illustrate the extremes of selfish self-interest in the case of Belfort and enlightened self-interest in the case of Azarya. Most people are unlikely to be so extreme. Accepting psychological egoism, a person may still layer altruistic concern for others on top of the foundation of self-interest. Indeed, one's ethical code may call for such altruistic concern. Even if one rejects altruistic ethical codes, one is still likely to act like Kant's shopkeeper, who is motivated by self-interest in not cheating customers. "Every man for himself" does not have to mean stabbing your neighbor in the back. In fact, it can mean serving your neighbor well. Smith crystallized this insight when he noted, "It is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own self-interest."⁵¹ In the economic realm, the pursuit of self-interest is not necessarily an impediment to promoting a common good. Again, as Smith rightly observes, every individual "intends only his own gain, and he is in this, as in many other cases, led by an invisible hand to promote an end which was no part of his original intention. By pursuing his own interest, he frequently promotes that of society more effectively than when he really intends to promote it."⁵²

Many are willing to admit that Smith is correct about the economic realm (at least to a certain extent and perhaps reluctantly), while nonetheless insisting that in the personal realm pure altruism is called for. In Rand's *Atlas Shrugged*, the despicable Jim Taggart responds to his wife's question, "What is it that you want to be loved for?" by saying, "I don't want to be loved *for* anything. I want to be loved for myself—not for anything I do or have or say or think. For myself—not for my body or mind or words or works or actions."⁵³ Taggart had deceived his wife into thinking that he was a sincere man of action rather than a duplicitous parasite, and now he wants her to

⁵¹ Adam Smith, *An Enquiry into the Nature and Causes of the Wealth of Nations* (New York: Bantam, 2003), pp. 23-24.

⁵² *Ibid.*, p. 572.

⁵³ Ayn Rand, *Atlas Shrugged* (New York: Signet, 1957), p. 809.

love him anyway. Taggart was asking for too much. Loving another person means merging my identity with that person to some degree, making him part of my team, making his flourishing apiece with my flourishing. Ordinarily, another person must have some clear value in order for me to love him as a friend or spouse. Thus, Jim Taggart's wife no longer finds it possible to feel oneness with him.

Of course, none of us is perfectly loveable or worthy of love. Certainly, there will be conflicts in the pursuit of self-interest. *Contra* Slote, I remain optimistic, though, that a broad acceptance of psychological egoism would ultimately have good consequences. Although ultimate altruism is impossible, altruism in the form of concern for others can still be layered on top of the ultimate foundation and motivation of self-interest. In fact, this would be common in a world in which everyone accepted psychological egoism. Yes, upon accepting the truth of psychological egoism, some people would foolishly indulge themselves and hurt others, à la Jordan Belfort, but most would ultimately learn to live with, and even cherish, the responsibility. Like students away at college for the first year, many might overindulge for a time, but most would ultimately realize that they hurt themselves by doing so.⁵⁴

Even though we do not all share the same self-interest, we can help one another in the pursuit of self-interest. We can praise those who realize that their self-interest incorporates the interest of others. Robert Olson says, "by praising a man for acting consistently in his own best interests one encourages him to cultivate habits of rationality and rational self-control with all of the social advantages which this entails."⁵⁵ None of this is easy, however. Acquiring self-knowledge, developing prudence, and applying them both in pursuit of self-interest requires discipline. But not only is the effort worth it for the individual's own sake, it is worth it for the individual to help others in their development as part of a more livable society. In Olson's words: "[I]f each of us were prepared to make reasonable sacrifices for the sake of more or less distant personal goods, the result would be a state of society in which private and social interests tend to coincide, thus

⁵⁴ This all holds, even if one rejects moral realism for reasons other than the impossibility of pure altruism, as I do. See William Irwin, *The Free Market Existentialist: Capitalism without Consumerism* (Oxford: Wiley-Blackwell, 2015), pp. 89-128.

⁵⁵ Olson, *The Morality of Self-Interest*, p. 9.

eliminating the ‘need’ for anyone to make unreasonable sacrifices for the good of others.”⁵⁶ Thus, some people pursue self-interest broadly and wisely and some pursue it narrowly and unwisely, but all pursue it. Ultimately, it is in everyone’s self-interest for everyone to pursue it wisely. As we have seen, psychological egoism does not imply that we cannot, or should not, care about others. Prudence can still motivate us to care about others a great deal.⁵⁷

⁵⁶ Ibid., p. 20.

⁵⁷ None of these fine folks should be mistaken for agreeing with me, but they all helped despite my hard-headedness: Jim Ambury, Shane Courtland, Fred Feldman, Joel Marks, Mark Mercer, Edwardo Perez, and two anonymous referees.

Wilt Chamberlain Redux: Thinking Clearly about Externalities and the Promises of Justice

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1. Introduction

Gordon Barnes accuses Robert Nozick and Eric Mack of neglecting, in two ways, the practical, empirical questions relevant to justice in the real world.¹ He thinks these omissions show that the argument behind the Wilt Chamberlain example—which Nozick famously made in his seminal *Anarchy, State, and Utopia*²—fails. As a result, he suggests that libertarians should concede that this argument fails. In this article, we show that Barnes’s key arguments hinge on misunderstandings of, or failures to notice, key aspects of the entitlement theory that undergirds Nozick’s and Mack’s work. Once the theory is properly understood, Barnes’s challenges fail to undermine the Chamberlain example, in particular, and the entitlement theory, in general.

2. The Chamberlain Example

Nozick offers his Wilt Chamberlain example to establish two closely related points. First, it demonstrates the plausibility of what Nozick calls a “historical” account of distributive justice (in particular, of his own “entitlement theory”). Historical conceptions hold that justice and injustice in holdings are matters of what has actually happened, of *how* a person ended up with a particular holding.³

¹ Gordon Barnes, “Wilt Chamberlain Redux?” *Philosophia* vol. 44, no. 1 (2016), pp. 79-85.

² Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974).

³ *Ibid.*, p. 152.

Specifically, if one can trace a holding through just steps to a just initial acquisition, or to some such steps that are unjust but rectified, the holding in question is just.⁴ According to historical theorists, the fact that two distributions are structurally identical—for example, you and I each have \$10 in our wallets—is no guarantee that they are equally just or unjust holdings.⁵

Having offered a partial justification of a historical view of justice, Nozick turns to establishing a second point: the implausibility of “patterned” or “end result” accounts of distributive justice.⁶ Patterned theories hold that a just set of holdings varies directly in accordance with some moral principle.⁷ A theory holding that need generates claims will identify a set of holdings that grants the most goods to those most in need. End result theories hold that there is some specific goal that a set of holdings must achieve.⁸ For example, a theory requiring maximizing equality will identify the set of available holdings that best achieves equality of outcome as just.

Theories of justice in holdings consist of justifying reasons (JRs) and distributions (Dx) resulting from the application of the JRs. The Wilt Chamberlain example invites the reader to fix her favored distribution (call it D1) resulting from the reader’s favored JRs. From D1, Nozick suggests that we allow people to engage in a certain activity they desire, like watching Wilt Chamberlain, a “great gate attraction,” play basketball.⁹ Chamberlain agrees to play for a

⁴ Ibid., p. 151. Of course, a proper theory of justice might also include a theory of abandonment, statutes of limitations on claims of injustice, and so on.

⁵ Ibid., p. 155.

⁶ Ibid. It is important to see that the Chamberlain example does not establish a just starting point. It establishes only the problem with maintaining some putatively just starting point. For a discussion of this issue, see Hillel Steiner, “The Natural Right to the Means of Production” *The Philosophical Quarterly* vol. 26, no. 106 (1977), pp. 41-49.

⁷ Nozick, *Anarchy, State, and Utopia*, pp. 155-56.

⁸ Ibid., pp. 153-55.

⁹ Ibid., p. 161.

particular team on the stipulation that each person willingly attending the team's home games drops a quarter in a box especially for him. After a full season and one million such transactions, a new distribution (D2) results. In D2, Wilt Chamberlain has an "extra" \$250,000. Nozick asks whether D2 is just.¹⁰

If D2 is just, the argument goes, then the set of JRs does not justify a unique distribution. D1 was just, *ex hypothesi*, and so is D2. Nozick presumably thinks that most people will accept this conclusion. On this understanding, combining a just initial distribution with justice-preserving transactions (respecting the rules of the entitlement theory) results in just distributions.¹¹

One who believes that D2 is unjust, on the other hand, might claim that D3, in which Chamberlain turns over a proper subset of his earnings in taxes, is instead just. In this case, both D1 and D3 are just. There are two possible scenarios, then, resulting from consideration of the Chamberlain example. Either Chamberlain is entitled to all of his earnings, in which case the JRs justify both D1 and D2, or Chamberlain is entitled only to his post-tax earnings (or some other distribution), in which case the JRs justify both D1 and D3. Either way, the JRs do not justify a unique Dx. Only those suggesting that Chamberlain must surrender all of his "excess" income, returning to D1, can avoid admitting that no unique just distribution comes from any plausible set of JRs.

The historical theorist focuses not on the resulting distribution (since liberty upsets patterns), but on the JRs, which are entirely historical, when examining how a distribution arose. So long as the Dx—whatever it is—has arisen through just initial acquisitions and through just transfers, or is the result of an appropriate rectification of injustice, that Dx is just. This exclusive focus on historical JRs is the hallmark of a historical account of justice in holdings.

3. Mack's Challenges to Patterned Theories: The Explanatory Argument and the (False) Promise Argument

Barnes aims to construct and refute two challenges the Chamberlain example presses against patterned theories of justice. Eric Mack identifies both:

¹⁰ Ibid.

¹¹ Nozick compares justice-preserving transfers to valid inferences. The latter are truth-preserving while the former are justice-preserving; see *ibid.*, p. 151.

Nozick is actually making two distinct, but interconnected points against the pattern theorist. First, the friend of pattern is bound to explain, but cannot explain, how quite innocuous transactions . . . can inject injustice into a previously just world. Second, the program of the friend of pattern promises us more than the ongoing application of the favored pattern can deliver—precisely because the successive application of the pattern is incompatible with the entitlements to holdings that we expect under the banner of justice in holdings.¹²

Barnes deems the challenge to explain how injustice infects the post-transfer set of holdings in D2 “The Explanatory Argument.” He calls the patterned theorist’s inability to tell people what they are entitled to “The False Promise Argument.”

The Explanatory Argument, Barnes claims, forces a dilemma on the patterned theorist. He “must say that there is an injustice after the Chamberlain transactions since his favorite pattern is violated. But if there is an injustice at the end of the story, then there must be some explanation of that injustice Either the pattern theorist explains the injustice in terms of some feature of the historical process that produced the distribution at the end of the story, or else the pattern theorist explains the injustice in terms of some nonhistorical feature of that distribution.”¹³ The former option unfortunately appeals to a historical conception of justice, which presumably violates the JRs endorsed by patterned theorists. Barnes claims that the latter option amounts to saying that “completely innocuous actions can produce injustice, and that is simply implausible.”¹⁴

Barnes cites Mack to justify this interpretation of The Explanatory Argument:

[T]he only thing that the pattern theorist can appeal to [in order to explain this injustice] is the sub optimality of the

¹² Eric Mack, “Self-Ownership, Marxism, and Egalitarianism (Part 1): Challenges to the Self-Ownership Thesis,” *Politics, Philosophy, and Economics* vol. 12 (2002), pp. 83-84.

¹³ Barnes, “Wilt Chamberlain Redux?” p. 81.

¹⁴ *Ibid.*

resulting D2. If the pattern theorist attempts to respond to Nozick by insisting on the non-innocuous character of certain processes that have been involved in the emergence of D2, he abandons his own view that the justice of any distribution is entirely a matter of the degree to which he realizes the right sort of pattern and is not at all a matter of the process by which it arises.¹⁵

Unmoved by The Explanatory Argument, Barnes writes that Mack has ignored a salient possibility: “Perhaps the explanation of the injustice the pattern theorist will cite lies in the consequences of the distribution.”¹⁶ Following Thomas Nagel, Barnes notes that “principles of justice are intended to govern entire societies, over long periods of time.”¹⁷ Focusing on the Chamberlain transaction in isolation from other transactions that would occur in society, we overlook the cumulative negative externalities.

Although the results in the Chamberlain case are insignificant, a series of similar transactions in other areas across time could produce startling inequality.¹⁸ The inequality in the Chamberlain example massively benefits Chamberlain, but it does not obviously significantly harm anyone else. Nonetheless, accumulated effects could “lead to extreme inequality, and thereby cause many other harms to people in that society.”¹⁹ Barnes calls this the Compounded Consequences Challenge.

Barnes endeavors to block two possible responses from the historical theorist. The first response denies “that the consequences of a freely chosen distribution are relevant to the justice or injustice of that distribution.”²⁰ Barnes rejects this principle as implausible; he notes, or at least implies, that Mack does as well.

¹⁵ Mack, “Self-Ownership, Marxism, and Egalitarianism (Part 1),” p. 83.

¹⁶ Barnes, “Wilt Chamberlain Redux?” p. 81.

¹⁷ Ibid.

¹⁸ Ibid., p. 82.

¹⁹ Ibid.

²⁰ Ibid.

Barnes attributes to Mack a different, second response, one that concedes “that the consequences of a freely chosen distribution are relevant to its justice, but (insists) that those consequences will be good overall.”²¹ Mack suggests this response when he asks, “[W]hat reason is there to believe that the aggregate of side effects of Chamberlain’s wealth (and the other disproportionate shares of wealth accumulated through voluntary exchange) would be negative—indeed, negative enough to render those side effects a net negative?”²² Barnes seems to deem Mack’s response to the Compounded Consequence Challenge inconclusive, claiming that “Mack has obscured the dialectical situation at this point in the argument.”²³ The dispute concerns what will happen in actuality; Barnes writes that “this debate ultimately rests on an empirical question.”²⁴ While Mack offered one possible outcome, he cannot believe he has offered a satisfactory response to the Compounded Consequence Challenge. In lieu of evidence, Mack’s response amounts to an assertion, or as Barnes puts it, “Mack offers no empirical evidence for that assumption, so it is unjustified.”²⁵

4. The False Promise and the Special Guarantee

Barnes is also unmoved by historical theorists’ False Promise Argument. This argument holds that patterned principles of justice promise people what they are entitled to as a matter of justice, but cannot deliver on that promise. Mack here presents the problem:

[I]n order to maintain allegiance to his favored pattern, the pattern theorist has to say that his doctrine never promises people any particular, identifiable, institutionalized income regime. Rather, in the name of distributive justice, people are promised income regimes that will be changed periodically (in light of what income streams have come into existence and what new technologies for generating income streams and for

²¹ Ibid.

²² Mack, “Self-Ownership, Marxism, and Egalitarianism (Part 1),” p. 94.

²³ Barnes, “Wilt Chamberlain Redux?” p. 82.

²⁴ Ibid.

²⁵ Ibid., p. 83.

redistributing them seem to have been discovered) so as to attempt to produce an optimal long-term distribution.²⁶

The patterned theorist thus “puts us in the dark about what our just income claims really are.”²⁷ New rules and technologies can always be invented to best achieve the favored pattern. These rules and technologies can be used to extract holdings from people in new ways. As a result, “we will quickly learn the foolishness of describing the income that anyone receives under any given regime as his just income. For we will quickly learn that social calculations in the not very distant future will very likely reclassify at least some of that income as unjust.”²⁸

Indeed, redistribution could be necessary even in the absence of transactions. If our neighbors engage in profligate consumption of their holdings and we save our money, some of our money—where “our” must be used descriptively and not normatively—could actually belong to our neighbors if the ideal pattern is violated. The upshot in such situations is that patterned theories make it easy to create demands for redistributions that better fit the preferred pattern of justice.²⁹ Quickly spending money in the hopes of “locking in” a benefit will not do; all forms of wealth might be subject to redistribution. Thus, on a patterned theory of justice, people can never know what is truly theirs.

In response, and in order to establish that the historical theorist is in no better position to offer a promised list of holdings, Barnes suggests the No Special Guarantee Challenge. He writes that “the crucial premise” of the False Promise Argument “is that people must be able to form legitimate expectations about their future holdings.”³⁰ However, Barnes finds this statement ambiguous: “[T]he content of people’s expectations about their future holdings can be more or less specific, by degrees. Thus, there is an entire spectrum

²⁶ Mack, “Self-Ownership, Marxism, and Egalitarianism (Part 1),” p. 89.

²⁷ Ibid.

²⁸ Ibid.

²⁹ This example is borrowed from *ibid.*, p. 81. A different means by which a pattern can be violated in the absence of transactions is in *ibid.*, p. 81 n. 12.

³⁰ Barnes, “Wilt Chamberlain Redux?” p. 84.

of possible interpretations of this requirement At one end of the spectrum the requirement is that people be able to determine the exact monetary value of their future holdings.”³¹ Barnes notes that not even Mack’s theory satisfies this reading. After all, we do not know what will have value on the market.³² On this extreme end of the spectrum of “guarantee,” neither the patterned nor the historical theorist can offer a guarantee. So, the historical theorist gains no traction against the patterned theorist.

Moving on the spectrum toward a less precise guarantee of income, both the patterned theorist and the historical theorist can make some guarantees. For instance, people may “know what their future holdings will be, under some abstract nonspecific descriptions or other. On this interpretation, the requirement is quite plausible, but is also easily satisfied by either a libertarian theory or a patterned or in-state theory.”³³ A libertarian will say that “a person will be entitled to whatever people voluntarily choose to give him in a free market in exchange for his goods and services.” A patterned theorist “can say that a person will be entitled to the method that best approximates her shareholdings under the pattern in question.” Assuming that this is the more reasonable request, both the historical and the patterned theorist can make a “guarantee,” meaning that the historical guarantee has no advantage relative to a patterned theorist’s; it is not *special*. Barnes claims that “what Mack needs, for the purposes of this argument, is a point on the spectrum of specificity that is both plausible and impossible for the pattern theorist to satisfy. But I see no reason to think that there is any such point on the spectrum, nor does Mack offer any reason to think so.”³⁴

Barnes’s objections seem to be the following: First, Nozick and Mack ignore the consequences that iterated Chamberlain-like transactions can have on others. Second, since at least Mack suggests that the consequences are relevant to distributive justice, he must shoulder the burden of showing that transactions in line with the entitlement theory would not produce relevantly bad externalities.

³¹ Ibid.

³² Ibid.

³³ Ibid.

³⁴ Ibid., p. 85.

Third, Mack fails to tell us how a plausible theory of justice must answer the question, “What precisely must people know in order for the promise of a proper theory of justice to be satisfied?” In what follows, we argue that, *pace* Barnes, there have as yet been insufficient reasons adduced to defeat the Chamberlain example’s central points.

5. Empirical Issues

We take up Barnes’s objections in order. First, despite Barnes’s claim, neither Nozick nor Mack ignores the consequences a distribution might have on others. Both authors work within the Lockean tradition. John Locke, as is well known, attempts to show how private property may justly be generated without prejudicing³⁵ or straitening anybody.³⁶ The prohibition on private property’s harming others in morally relevant ways is Locke’s famous proviso. Appropriations must leave “enough, and as good” available for others.³⁷

Nozick also has a proviso, which “is meant to ensure that the situation of others is not worsened.”³⁸ Nozick’s proviso’s content is unimportant because Barnes focuses his attack on Mack. What matters, beyond the fact that the proviso addresses Barnes’s concern, is that Nozick seems to extend the proviso beyond mere appropriations to transfers.³⁹ So if any series of appropriations or transfers have the same negative effect on someone that a prohibited appropriation would, the proviso is violated. It is thus false to claim that Nozick *ignores* the cumulative effects that transfers might have on others.

In more than two decades of work on the subject, Mack has developed what he calls the “Self-Ownership Proviso” (SOP). The SOP claims that, morally speaking, we may not employ our holdings in a way that nullifies the world-interactive powers of others. These world-interactive powers include the individual’s “capacities to affect

³⁵ John Locke, *Second Treatise of Civil Government* (New York: Macmillan, 1952), sec. 33.

³⁶ *Ibid.*, sec. 36.

³⁷ *Ibid.*, sec. 27.

³⁸ Nozick, *Anarchy, State, and Utopia*, p. 175.

³⁹ *Ibid.*, p. 179.

her extra-personal environment in accord with her purposes.”⁴⁰ As Mack sees it, these powers are “essentially relational. The presence of an extra-personal environment open to being affected by those powers is an essential element of their existence.”⁴¹ In order to respect those essentially relational powers, Mack explains:

I maintain that recognition of persons’ rights over their world-interactive powers, and of the essentially relational character of these powers, supports an “anti-disablement constraint” according to which individuals may not deploy themselves or their licit or illicit holdings in ways that severely, albeit noninvasively, nullify any other agent’s capacity to bring her talents and energies purposively to bear on the world. The SOP is a special case of this anti-disablement constraint.⁴²

The SOP is distinct from Nozick’s Lockean proviso. The latter seems a restriction on holdings, but, as noted above, there seem to be other ways of using one’s property to violate people’s rights. The SOP does not limit *per se* the acquisitions in which individuals may engage, but only how individuals may employ their resulting property. Also, Nozick’s proviso deals with whether an acquisition allows others to improve their situation via acquisition. The SOP does not focus on whether others can engage in acquisitions; instead, what matters is that others may employ their world-interactive powers. So even if individuals cannot make acquisitions, they may come to have opportunities sufficient to bring their world-interactive powers to bear in some other way. In order to illustrate this possibility, Mack has us consider the situation in Hong Kong, where although there is no opportunity for initial acquisition, the prospects of bringing one’s world-interactive powers to bear have increased dramatically. Thus, the uses of holdings do not run afoul of the SOP.⁴³

⁴⁰ Eric Mack, “The Self-Ownership Proviso: A New and Improved Lockean Proviso,” *Social Philosophy and Policy* 12, no. 1 (1995), p. 186.

⁴¹ *Ibid.*

⁴² *Ibid.*, p. 187.

⁴³ We say they do not necessarily do so. We take it that, as a matter of historical fact, they did. We are only making a point about the SOP, not the specific actions of individuals in Hong Kong.

Mack holds that “the market order constitutes an alternative which is hospitable in its own way to people’s efforts to make their way in the extrapersonal world.”⁴⁴ The market is the moral analogue of the natural world. He argues that, just as objectionable appropriations may not do so, the participants in the market order may not seriously nullify people’s world-interactive powers.

It should now be clear that neither Nozick nor Mack ignores the consequences of transfers full stop. Barnes might have a subtler point in mind; he may mean that neither Nozick nor Mack tries to prove that Chamberlain-like transfers will not run afoul of their specified proviso. Two points need to be noted in this regard. First, Nozick does cite economic work to justify his belief that the proviso will not be violated. He mentions what he calls “familiar social considerations favoring private property.”⁴⁵ These considerations include the following: private property increases the total availability of goods; it puts goods in the hands of the most productive; it encourages experimentation; it allows people to insulate themselves from the risky ventures of others; and it encourages saving some resources for future markets.⁴⁶ If these familiar considerations are correct, then there are good reasons not to expect a functioning market to violate the proviso.

These considerations in favor of private property should be familiar to those well-versed in the liberal arts tradition.⁴⁷ When

⁴⁴ Eric Mack, “Self-Ownership, Marxism, and Egalitarianism (Part 2): Challenges to the Self-Ownership Thesis,” *Politics, Philosophy, and Economics* vol. 1, no. 2 (2002), p. 212. It is important to notice that this article is a companion to the piece that Barnes critiques. However, Barnes never mentions Part 2.

⁴⁵ Nozick, *Anarchy, State, and Utopia*, p. 177.

⁴⁶ *Ibid.*

⁴⁷ Plato’s *Hipparchus* (individual profits) and *Republic* Books I-II (non-interference from the state) discuss two seminal threads in favor of the market; see *Plato: Complete Works*, trans. John Cooper (Indianapolis, IN: Hackett, 1997). Aristotle’s *Politics*, trans. C. D. C. Reeve (Indianapolis, IN: Hackett, 1998), discusses how communities might pursue “the good life” in part through pursuit of property and wealth (see esp. Book 1); Locke, *Second Treatise*, and Adam Smith, *An Enquiry into the Nature and Causes of the Wealth of Nations*, two vols., ed. Edwin Cannan (London: Methuen, 1904), give position of privilege to the market as conducive to individual happiness.

making a foray into work in distributive justice, one must consider the foundational texts and the received wisdom of those sources. While debates remain over what economic system best achieves the outcomes Nozick mentions, those debates are irrelevant to the question of whether the market will function well enough to avoid running afoul of the proviso. The proviso requires the preservation of a sufficient level of opportunities to bring one's powers to bear on the world; it does not require that we have the absolute best system for maximizing opportunities.

Beyond these "familiar considerations," Nozick cites David Friedman's *The Machinery of Freedom*. This work is based largely on economic theory, employing some empirical evidence, but it also importantly defends markets largely by appealing to what we have reason to expect them to accomplish.⁴⁸ Nozick thus relies on an intellectual division of labor in his work. What Barnes demands beyond this is not exactly clear. An explanation of why he is unmoved by Nozick's cited evidence would be helpful.

Furthermore, Mack cites the history of markets to justify his belief that markets actually increase opportunities. The problem for Barnes is that Mack does not cite this work in the one article Barnes cites in his attempted refutation of the Chamberlain example. While Barnes might criticize Mack for not putting the sources in the article Barnes targets, it is not as if Mack cites no work elsewhere to justify his views about the proviso and markets.

In the article in which he initially presents the SOP, Mack cites two books on economic history. The first, Douglas North and Richard Thomas's *The Rise of the Western World: A New Economic History*,⁴⁹ is largely an attempt to explain why the claims in favor of private property that Nozick deems "familiar" turn out to be true. The second book, Nathan Rosenberg and L. E. Birdzell's *How the West Grew Rich*,

John Stuart Mill, at least in his early writings, holds that markets maximize overall happiness and improve people's moral character.

⁴⁸ Friedman is not a consequentialist, but that does not prevent him from offering an economic defense of a free market system in terms of the system's economic outcomes.

⁴⁹ Douglas North and Richard Thomas, *The Rise of the Western World* (New York: Cambridge University Press, 1973).

is a historical attempt to link increased freedom to increased prosperity.⁵⁰

Our goal here is not to settle the empirical question of whether iterated Chamberlain-like transactions will run afoul of the proviso. Instead, our goal is to show that Barnes ignores the evidence that Nozick and Mack adduce to accomplish this goal. Indeed, Barnes himself writes that “Mack’s argument ultimately depends on an empirical assumption. . . . Unfortunately, Mack offers no empirical evidence for that assumption, so it is unjustified.”⁵¹ But Barnes is wrong.

While division of labor has many benefits, notably allowing articles to be digestible in size, this division also renders it difficult to find experts in the moral, political, and historical claims that so frequently (and rightly) commingle in writings on distributive justice. We stress the tremendous depth and breadth of the scholarship that has gone into the Chamberlain example specifically and into the debate regarding distributive justice generally. Claims that a particular theorist has not considered a particular challenge or has not shouldered a particular burden, should not be leveled lightly. For his part, Barnes has argued elsewhere that property is not an exclusive route to “human progress,” but his analysis seems to admit that property often has the effect of “internaliz[ing] responsibility” and “mak[ing] people more productive than they otherwise would be.”⁵² Note that neither Nozick nor Mack needs the stronger claim that the market is the only way to achieve these things; they simply need the claim that the market is a way to achieve these things. Given his own forays into the fields contributing to distributive justice, Barnes should thus be aware that the work his challenge asks for is available.

⁵⁰ Nathan Rosenberg and L. E. Birdzell, *How the West Grew Rich* (New York: Basic Books, 1986). We could, of course, add the many economists who think that markets do far better than the proviso actually requires. A wonderful quip about the history of capitalism comes from Dierdre McCloskey: “Once upon a time we were all poor, then capitalism flourished, and now as a result we’re rich”; Dierdre McCloskey, *If You’re So Smart: The Narrative of Economic Expertise* (Chicago, IL: University of Chicago Press, 1991), p. 1.

⁵¹ Barnes, “Wilt Chamberlain Redux?” p. 83.

⁵² Gordon Barnes, “Property and Progress,” *Reason Papers* vol. 34, no. 2 (2012), p. 149.

Turning now to Barnes's call for Mack to be specific about what people's entitlements to the future holdings are, it seems that Barnes has missed the point of Mack's challenge. Why the entitlement theorist must meet the challenge Barnes raises is unclear, given that the entitlement theorist can obviously promise things that the patterned theorist cannot. The entitlement theorist holds that whatever arises for me in a just situation via justice-preserving steps is itself just. While that formulation is intentionally ambiguous, the entitlement theorist can promise that *when* people have what they are entitled to as a matter of justice, those entitlements cannot change unless the people themselves change them.⁵³ The proviso allows people to retain their property and restricts only how they may use that property *under rare circumstances* (that is, when one is or would be "straitened") in order to preserve justice. The promise of your property is a true one, and it is unavailable to the patterned theorists.

Perhaps this point is obscured by Nozick's version of the Chamberlain example. In that example, people change their holdings by interacting with others. We observed above that autarchic manipulations of property might require redistribution away from others, at least for the patterned theorist. If the initial distribution was just, the patterned theorist will need to hold that the upshot is unjust. Now surely, those who simply increased their own just holdings must wonder how their holdings were actually their own when they now owe some of those holdings to others. If they owe some of their holdings to others, it is either because they were not allowed to manipulate their own holdings or because of the actions of others. Entitlement theorists can promise that the distorted thing will not happen, but patterned theorists cannot.

When Barnes focuses on income, he obscures the issue. Even if, under some D1, *nobody generates any income* but people unilaterally increase or decrease their holdings so as to generate a putatively inferior D2, that D2 is unjust precisely because there will be some D3 that better matches D1. This problem of never being able to insulate one's holdings from the demands of social calculation generates the False Promise argument. If an individual is entitled to something as a matter of justice, the individual expects to be able to do certain things with the object, irrespective of what others might do. No patterned theorist can promise that the individual may do this.

⁵³ The rules of just transfer will vary depending on where the transfers occur; see Nozick, *Anarchy, State, and Utopia*, pp. 150 and 320-25.

The best sense we can make of Barnes's error is that he mistakes post-tax income with just holdings. A patterned theorist cannot promise that an individual's post-tax income is justly held by that individual unless the post-tax income happens to match the preferred pattern. Barnes writes as if it were easy to formulate expectations in a tax-heavy world, and he is correct only if those taxes do not try to preserve specific distributions. If there were confiscatory taxes on wealth *and* income, as preservation of a favored pattern requires, then planning would be remarkably difficult. It is precisely because wealthy nations do not try to preserve patterns of distribution that people are able to plan.

6. Conclusion

We conclude that Barnes is wrong on three counts. First, Nozick and Mack *are* sensitive to the consequences that Chamberlain-like transfers might have on others, for the famous proviso determines which consequences are objectionable. Second, both of them *do* adduce some empirical evidence to justify their belief that a well-functioning market would not violate that proviso. Third, Barnes's response to the False Promise Argument is mistaken. The entitlement theorist can promise that once an individual holds something as a matter of justice, the object belongs to that person, irrespective of what others might do. The patterned theorist cannot make this promise. Since a good theory of justice must make this promise, patterned theories are not good theories of justice. Thus, we conclude that Barnes has given proponents of historical entitlement theories no reason to concede defeat.

Book Review

Liebreich, Karen. *The Black Page: Interviews with Nazi Film-Makers*. UK: McHugh Publications, 2017.

For those interested in propaganda and its use as a tool for political power, the paradigm case to examine is the German National Socialist regime (hereafter the Nazi Regime). Most other governments—even democratic ones—use propaganda. Perhaps some other totalitarian regimes have matched the power and deceitfulness of the Nazi Regime, but I daresay none has surpassed it.

Karen Liebreich's *The Black Page* is a gem of a book that helps us to understand how many of the key players in Nazi cinema felt about their work in retrospect. The book is based upon her personal interviews (conducted in the 1990s) with a number of actors, directors, critics, cameramen, and so on. It is remarkable that of the Nazi film industry players alive fifty years after World War II ended so many agreed to talk with her. She includes sixteen of these interviews in the book. These include, most notably, ones with: Wilfred von Oven, press officer to Joseph Goebbels; Fritz Hippler, director of the Reich's Film Department; Hans-Otto Meissner, Diplomat; Hans Feld, film critic; and Kristina Soderbaum, actress (the heroine in *Jew Suss* [1940]).

The Nazi Regime put special weight on cinema as a medium of propaganda. Goebbels, the Regime's propaganda minister—with his training in literature—held film to be second only to radio in its propagandistic potential. As he put it, "We are convinced that in general film is one of the most modern and far-reaching methods of influencing the masses. A regime must not allow film to go its own way" (pp. 8-9). Adolf Hitler—with his early interest in becoming an artist—wrote cynically in *Mein Kampf*, "The mass of the people as such is lazy. The picture in all its forms up to the film has greater possibilities. Here a man needs to use his brains even less. It suffices to look . . . and thus many will more readily accept a pictorial presentation than read an article of any length. The picture brings them in a much briefer time, I might say at one stroke" (pp. 7-8). It is no surprise, then, to find that the Nazi Regime produced during its twelve-year reign nearly 1,100 films, which is almost two releases per week. It exploited the cover of film to indoctrinate the young by installing film projectors in 70,000 schools in the first two years alone and making film showings mandatory at Hitler Youth meetings (p. 16).

Two of the interviews warrant special discussion. First, von Oven's is a fascinating interview. He was Goebbels's press secretary for the last two years of the war, after which he (like so many other Nazis) immigrated to Argentina. He there set up a German-language newspaper and wrote for it as well as for a number of other extreme right-wing publications. Von Oven told Liebreich that Goebbels only informed him of the existence of the death camps shortly before the end of the war; while he didn't overtly deny the Holocaust, he scoffed at the claim that six million Jews were killed (p. 26). He also told Liebreich that the war started when Polish Jews massacred 5,800 German civilians in the city of Bromberg (p. 25). (In reality, the Germans had invaded Poland two days before. It is arguable that the German civilians were killed by "friendly fire," that is, accidentally killed by German troops firing upon retreating Polish troops.¹)

Regarding Goebbels, von Oven said that Goebbels was arrogant, but was intelligent and knew more about film than most people. Von Oven was able to shed some light on Goebbels's theory of propaganda. Goebbels held that propaganda should be kept simple and geared to the slowest people, and used the analogy of a convoy, which "must adjust its speed to suit the slowest ship" (p. 27). Moreover, Goebbels insisted that he didn't want "didactic" films, but rather, propaganda conveyed through entertainment films.

Also illuminating is the brief interview with Hippler in his house overlooking Berchtesgaden. Besides being the head of the Nazi film department, Hippler was the director of the infamous anti-Semitic "documentary" *The Eternal Jew* (1940). The film attacks Jews in a number of ways and at the grossest of levels (as being physically repellant, culturally inferior, and dangerous in their alleged thirst for control). Hitler wanted the film to push the idea that Jews form a parasitic race. Goebbels approved the initial film takes, writing in his (Goebbels's) diary that the scenes were "horrific and brutal" and supported his view that Jewry must be "eliminated" (p. 66). Liebreich concludes the interview by noting that Hippler was still an ardent supporter of the Nazi Regime's ideology.

Two main points emerge from reading this book. First, Goebbels greatly favored film that purveyed the Nazi Regime's message opaquely, that is, disguised as pure entertainment. As he put it

¹ "Bloody Sunday (1939)," Wikipedia, accessed online at: http://nlp.cs.nyu.edu/meyers/controversial-wikipedia-corpus/english-html/main/main_0089.html.

in 1942, the ideal film would be 80% entertainment and 20% propaganda (p. 8). Certainly, the most effective propaganda movies the Regime produced were entertainment features. In the case of the major Nazi anti-Semitic propaganda films, arguably the least effective was *The Eternal Jew*, which was the only one made as a documentary. It wasn't nearly as effective as *Jew Suss*.²

Second, it is astounding that after nearly a half-century since the Nazi Regime ended with Germany in total ruins and the revelation of the death camps that killed eleven million people, “Only one or two of our interviewees showed any sign of self-awareness or self-doubt about their contribution to the success of the regime” (p. 13). Indeed, some of the Nazi film-makers—including Hibbler, Meissner, and von Oven—were completely unrepentant. Such people are difficult to explain. Are they delusional? Is the narcissism that characterizes so many in the film industry just especially deep in them? Is this the ultimate in cognitive dissonance? This puzzle is outside of the realm of propaganda studies; it can be answered only by psychiatry.

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² For a review of both of these movies, see Gary James Jason, “Selling Genocide II: The Later Films,” *Reason Papers* vol. 39, no. 1 (Summer 2017), pp. 97-123.

Afterwords

You've Got Mail: Teaching Osama bin Laden's "Letter to the Americans"¹

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"For against an objector who sticks at nothing, the defense should stick at nothing."

—Aristotle, *Topics* V.4 (134a1-3)

I use the phrase "dialectical excellence" in a somewhat revisionary way to name a set of moral-intellectual capacities canonically associated with a "dialectical" tradition in philosophy that includes the Platonic dialogues, Aristotle's treatises on dialectic and rhetoric, Cicero's dialogues, Thomas Aquinas's *Summas*, and John Stuart Mill's *Autobiography* and *On Liberty*. What makes these texts "dialectical" (as I see it) is their attention to philosophy as a conversational activity, with particular attention to the adversarial or polemical features of philosophical conversation. Philosophy in this tradition vindicates or refutes controversial claims in order publicly to demonstrate their truth or falsity to an educated but potentially indifferent, skeptical, or even hostile audience. As conceived in this tradition, "dialectical excellence" names the capacity, in adversarial contexts, to refute a sophistical argument in a rhetorically effective way.

¹ The most easily accessible online version of bin Laden's 2002 "Letter to the Americans" is the one posted at the website of *The Guardian*, accessed online at: <https://www.theguardian.com/world/2002/nov/24/theobserver>. An earlier version of this article was first presented on April 16, 2011, at the 17th Annual Conference of the Association for Core Texts and Courses, two weeks prior to Osama bin Laden's death at the hands of the U.S. Special Operations Command. Given my focus on bin Laden's message rather than his person, however, I refer to that message in the present tense throughout the essay.

So understood, dialectical excellence demands three sets of skills of its practitioners. One set is intellectual: the capacity to identify sophistry and factual inaccuracy at the weakest and most fundamental junctures of an adversary's arguments. A second set is rhetorical: a facility with language (ideally, more than one) that enables one to put one's case in its most rhetorically effective form, rousing the moral passions of one's audience, without exploiting the ignorance or irrationality that so often accompanies such passions. A third set is psychological: the disposition to maintain confidence in one's case without losing one's composure, lapsing into dogmatism, or giving in to intimidation. Dialectical excellence, we might say, requires the integration of all three skills in a single person, along with the readiness and ability to use those skills in the right way at the right time for the right reasons.²

Over the past several years, I've had students in upper-division philosophy and political science classes read and engage with Osama bin Laden's so-called "Letter to the Americans"³ (hereafter "Letter"), a manifesto posted on the Internet in Arabic about a year after the 9/11 attack, later translated into English, but ironically almost entirely unknown to its putative addressees. In brief overview: the "Letter" offers an extended justification for the 9/11 attacks, blaming Americans for having brought the attacks on themselves, promising further attacks if the U.S. government continues its present policies in the Near East, and enjoining Americans both to change those policies and to convert immediately to (bin Laden's form of) Islam. In overarching form, the Letter is a not-very-subtle ultimatum threatening mass murder in the event of non-compliance, adding some gratuitous insults along the way.

² Cf. Aristotle, *Nicomachean Ethics*, trans. Terence Irwin (Indianapolis, IN: Hackett Publishing, 1999), II.6, 1106b20ff.

³ I refer throughout this article to students I've taught over the last decade at Felician University (2008-2018), a small Catholic-Franciscan liberal arts institution in New Jersey. Though I have not specifically taught bin Laden's letter outside of the United States, I have discussed related topics (Islamism, terrorism, U.S. foreign policy) with undergraduates at Forman Christian College and University in Lahore, Pakistan, and with undergraduates, master's students, and law students at Al Quds University in Abu Dis, Palestine. Pakistani and Palestinian students' claims on this topic are, to put it mildly, radically different from those offered by American students. I hope to discuss this issue on a different occasion.

Why promote such a document—raving in demeanor, murderous in prescription—to prominence within the undergraduate curriculum? The answer, I think, is that the Letter is an extraordinarily good counterfeit of dialectical excellence, and like all good counterfeits, offers the perfect opportunity for exercise in recognizing (and in this case, acquiring) the real thing.⁴ Its cleverness and rhetoric skillfully conceal its inaccuracy, incoherence, and immorality, a fact that takes some difficult but instructive work to grasp.

Rhetorically at least, bin Laden's Letter exemplifies dialectical excellence to a higher degree than most American political or theological discourse intended for a comparably broad audience. As a purely formal matter, the Letter has the structural integrity of a Scholastic *questio* out of Aquinas's *Summa Theologiae*. As Bruce Lawrence puts the point: "In a feature of the Arab *fatwa* tradition, opinions are here couched as detailed responses to specific questions, [and] broken down into sections and subsections in such a way as to emphasize the irrefutable logic of *jihad*."⁵ The result is a document that, on its own terms at least, makes a clearer and more cogent case than almost any comparable American work.

Form aside, the Letter manages to say *more* than comparable recent American documents, and seems to presume a higher intellectual level on the part of its audience. Where, for instance, George W. Bush's 2002 State of the Union Address focuses pointillistically and in amnesiac fashion on the 9/11 attacks and their immediate aftermath,⁶ bin Laden's Letter puts the attacks in a wider and more informative historical context, marshalling a wealth of evidence to demonstrate that (on bin Laden's terms) the U.S. has for decades been a systematic aggressor deserving of massive retaliatory response. Where the speeches of American pundits, clerics, and politicians circa 2001-2002 serve up an embarrassing hash of bravado and sentimentality, bin Laden offers his audience what one

⁴ Thanks to Amy Lynch for a helpful conversation on the expertise involved in recognizing counterfeit currency.

⁵ Bruce Lawrence, "Editor's Commentary," in *Messages to the World: The Statements of Osama bin Laden*, ed. Bruce Lawrence, trans. James Howarth (New York: Verso Press, 2005), p. 160.

⁶ Accessed online at: <https://georgewbush-whitehouse.archives.gov/news/releases/2002/01/20020129-11.html>.

commentator calls a “magnificent,” “eloquent,” and “even at times poetic” expression of moral self-assurance,⁷ and what another has described as “the authentic, compelling voice of a visionary,” expressing “what can only be called a powerful lyricism.”⁸ Little in *Vital Speeches of the Day* from the last few decades survives rhetorical comparison with bin Laden’s Letter, and as far as I know, no comparable American document exists that rebuts his claims as thoroughly as he makes them.

Having appreciated the Letter’s narrowly rhetorical merits, however, the fact remains that morally and intellectually, its argument is an abject failure. Morally, much of what bin Laden says in it consists of platitudes insufficiently determinate to settle any dispute between bin Laden and his American adversaries. As bin Laden’s moral claims become more determinate, they also become more controversial, but the more controversial they become, the less he offers in the way of argument for them beyond question-begging citations of Scripture, question-begging even from an orthodox Islamic perspective. Moral claims aside, almost every historical or political claim in the Letter is either straightforwardly false or else ridiculously under-argued, a fact that bin Laden brazenly evades throughout the text. Finally, the Letter practically radiates illogic and bad faith: this is a document that, on the one hand, rationalizes mass murder on the grounds that “the Americans” have stolen “our” oil (*whose* oil?), and, on the other hand, rationalizes the same act on the grounds that the Americans show insufficient concern for the perils of anthropogenic global warming. Incoherence of this sort is par for the course throughout the Letter, and indeed, throughout the entire bin Ladenite Corpus.

I’ve assigned the Letter to undergraduates at Felician in three courses: an upper-division course on ethics where the topic of moral and cultural relativism comes up (PHIL 301, Moral Philosophy); a basic course on international relations where terrorism comes up (PSCI 303, International Relations); and an independent study I’ve designed on cultural conflict between “Islam” and “the West” (PHIL 420, Islam and the West: Encounter and Conflict). Regardless of the course, the basic question at issue is whether an objective verdict on the Letter’s claims is possible, and if so, what the verdict ought to be. After a class

⁷ Bernard Lewis, “License to Kill: Usama bin Laden’s Declaration of *Jihad*,” *Foreign Affairs* vol. 77, no. 6 (November/December 1998), p. 14.

⁸ Lawrence, “Introduction,” p. xvii.

session or two of discussion, I ask students to write a short paper defending their own views on that question. Given the unfamiliarity to them of bin Laden's historical and political assertions, I allow them to remain agnostic where they lack the knowledge to reach a verdict, but ask that they identify what further facts they would need to know in order to reach one. Since, I suggest, any thinking reader would have to reach a verdict of some kind on bin Laden's claims, it is worth knowing whether such verdicts can be defended, and if so, how. I insist, sincerely, that I am open to *any* verdict, positive or negative. Counterintuitive as it may seem, that insistence is central to the pedagogical value of the exercise.

The results are pretty disheartening; indeed, few assignments so starkly reveal students' dialectical weaknesses as this one. The reactions I usually get fall into two rough categories, which I call *fideist resistance* and *thoughtful acquiescence*. In some cases, these categories represent two distinctly different groups of students; in other cases, they represent the same student at different phases of engagement with the Letter. In both cases, I suggest, they represent dialectical failure.

The fideist resister is *a priori* convinced that the Letter's claims must all be wrong; that Americans everywhere are and have always been innocents; that the U.S. government could "never have done" what bin Laden accuses it of doing; and (paradoxically) that even if the U.S. *were* entirely guilty of bin Laden's indictment, its guilt would have no bearing on the cogency of his case. According to the fideist resister, it is our duty categorically to condemn bin Laden, whether or not we have an explanation for why he attacked us, and whether or not we are capable of evaluating the reasons he gave for doing so. The vehemence of our repudiation of bin Laden is the measure of our virtue, and there is apparently no better guarantor of virtue so conceived than the steadfast refusal to deal with anything that might cast doubt on our moral beliefs.

I've stated the view in its extreme form, but commitment to it comes in degrees. In its more moderate forms, fideist resisters will engage with the Letter in a half-hearted way, taking issue with this or that claim, but ultimately expressing impatience or exasperation with bin Laden's tendency to dwell on "ancient history." Since the history in question is unfamiliar and temporally distant, such students infer that historical considerations must *themselves* be irrelevant to so recent

an event as 9/11.⁹ Fideist resisters tend not to notice that their argument (such as it is) cuts both ways: If historical claims are irrelevant to the justice of bin Laden's claims, they must equally be irrelevant to that of his victims. On the fideist resister's view it therefore becomes our duty to veto historical inquiry into bin Laden's case, even if we have to forswear the discovery that the facts are on our side.

The thoughtfully acquiescent reader rejects the dogmatic and self-defeating character of the fideist resister's strategy, and resolves instead to give bin Laden a fair hearing. Having done so, however, this reader quickly runs into alien territory, and then gets bogged down in it; bin Laden's accusations against the Americans are practically designed to strike this sort of reader as both maddeningly obscure and yet vaguely guilt-inducing. Within a few sentences, the fair-minded but dialectically inexperienced reader encounters a barrage of obscure but overheated references to "your" atrocities at Hiroshima and Nagasaki, as well as those in Palestine, Iraq, Somalia, Lebanon, Algeria, and the Philippines. The reader is held personally responsible for environmental degradation and the evils of globalization, and is treated to a detailed guilt-trip over "your" addiction to drugs, pornography, and lucre. The guilt-trip seems at once over the top and yet troublingly plausible. The acquiescent reader has no idea of what to make of bin Laden's history lesson, and (being both acquiescent and allergic to history) is disinclined to seek clarification. But bin Laden's attack on capitalism, hedonism, and consumerism doesn't *need* clarification; the thoughtfully acquiescent student has heard all of that before, and is prepared—even eager—to allocute to the charges.¹⁰

And so, this student concludes, bin Laden must surely "have a point" about all the ancient history he brings up. Since he does, it must

⁹ Of course, as time passes, 9/11 becomes less and less recent an event, so that a fair number of students regard *it* as "ancient history," and are reflexively bored by the mention of it.

¹⁰ Contrary to a frequently repeated claim, bin Laden does not restrict his criticisms of the U.S. to the imperialist features of its foreign policy, but repeatedly and explicitly attacks the theory and practice of American freedom as such, treating American foreign policy as one expression of American freedom among others. An egregiously inaccurate version of the claim has been promulgated for years by ex-CIA agent Michael Scheuer; for a representative instance, see his interview with Fox Business (March 4, 2013), accessed online at: <https://www.youtube.com/watch?v=ES-xWjzZwZE>.

be safe to take his version of historical events roughly at face value. The less dialectically expert the student, the greater the tendency to turn “roughly at face value” into “essentially at face value,” and eventually into fundamental acceptance of bin Laden’s version of twentieth-century history. Having accepted bin Laden’s historical narrative without a fight, our thoughtful reader is now surprised to discover how “reasonable” bin Laden sounds. For what is he saying but that al-Qaida attacked “us” because “we” attacked “them” first? And how wrong could he be, if “we” were by all accounts occupying “his” lands with “our” tanks and “our” troops? In that case, bin Laden is probably right to suggest that things would go better if only we dealt with one another (in his words) “on the basis of mutual interests and benefits.” Doing so surely seems preferable to fighting bloody and interminable wars against “his” people. In my experience, students rarely if ever quarrel with bin Laden’s use of pronouns, buying into it, and conceding most of his case right from the start.

Like the fideist resister’s view, this one comes in degrees: sympathy for bin Laden’s case co-exists in guilty and confused fashion with vehement expressions of rejection, revulsion, and contempt, and with expressions of patriotism. But the essential feature of thoughtful acquiescence is the assumption that acquiescence in bin Laden’s case is more expedient than inquiry into it. We are, on the thoughtful acquiescer’s view, entitled or obliged to treat bin Laden’s assertions (particularly his historical assertions) as a substitute for such an inquiry, and to offer a verdict not on the facts as such (which are regarded as inaccessible on principle) but on his assertions, taking their approximate truth essentially on faith.

The upshot of the exercise is that whether they are fideist resisters or thoughtful acquiescers, our students have a predisposition to believe what bin Laden wants them to believe. The fideist resister resists inquiry into bin Laden’s case because he fears that bin Laden might well turn out to be *right*. The thoughtful acquiescer resists inquiry into that case because she sees no reason to think that bin Laden could be *that* wrong. What seems lost on these students is the possibility that moral and historical inquiry into bin Laden’s claims might yield a verdict that was objectively true, rationally justified, and yet thoroughly negative. Unfortunately, this is just another way of saying that what seems lost on them is the idea of moral inquiry into history as such.

In my view, the dialectical ineffectuality of our students (or at least *my* students, defeasibly taken as representative of a larger

population) points to serious weaknesses in American higher education. Powerful institutional biases militate against the inculcation of dialectical excellence there, all of which deserve challenge. Consider three problems from a much longer list.

For one thing, dialectical excellence demands high intellectual standards along with what Aristotle calls *paideia*, the general educatedness that makes a person a good judge in every area of life that calls for judgment.¹¹ Despite the wearisome talk of “assessment,” “rubrics,” “mission statements,” “Bloom’s taxonomy,” and so on foisted on us by bureaucrats, accreditation agencies, and administrators, we lack any serious way of assessing or rewarding success at *paideia*, and so, lack the thing itself. To be more specific, I would argue that dialectical excellence requires a more concerted emphasis on informal logic as conceived of in the Aristotelian tradition (a.k.a., “critical thinking”), and a more serious emphasis on the study of history, especially world history, conveyed less by textbooks than by real historiography.¹² Unfortunately, allegiance to the usual disciplinary (and other) tribalisms makes this an unlikely outcome, as does the loss of interest in non-STEM (science, technology, engineering, math) fields, along with the widespread skepticism and cynicism about the value of higher education now prevalent in the United States.¹³

¹¹ Cf. Aristotle, *De Partibus Animalium*, trans. D. M. Balme, rev. Allan Gotthelf (Oxford: Clarendon Press, 1992), I.1, 639a1-12; Aristotle, *Metaphysics*, trans. W. D. Ross, ed. Jonathan Barnes (Princeton, NJ: Princeton University Press, 1984), IV.4, 1006a5-7; Aristotle, *Nicomachean Ethics*, I.3, 1095a1-12.

¹² For an excellent discussion of the teaching of history, see Christopher Hitchens, “Why Americans Are Not Taught History,” in Christopher Hitchens, *Love, Poverty, and War: Journeys and Essays* (New York: Nation Books, 2004), pp. 265-78. For further thoughts on teaching 9/11, see Irfan Khawaja, “‘Why They Hate Us’: A Pedagogical Proposal,” *Philosophy of Education in the Era of Globalization*, eds. Yvonne Raley and Gerhard Preyer (New York: Routledge Press, 2010), pp. 91-109.

¹³ For example, in the fall of 2013, my own institution conducted a “prioritization review” based on advice offered by Robert C. Dickeson, author of *Prioritizing Academic Programs and Services: Reallocating Resources to Achieve Strategic Balance* (Hoboken, NJ: Jossey-Bass Publishers, 2010), and President and Principal of Academic Strategy Partners, a consulting firm. Though Dickeson makes *pro forma* reference to Aristotle in his book (on

Second, dialectical excellence demands rhetorical facility and research skills that are nowadays almost entirely the responsibility of overburdened Departments of English, where the *modus operandi* is to cram everything into that old standby, English 101 (“English Composition,” “Writing the College Essay,” etc.). Despite the efforts of the faculty who teach such thankless courses, there is no way to wrest dialectical excellence from functional illiteracy in a single semester, and no way to retain whatever literacy is achieved if the gains of that single semester are forgotten or subverted for seven (or more) subsequent semesters. Suffice it to say that if real literacy is the object, we need to rethink how things are done.

Third, dialectical excellence demands a certain psychological toughness from its practitioners that is incompatible with the “sensitivity” that is now routinely expected of both students and faculty in the classroom. We all like to be liked, but a good dialectician gives higher priority to the task of refuting sophistry and exposing falsehood than to popularity or niceness, something guaranteed to hurt the feelings of those folk in the grips of such things. At a certain point, we simply have to admit (and get administrators to admit) that hurt feelings are an integral part of real intellectual life. Many dire fears are expressed, some of them justified, about the consequences of teaching students controversial subjects in a less-than-welcoming academic environment. Much less is said about the incoherence, ignorance, and lassitude that are the predictable result of a low-pressure classroom environment, where everyone is allowed to emote with impunity because the work of dialectical contestation would generate more discomfort than is currently thought tolerable. But as matters stand, I would suggest that the “sensitive” classroom has done at least as much damage to American higher education as has the “mean” one, not that those options exhaust the possibilities. In any case, the fact remains that the “sensitive” classroom is systematically *insensitive* to the

paideia no less, p. 45), I can attest—as the primary author of the prioritization review for Felician University’s Philosophy Department—that a standard-issue “academic and administrative prioritization review” is little more than a bureaucratic assault on the existence of non-STEM academic programs, carried out in the name of something called “strategic balance.” For a good discussion of the trend I have in mind, see Benjamin Ginsberg, *The Fall of the Faculty: The Rise of the All-Administrative University and Why It Matters* (Oxford: Oxford University Press, 2013).

psychological requirements of dialectical excellence, a fact that has to be entered into any credible cost-benefit analysis.

Excellence in any field is easier discussed than achieved, and dialectical excellence is no exception. But if achieving it seems optional, consider the consequences of dialectical mediocrity. It may seem hyperbolic to suggest that we face a choice between dialectical excellence on the one hand, and murderous insanity on the other, but it's a hypothesis worth considering. As the twentieth century ought to have taught us, a society's discursive mediocrity leaves a vacuum easily filled by sophistry in the service of mass murder—think of Czarist Russia, Weimar Germany, or the colonial and post-colonial Near East. Bin Laden's Letter teaches us that lesson once again. We owe it to our students to enable them to learn it.¹⁴

¹⁴ I dedicate this essay to Marilyn Bornstein, Benjamin Estilow (1930-2010), and Christopher Hitchens (1949-2011), my first mentors in dialectical excellence. Thanks also to George Abauza, Fahmi Abboushi, Kristen Abbey, David Banach, Joseph Biehl, Carrie-Ann Biondi, Jeff Buechner, Richard Burnor, Donald Casey, Michael DeFilippo, Gerald Graff, Christopher Hitchens, Amy Lynch, Julie O'Connell, Charles Persky, Gail Persky, Hilary Persky, Neil Robertson, and Joseph Spoerl for many helpful conversations on the issues discussed here.

The Fountainhead Play: Taking a Stand on Ideas

Robert Begley
New York Heroes Society



(Photo courtesy of Brooklyn Academy of Music's website.)

In late 2017, globally esteemed Belgian director Ivo van Hove brought his staged adaptation of Ayn Rand's *The Fountainhead* to New York City. I enjoyed this four-hour, Dutch-spoken, English-surtitled play enough to attend two of its five performances.¹

Van Hove and his company, Toneelgroep Amsterdam, previously performed versions of Shakespeare, Schiller, and Ibsen, demonstrating their respect for the classics. Adapting Rand's idea-driven novel is an ambitious feat for any director, and van Hove's effort is valiant.

Let's take a step back and see how *The New York Times* reviewer Lorine Pruette, seventy-five years ago, described *The*

¹ A two-minute trailer for the 2014 production of *The Fountainhead* in Amsterdam is available online at YouTube: <https://www.youtube.com/watch?v=OeqgmAu2iO0>.

Fountainhead and its author: “[A] writer of great power. She has a subtle and ingenious mind and the capacity of writing brilliantly, beautifully, bitterly. . . . Good novels of ideas are rare at any time. This is the only novel of ideas written by an American woman that I can recall.”²

Van Hove understands this emphasis on ideas and names two of the four acts accordingly: Act I is called “The Idea Factory” and Act IV is called “The War of Ideas.” These two acts bookend the storyline’s clash between individualism and collectivism. In the play, as in the novel, innovative architect Howard Roark (Ramsey Nasr) is a first-handed individualist, a man of self-sufficient ego who does his work his way. His integrity is challenged by the collectivists all around him.

The stylized theatrical setting has a minimalist feel. It blends antiquated objects (typewriter, rotary phone, drafting table) with modern theatrical audio-visual devices, such as large projector screens (as in the photo above), which give the audience a more intimate view of the action. As the house lights go down, the play begins with Roark striding to his drafting table, strategically placed close to the audience. We see him pick up a paperback copy of *The Fountainhead* and read aloud: “He stood naked at the edge of a cliff.” Roark explains how the materials of the earth (stones, trees, lakes, etc.) are here for him to reshape into buildings according to his own vision.

A few scenes later, we visually experience how Roark reshapes these materials: a treat that the novel, with all its descriptive power, cannot provide. The projection system magnifies the structure on the side of the cliff where we see the building coming to life (see photo above). We also hear the scratching of pencil on paper; the calming sounds of the marimba modulate Roark’s intense focus, conveying his expert control of the creative process. As he sketches the Heller House, he states that a building’s form must follow its function.

Roark immediately faces adversity when his college-friend-turned-colleague Peter Keating (Aus Greidanus, Jr.) and their boss, prestigious architect Guy Francon (Hugo Koolschijn), “improve” this sketch by giving it a more conventional look. Rather than allow his building design to be stripped of its unity and symmetry, Roark angrily rips up the altered drawing and throws it on the floor while yelling at Keating. This was disappointing to watch, as Rand’s Roark would never have such an emotional outburst.

² Lorine Pruette, “Battle Against Ideas: Review of *The Fountainhead*,” *The New York Times*, May 16, 1943.

Bart Slegers convincingly portrays Roark's main adversary: Ellsworth Toohey. The newspaper columnist and art critic uses his public prominence to attack the ideas that drive Roark. While promoting Keating's career, he preaches that the public good is superior to private ambition and the ego is evil. He also tells his niece, Catherine Halsey (Helene Devos)—who is engaged to Keating—that she should give up her selfish goal of attending college. The ultimate statement of Toohey's ideas is portrayed with the release of his book *Sermons in Stone*, of which we see an excerpt projected on a large screen. It concludes with the collectivist premise: "Vox Populi, Vox Dei" ("The voice of the people is the voice of God.") (Later, we'll see how this premise has deadly consequences for those in the play who accept it.)

Act II ("Labor and Love") opens with Roark hammering away at a quarry, since he cannot find architectural work at present. When the beautiful newspaperwoman and daughter of Guy Francon, Dominique (Halina Reijn), meets him, she does not know that he is capable of building beautiful skyscrapers, but their attraction is automatic. As in the novel, violent sex scenes dramatize the conflict between these strong individualist souls. We see Roark overpower Dominique, who initially resists and then submits, claiming to enjoy what she calls "rape." The glaring overhead projection of their nude bodies entwined on stage lacks intimacy and romance.

Despite various impediments placed before him, on stage we see Roark constantly working or thinking. He either sketches at his drafting table or, when nobody will give him a commission, reads publications about the building trade. Periodically, he will pick up a copy of *The Fountainhead* and leaf through it. We sometimes see him take a finished sketch and carefully, proudly place it on a side wall where the audience can gaze at it.

When Act III ("Valhalla") begins, we see newspaper magnate Gail Wynand (Hans Kesting) holding a gun to his head, wondering whether he should pull the trigger. In a soliloquy, he describes how he rose from the slums of Hell's Kitchen, deciding that his newspaper, *The Banner*, was the way to amass money, influence, and power. Appealing to the lowest common denominator, he states that the public wanted crime, scandal, and sentiment, so he provided it. We learn that he channeled his enormous energy and drive to the purpose of ruling others, so that he would no longer be pushed around in a "dog-eat-dog" world. Wynand lowers the gun, concluding that today will not be the day he dies.

We see that when Toohey arranges for Wynand to meet Dominique (who chose to leave Roark because she feared the culture would destroy him), the tycoon immediately falls in love with her. Van Hove captures the affinity between Wynand and Dominique through their natural comfort on stage. Their words speak of a reverence for the best in man, although neither thinks that integrity and joy are possible. When Dominique tells him of her love for skyscrapers, Wynand replies, "I would trade the best sunset for one glimpse of the skyline of New York. What other religion do we need?" The entire back wall (40-by-15-foot screen projection) of the stage shows us the view of that skyline as seen from Wynand's fifty-seventh floor penthouse. Van Hove gives perceptive audience members the chance to grasp that it is the soul of first-handers like Howard Roark who are capable of building those skyscrapers they admire so much.

Similar to the novel, in Act IV Keating asks Roark to design a government housing project called Cortlandt Homes. We had seen Roark do Keating's designs for him earlier, but this time Roark agrees only on the condition that it be built exactly as he designs it. Keating agrees.

Here, van Hove's staging reaches its apex as he seamlessly compresses several scenes. For example, at one point, Roark sits at his drafting table and designs the Cortlandt Homes housing project. He spends fifteen minutes focused on drawing, the symmetrical buildings taking shape on the overhead screen. While Roark is lost in his creative process, Toohey stands behind him and voices words from his column, stating that man must live for others and that freedom and compulsion are compatible.

We then see the effects of Toohey's philosophy play out as we witness the complete demise of Keating and Catherine. After years of counseling by Toohey, Keating looks beaten, bloated, and spiritually empty. His career has plummeted since Toohey stopped promoting him. Catherine has replaced her youthful aspirations with a cynical demeanor as a social worker. In a final scene between the formerly engaged couple, she tells the heartbroken failure, Keating, that love is immature and selfish. We actually feel sorry for Keating here, as he has lost the only thing he ever truly wanted.

By the time Wynand meets Roark, we anticipate how the tycoon will try to break the man of integrity. Once again, van Hove uses the projector screen to great effect, as Wynand asks Roark to redesign his original drawing of Wynand's home in a Rococo style. When we see Roark willingly oblige, Wynand laughs at how

preposterous it looks. On stage the two characters bond well; it is the only time we see Roark smile.

That smile quickly vanishes when Roark returns from a trip with Wynand. He sees that the early-stage construction of Cortlandt Homes has been stripped of its principled unity of form. It has been turned into a hodgepodge of styles by the collective souls of the Toohey-influenced architects.

The war of ideas blasts off when Roark dynamites Cortlandt Homes. He first asks Dominique to help him by serving as a decoy so that nobody on site is injured. They both know that those disfigured buildings are an insult to Roark's integrity; he cannot allow them to be built as such, so he must take action. As Dominique lies flat we see the full backdrop screen of the unfinished Cortlandt structure (see photo below). The loud explosion is timed with her screaming Roark's name. The seats shake as the building implodes before our eyes. The winds from the blast scatter papers all over the stage.



(Photo courtesy of Brooklyn Academy of Music's website.)

In the wake of the destruction, we learn that Wynand thinks that he can once again shape public opinion, this time for a cause he believes in. Since a man like Roark exists, Wynand now thinks that individualism can win in the culture. He attempts to make this happen through the force of his printing press. Van Hove's mechanical representation of Wynand is effectively achieved by means of a huge

printing press, which is slowly and loudly marched out onto the stage. Its rumble gives the rhythmic pulse of the heartbeat of ideas. But for too long it has been used only for supporting conventional views. When Wynand's policy was reversed to plug Roark as a great architect of integrity, the machine churned out thousands of papers that came back unread.

Wynand bitterly realizes that he cannot force people to think his way. When a collectivist publication (which Toohey had manipulated for years) cannot effectively be used to defend a man like Roark, Wynand gives up on his late-blooming bid for integrity. Grasping that his life's work and his quest for power by controlling public opinion has been in vain, he then pulls the trigger of the gun which he held to his head one act earlier.

This scene differs from the novel, in which Wynand commits metaphorical suicide by closing the *Banner* and cutting off all ties of friendship with Roark, even though he hires him to build his greatest skyscraper, the Wynand Building. This is a reasonable adaptation change to make. It is visually difficult to depict a metaphorical suicide, especially when the audience has already seen the character hold a gun to his own head.³

Toohey's lust for power then reaches its height. We have seen him destroy Keating, Catherine, and Wynand. His final test is Roark. Van Hove chose to dramatize the final showdown between these antagonists in two closing speeches, rather than in a courtroom trial as the novel does. The play, unlike the novel, thus leaves it up to the audience to decide who is right.

Toohey stands center stage, the gun still smoking from Wynand's suicide at the back of the stage. In soliloquy form, he tells the audience that Roark is a builder who became a destroyer and an arrogant egoist who wished to have his own way at any price. He concludes that society has the right to rid itself of him. Toohey implies that "we" should condemn—perhaps, to death—anyone who refuses to live for others.

It is then Roark's turn to address the audience. He slowly walks from one side of the stage to the other in utter silence, the sound of his shoes ringing out. When he begins to speak, it is with conviction about men like him, innovators who dared to do what others did not.

³ Wynand also kills himself in the movie version of *The Fountainhead*, directed by King Vidor (Warner Bros. 1949). Although Rand wrote the film's screenplay adaptation and initially approved of its production, I enjoyed van Hove's play much more than Vidor's film, which I could hardly watch.

Every set of eyes in the theater is on him. He explains how egoistic and individualistic ideas led to the birth of America: “This country was based on a man’s right to the pursuit of happiness. His own happiness. . . . I came here to say that I do not recognize anyone’s right to one minute of my life.” Showing van Hove’s insufficient understanding of Roark, at one point in this speech he has the protagonist jarringly mention how unfair certain taxes are. Upon finishing his speech, he exits through a back door of the stage. The audience is challenged to ponder the fundamental alternative of egoism/individualism versus altruism/collectivism.

The biggest flaw in the play is that Roark lacks the joy and benevolence portrayed in the novel. He has fits of anger and tells Keating to shut up. This could never happen in the novel not only because it in fact doesn’t, but because such an outburst doesn’t fit with the calm, collected Howard Roark who Rand created.⁴ If the director didn’t blatantly ignore Rand’s vision for Roark, he also did not fully achieve it. It is easier to portray a villain (Toohey), a giant with mixed premises (Wynand), and a conformist (Keating), than it is to embody an ideal man.

However, it is important that Ayn Rand’s masterpiece has been brought to the stage by an acclaimed director, even if the heroism and value-driven romanticism of her art are not completely realized there. A sharp contrast exists between this kind of play and most of today’s theater. The latter is too often farcical, cynical, absurd, naturalist, or even nihilistic.

Though less than ideal, the play is still quite enjoyable, and it serves a wider and important goal. When an esteemed theater group travels the world performing a stage adaptation of a novel, they can’t help but act as a billboard for that novel. In this case, it’s a novel full of life-changing, potentially earthshaking ideas, and it’s on sale in the lobbies of impressive theaters around the world. This is more than

⁴ For further (and somewhat different) analysis of the play, especially on this flaw, see Carrie-Ann Biondi, “*The Fountainhead* Takes the Stage: Helping or Hindering Heroism?” *The Savvy Street*, December 13, 2017, accessed online at: <http://www.thesavvystreet.com/the-fountainhead-takes-the-stage-helping-or-hindering-heroism/>. See also insightful commentaries on the play by Shoshana Milgram and Gregory Salmieri, accessed online at: <https://ari.aynrand.org/blog/2017/12/05/watch-now-ayn-rand-experts-discuss-ivo-van-hove-staging-of-the-fountainhead> (scroll down the page for an embedded link to the archived Facebook recording of this panel discussion, moderated by Ann Ciccolella).

could be said prior to van Hove's efforts. I hope that the play returns soon to the United States, so that the ideas of this American classic can reach an even wider audience. That would be a great way to celebrate *The Fountainhead's* seventy-fifth anniversary.

