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Editorial

In an election year, we're frequently told, we have a special obligation to become informed on the issues and make crucial decisions. But why should we have this obligation only in election years? Surely we have an obligation, to ourselves, to exercise our critical faculties all the time. We are constantly making decisions about a variety of things. We need to make rational, well-informed decisions all the time, not just in November. This Journal takes no official position on the upcoming presidential election, but, as its title might suggest, is strongly in favor of reasoned discourse, both with oneself and with others. Vote for this one, vote for that one, or vote for none of the above, but be sure that whatever decision you arrive at has been the product of reasoned deliberation. You owe it to yourself. We're told that the vote is your most precious gift. But it's not. Your most precious gift is your mind. Treasure that.

In this issue of *Reason Papers*, you will notice that one essay is Part One of a two-part essay. Part Two will run in vol. 28, which is planned for this coming winter. Please visit our website periodically for new information: <http://webhost.bridgew.edu/askoble/RPad.htm>. In the future, some content will become available electronically, and the website also contains an archive of past volumes, and ordering information. Thanks for reading *Reason Papers*, and thanks for thinking.

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Mere Libertarianism: Blending Hayek and Rothbard

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The continued progress of a social movement may depend on the movement's being recognized as a movement. Being able to provide a clear, versatile, and durable definition of the movement or philosophy, quite apart from its justifications, may help to get it space and sympathy in public discourse.¹

Some of the most basic furniture of modern libertarianism comes from the great figures Friedrich Hayek and Murray Rothbard. Like their mentor Ludwig von Mises, Hayek and Rothbard favored sweeping reductions in the size and intrusiveness of government; both favored legal rules based principally on private property, consent, and contract. In view of the huge range of opinions about desirable reform, Hayek and Rothbard must be regarded as ideological siblings.

Yet Hayek and Rothbard each developed his own ideas about liberty and his own vision for a libertarian movement. In as much as there are incompatibilities between Hayek and Rothbard, those seeking resolution must choose between them, search for a viable blending, or look to other alternatives. A blending appears to be both viable and desirable. In fact, libertarian thought and policy analysis in the United States appears to be inclined toward a blending of Hayek and Rothbard.

At the center of any libertarianism are ideas about liberty. Differences between libertarianisms usually come down to differences between definitions of liberty or between claims made for liberty.

Here, in exploring these matters, I work closely with the writings of Hayek and Rothbard. I realize that many excellent libertarian philosophers have weighed in on these matters and already said many of the things I say here. I ask that they will excuse this errant economist for keeping the focus on Hayek and Rothbard.

Rothbard and Hayek on Liberty

Rothbard (1982a) insisted that liberty consists in matters of private

¹ For useful comments I thank Niclas Berggren, Bryan Caplan, Tyler Cowen, Jock Macleod, David Friedman, Jeff Hummel, Tom Palmer, Chris Sciabarra, Alex Tabarrok, Joan Taylor, and an anonymous *Reason Papers* referee. The expression "mere libertarianism" comes from Ralph Raico's eulogy of Roy A. Childs, Jr.

property, consent, and contract. Working within a Lockean logic of self-ownership, homesteading, and exchange (21-24), as well as appropriation of lost or stolen property (51-67), Rothbard said each human being owns property, including his own person, basketballs, television sets, acres of land and whatever else is acquired by “voluntary” means -- that is, by consent and contract with other property owners. The institutions and activities of legitimate society -- meaning, according to Rothbard, non-governmental, non-criminal society -- derive from consensual agreements between property owners. Non-consensual social rules that would restrict individuals in the voluntary use of their property are violations of liberty, or instances of coercion. Rothbard’s definition means that governmentally imposed price controls, occupational licensing, import restrictions, and drug-use prohibitions are all violations of liberty. This idea of liberty did not, of course, originate with Rothbard, but no other thinker has insisted more emphatically on this definition, explored and developed more thoroughly the specifics of the definition (as Rothbard did notably in *The Ethics of Liberty*), and pushed harder for a consistent application of the idea in the analysis of public issues.

Others have offered other concepts of liberty. In *The Constitution of Liberty* Hayek offers a series of passages and remarks that attempt to delineate his own idea of liberty. A brief examination of some of the passages ought to establish, as argued by many critics (Viner 1961, Hamowy 1961, 1978; Brittan 1988: 85-92; Kukathas 1989: 151-65), that Hayek’s hints about the meaning of liberty are deeply flawed.

In the book, Hayek never defines liberty in a Lockean fashion (coming closest at 140-41). Rather, he says, “Whether [someone] is free or not [depends on] whether somebody else has power so to manipulate the conditions as to make him act according to that person’s will rather than his own” (13). Liberty is the “independence of the arbitrary will of another” (12); it is the absence of “coercion by other men” (19, 421).² The state of liberty is “that condition of men in which coercion of some by others is reduced as much as possible in society” (11). Each hint introduces additional terms that call out for definition.

Leaving aside Hayek’s attempts to clarify the meaning of freedom using examples of private coercion (pp. 135-38), attempts that have been incisively criticized (Viner 1961: 231; Hamowy 1961: 32-33), consider Hayek’s attempts to clarify freedom in the context of state activity. Freedom means “that what we may do is not dependent on the approval of any person or authority and is limited only by the same abstract rules that apply equally to all” (155). There are at least two grave problems with Hayek’s “abstract” or “general” rules definition of freedom.

² We are concerned with the coercion of non-criminals. Both Hayek (1960, 142) and Rothbard (1982a, 52, 84, 219) speak of the legitimate coercing of coercers.

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A general rule may “apply equally to all” yet dictate to all, such as a rule prohibiting the wearing of straw hats or the installing of bathtubs, or which commands the performance of public service one day each month. Second, whether a rule is “general” can scarcely be decided without developing contextual distinctions between types of rules. Is the rule “one may install bathtubs only if one has obtained a state-granted plumber’s license” a general rule? The rule is presumably less general than the rule: “anyone may install bathtubs,” but more general than “one may install bathtubs only if one has obtained a state-granted plumber’s license and is not in arrears on one’s state income taxes.” How about a rule, “one may build additions on to one’s house only if one has received permits from the city planning commission”? Virtually any rule may be framed as “general” and “applying equally to all” if we are careful to sort out the layers and clauses of the rule. As numerous scholars have concluded, Hayek provides no real solution to this problem.

Hayek resorts to shifting about. Sometimes he abandons the effort to delineate freedom and coercion and shifts rather to speaking of features of rules that reduce the “harmful and objectionable character” or “evil nature” of coercion (142, 143). Is it any coercion, then, which despoils liberty, or only coercion of a very evil nature? He shifts also to saying that freedom demands that government use coercion only for “enforcing known rules intended to secure the best conditions under which the individual may give his activities a coherent, rational pattern” (144), thus nesting within his definition of freedom the entire issue of deciding which conditions are “best” (Gray 1989, 97).

Similar criticisms came immediately from Jacob Viner and Ronald Hamowy. Hayek (1961) responded to Hamowy by introducing yet another wrinkle in his notion of coercion, namely, that a coercive act puts the coerced “in a position which he regards as worse than that in which he would have been without that action” (71), which again raises as many problems as it solves. We may ask, for example, whether a law requiring every Los Angeles citizen to limit his auto emissions coerces John Doe who is made better off by everyone (including John Doe) limiting his emissions, yet not as well off as he would be if everyone except him were held to low emitting. Are we to say that government’s passing the law does not coerce John Doe but any enforcement efforts aimed particularly at him do (thus artificially separating the passing of the law from its concomitant enforcement measures)?

At the time of his criticism of Hayek, Hamowy was studying under him at Chicago, but was more influenced by Rothbard. Rothbard himself read the manuscript of *The Constitution of Liberty* and sent to Hayek a 29-page, single-spaced commentary two years prior to its publication (Rothbard 1958). Hayek, then, was in intimate contact with the Rothbardians and no doubt painfully aware of the definitional troubles. Reading *The Constitution of Liberty* today, one recognizes behind the vaporous passages an idea of liberty principally in line with

Locke-cum-Rothbard. Hayek's reply (1961) to Hamowy in a libertarian periodical freely allows that conscription, even under "general rules," is coercive and emphasizes that government coercion is "justified only by the general purpose of preventing worse coercion" (70, 72). Moreover, by 1973 in the first volume of *Law, Legislation and Liberty* Hayek adds the classic "no harm to others" condition to his formulation of liberty, remarking that the additional condition "answers a problem that has often worried students of these matters, namely that even rules which are perfectly general and abstract might still be serious and unnecessary restrictions of individual liberty" (p. 101), and cites Herbert Spencer (in note 11).

Hayek felt fundamentally aligned with Rothbardian libertarianism but did not accept that Locke-cum-Rothbard liberty provided a desirable prescription in every case. Hayek favored, or at least did not explicitly oppose, numerous government actions that clearly violated Rothbardian liberty. Hayek's sensibilities about the desirable did not conform in every case to Rothbardian liberty. Confronting this impasse, he opted to reject Rothbardian liberty and find another liberty that *would* conform to his sensibilities of the desirable. The result is the jumble of platitudes and convolutions found in *The Constitution of Liberty* and elsewhere.

A tack that Hayek might have taken is to adopt the Rothbardian definition of liberty while maintaining that it does not provide a desirable prescription in every case. In other words, he could have adhered to Rothbard's definition but not his ideal. He could have explained what liberty means, taken care to show its limitations (as he had done in a 1947 Mont-Pelerin address (Hayek 1948, ch. 6)), and said that in many cases he favors it for such-and-such reasons, in some cases rejects it for such-and-such reasons, and in some cases remains agnostic. Hayek could have taken such a tack and left most of *The Constitution of Liberty* unchanged.

That Hayek did not take this tack may have been for the best. Hayek acquired from Mises a strong suspicion of government beyond the night watchman, yet one may well speculate that he also found in Mises tendencies to avoid. Mises's experience taught that getting down to brass tacks and speaking forthrightly could close off avenues of influence and respectability. Even if Hayek, using Rothbard's definition of liberty, were to have assured his readers that he did not favor it in all relevant cases, most mid-twentieth century intellectuals would have been repelled simply by the definition. They would have accused Hayek of reverting to the language of Herbert Spencer and William Graham Sumner, even if he did not support their positions. To submit to such terminology would have been to accept that most economic regulation was coercive and to enter into a discussion of the worth of wholesale coercion. Avoiding such problems was exactly why the "New Freedom" terminology was invented during the decades of T.H. Green, Arnold Toynbee, L.T. Hobhouse, and

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J.A. Hobson, decades during which the terms “freedom,” “liberty,” “rights,” and “justice” took on new meanings. Collectivists and social democrats would have forfeited such terminological invention had they accepted a Locke-cum-Rothbard definition of liberty.

Furthermore, had Hayek clearly set out a Rothbardian idea of liberty, the intellectuals would have asked: Just how far would you go in adhering to the maxim? Even though Hayek approved of state activity beyond night watchman functions, it was to an extent the smallness of which, had Hayek come clean, would have alarmed the intellectuals of his time. In the terminological sunlight of Rothbardian liberty, it would have been nearly impossible for Hayek to conceal his true positions, for he would have had to lie outright or remain damningly silent. Drenched in sunlight, Hayek would have been dismissed and ignored.

To speculate, we might imagine that Hayek’s meta-conscious faced a trade-off between obscurantism and obscurity. Hayek’s obscurantism, his muddled definition of liberty, however willful, enabled the philosophy of anti-statism to gain a hearing that was extensive and persuasive.

Limitations of Rothbardian Liberty

The Locke-cum-Rothbard definition of liberty is the one that endures while others, all others, evaporate. Rothbard deserves a pre-eminent place in twentieth-century political thought as one who kept up the good definition of liberty.

Rothbardian liberty, however, suffers from numerous limitations. The limitations are not uncommon to political ideas and ideologies. Indeed, they are to some degree common to all. Nonetheless, serious students of a political ideology mind its limitations. Rothbard tended to neglect or even deny the several limitations. In finding proper concern for limitations, libertarians ought to shun Rothbard and instead follow Hayek. Hayek admirably agonized over the limitations of principles, maxims, and justifications, including his own.

In discussing the several limitations, we have in mind government policy (including jurisprudence) in a modern complex society -- what Adam Smith called “a great society.” We may think of societies like the United States, western Europe and so on, where government officials and ordinary voters have in some cases listened to libertarian ideas, learned a better appreciation of liberty, and cooperated in reforms that reduced the size and intrusiveness of government. The policies most relevant to the discussion here are strictly domestic or internal.

Limitation 1:

The Locke-cum-Rothbard Definition of Liberty Is Often Ambiguous

When modern liberals, statist conservatives, and others criticize the libertarian idea of liberty, they point to cases in which the distinction between liberty and

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coercion is ambiguous. In many cases, property, ownership, consent, and contract are unclear or ill defined. Critics may even go so far as to suggest that libertarian liberty is meaningless. For example the British political philosopher John Gray (1993b) points out ambiguities and forthwith scorns libertarian liberty as “virtually empty of content” and “only a mirage” (6).

But ambiguities do not, of course, necessarily undo a definition or distinction. That there is twilight does not destroy the distinction between night and day. Conditions might be ambiguous at 6:30 in the evening, but at 12 noon unambiguously it is day and at 12 midnight unambiguously night. All legal, political and ethical concepts involve ambiguities. Whether ambiguities render a concept not worthwhile depends on how extensive or severe they are, relative to like limitations of competing concepts. That libertarians, while conceding ambiguity, be prepared to show the limits of that limitation is crucial to their overcoming the pedestrian dismissal of libertarian thinking. Such preparedness is not to be gained by reading Rothbard.

That the ambiguities are countless is undeniable. The limits of ownership, rights of joint property, criteria for nuisance or invasion, definition of “threat” or “risk” to one’s property, relevance of intent, definition of “use” in homesteading, status of brand-names, trademarks, patents, copyrights, and stolen property, criteria for consent, implicit terms of contracts, status of promises, issues of children and the senile, liability of principals for the torts of agents, the theory of punishment, compensation of duress, standards of proof in court, etc., all involve serious gray areas and matters of interpretation—as the libertarian theorists David Hume (1751: 26-32), Wordsworth Donisthorpe (1895: 1-121) and David Friedman (1989: 167-76) have explained. Sensible judgments on such matters will depend on particulars of time and place -- the paths of technology, of precedent, of expectations, and so on. It is foolish to think that a definition of liberty could ever spell out definitive interpretations and clear demarcation lines.

Rothbard’s writings here and there acknowledge ambiguity in particular dimensions of the idea of liberty (for example, 1982a 72, 81, 86, 89, 97; 1982b, 83), but he tends to diminish the problem and he never admits it as a pervasive limitation or general problem for his idea of liberty. He tends to work with stark examples of noon and midnight, avoiding the twilight (1982a, 81, 189, 219, 261). Often Rothbard writes as though the contours of libertarian law are as clear as geometry:

[I]t would not be very difficult for Libertarian lawyers and jurists to arrive at a rational and objective code of libertarian legal principles and procedures based on the axiom of defense of person and property, and consequently of no coercion to be used against anyone who is not a proven and convicted invader of such person and property. This code would then be followed and applied to specific cases by privately-

competitive and free-market courts and judges. (Rothbard [1965], 208)

Regarding air pollution, Rothbard ([1970], 187-88) said the “crystal clear” remedy is “simply to enjoin anyone from injecting pollutants into the air, and thereby invading the rights of persons and property. Period.”

Hayek (1960) is much more sensible to the ambiguities of liberty (whether Locke-cum-Rothbard or his own vague variant). He says repeatedly that liberty and coercion vary in degrees (12, 138, 146). In his Mont-Pelerin address (1948), Hayek said “the formulas ‘private property’ and ‘freedom of contract’ “ often do not provide much guidance:

[T]heir meaning is ambiguous. Our problems begin when we ask what ought to be the contents of property rights, what contracts should be enforceable, and how contracts should be interpreted or, rather, what standard forms of contract should be read into the informal agreements of everyday transactions. (113; see also 20-21, 1960: 341)

A Significant Twilight Area: Local Governance

In the Mont Pelerin address and again in *The Constitution of Liberty*, Hayek calls attention to the ambiguity to which libertarians most need to own up: the continuum that inheres between private, voluntary agreement and coercive local government. When the members of a condominium association elect fellow residents to a rule-making board, we call any rules that restrict the use of private property “contractual.” But when the residents of Imperial, Nebraska (population 2,007) elect fellow residents to a rule-making body, libertarians are wont to call any such rules “coercive.” One might argue, however, that the government of Imperial is a body selected by voluntary democratic means, and that the body has homesteaded all the public town property. It issues rules for the community, and individuals voluntarily choose either to abide by the rules or to exit the community. Although newcomers do not sign a contract upon moving in, it is not far fetched to speak of one’s entering into a commonly understood agreement about town governance, as though by the very act of moving in, one publicly announces: “I hereby agree to abide by whatever rules happen to emerge from the town government.” (And, by the way, having such a declaration in writing would not make a meaningful difference.) I find this “implicit contract” interpretation of town government to be somewhat compelling for small towns. In this sense, restrictions by town government -- such as tax rules, rent control, and prohibitions on the use of leaf-blowers or on smoking in restaurants -- are *less* coercive than the same by state or national government. Decentralized government, as in Switzerland, begins to merge with voluntary governance. In that case, if a larger authority or power were to prevent or overturn such local rules, that action might itself be coercion. When Tocqueville (1835) wrote that

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the New Englander “is attached to his township because it is independent and free” (71), he described town governance in early New England as to some extent voluntary.

Where Rothbard (1982a) addresses the idea that government restrictions belong to a voluntarily accepted package or contract -- the “love it or leave it” argument -- he simply dismisses it out of hand, treating “the State” as a monolithic entity, “a coercive criminal organization that subsists by a regularized large-scale system of taxation-theft” (172; see also 191-92). Rothbard, it appears, nowhere acknowledges the significant gray area about local governance (see 119).

The attempt to distinguish voluntary association from coercion ought, as always, to begin with tracing the Lockean lineage of property claims. But such an approach may not deliver a good answer. In 1886 the government of the newly incorporated town of Imperial secured powers from the state of Nebraska. Residents who took no part in incorporation, or even opposed it, were subsequently required to pay taxes and to obey town restrictions on their private activities. Thus we may conclude that the government was not created by voluntary processes. But if no one living in Imperial this year 2004 is the descendent of any of the individuals coerced long ago, and if every resident today joined Imperial subsequent to the establishment of the local government, what difference does it make what happened long ago? In his discussion of stolen property, Rothbard (1982a) says that if we cannot clearly show whose ancestors were aggressors and whose victims, justice calls for all concerned to regard the current possessors as legitimate owners (57-58). History, as it were, eventually forgets. But current possession is often based on customs and institutions of government. As Hayek (1948) says, “jurisdictions and legislation evolve standard types of contracts for many purposes which not only tend to become exclusively practicable and intelligible but which determine the interpretation of, and are used to fill the lacunae in, all contracts which can actually be made” (115). Blending Hayek’s observations and Rothbard’s own principle, it seems somewhat sensible to say that the people of Imperial, or its local government, assume a legitimate ownership of public resources in Imperial, and that Imperial regulations are rules to which people effectively consent by entering and remaining in Imperial.

Although I would regard town-issued rent controls or bans on smoking in restaurants to be coercive for most American towns, and would applaud their being overturned on Constitutional grounds, there remains nonetheless grey areas on matters of local governance. When tracing Lockean lineage is impractical or insoluble, how are we to draw the lines? If the variable by which we distinguish between night and day is the extent of sunlight, what is the variable by which we distinguish between coercive local government and voluntary agreement? Is it the ability of residents to exercise meaningful voice, the number and homogeneity

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of the residents, the number of services included in the bundle, the form of the agreement, the integrity and accountability of officers, the degree of competition with other communities and one's cost of exit?

Rothbard's Emphasis on the Endzone

With liberty defined, Rothbard (1982a) proceeds to maintain that liberty provides a "universal ethic" for human conduct (42, 43). Liberty serves as a moral axiom, the so-called nonaggression axiom: "no man or group of men may aggress against the person or property of anyone else" (1978, 23; see also 1956, 252). The rule is right and good in all cases in which it may be applied.

In discussing the status of Benthamite individualism in Britain during the 19th Century, A.V. Dicey (1914) wrote:

Open-mindedness, candour, and the careful sincerity which forbids all exaggeration, even of the truth, are admirable qualities, but they are not the virtues which obtain for a faith the adherence of mankind. It is the definiteness not vagueness of a creed, as it is the honest confidence of its preachers, which gains proselytes. As utilitarian doctrine became less definite, and as its exponents stated it with less boldness and with more qualification, the authority of Benthamism suffered a decline. (444)

Rothbard was a self-conscious proselytizer. "Every new idea," he wrote, "begins with one or a few people, and diffuses outward toward a larger core of converts and adherents" (1982a, 265). His "strategy for liberty" called for a self-conscious libertarian movement led by an elite "cadre" or "vanguard" of libertarian theorists (1982a, 264-65); the unstated presumption was that at the pinnacle would be Rothbard himself (for as long as he lasted). Rothbard cultivated a circle of followers and acolytes who, as he often wrote when quoting them, "trenchantly" criticized the ideas of others but never challenged or attempted to best the master.

Rothbard oversold the simplicity and purity of liberty as an ethical rule. One way he did so was to shift discussion to how things would work in a purely libertarian society. In general he refused to reason within a context limited to alternatives that entail continued government activism. He insisted on introducing the most complete libertarian reform, even if such a proposal was radical in the discourse situation. To refrain from doing so, he said, "would mean that considerations of justice have been abandoned, and that the goal itself is no longer highest on the . . . libertarian's . . . political value-scale. In fact, it would mean that the libertarian advocated the *prolongation* of crime and injustice" (1982a, 261).

In insisting "with alacrity" on radical libertarian alternatives, the

Rothbardians have expanded thought and discussion. And by exercising that tendency, they have won many adherents to a profound and incisive way of thinking. But conventional policy discussion keeps within the 30 yard lines, so the Rothbardians have generally been unable to sustain discourse with mainstream journalists, academics, and government officials -- whom Rothbard (1982a) dubs “court intellectuals” and “statist apologists” (168-71). The radical tendency of Rothbardianism results in its own marginality, and its marginality attracts individuals who lack power and respectability. Rothbardian doctrine can, to some extent, explain, or provide an excuse for, the career failures of the Rothbardian intellectual. The circular relation between marginality and extremism has resulted in some foolish and unfortunate tenets. For example, Rothbard said that libertarian reform would burgeon in a dramatic transition; the state would face severe crisis resulting from its own internal collapse and from libertarian criticism and agitation. It would cede power, leaving the realm to the simple and obvious truths of libertarianism, interpreted in the moment, we are to presume, by the libertarian vanguard (1982a, 264-69). “[T]he inner contradictions of the existing system . . . will lead inevitably to its long-run collapse. . . . [Statism is] now in process of imminent breakdown . . . the libertarian triumph must eventually occur” (268, 269); “the dark night of tyranny is ending, and . . . a new dawn of liberty is now at hand” (Rothbard 1978, 313).³ This absurd vision epitomizes the pathetic aspect of the Rothbardians, and is anathema to Hayek, who expected desirable reform to be gradual and sought to meet and join power and persuade toward cooperation in liberalization.

Rothbard’s refusal to converse between the 30 yard lines, his insistence on moving to the State’s 1 yard line, or even the State’s endzone, enabled him, to an extent, to avoid candid discussion of the limitations of the liberty prescription. Speculations on a society so distant from any we have known are bound to be open-ended and unspecific. Rothbardians make claims of libertarian felicity, but the theory behind the claim is so broad and so general that skeptics ignore it rather than contest it. The Rothbardians fail to achieve dialogue with those concerned about the limitations. And by insisting on radical alternatives, Rothbardians avoid the possibility that for a choice between two middle positions, the position with greater liberty might not be the better. Yet some liberty-increasing reforms might be worse than the status quo. Furthermore, by

³ Likewise, Hans-Hermann Hoppe (1990) writes of a “desperate need for ideological solutions to the emerging crises,” and says that “a positive solution is offered in the form of a systematic and comprehensive libertarian philosophy coupled with its economic counterpart, Austrian economics, and if this ideology is propagated by an activist movement, then the prospects of igniting the revolutionary potential to activism become overwhelmingly positive and promising. Anti-statist pressures will mount and bring about an irresistible tendency toward dismantling the power of the ruling class and the state as its instrument of exploitation” (90).

insisting on the endzone in which there is no government, Rothbard circumvented orthogonal issues involving government property; he was able to avoid ten thousand important questions of public administration for which the liberty prescription does not apply.

Libertarians can be Rothbardian in the definition of liberty but non-Rothbardian in their understanding of liberty as a prescription. For a pair of policy reforms on an issue, we might be able to rank them according to the extent to which they accord with liberty, generating a dyadic liberty ranking. Two ways of formulating a liberty ranking stand out.

The first is to limit consideration to the policy itself (including the government enforcement of the policy). A minimum wage of four dollars rates higher than a minimum wage of five dollars. Note that the law forbids employers from paying less—it does not coerce workers; they suffer as a result of employers being coerced. A regime that prohibits the use of cocaine rates higher in liberty than one that prohibits both cocaine and opiates. Liberty rankings are, I suppose, transitive: If policy reform R_1 ranks higher in liberty than reform R_2 , and R_2 higher than R_3 , then R_1 ranks higher than R_3 . (Using the symbol $>_L$ to represent the first kind of liberty ranking, we may rewrite transitivity in liberty as follows: If $R_1 >_L R_2$, and $R_2 >_L R_3$, then $R_1 >_L R_3$.)

A second kind of liberty ranking would be the consideration of the long-term or overall liberty. The imposition of a curfew during an urban riot is, according to the first liberty standard, clearly more coercive than not imposing the curfew. But the curfew might succeed in preventing a lot of coercion by looters. So in an overall sense, one might deem the curfew to rate higher in liberty overall. Using the symbol $>_{L_o}$ to represent ranking of overall liberty, we find that although no-curfew $>_L$ curfew, perhaps curfew $>_{L_o}$ no-curfew. The same might be said of legalizing bazookas.

The curfew and bazooka examples suggest that some government coercion might be more than compensated for by the consequent reductions in non-governmental coercion. But other case might suggest that some government coercion might be more than compensated for by the consequent reductions in other *government* coercion. For example, one might say that the Savings & Loan deregulation of the 1980s, which rated an increase in liberty in the first sense, led to greater taxation and perhaps subsequent regulations, and less liberty in the overall sense. (And on second thought, maybe legalizing bazookas would lead to less overall coercion, because, though it would increase non-governmental coercion, it would make it harder for the government to maintain the drug war!)

The main problem with the overall-liberty ranking is that we really don't know what a policy's consequences will be. The overall-liberty standard necessitates the incorporation of theories of—or at least predictions about—social processes, about which we might disagree or in which we simply not have any confidence, and therefore introduces much vagueness and indefiniteness into

the associated liberty ranking, $>_{L_0}$. Thus, although both kinds of liberty rankings remain important, by and large I think that it is the first—which limits consideration to the single policy itself—that is most cogent and relevant to both Hayek’s and Rothbard’s ways of thinking. In particular, I do not think that the differences between Hayek and Rothbard can be boiled down to Rothbard thinking in terms of the first idea of liberty ranking and Hayek the second. We do not find in Hayek a case for sacrificing some liberty today to prevent greater losses in liberty tomorrow. (In fact, the reverse was one of his main themes.)

Now, working with the idea of the liberty ranking in the first sense, we may define the *liberty maxim*:

The liberty maxim says that for policy-reform choices between two alternatives that can be ranked in terms of liberty, choose the higher-liberty alternative.

Again the maxim I shall work with uses $>_L$, not $>_{L_0}$. One could alternatively proceed with a maxim based on $>_{L_0}$, but that is not done here.

Working with this liberty maxim, the question is, should we always adhere to the liberty maxim?

Limitation 2:

The Liberty Maxim Is Not Desirable in All Cases in which It Applies

The term “maxim” indicates that the prescription is only a rule of thumb. In some cases it should not be followed. Consider the matter of easements for crossing lands. It would seem that in a purely Rothbardian society, someone could buy up a ring of land around Bill Gates’s Seattle mansion and demand exorbitant tolls every time he wants to buy a carton of milk (though Gates presumably would be permitted to go by helicopter or, as Walter Block (1998, 319) stresses, to build a bridge or tunnel). The example is silly but the point is real. Corridors supporting private toll roads, railroads, and gas and oil pipelines have historically been required to provide adequate crossing points. As classical-liberal economists Ronald Coase ([1960], 155) and Gordon Tullock (1993) have pointed out, without easements for crossing, people might find themselves cut off from nearby destinations, as though enormous toll-demanding moats crisscrossed the terrain. Rothbard (1982a) touches on the issue, saying “any rational landowner would have first purchased access rights from surrounding owners” (240). Elsewhere (1982b, 77-78) he reasons in a fashion that leads one to suspect that he would argue that Bill Gates’s prior practice of crossing surrounding (and privately owned) lands established for him a prescriptive right (or easement), all in accordance with the principle of liberty. That argument, it seems to me, stretches the definition of liberty and introduce new problems. At any rate, it leaves open the status of newly imposed easements for which there was no prior

custom. It seems to me that crossing easements are a limitation on real property and, at least sometimes, a deviation from liberty. And, even when newly imposed, sometimes are desirable.

If the mayor of current-day Los Angeles had the power to set auto-emissions policy in the region, perhaps he should take active measures to limit emissions, such as measuring on-road emissions using a device called the “remote sensor” (Klein 2003). Gross polluters would be fined and persistent noncompliers would eventually have their cars impounded. Whether such policy entails coercion is not entirely clear, because all this would be taking place on government property. But even if it were somewhat coercive I might favor it nonetheless.

If the governor had to resort to eminent domain powers to complete a good highway project, probably he should. If the governor today had the power to legalize entirely the manufacture and sale of bazookas, perhaps he should not. During the 1992 riots in Los Angeles, government officials finally imposed a curfew, which helped. Given the existence of federal insurance of individual bank deposits, I probably would have opposed the 1980s deregulation of the U.S. savings and loan industry, even though deregulation itself was an increase in liberty.

Even if I wanted to eradicate some intervention entirely, I might prefer to do so in a gradual manner, deviating from the liberty maxim. Concerns about social and political backlash, and future reverses, might lead one, even Rothbard, to favor half-measures and gradualism. The alternatives constituting a policy reform dyad are considered within a set of social conditions. Particulars might affect our judgment. As the English libertarian historian H.T. Buckle (1821-1862) wrote, “the political economist . . . says with good reason that it is both absurd and mischievous for government to undertake to supply the working-classes with employment. [And yet it] may be right for a government to supply the employment, when the people are so ignorant as to demand it, and when, at the same time, they are so powerful as to plunge the country into anarchy if the demand is refused” (Buckle 1904: 807). Although conservatives grossly overstate the threats of liberty to basic social order, the point, in some cases, may have bite and lead us to deviate from the liberty maxim.

But even apart from the hazard of major disorder or future reversals, our sensibilities might in some cases favor gradualism:

[W]hen particular manufacturers . . . have been so far extended as to employ a great multitude . . . [h]umanity may . . . require that the freedom of trade should be restored only by slow gradations, and with a good deal of reserve and circumspection. Were those high duties and prohibitions taken away all at once, cheaper foreign goods of the same kind might be poured so fast into the home market, as to deprive all at

once many thousands of our people of their ordinary employment and means of subsistence. (Adam Smith 1776, 469)⁴

Rothbard (1982a, 262) would reject any such grounds for delaying any degree of liberty.

Rothbard uses the term “axiom” quite literally -- the justice (or desirability) of liberty holds for all people “whatever their location in time or place.” “Rights must not be transgressed, period” (1982a, 42, 241). Rothbard had the most cogent idea of liberty. Simplistically invoking the idea of demonstrated preference, he proceeded to assert liberty as a “universal ethic.” “[W]e deduce that: *no act of government whatever can increase social utility*” (1956, 252). In that sense he molded his judgment of liberty’s desirability to fit his definition of liberty. Hayek had sensibilities that would tolerate and sometimes even favor deviations from the liberty maxim⁵; he molded liberty to fit his sensibilities about the desirable.⁶ Each in his own way, Hayek and Rothbard maintained that the desirable always concords with liberty (or, for Hayek, maximal liberty). Seeking to fuse perfectly liberty and the desirable was understandable in Hayek’s and Rothbard’s respective circumstances, but today’s circumstances argue for libertarians to do otherwise.

Notice that a policy reform is “desirable” only in relation to a less desirable reform (which might be to not change the status quo at all). Again, we are dealing with policy-reform dyads. Desirability judgments are, presumably, transitive: If reform R_1 is preferred to reform R_2 , and R_2 is preferred to R_3 , then R_1 is preferred to R_3 . (Using the symbol $>_D$ to represent desirability ranking, we may rewrite transitivity in desirability as follows: If $R_1 >_D R_2$, and $R_2 >_D R_3$, then $R_1 >_D R_3$.) When we speak of “sensibilities about the desirable” we refer to judgments between policy reforms as presented in dyads. Our sensibilities are exercised in making such judgments, and expressed in the general character or pattern of judgments in a range of such dyadic choices.

Because institutions such as Cato, Reason, the Foundation for Economic Education, and the Independent Institute have become established and fairly well known, libertarians do not need pat definitions and absolutes to define themselves. They can say, “I’m a Cato type, I tend to favor more liberty in just about every area of public policy.” A 95 percent support for its leading maxim defines a movement or ideology. Other ideologies are riddled with intellectual

⁴ Smith goes on, however, to expound on how such disorder “would in all probability . . . be much less than is commonly imagined,” leading one to doubt that he would in fact prefer gradualism in this case. He sounds more disposed towards gradualism at 606.

⁵ See Hayek 1960, 223, 225, 257, 259, 279, 285-6, 327, 355, 365, 375, 381.

⁶ See Hayek 1948, 16-17; 1960, first lines of 11, 68, middle of 257, and end of 284; 1973, 61.

limitations. The neoconservatives, modern liberals, communitarians, and social democrats espouse maxims far less cogent and support those maxims far less consistently than Hayek supported the liberty maxim (especially since Hayek in his late years became more consistently pro-liberty). If other ideologies are allowed ambiguities, inconsistencies, and incompletenesses, it is only fair that libertarianism be cut the same slack.

It is libertarianism's exceptional cogency and consistency that induces some people to think that it is foolishly consistent, a philosophy of small minds. Being most in something arouses caricatures of being entire, and critics (such as Sen 1999: 65-67) dismiss the caricature. Libertarians can correct the impression by casually admitting that sometimes they reject the liberty maxim (that is, for some policy reforms R_1 and R_2 , $R_1 >_L R_2$, but $R_2 >_D R_1$). Such admission will show that libertarianism does not stake itself on brittle absolutes and will underscore that if other camps may define themselves in less-than-100 percent terms, so may libertarianism.

The "consistency" hobgoblin is removed by recognizing that libertarianism does not claim that the liberty maxim should always be adhered to. That the desirable does not always conform to the liberty maxim is not a logical inconsistency; the apparent "inconsistency" reflects merely that our sensibilities generate refined and complex patterns of judgments over many different cases. Our sensibilities and the induced patterns of judgments can be stated only in incomplete and provisional form, but in principle in a way that avoids logical inconsistency. The "inconsistency" issue becomes a question of simplicity versus complexity. Complex in its thinking the libertarian movement need not apologize for a measure of "inconsistency" and agnosticism.

It may perhaps be said that the approach described here was advanced long ago by Adam Smith. His idea of "natural liberty" or "Freedom" seems to have been in the tradition of Locke and tended toward a libertarian understanding (see 1776, 138, 606, 687 and especially 400). Although Smith's message was that "the proper business of law [is] not to infringe, but to support [natural liberty]" (p. 324), he explicitly rejected the idea that the desirable always concords with liberty:

[T]hose exertions of the natural liberty of the few individuals, which might endanger the security of the whole society, are, and ought to be, restrained by the laws of all governments; of the most free, as well as the most despotical. The obligation of building party walls, in order to prevent the communication of fire, is a violation of natural liberty, exactly of the same kind with the regulations of the banking trade which

are here proposed. (324)⁷

Suppose we agree on a desirability ranking $R_1 >_D R_2$. Where we situate the reforms R_1 and R_2 within a liberty/coercion matrix (that is, whether we maintain $R_1 >_L R_2$ or the reverse) and how we draw the lines of demarcation of that matrix (that is, how we define the relation $>_L$) are matters that we decide jointly, in one encompassing decision. We can adjust the distinctions, terminology, and definitions to suit our interests as philosophers, theorists, or intellectual activists. To some extent we *do* adjust the lines of liberty to correspond with our sensibilities about the desirable, because doing so enhances the serviceability of the totality of our vocabulary, beliefs, and justifications. But to serve our largest and most enduring interests, such adjusting and smoothing must heed certain constraints. Both Hayek and Rothbard attempted to draw the lines so as to achieve a concordance between the desirable and liberty (or maximal liberty). That, it seems to me, pushed the adjusting and smoothing beyond bounds and into the realm of philosophical and terminological gerrymandering. At the farthest depths of our rhetoric, we should heed Smith.

One may grant, by the way, that the liberty maxim does not always conform to the desirable, yet still believe that the ideal or best society would be that of pure liberty or no government (whatever that might mean). We may judge the state's 11 yard line to be better than the state's 10 yard line, yet the state's endzone (total liberty) to be best of all.

Limitation 3:

The Liberty Maxim Is an Incomplete Guide to Public Policy, For in Many Cases It Does Not Apply

Rothbard's "endzone" approach to policy discussion spared him from ever dwelling at a mid-field position and exploring important questions that are orthogonal to the liberty-versus-government gridiron. At a mid-field position there exist many government organizations, resources and types of property. Apart from trying to move forward on the gridiron, there remain countless orthogonal dyads asking: What rules ought to govern the use of government resources? Given that there is a Federal Reserve System, what type of policy should the Chairman and Board pursue? Given that we have government owned streets and roads, what should be the speed limit? Should there be random checks for drunk driving? What should be the penalty for running a red light?

⁷ On page 530, Smith speaks of two particular laws being "evident violations of natural liberty, and therefore unjust," contradicting, it may seem, the quoted passage. However, perhaps Smith did not view the set of just government actions as conforming perfectly to the set of desirable actions. Perhaps he would say that sometimes the government ought to take a certain action, even though it is an unjust action.

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What vehicles should be allowed to pick up passengers at bus stops? Should people be allowed to panhandle or peddle goods on the sidewalk? Given that government owns the park in town, should people be allowed to camp out? Should Nazis be allowed to demonstrate? In government schools and universities, what should be the curricula, dress codes, racial or gender preferences, and disciplinary rules? Should US Postal Service workers be allowed to put up *Playboy* calendars in their lockers? In government buildings, should people be allowed to smoke? The liberty maxim is basically irrelevant to all such issues; it is mostly silent on dyadic issues of public administration and resource utilization. Needless to say, the questions posed here touch on only a few public policy issues, each of which is made up of many important practical problems.

Rothbard (1982a) diminished such issues by pretending that they are beyond the pale of reasoned discourse. He insisted:

[U]ltimately, there *is* no entity called “government”; there are only people forming themselves into groups called “governments” and acting in a “governmental” manner. *All* property is therefore always “private”; the only and critical question is whether it should reside in the hands of criminals or of the proper and legitimate owners. (56)

Lacking legitimate ownership rights the lords of government resources correspondingly lack any ethical grounds for using the resources in one manner rather than another: “so long as the streets continue to be government-owned, the problem and the conflict remain insoluble” (118). Rothbard says that there is no ethical criterion at all in making governmental decisions “and such governmental decisions can only be purely arbitrary” (181; see also 118, 132). Not only is the ethical status of liberty that of an axiom, it is the only principle for political affairs with *any* ethical authority. Outside the realm of its application there is only moral chaos.

Yet libertarians routinely reject such a conclusion, and rightly so. Suppose that national government continued to collect taxes in amounts corresponding to current welfare expenditures, but instead of continuing to give such welfare the government, year after year, gathered the funds into an enormous pile of federal reserve notes, doused it with gasoline and lit it on fire. Libertarians, including myself, would probably prefer the bonfire to the giving of welfare, but in justifying such a judgment libertarians cannot invoke the virtues of liberty, because the bonfire policy entails just as much coercion as the welfare policy.⁸ The judgments of each of us go beyond the liberty dimension.

⁸ Even though the welfare policy is more likely to lead to secondary measures that violate liberty, that does not invalidate other considerations that also lead libertarians to prefer the bonfire.

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It is fine for libertarians to focus on issues to which the liberty maxim applies, but they ought to be quick to admit that the maxim is an incomplete guide to desirable reform, that there are many important and legitimate policy issues to which it does not apply. Indeed, if libertarians were to open a discussion of privatizing government resources, the whole question of how best to privatize again goes largely unanswered by the liberty maxim. As Hayek (1973) put it, “no code of law can be without gaps” (117-18).

The Three Practical Limitations Diagramed

The foregoing brings out difficulties in applying the liberty maxim to policy dyads:

- Which policy in the dyad is the higher-liberty alternative? AMBIGUITY points out that answering this question will sometimes be difficult, highly tentative, or rather arbitrary.
- Is the higher-liberty alternative in fact desirable? UNDESIRABILITY points out that sometimes the answer is *no*.
- Does the liberty maxim even apply to the dyad in question? INCOMPLETENESS points out that sometimes it does not.

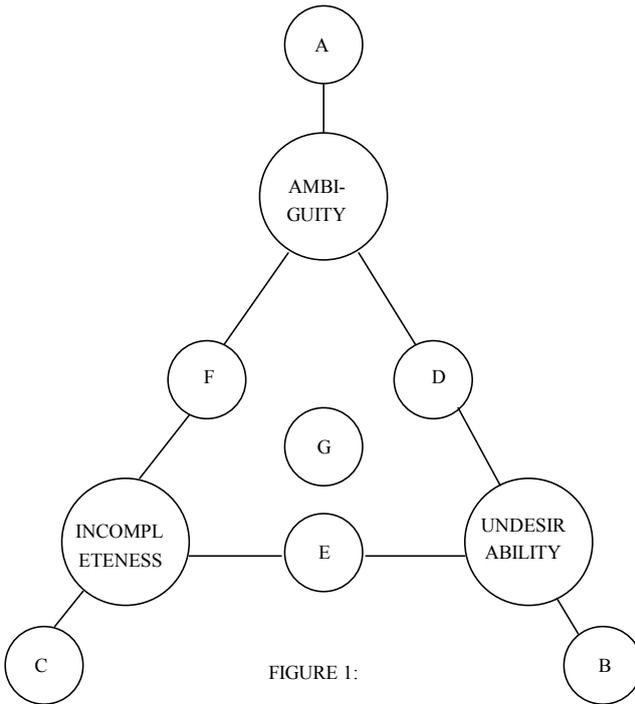


FIGURE 1:
Conceptual Terrain of the Three Practical
Limitations of the Liberty Maxim

In Figure 1 the three practical limitations are arranged in a triangle. Specific policy cases—a case being both a dyad and a desirability judgment—may be placed into the diagram based on the limitations they exemplify:

- Twilight cases of tort rules (regarding, say, threat, brand-names, stolen property, implicit terms, etc.) may be hard to interpret in terms of more-liberty and less-liberty, so such should be located beside AMBIGUITY at point A.
- If we were to favor the use of eminent domain to complete a highway, we might locate such a case beside UNDESIRABILITY at point B. Similarly, a state-wide ban on bazookas, if desirable, might be located at point B.
- Cases of rules for government, such as term limits or hours of operation

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for the post office, are cases to which the liberty maxim simply does not apply, so such cases are located beside INCOMPLETENESS at point C.

The diagram allows us to show that our interpretations of cases are themselves ambiguous and unresolved:

- At point D we locate cases that to some extent exemplify AMBIGUITY and to some extent UNDESIRABILITY. One might prefer to locate the bazooka ban here, reasoning that merely owning a bazooka poses a risk or threat to others to such an extent that such controls constitute the protection, rather than transgression, of property rights according to the liberty principle. The case of easements for crossings might be here: to some extent they are simply desirable violations of property rights, but, it might be said, to some extent easement rights are the liberty-rights of the crossers. Also here might be small town rules against, say, the open sale of pornography (should we favor such restrictions).
- At point E we locate cases that to some extent exemplify UNDESIRABILITY and to some extent INCOMPLETENESS. If we were to favor restrictions on immigration, the restriction would be a violation of the would-be immigrants' liberty; but to some extent one could interpret the restriction as saying, "no such foreigners may come onto federal government property," yielding a case where the liberty maxim does not apply (hence, incompleteness). Also here might be a curfew imposed during an urban riot or speed limits on government roads.
- At point F we locate cases that to some extent exemplify INCOMPLETENESS and to some extent AMBIGUITY. Where government property and private property intermingle, where the demarcation between them is ill-defined, such as in matters of private use of a governmentally owned river, it may be hard to decide whether the case falls entirely within the realm of government property (hence exemplifying incompleteness), or falls partly or all within the realm of private property and the liberty-rights are ambiguous. Suppose a private business wished to erect an enormous sign that would block the customarily enjoyed sunlight at a government park, or block the customarily enjoyed view of the mountains. We might say that the customarily enjoyed access is a government resource to which the liberty maxim does not apply. Or that all aspects of the case should be translated into private property but find that the liberty maxim is in this case highly ambiguous.
- Point G at the center of the triangle is for cases that can be interpreted in terms of any of the three practical limitations. The bazooka ban, for example, can be said also to demonstrate INCOMPLETENESS, in as

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much as the ban is interpreted as saying that no one may bring a bazooka onto any government property (in which case you might not be able to get your bazooka home from the bazooka store). Desirable emission controls, desirable small-town regulations of nearly any kind, desirable rules governing just about any interface between government and private property, will all be open to interpretation.

A policy area especially difficult to locate is the chief process by which private property is transformed into government property—that is, the process of taxation. My sensibilities do not favor the complete and immediate abolition of all taxation, if for no other reason than that doing so would probably lead to political chaos, backlash, and ultimately maybe less liberty. In favoring to reduce taxes moderately rather than drastically, do we exemplify ambiguity, undesirability, or incompleteness?

Limitation 4:

Libertarianism Does Not Serve All Valid Human Values

Critics contend that libertarian policy fails to serve certain important human values. Libertarians respond in several ways. When critics claim, for example, that libertarian policy reduces economic security and peace of mind, libertarians tend to respond by arguing that it just isn't so, that the invisible hand, broadly interpreted to include noncommercial voluntary activities, in fact delivers such intangibles in ways more diverse and effective than people generally appreciate. Intellectual understanding of the fertility and suppleness of voluntary processes, or spontaneous order, or, to echo Bastiat and Hazlitt, learning to see the “unseen,” is difficult for most and is not too advanced among the general public or the intellectuals. Invoking such learning libertarians sometimes maintain that libertarian policy is capable of reconciling and best advancing simultaneously all valid human values. Community, tolerance, individual dignity, material progress, intellectual complexity, intellectual simplicity, spiritual adventure, spiritual tranquility, hedonism, and temperance are all best advanced according to each person's own tastes and preferences.

When critics claim that libertarian reform will erode certain cultural traditions and ways of life, libertarians might respond that members of cultural groups are free to continue their traditions, as do the Amish. (Again, our concern is the *domestic* policy of a country like the U.S.) Were such individuals not to continue the traditions, such choosing would indicate that they have higher priorities, other values, which would go less well served if government policy limited choice, commerce, or cultural competition. Within the traditional community, some members, especially older members, may indeed lose, maybe whole generations will suffer, but the damage here is akin to the losses that befell truckers and airlines when entry barriers were removed and consumers chose the

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better deals of competitors. The loss is a transitional one, a part of the dynamic process of betterment, and not an essential shortcoming of libertarian reform. In a sense the libertarians are simply expanding the spontaneous order argument to include particular cultures as loosely delineated voluntary groups that must compete for support.

There is a more serious challenge to libertarian reform. People want to belong not merely to a private club but to *a people*. They may wish to simplify and circumscribe day-to-day life, or, more importantly, they find an elemental joy in sharing experiences that encompass the whole of the people. In *The Theory of Moral Sentiments*, Adam Smith (1790) made repeated use of a certain metaphor to capture an individual's elemental joy at being in resonance with his fellows:

The person [suffering misfortune] longs for . . . the entire concord of the affections of the spectators with his own. To see the emotions of their hearts, in every respect, beat time to his own . . . constitutes his sole consolation. (22)

The great pleasure of conversation and society . . . arises from a certain correspondence of sentiments and opinions, from a certain harmony of minds, which like so many musical instruments coincide and keep time with one another. (337)

The joy, consolation and pathos of coordinating our own sentiments to those of others, of mutually recognizing that coordination and seeing in their eyes the reflection of our own sentiments, is plain enough in our reactions as spectators at a sporting event or as parties to a love affair. The principle applies also to the collective romance effected and mediated by the state. Consider the following Smith passage into which I have inserted the state:

[W]e join with [our companions] in the complacency and satisfaction with which they naturally regard whatever is the cause of their good fortune. We enter into the love and affection which they conceive for [the state], and begin to love it too. We should be sorry for their sakes if it was destroyed . . . When we see one man assisted, protected, relieved by [the state] our sympathy with the joy of the person who receives the benefit serves only to animate our fellow-feeling with his gratitude towards [that which] bestows it. (70)

Love for and allegiance to the state depends on sentiments, interpretations, and mythologies being in sync. In Sweden the Social Democrats promulgated the mythology of "The People's Home," in which everyone will take care of everyone and everyone will be grateful and connected to everyone. The interest in sharing in, or beating time to, a common experience, romance, and way of life

is often ill served by libertarian reform.

In its power and permanence, government determines and enforces the setting for an encompassing collective romance, for example by imposing a common school system, and advances the events and dramas by providing the central agency. Even if they do not say it in such terms, critics oppose libertarian reform simply because it fails to serve the human value of an encompassing and enduring collective experience. Critics see that the government creates common, permanent institutions, such as the streets and roads, the postal service, and the school system, and that the business of politics creates an unfolding series of battles and dramas relevant to all. The ability of citizens to achieve mutual and encompassing coordination of their sentiments—whether the focal point is election-day results, the latest efforts in the Drug War, or emergency relief to hurricane victims—and the corresponding regard for the state as a romantic power—certainly are human values that libertarian policy fails to serve.

Libertarians might respond along the lines of spontaneous order: In as much as people value collective experience and romance, those services will be produced in a free society. Sports, movies, television and the media offer experiences that can, in principle, be shared by all. In this case, however, the spontaneous order resolution is doubtful. If 80 percent of the people greatly value having a cultural experience that is shared by all, while the remaining 20 percent do not want to have the experience, under a libertarian regime the 80 percent will have their values served only if they can somehow compensate the remaining 20 percent to participate. Free riding among the 80 percent and holding out among the 20 percent will upset such a solution.

But more importantly, even if the majority could, by voluntary means, induce the minority to participate, such a form of interaction may be unsatisfactory to the majority (and not merely because they have had to cough up compensation). What they value is not merely a shared experience, but the power of the majority, through its perceived agent, the government, to determine social events, experiences and culture. They value the use of state power to enforce the setting and create the focal points for an encompassing social romance—The People's Romance (Klein 2004). The problem is not amenable to a negotiated solution. The "transaction costs," as it were, are infinite. Either the government creates The People's Romance, in which case the majority benefit and the minority lose, or libertarian policy prevails, with the reverse results. The desire for The People's Romance clearly is ill served in a libertarian society, except perhaps in wartime.

The libertarian might again return to political economy, now emphasizing all of the pathologies of public opinion, democratic politics, and the government sector, and plead that The People's Romance is just too costly. This argument, in substance and tone, pretty well sums up Hayek's project. He began as a mild Fabian and knew the appeal and power of collective romance (Shearmur

1996, 26-34). Around the age of 23-24 he rapidly came to understand that the romance entailed significant state activism, and that such activism was extremely costly, materially and spiritually. He devoted his efforts to enlightening others to such costs, mainly by explaining spontaneous order and the damages wrought by intervention. The human benefits derived from government-led mutual coordination of sentiment come at great damage to another kind of coordination, namely, the extensive arrangement of activities that on the whole would be pleasing to a wise and liberal omniscient observer.⁹

But even once the costs are properly understood the critic might still feel that The People's Romance, at least at some levels, is worth the costs. He might favor, as a citizen and as a humane observer, substantial amounts of government intervention and activism, even though he knows all that Hayek, Friedman, and the Cato staff of policy analysts could possibly teach him. Here we arrive at a deep conflict of values. The libertarian, in response, to preserve the claim that on the whole libertarian policy best advances all valid human values, might maintain that the value in question is not valid. It is "irrational," "false," or "immoral." Rothbard (1978) writes: "by stressing the virtue of tradition and irrational symbols, the conservatives could gull the public into continuing . . . to worship the nation-state" (11-12). But The People's Romance is a bona fide value for bona fide human beings, and might determine a preference even once its costs are well appreciated. To dismiss it as "irrational" is, it seems to me, to attempt to salvage an overstatement of the virtues of libertarianism by engaging in philosophical gerrymandering.

The point here stands even as we weaken the case. Even if it is the 20 percent who wish for The People's Romance, while 80 percent object, and even if those among the 20 percent *would* renounce support for statist romance once they studied carefully all the scholarly libertarian literature, there still is a bona fide human value that libertarian policy fails to serve. Opponents are instinctively aware of this failure of libertarian policy, even if they do not formulate it as such.¹⁰ Libertarians gain trust and persuasiveness when they show awareness that libertarian policy forsakes some values. Such candor is displayed by Hayek in

⁹ On the distinction and the relationship between the two coordinations, see Klein 1997, 1998a.

¹⁰ The People's Romance is related to what Robert Nozick (1989) speaks of in a chapter entitled "The Zigzag of Politics." Whereas The People's Romance refers to just about any form of government coordinated experiences and sentiments, Nozick writes favorably of something more specific: Government action as a way of solemnly marking what society holds dear (pp. 287-89). It would seem that Nozick finds this symbolic value only in actions that affirm what society does in fact hold dear, whereas The People's Romance, while including Nozick's solemn-marking function, also includes activities that determine and instantiate what society is to hold dear.

the Preface to *The Constitution of Liberty*: “I believe I have made honest use of what I know about the world in which we live. The reader will have to decide whether he wants to accept the values in the service of which I have used that knowledge.” Hayek writes that liberty “is the source and condition of most moral values” (6)—*most*, not *all*.

If libertarians do not value The People’s Romance, or other values ill served by libertarian reform,¹¹ that could be a consequence as well as a cause of their beliefs. The more committed we become to libertarian ideas, the more prone we are to reject values ill served by libertarian reforms. One’s philosophy and one’s sensibilities act on each other through time.

Limitation 5:

Libertarianism Lacks a Definitive, “Rational” Foundation

Rothbard viewed government decision making as activity in a moral vacuum because he saw no ethical axiom to provide a standard. Government decision making, in his view, is merely a historical unfolding of powerful interest groups, some pushing in one direction, some in another direction. But influence and persuasive abilities stem from the moral appeal of the arguments; there is a moral cohesion between persons, even those in government. Rothbard is wrong to imply that without an ethical axiom decision makers are morally rudderless. By the same token, no axiom is needed to affirm moral legitimacy in voluntary affairs. Libertarian scholarship and policy analysis is itself a human interest group that mobilizes its own moral powers and influence in struggles with others.

Rothbard (1982a) pretends to articulate a “foundation for a systematic

¹¹ I confess to sometimes wondering about other inchoate values—other, that is, than the People’s Romance—that might give impetus to statist judgments on the part of well-informed intellectuals. A great discomfort may attend the presence of beauty, excellence, adventure, and greatness, a discomfort arising out of our own envy and feeling of inferiority. As would-be policymakers we ought to recognize such consequences. Such a thesis about repressive and collectivist impulses may be credited to H.L. Mencken. Ever underscoring the finitude of existence and the fragility of selfhood—and the ridiculousness of it all—Mencken regarded the values of stasis and unexceptionalism—what the Swedes call “The Law of Jante”—as valid and real. In candidly recognizing conflict between values, he, like Machiavelli, accorded a validity to the values of his opponents (see, for example, Mencken 1926: 151-52). That such values are ill served by libertarian reform is arguable. Spontaneous order theory suggests that libertarian reform would facilitate our finding our own ponds, refining our selfhood to afford ourselves a greater sense of individuality (a counter-agent to invidiousness), circumscribing stimuli, and respecting the circumscriptions sought by others. The values of stasis and unexceptionalism, furthermore, might be not only a cause of collectivist/statist impulses but a consequence of collectivist sentiments. The very interest in stasis and unexceptionalism might diminish insofar as libertarian policy reduces collectivist sentiments.

theory of liberty and the rights of the individual” (199). But justification is never definitive or final. For any justification given, we may ask for *its* justification. The iteration of justification generates rich and varied webs of arguments about policies and values, the threads of which are inter-connecting and open-ended, the arrangements of which are complex, tentative and uncertain, trailing off in all directions, arriving at places sometimes unfathomed and sometimes familiar but newly visited. It is unhelpful to think of one’s own policy positions pressed by gravity to a block of ratiocination the way a house sits on a block of concrete. It is philosophically naive to seek a full account of the origins and determinants of our judgments about what is desirable, an articulation of our sensibilities about the desirable. We may profit by attempting to unearth the deeper roots of our judgment, but we recognize that any roots unearthed will have yet deeper roots. The deeper we go, the more platitudinous become the accounts of our reasoning. As Hayek (1960) said:

Probably all generalizations that we can formulate depend on still higher generalizations which we do not explicitly know but which nevertheless govern the working of our minds. Though we will always try to discover those more general principles on which our decisions rest, this is probably by its nature an unending process. (209).¹²

Recursivity and Vigilance

Suppose you are preparing to take your regular jog when a friend calls with the tempting invitation to drink beer and watch baseball. In deciding between jogging and beer you recognize the enhanced health and strength gotten from jogging today. If your jogging relies on routine and discipline, one may also argue for jogging today on the grounds of *jogging tomorrow*. A gain in the likelihood of jogging tomorrow is one of the consequences of jogging today, and that gain translates again into health and strength. Jogging has a recursive relationship with itself (it’s a habit).

In a similar way, liberty today can be argued for on the grounds of liberty tomorrow, and liberty in policy area A on the grounds of liberty in B. Because rule-making and belief systems in society work by expectations, focal points, symbols, conventions, precedents, and habits, when judging a reform we must consider the precedent it would set, or fail to set. If we ban machine guns today it may make it more likely tomorrow that those in power will ban rifles. Politics, law, and opinion involve slippery slopes, as Hayek often stressed. Vigilance today may be the price of preventing significant losses tomorrow. (On

¹² Hayek (1973) quotes Roscoe Pound saying that “the trained intuition of the judge continuously leads him to right results for which he is puzzled to give unimpeachable legal reasons” (117).

this point, great passages from Hume are provided in Hayek 1960, pp. 454-55.)

The present interpretation of libertarianism is prepared to incorporate fully the significance of recursivity, feedback effects, and slippery slopes. Recursivity and the power of symbols are important, often dominating considerations, so they must be carefully considered in judging between reform alternatives. When we imagine ourselves to be the policymaker judging between reform X and reform Y, we do so on the assumption that the policymakers on all other issues will *not* be determined by us, but will be those as determined by real-world political arrangements. The framework for our discussion of judgments and sensibilities is that of imagining ourselves as having the one-time opportunity to converse with an intelligent, patient, and well-meaning policymaker. And even if we were actually the Governor of California or the Chairman of the Federal Trade Commission, the natural assumption is that we would not be involved in subsequent policy decisions in many other fields, and certainly not as autocrats. What we decide about this moment's issue will have important effects on the processes by which many other issues are formulated and decided. We must consider such effects when deciding on the issue of the moment. (Indeed, the jogging example suggests—and Lord Acton's adage agrees—that even when the future policy makers will be ourselves, we still must consider feedback effects.)

Our interpretation of libertarianism fully recognizes, therefore, the virtue of hardy principles and focal points in policy making and the evolution of social norms. To characterize the present interpretation as one which ignores or discounts the symbolic and systemic aspects of the evolution of law, morals, and beliefs, one which judges a case only on the narrow and immediate “utilitarian” or “pragmatic” consequences, would be a mistake.

As we incorporate recursivities and feedbacks, the case for liberty becomes even stronger (as argued in Klein 1998b). One might conclude that such considerations seal the case for the desirability of liberty in 100 percent of dyads, that we should even favor reforms to legalize bazookas, abolish all eminent domain practices, and abolish all air pollution controls (save those emerging from injunctions). But there is still no chagrin in sometimes opposing liberty or admitting agnosticism. Even when recursivities are figured in, libertarianism does not depend on 100 percent. Creating a powerful focal point in liberty and generating a strong presumption of liberty does not depend on 100 percent.

All participants in public discourse and political machinations are bound to promulgate symbols, myths, and principles. We ought to urge citizens to revere and consecrate those we especially favor. There is no intention here to excise from libertarian rhetoric all talk of “natural rights,” “natural law,” “morality,” and other hallowed phrases. Even Adam Smith (1776, 687), in his most mature work, spoke of “the obvious and simple system of natural liberty” (though, as we have seen, he did not understand that to conform perfectly with the

desirable). Rather, I encourage libertarians to be better aware of how they fashion rhetoric depending on the discourse situation, and to be more mindful of how their popular and broad-based justifications may be misunderstood or used to show that libertarians engage in over-generalization and rely on brittle and simplistic arguments.

By the way, recall that our liberty maxim is based on the liberty ranking $>_L$, which considers only the immediate policy itself (including enforcement machinery), and not the ramifications for liberty. The other liberty ranking, $>_{Lo}$, considers the *overall* consequences in terms of liberty. A liberty maxim based on $>_{Lo}$ would incorporate recursive and feedback effects into the ranking. The liberty maxim based on $>_L$ tells us to deregulate Savings and Loans (along the lines done in the 1980s, not full deregulation). If we reject that recommendation, then we have an example of undesirability. However, the overall affects of the deregulation might be less liberty (notably because of higher taxes for bail outs), so a liberty maxim based on $>_{Lo}$ would not recommend deregulation, and hence no occurrence of undesirability. Again, the reason we focus on $>_L$ rather than $>_{Lo}$ is that with $>_{Lo}$, so often one just does not know how to rank two policy reforms, and even when he does his ranking so often will not agree with how others—even other libertarians—rank them. Was the 1980s S & L deregulation a reduction in liberty overall? Who knows?

The Name of the Party of Liberty

In the Postscript to *The Constitution of Liberty*, Hayek addressed the question of the name of the party of liberty. He opted for “liberalism,” but with significant misgivings. Forty years later, “liberalism” makes even less sense. Whether Tocqueville, Acton, Spencer, and Gladstone represent the true soul of the original liberalism is open to challenge. But even if they represent that soul, the farther we get from their times, the more remote and scholastic becomes the case for a libertarian restoration of that term. It never was unambiguously libertarian, but even if it were, that character has been lost for so long, at least in the United States, that it would be foolish to toil in the hope of someday restoring it.

Hayek rejected “libertarian” because “it carries too much the flavor of a manufactured term and of a substitute” (1960, 408). Hayek probably associated “libertarian” especially with the rigid, rationalist package proffered by Rothbard and the like. But as the Rothbardian strictures are pared away, “libertarianism” becomes a big tent for those who really do want government to be significantly smaller and less restrictive. It means “generally anti-statist across the board.” Indeed, according to the 1928 *Oxford English Dictionary*, “libertarian” was used to mean “One who approves of or advocates liberty.” The term was used in some such sense by many writers prior to Rothbard’s rigid characterization, including:

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J.R. Seeley, F.W. Maitland, R.K. Wilson, C.P. Scott, Benjamin Tucker, Charles Sprading, J.P. Warbasse, Albert Jay Nock, Harold Laski, H.L. Mencken, Cecil Palmer, Harry Elmer Barnes, Ludwig von Mises, Isabel Paterson, Frank Chodorov, Leonard Read, Dean Russell, Frank Meyer, Henry C. Simons, Frank Graham, Clarence Philbrook, Arthur Ekirch, Robert Nisbet, Michael Oakeshott, Isaiah Berlin, and Spencer MacCallum.

And subsequent to *The Constitution of Liberty*, Hayek, though continuing to use “liberal,” came to use “libertarian” rather frequently.

Journalists and intellectuals usually frame politics and public issues as a battle between two camps. Public discourse today conventionally pits “Left vs. Right,” “liberal vs. conservative,” etc. Public understanding would be advanced substantially if issues were instead framed as battles between positions corresponding to less and more government. A big-tent definition of libertarianism encourages mainstream voices to recognize as a meaningful category those for reducing government. This essay suggests how libertarianism might be fashioned and understood to enhance its bid for becoming the mainstream name of the position of reducing government and increasing liberty.

In the United States, the very aim of gaining public recognition of such a position depends on “libertarianism,” because no other term can possibly work. “Liberal” (whether “classical,” “market,” or “neo”), “conservative,” “individualist,” “voluntaryist,” “capitalist,” “anti-statist,” are all fatally flawed.¹³ (In many other countries, “liberalism” is still viable and better than

¹³ The term “conservative” is not viable for at least four reasons: (1) The term carries strong connotations about matters beyond public policy, such as personal morals and lifestyles, cultural attitudes, aesthetics, and religion. The party of liberty must have a name that is silent and aloof about the individual’s choices in all such matters. (2) In as much as “conservative” as a name for a policy platform or sensibility has any meaning, that meaning is multiple and conflicted. Many self-described conservatives favor liberty and small government, but many, now and for centuries past, have so favored statism that one cannot have much confidence that a “conservative” much favors liberty. (3) The term suggests that in matters of policy we should *conserve* the past. But America’s policy history, even prior to F.D.R., is so checkered—coverture, slavery, trampling of Indians’ life, liberty and property, Jim Crow, postal monopoly, protectionism, Prohibition, sexual and lifestyle proscriptions, anti-trust, conscription, etc.—that mere conservation is senseless. The real question emerges: Which policies should be conserved and which scrapped? The answer is much better indicated by the term “libertarianism.” (4) One connotation of the term “conservative” is opposition to radicalism. Yet the party of liberty ought to hold a healthy spirit of pragmatic radicalism. The party of liberty ought to accept the political constraints of the status quo and focus on moderate reform, but it does so with a long-range hope of moving significantly down field by a continual reform process stretching over generations. In spirit and intellect, the party of liberty is too radical to be called “conservative.”

“libertarianism”.) Without a good name actions are ineffectual. In the U.S., fortunately, leading libertarian institutions such as Cato, Reason, Foundation for Economic Education, and the Independent Institute now identify themselves as libertarian, generally using the term in a manner that adheres to Rothbard’s definition of liberty while relaxing his strictures for libertarianism. In the mainstream media in the U.S. the term libertarian is used increasingly to refer to a person who favors significant reductions in government.

Challengers and Bargainers

Discourse may be modeled as a debate between two speakers before an audience. Each speaker strives to persuade but the channels are twofold: persuading the other speaker and persuading the listening audience. When the libertarian Speaker A debates anti-libertarian Speaker B, she faces trade-offs between appealing to B, who has made substantial intellectual and emotional commitments to his anti-libertarian ideas, and appealing to the Listener, who, especially if *young*, often has not made commitments. In appealing to Speaker B, Speaker A may try to unravel his thinking, getting him to back up the path which led him to his position. Speaker B advocates a highly statist Position T shown as the right-most node in Figure 2. The bargaining libertarian starts, for the sake of argument, at Position S and questions belief Z. She explains the weaknesses of belief Z (in comparison to belief Y) in hopes of backing Speaker B up to Position S. If success:

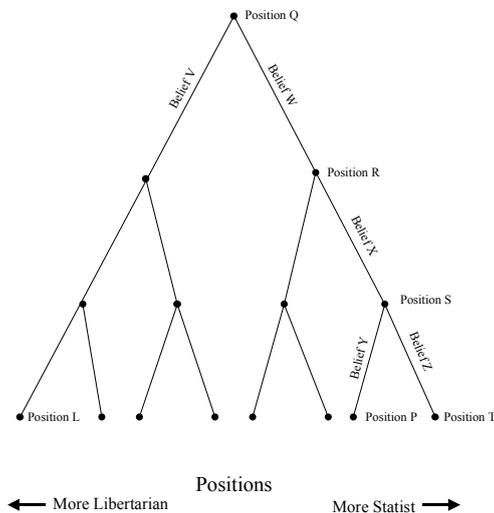


Figure 2
 Bargainer begins by challenging Belief Z.
 Challenger begins by challenging Belief W.

An alternative approach is to challenge from the outset the more basic belief W (by arguing for the superiority of belief V). When the opposing speaker is deeply committed to the beliefs along the right side of the figure, this fundamental challenge is unlikely to influence him at all. But the challenger might deeply influence the Listener, who candidly and freshly considers belief V versus belief W. Listener might be more open to seeing and accepting the worthiness of belief V.

Notable libertarian challengers are Etienne de la Boetie, Thomas Paine, Frederic Bastiat, William Lloyd Garrison, Lysander Spooner, Ludwig von Mises, Ayn Rand, Thomas Szasz, Murray Rothbard, and Robert Higgs. Notable libertarian bargainers are Smith, Hayek, Aaron Wildavsky, Richard Epstein, and Tyler Cowen. Both types are useful. It is not an issue of one or the other.¹⁴ Each has great virtue; libertarians want to persuade both Listener and Speaker B, both the young and the currently powerful. And each has drawbacks and hazards. Challengers tend to be expelled and ignored by the mainstream, losing exposure and losing the intellectual checks and disciplines exerted by critics and opponents in dialogue. Bargainers tend to lose sight of the more fundamental issues and to go native—that is, mainstream or official or academic.¹⁵

Rothbard and the Rothbardians have sometimes insisted on challenging as a matter of philosophical soundness. Rothbard (1982a) maintained that government must be regarded always as “the enemy of mankind, that it is [impossible and undesirable] to *use* the State in engineering a planned and measured pace toward liberty” (262). Rothbard seemed to think that a wholesale challenge to government can gain popular support and extirpate interventions root and branch. The vision is characteristic of the challenger. The challenger view of things turns on the distinction between voluntary and coercive action becoming a focal point for human discourse and institutional change. If the distinction between liberty and government is sharpened, the challenger can push for a libertarian moment in which people get on the right thing *en masse*. The challengers’ overstatement of the sharpness fits their attitude about the state and the reform process.

But I am inclined to think that the only manner in which libertarian reforms can ever be effected in countries like the United States (or New Zealand) of today is piecemeal pruning of individual branches. The achieving of such reforms calls for an attitude very different from Rothbard’s. Government will not be reduced but by government reducing itself, and the government will not reduce

¹⁴ My challenger-bargainer distinction is a variation on Steele’s (1990, 11).

¹⁵ I do not mean to imply that libertarian bargainers who go native come to espouse anti-libertarian positions. Going native is more a matter of withdrawing ideologically than of adopting a new ideology.

itself until anti-government individuals become the government. Government has at least one necessary and important function: the undoing of other governmental functions.

When Hayek (1944) noted that a *petite fonctionnaire* wields more power over people than does a multi-millionaire (104), he was thinking of the real damage that even minor government decisions can cause. A little bit of persuasion of the *fonctionnaire* could mean a lot to society. Even more could be achieved by a libertarian with a career in government. The contributions to the effecting of policy reforms of all the intellectuals who teach citizens to see the unseen can be realized ultimately only in political decisions. The entire arc from teaching *Economics in One Lesson* to the successes of actual reformers must offer a belonging and esteem for doing what libertarians know to be good. “[T]he greatest and noblest of all characters,” wrote Smith (1790), is “that of the reformer and legislator of a great state” (232).

Challengers inspire bold and independent thinking; they found movements and teach adherents what they are and how they stand apart. Bargainers inspire them to be persuasive and effective in meeting and joining and cooperating with power, to stand *with others* as colleagues in power but as something somewhat different from them. Some occasions call for challenging and some for bargaining. Members of the libertarian movement tend to practice their comparative advantage. Yet the relationship between challengers and bargainers is often marked by envy and dislike.

Libertarian challengers are more likely to speak plainly of liberty as Locke-cum-Rothbard liberty. Again, the very idea is a fundamental challenge to persons of power (including mainstream intellectuals and academics). It is not surprising that the twentieth-century libertarian who wrote out and promoted, with alacrity, the cogent definition of liberty was someone with the temerity to spit into the wind, someone with simplistic and categorical tendencies in judgment, someone who could make a virtue out of being regarded as an untouchable by the intellectual mainstream.¹⁶

In the writings of libertarian bargainers the cogent idea of liberty is scarce. It is not surprising that when the century’s greatest libertarian bargainer sat down to write out a treatise on liberty, he presented a definition (actually, multiple definitions) within which the Locke-cum-Rothbard core was visible only to those who knew to look for it. Indeed, there is reason to believe that Hayek was always more radical than he let on. In 1976 he wrote an endorsement of Walter Block’s highly Rothbardian book *Defending the Undefendable*, saying that it “made me feel that I was once more exposed to the shock therapy by which, more than fifty years ago, the late Ludwig von Mises converted me to a

¹⁶ Incidentally, Rothbard also assumed the challenger persona and tactics in his struggle for leadership of the direction and character of Austrian economics. See especially Rothbard 1992.

consistent free market position” (italics added, p. 14 of Block 1976).) In watering down their ideas, bargainers sometimes damage the meaning or understanding of the movement’s core vocabulary, and therefore the intellectual power of that vocabulary.

Every libertarian intellectual sometimes leans toward challenging and sometimes toward bargaining. The public’s understanding of *liberty* and *libertarianism* would be enhanced if libertarians agreed on their meaning and used those terms more often. In bargaining, the libertarian may explain the Locke-cum-Rothbard sense of liberty, yet reassure and sustain dialogue by casually admitting limitations of the liberty maxim. In challenging, the libertarian may temporarily suspend the limitations to strike sharply at more fundamental beliefs. The handling of such tensions, situation by situation, and deciding whether to use the term “libertarian” call for finesse. As challengers or bargainers, libertarians can meet discourse situations with greater agility and versatility by upholding the cogent idea of liberty while minding its limitations.

Each type, challenger or bargainer, has much to offer the other. Bargainers often show more intellectual flexibility (Hayek 1973, 87 remarks on deadening effect of “the mechanical use of verbal formulae”). Also, bargainers often have more standing in the establishment and therefore more access to the intimate knowledge of current policies and issues. Hence, bargainers can exert intellectual discipline on the challengers. Also, bargainers often enjoy more mainstream stature and power, and can help challengers get an audience or position or mainstream respectability.

Meanwhile, challengers can serve as the conscience of bargainers, reawakening them to the more fundamental beliefs that led them into their selfhood, and showing how broadly the more basic ideas still hold up. Challengers re-activate the bargainer’s authenticity and reconnect them to nobler pursuits, such as inspiring and edifying the young.

The delicate relationship between bargainers and challengers calls for mutual trust. A bargainer, who to some extent operates in stealth mode, might help a challenger to get a mainstream hearing, but only if she can trust him not to become unduly glossy or blow her cover. The challenger must likewise trust the bargainer not to abandon him, or turn on him, and hang him out to dry before the audience of her mainstream peers. An escalation of distrust can prompt each to defect on the other. Anticipating the problem, they may shun team efforts altogether.

A mindfulness to that which underlies the worthiness of the efforts of both and to the gains in team productivity achieved by the division of labor may encourage the mutual contact and moral support which yet further advance their several efforts.

In Brief

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My own story of becoming a libertarian is probably rather typical. At 16 I was completely uninterested in politics. None of it made any sense and I preferred to spend my time listening to records and hating my teachers. A friend much more intellectual than myself introduced me to libertarianism and free-market economics. Within a year, I became keenly libertarian in the Rothbardian manner. Since that time I have reconsidered Rothbardianism and become more aligned with Smith and Hayek. But Hayek too has failings that Rothbard's temerity and conceptual clarity overcome. I accumulate counsels and repeat them to myself like a modern day Polonius:

- View libertarianism as being concerned only with legal and policy issues, not as a system of moral or ethical principles for human conduct in general.
- See “being a libertarian” to mean *merely* the following: tending to favor policy reforms toward more liberty, more individual responsibility, and less government.
- Strive to formulate political questions in terms of policy brass tacks.
- Formulate policy issues chiefly as a choice between alternative reforms to current arrangements, rather than as policy for some ideal society.
- Accept that policy-issue formulation must suit the discourse situation. Maybe Reform A is better than Reform B, which is better than the status quo. In some discourse situations it is best to bargain: focus on Reform B's superiority to the status quo. In some, challenge: focus on Reform A's encompassing superiority. Libertarianism is about moving the ball in the right direction, and different field situations call for different plays, sometimes the full-back push for a first down, sometimes throwing the bomb.
- Define liberty pretty much as Rothbard does.
- Mind the liberty maxim's three practical limitations—ambiguity, undesirability, and incompleteness—and be ready to make evident your awareness of those limitations.
- Be ready to admit that some valid human values are ill served by libertarian reform.
- Argue for your judgments, but do not attempt to provide an algorithm for judgment or a full account of your sensibilities.
- View government officials as amenable to intellectual and moral instruction and the government as the agent that validates and institutes libertarian reform.

Word for word, Hayek and Rothbard cannot be reconciled. Hayek had different sensibilities about policy reform, sensibilities that are larger, better

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considered, and more diplomatic. Hayek's fairness to diverse social and political values, especially ones recognizing the importance of customs and traditions, sometimes led him to conclusions at odds with a Rothbardian line. Hayek knew that in propounding classical liberalism in the twentieth century the dialectics of discourse and expulsion from discourse could, over the years, paint him into a corner of crankiness and brittleness. Hayek was a bargainer. He paid keen attention to the several limitations of the liberty maxim.

Yet, as significant as the several limitations are, today they need not lead us, as they led Hayek (in letter, if not in spirit), to jettison that idea of liberty. I conclude, for reasons beyond the scope of this essay, that Hayekian challenges (as well as other challenges) do not invalidate several of Rothbard's most important precepts: that liberty as he understood it, despite its holes and ragged edges, is the core of any sound notion of liberty; that the distinction between liberty and coercion is a central theoretical fulcrum of policy sciences; that the contest between liberty and government coercion is the centerpiece of political philosophy; and that in the American context people who seek to advance liberty should build and sustain a *libertarian* (not "liberal," not "conservative") movement.

The respective strengths of Hayek and Rothbard can be blended into an overall interpretation of libertarianism. Perhaps the blend is one to the music of which, in the right circumstances, Hayek and Rothbard would both beat time, as an understanding of their common cause.

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THE MORAL ARGUMENT FOR A POLICY OF ASSASSINATION

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I. The Ban on Assassination

One policy that could be holding back the United States's ability to strike back at aggressor governments is Executive Order 12333 of 1981, a Reagan administration update of an executive order from President Ford in 1976. The regulation states: No person employed by or acting on behalf of the United States government shall engage in, or conspire to engage in, assassination. The proper interpretation of this order is somewhat controversial. For example, former president Bill Clinton asserted that the order is a narrow one, applying only to heads of state and not to terrorists or wartime heads of state. Even if this narrow interpretation is correct, the issue arises as to whether the US should have such a regulation, i.e., whether there is anything morally wrong with a policy of assassinating certain heads of state. This is particularly relevant since the US has acted, whether directly or indirectly, to remove various leaders from power and since this can be done via military invasion, support of a civil war, or assassination, and the first two would likely produce many casualties. Note this paper does not take any position with regard to whether the particular killings that the US attempted, committed, or encouraged were just or prudent, e.g., Saddam Hussein, the Taliban leaders, Fidel Castro, Ngo Dinh Diem, or Salvador Allende.

There are three main theories about the way in which war may be fought. My strategy will be to try to show that all three allow that in some cases national leaders may be disabled or killed. The first approach, the immunity thesis, focuses on whether the person to be killed or disabled is a combatant. Here I argue that some national leaders who lead unjust campaigns are combatants because they are both causal and logical agents of an unjust military campaign. However, I argue that the immunity thesis itself should be rejected since it rests on dubious claims about the constitutive conditions of roles such as a combatant. The second approach, the self-defense theory, focuses on the distinction between threats and non-threats. This approach differs from the first since the combatant/non-combatant and threat/nonthreat distinctions differ. I argue that some national leaders may be killed because they are threats and that because they are threats, they forfeit those moral rights that protect them against injurious action. On the third approach, the consequentialist theory, I argue that such a policy would likely bring about the best consequences since it would be help to

prevent genocide, unjust military aggression, and other horrendous state actions.

II. THEORY #1: Some National Leaders are Combatants

At the heart of the immunity thesis is the notion that it is morally wrong to intentionally kill noncombatants.¹ Immunity thesis proponents think that justice prevents the intentional killing of noncombatants for one of three reasons. First, some theorists argue that noncombatants are morally innocent and that it is always wrong to kill innocent human beings.² Second, other theorists argue that the principle of self-defense does not allow the killing of innocents since they are not a direct threat to others.³ Third, some theorists argue that the United States' promise to other countries not to intentionally kill innocents generates an obligation not to do so. On this last account, the obligation is either promised-based or rests on the utility of keeping promises.⁴

Just-war theorists also assert that it is permissible to kill combatants only where the killing achieves consequences that are on balance desirable.⁵ In addition, some recent proponents of immunity thesis assert that combatants can

¹ Under the immunity thesis, combatant immunity might be viewed as *prima facie* rather than absolute. Such an account can be seen in James Childress, "Just-War Theories: The Bases, Interrelations, Priorities, and Functions of Their Criteria," in Malham M. Wakin, ed., *War, Morality, and the Military Profession* (Boulder: Westview Press, 1986), pp. 256-276.

² Elizabeth Anscombe, "War and Murder," *Ethics, Religion and Politics* (Basil Blackwell: Oxford, 1981), pp. 43-50.

³ For a self-defense account see, e.g., Robert K. Fullinwider, "War and Innocence," *Philosophy & Public Affairs* 5 (1975): 90-97.

⁴ This sort of convention-dependent defense of the immunity of noncombatants can be seen in George Mavrodes, "Conventions and the Morality of War," in Louis P. Pojman, ed., *Life and Death* (Boston: Jones and Bartlett Publishers, 1993), pp. 491-501. Mavrodes then defends the value of the convention on utilitarian grounds. Others defend particular applications of non-combatant immunity via the value of avoiding harmful consequences. For example, Courtney Campbell summarizes some of the forward-looking reasons against assassination. Courtney Campbell, "Irregular Warfare and Terrorism," in James Turner and John Kelsay, eds., *Cross, Crescent, and Sword* (New York: Greenwood Press, 1990), 116-119. Still other defenses of non-combatant immunity are available. On some accounts what makes certain wartime killings wrong is the agent's objectionable attitude toward the victim. An example of this approach can be seen in James Turner Johnson, "Why We Shouldn't Assassinate Muammar Qaddafi," *The Washington Post*, April 20, 1986, pp. C1, C2. I leave such accounts aside since assassination can be done without such attitudes and since the mere presence of an objectionable attitude does not by itself make an act wrong.

⁵ A Kantian defense of one version of the doctrine of double effect can be seen in Warren Quinn, "Actions, Intentions, and Consequences: The Doctrine of Double Effect," *Philosophy & Public Affairs* 18 (1989): 334-351.

be killed only in ways designed to eliminate their capacity as combatants and that additional harm cannot be intentionally inflicted even where doing so aids in the war effort.⁶

The issue thus arises as to whether national leaders of countries that engage in unjust aggressive wars are combatants and, if so, whether they may be killed.

A. National Leaders of Unjust Aggressive Wars are Combatants

National leaders who help to launch unjust aggressive campaigns should be considered combatants. A combatant is a person who is a causal and logical agent of the project to destroy his enemy or his enemy's capacity to fight.⁷ The causal condition ensures that a person is a combatant with regard to the relevant aggressive campaign, the logical condition ensures that the person has a role closely connected to the aggression. The notion here is that certain roles have necessary conditions and these conditions affect the moral status of intentionally killing or disabling the role occupant during a military campaign. The leaders sometimes cause the attack on others. This can be seen in that but for their actions, the aggressive campaign would not have occurred. Also, in virtue of their role in intentionally promoting unjust aggression the leader has adopted a role that is inextricably military aggression.

The logical role of a leader might be thought to exclude him from being a combatant since the constitutive conditions of his position are unrelated to aggression. Two influential accounts of the constitutive conditions of a position

⁶ Thomas Nagel, for example, argues that weapons must aim to stop a person qua combatant and not inflict unnecessary harm upon him. Thomas Nagel, "War and Massacre," in Samuel Scheffler, ed., *Consequentialism and Its Critics* (New York: Oxford University Press, 1988), p. 70.

⁷ The idea for this definition comes from Jeffrey Murphy, "The Killing of the Innocent," *Retribution, Justice, and Therapy* (Boston: D. Reidel Publishing Co., 1979), pp. 7-8. On Murphy's account, we should focus on a chain of agency in which each link is identified logically and not merely causally. He suggests that we focus on whether a person's role is logically separable from the waging of war. A similar account can be found in Michael Walzer who argues that workers at a manufacturing plant are not combatants if they are not part of the process that supplies what soldiers need qua soldiers but rather what they need qua human beings. This suggests some connection to the conceptual role of a worker and not her causal role. Michael Walzer, *Just and Unjust Wars* (New York: Basic Books, 1977), 145-146. Courtney Campbell similarly fills out a combatant as one who occupies a functional role of either posing a lethal threat or serving the fighting needs of others who pose such a threat. Campbell, "Irregular Warfare and Terrorism," 116. This connection is not merely causal because those who serve a soldier's human needs, e.g., medical care or food, may causally contribute more to unjust endangerment than those who serve his fighting needs.

are that they are determined by the social understanding of the position or its internal goal.⁸ The difference between the two accounts is the former account makes a position's constitutive conditions depend on some feature of a collection's belief whereas the latter makes it depend on the type of good brought about by persons in that position. On these accounts, for example, a doctor's logical role is to heal sick persons or to alleviate their suffering and a farmer's role is to grow food. This is a result of the how the relevant community understands the position or its internal nature. In the context of wartime leader, it might be argued that the leadership position does not have as its constitutive condition the causing or directing of aggressive military projects. This is because a leader's role in promoting international aggression does not seem to be an obvious part of either the community's social understanding of her position or an internal goal of that position. For example, a leader of a pacifist nation does not seem to occupy a different sort of role from one who leads a non-pacifist nation. This is similar to the way in which the farmers of both countries occupy similar roles. On a third account, the constitutive conditions of a position are picked out by a counterfactual test since this test is linked to our knowledge of what lies at the heart of a position.⁹ On this last account, a leader is not a combatant if he would not occupy the same leadership position in the absence of his connection (or control) of the military or perhaps some more general military goal (e.g., the defense of the homeland). On this third account, a national leader might not be thought to be a combatant since he would occupy the same leadership position if he had no connection to the military or his country did not even have one.

On all three accounts, the constitutive conditions of a leadership position are context-specific. A leadership position has features that are characteristic of a property. In particular it is capable of being occupied by different persons. It can also have temporal and spatial gaps in that there may be space and time intervals between occupants. Such gaps can occur, for example, where there is a civil war that prevents a successor from taking office or where a person assumes the office from outside a country's borders. In contrast, a leader, rather than the leadership position, is a concrete particular. For example, the President of the United States is treated as a fitting object of obedience and it is not clear how duties could be owed to a mere property. In addition, it is necessarily particular in that in some systems there can be only one leader at one point in time, e.g., there can't be more than one President at a time. If a person who is the leader does not

⁸ The social understanding of the constitutive conditions of a job can be seen in Michael Walzer, *Spheres of Justice* (New York: Basic Books, 1983), p. 88n. The internal goal account can be seen in Bernard Williams, "The Idea of Equality," in Joel Feinberg, ed., *Moral Concepts* (New York: Oxford University Press, 1970), pp. 163-164.

⁹ The but-for account of a combatant can be seen in the article by George Mavrodes who argues that noncombatants are persons engaged only in the sort of activity that would be carried on even if the nation were not at war. Mavrodes, 492.

necessarily occupy this role, then it is hard to see how he, rather than the position, can have position-specific constitutive conditions. However, if it is merely the leadership position that has the position-specific constitutive conditions then the property is likely conventional rather than natural. By conventional I mean that it is a result of a social practice. This is because the notion of a leader seems to depend on the way in which a community has organized itself via the allocation of communal- or promise-based duties and powers.¹⁰ This will be true so long as a position's constitutive conditions are a result of collective understanding, the goal that the occupant is assigned to accomplish, or the way in which the collective thinks about the relevant counterfactual. Since the leadership position is conventional, its constitutive conditions are context-specific.

The above accounts of roles are not merely context-specific but also nation-specific. Since the leadership position is a national one, at least in the assassination context, the convention that determines its constitutive conditions will relate to the collective understanding. The collective understanding in turn will be a function of the country's central projects or organizing goals. Where these include violence, whether as a means or an end, the position will have a necessary link to violence. This is because the position will necessarily refer to an entity that has a conceptual link to violence. For example, the Nazi regime was conceptually linked to certain political doctrines and to protecting, and likely promoting, these doctrines via intra- and international force. Almost all leadership positions have such a link to violence since one of the main reasons for a forming a state is to protect its citizens against external and internal aggression. Hence, upon the onset of violence the leader of a warring country is a combatant because he has the proper logical and causal link to the violence.

The reasons behind noncombatant immunity also support identifying leaders of unjust aggressive campaigns as combatants. First, the leaders are often not morally innocent in that in many cases they have voluntarily chosen to enable violent attacks on other countries to take place. Second, defeating them is an integral part of self-defense in the same way that shooting a person whose job it is to direct mortar fire is a legitimate part of self-defense. In addition, since the US has not signed any international treaty banning the assassination of foreign leaders, a promise-based account of ban on assassination does not apply. The case for leaders of just aggressive campaigns is considerably more complex. If there are any reasons, and I doubt that there are, to treat soldiers who are part of a just campaign as being legitimate targets, these will also apply to the leaders of the campaign. One explanation of why these soldiers are not legitimate targets is that in the context of war their moral rights are weakened or lost (relative to their opponents) only if they are both combatants and participants in an unjust

¹⁰ I wish to leave open the question of whether the relevant duties are the result of associative political obligations, the duty of fair play, consent, or something else.

campaign.

A problem with these accounts of a combatant relates to the underlying idea: namely that soldiers have a moral status in virtue of occupying particular roles. I shall argue that this notion should be rejected.

B. Reject the Combatant/Noncombatant Distinction

In this section I shall argue that the combatant-noncombatant distinction is untenable. My strategy is to first argue that job types don't have contract-independent conditions. I then argue that since the notion of a combatant role rests on contract-independent conditions and since this role is analogous to a job type, it is untenable.

(1) Job types don't have contract-independent conditions

Certain activities seem to have an internal goal.¹¹ For example, medical care should be given out on the basis of ill health. Since activities have internal goals, it is argued that it is a necessary truth that the activity should be arranged so as to fulfill that goal. Similarly, it is argued that since certain goods (and jobs) have a social meaning, the distribution of them (or the tasks that constitute them) should be in accord with this social meaning.¹² The social meaning of an activity is the type of good that the activity produces in the life of a particular collection of people. This account is similar to the internal-goal account except that the tasks constituting a job are society-specific rather than universal. This account of jobs views certain tasks as constituting a job. This constitutive account provides a unified account of the particular tasks that constitute a job. A physician's job tasks may include such things as diagnosing disease, investigating family medical history, eliminating bacterial infection, and setting broken bones. On a constitutive account, these tasks are unified by a particular goal, e.g., the promotion of health.

Robert Nozick notes that one problem with these internal-goal accounts is that there needs to be a defense of the claim that goods ought to be distributed in accord with their internal goal or social meaning.¹³ Yet it is not clear why this should be the case. Couldn't a person set up a practice that provides medical care (called 'schmoctoring') to those clients who can maximize the schmoctor's profits rather than providing medical services to those with ill health? Promoting

¹¹ This idea can be seen in Bernard Williams, "The Idea of Equality," in Joel Feinberg, ed., *Moral Concepts* (New York: Oxford University Press, 1970), pp. 163-164

¹² This idea can be found in Walzer, *Spheres of Justice*, 88n.

¹³ The criticisms in this paragraph all come from Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), pp. 232-235.

health might be the means to making profits, but it would be the former that would be the fundamental goal. Nozick notes that in some cases the notion of that distribution should track an internal goal produces absurd results. For example, is it wrong for a barber to provide his services to those who pay him rather than those who need their hair cut?¹⁴ It may be that the titles of certain jobs are used as shorthand for a particular stated goal in which case it is the job occupant's implicit promise that creates the duty to pursue certain goals. For example, the label 'doctor' or 'barber' might indicate the occupant's promise to promote certain ends, e.g., promoting health and cutting hair. This, however, introduces another problem.

A second problem is that these internal-goal accounts are that there are reasons of autonomy that conflict with the underlying accounts of goods and of a job. Reasons of autonomy involve a sphere in which a person has no (non-volunteerist) duties owed to others. That is, she has a Hohfeldian liberty to pursue her own ends. This sphere gives a person the space in which to pursue her desires, projects, and personal relationships, thereby carving out a space by which she is able to shape her life free from interference by moral claims from others.¹⁵ Yet if the occupation of a job obligates a person to serve others without those others contracting for such services or without the person promising to provide such services, then the area in which the person can shape her own life is lessened. Hence, assuming rights to autonomy, persons ought to be able to attempt to create jobs that have demands that do not track the internal goals or social meaning of that position. For example, a person should be permitted to try to be a schmooctor rather than a doctor.

An objector might still assert that an internal goal or social meaning determines the tasks that constitute a job, but think that there should be a fine-grained individuation of job-types. The notion that the social meaning should determine the tasks that constitute a job but that there should be an almost endless array of different job-types for a person to adopt, is nearly indistinguishable from the view that persons can construct the demands that constitute a job. The social-meaning account is misleading since it fails to draw attention to the control an individual has over the tasks that constitute a job and for that reason it should be set aside.

¹⁴ Ibid., p. 234.

¹⁵ This notion can be seen in Thomas Nagel, *The View from Nowhere* (New York: Oxford University Press, 1986), pp. 164-188. The other type of reason Nagel brings up is a deontological reason, which is an agent-relative reason not to maltreat others in certain ways. Despite the confusing labels, both types of reason might be thought to rest on the value of autonomy, which is a person's shaping himself through the selection of his beliefs and desires.

¹⁶ The idea for this point comes from Richard Epstein, *Forbidden Grounds* (Cambridge: Harvard University Press, 1992), p. 302.

One might wonder whether job types have contract-independent constitutive conditions at all, rather than merely having multiple conditions that reflect the deal struck by the contracting parties.¹⁶ One should view jobs as having constituent tasks that are relative to the purposes for which they are done. The purpose or purposes for which a job is done does not seem to depend on some internal feature of the job type or on the general communal understanding of it. Rather, the purpose or purposes for which it is done seem to be a function of the demands of the employer or perhaps both contracting parties. These contractual conditions are constitutive conditions of the contract and are merely contract-based duties that are not unique to the job context. And since they are owed only to the other contractors and not third parties, although their content may refer to actions involving third parties, they do not seem capable of grounding the broader social duties that characterize the above sorts of job theories.

(2) The constitutive accounts of a job type and a combatant have the same difficulty

If the constitutive account of a job type fails then it is likely that the constitutive account of a combatant similarly fails. This is because the military purchases the services of persons under different contracts, some of which are required to be members of it while others are not. For example, the army might hire a supply sergeant or instead form a contract with a private individual to supply certain goods. There is nothing about the contract that would seem to make the former a legitimate target unless the former consented to be made a more legitimate target than civilians or unless it is fair that he be made so. However, it is not clear that either is correct. Prospective soldiers do not consent to be more permissible targets than civilians are. This is because their promises and the conditions to which they consent do not contain this condition. For example, this is not part of the oath taken by persons joining the army.¹⁷ Nor does fairness support the notion that they should be treated as such where they are not part of an unjust aggressive campaign. A similar thing should also be said of

¹⁷ For the United States, consider 10 USC Sec. 502. - Enlistment oath: who may administer

Each person enlisting in an armed force shall take the following oath: "I, _____, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I will obey the orders of the President of the United States and the orders of the officers appointed over me, according to regulations and the Uniform Code of Military Justice. So help me God." This oath may be taken before any commissioned officer of any armed force.

national leaders.

I have argued that non-combatant immunity is dubious insofar as it rested on non-contractual conditions. An objector might note that it is open to the immunity theory proponent thinker to deny that there are necessary conditions to non-combatancy. Instead, she might assert that this is a fluid category with various satisfaction conditions that leave considerable gray area surrounding a fairly clear core. To see where this goes wrong, consider the immunity theorist's argument. She argues that in virtue of occupying a position, certain general duties or permissions are generated with regard to various persons in other countries during wartime. Three assumptions underlie this position. First, persons are distinct from the positions they occupy. This can be seen by the fact that a person can occupy a position at some times but not at others. Also, some positions can have multiple occupants (e.g., soldier) and spatiotemporal gaps (e.g., a country can temporarily have no secretary of state). Second, some attribute or attributes of the position (or of the person in virtue of his occupying the position) ground the relevant moral relations. This is required if the occupation of a position is to explain why certain persons are immune from direct attack during wartime while others are not. Third, the position has conditions that differentiate it from other positions. In the context of the immunity thesis, there must be some attributes in virtue of which a person is a non-combatant. These conditions may be a loose cluster of conditions some percentage of which must be satisfied or a straightforward set of individually necessary and jointly sufficient conditions.

The constitutive conditions mentioned in the third assumption cannot be the result of contractual agreement between warring parties. This can be seen in that just-war theorists do not think that the immunity thesis becomes morally invalid once one side violates the agreement even though this is true of contracts. In addition, just-war theorists sometimes assert that the immunity thesis applies even to countries that have not entered into the relevant international contracts. Nor can the constitutive conditions be the result of a contractual agreement between one warring party and its soldiers since this would not affect the moral relations between the soldiers and persons whose countries do not sign on to the agreement.

If the constitutive accounts of a combatant fail, then we need another analysis of when, if at all, it is permissible to kill a person in wartime. I will argue that we should use the same sort of analysis that is found in the context of self-defense and that this relates to whether a person is a threat. On some accounts, the self-defense analysis is a type of immunity thesis rather than a competitor theory.¹⁸ I leave aside this issue of taxonomy and note that the above role-based

¹⁸ The U.S. Catholic Bishops interpret the immunity thesis to require immunity for those not *directly* involved in a war effort. U.S. Catholic Bishops, "The Just War and Non-Violence Positions," in Maltham Wakin, ed., *War, Morality, and the Military Profession* 2nd ed. (Boulder: Westview Press, 1986), 239-255, esp. 250-251. Among the examples

analysis of a combatant differs from the self-defense analysis in that the former has both causal and logical conditions whereas the latter merely has a causal condition.

III. THEORY #2: Some National Leaders are Threats

A. The Threat/Nonthreat Distinction

A threat is a cause of a part of a process that will infringe on another's rights and likely physically damage him. My usage of 'threat' differs from ordinary usage in a couple of ways. First, my definition excludes certain types of proposals as threats (e.g., "Your money or your life"). Second, my use of a threat is a moralized (or, more accurately, a justice-specific) notion in that threats are never part of a just causal process. Thus, on this account, a person using significant force, e.g., a knife, to defend herself against rape is not a threat to her attacker. To the extent that one dislikes this usage, he should substitute 'unjust causal threat' where I have used 'threat'. It should also be noted that my usage of 'threat' relates to whether certain acts are just, it does not address whether these acts are efficacious deterrents.

Unlike a combatant, a threat need not be a logical agent of certain project types. Thus, we escape the problems that characterized the emphasis on whether a person is a combatant. This is relevant since it opens the door to the issue of whether paradigmatic non-combatants, e.g., farmers and physicians, are threats.

A threat may also be innocent as in the following case: *psychotic aggressor*.

A person in an elevator goes berserk and attacks you with a knife. There is no escape: the only way to avoid serious bodily harm or even death is to kill him. The assailant acts purposely in the sense that his means further his aggressive end. His actions are frenzied and it is clear that his

they provide is the immunity that is owed farmers who produce goods not *directly* related to military purposes. However, the criterion for non-combatant is probably not causal since the Bishops explain this immunity, at least in part, in terms of innocence and this can and often does diverge from causal contribution to a threat. They do, however, note the need for further discussion of the notion of a non-combatant.

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conduct is non-responsible. If he were brought to trial for his attack, he would have a valid defense of insanity.¹⁹

This is particularly relevant in the context of war since many soldiers lack the information and in some cases the reasoning capacity by which to understand the unjust nature of their side's actions. This is particularly true where the soldiers are young, illiterate, or where the state controls the information available to them. A person may be a threat even though he does not even perform an action. Consider innocent threats, which are persons who innocently are a causal element in a process such that he would be an aggressor had he chosen to become such an element.²⁰ Such threats are legitimate targets of self-defensive force. Consider the *innocent projectile*.

Someone picks up a third party and throws him at you down at the bottom of a deep well. The third party is innocent and a threat; had he chosen to launch himself at you in that trajectory he would be an aggressor. Even though the falling person would survive his fall onto you, you may use your ray gun to disintegrate the falling body before it crushes and kills you.

The unifying feature of such blameworthy and innocent aggressors and innocent threats are their role in causing unjust harms or a great risk of them. This intuition rests not merely on the *psychotic aggressor* and *innocent projectile* cases but also on a wide range of related cases in which it intuitively seems that innocent persons whose actions endanger others may be violently prevented from doing so.

The notion of a threat differs from a combatant since threats need not be persons who are logical agents of the project to destroy his enemy or his enemy's capacity to fight. For example, farmers delivering food and ammunition to the front lines and doctors treating soldiers so that they may return to the battlefield are threats but lack the logical role of a combatant.²¹

The notion of a threat needs to be broadened to include not only those participating in the causal process but also those enabling the causal process to continue.²² To see this, consider the case of the innocent shield, which is an

¹⁹ This example comes from George P. Fletcher, "Proportionality and the Psychotic Aggressor: A Vignette in Comparative Criminal Theory," *Israel Law Review* 8 (1973): 367-390. A similar example occurs in Sanford H. Kadish, "Respect for Life and Regard for Rights in the Criminal Law," *California Law Review* 64 (1976): 889.

²⁰ This notion and the following example come from Nozick, *Anarchy, State, and Utopia*, p. 34.

²¹ A similar point can be found in Lawrence Alexander, "Self-Defense and the Killing of Noncombatants: A Reply to Fullinwider," *Philosophy & Public Affairs* 5 (1976): 408-415.

²² Larry Lombard's taxonomy on causes and enablers is useful here. A disposition is

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innocent person who is by herself a nonthreat but is so situated that she will be damaged by the only means available for stopping the threat.²³ Consider the *tank shield*.

Innocent persons are strapped onto the front of tanks of aggressors so that the tanks cannot be hit without also hitting them are innocent shields of threats.

In this case, it seems that you can shoot through the innocent shield to protect your own life or that of others.

Now others may not share my intuition here or at least may think that it is not in which we are confident. I think this intuition is similar to our intuitions in a range of cases where aggressors protect themselves by ensuring that any defensive action will directly bring about the death of innocent persons. For example, I see no difference between the case where the innocent persons are tied up inside the tank and where they are tied up in front as opposed to the case where they are tied up inside. On doctrine of double effect grounds it may matter whether the innocent is used to target the antitank gun but let us assume that this is not the case. If the intuitive case for shooting the attacking tank that contains an innocent person inside is clear, and I don't know if this is the case, then the above intuitions in *tank shield* are likely secure. But even if this argument is mistaken, this does not weaken the case for the threat/non-threat distinction so much as show that the notion of a threat does not include innocent shields.

However, the line is not always a clear one since the participation in the causal process is a matter of degree. Consider the *homicidal diabetic*.²⁴

A diabetic is chasing you through the woods of an enclosed game preserve, attempting to kill you for sport with a pistol. However, because of his medical condition, he must return to a cabin in the middle of the preserve every hour in order that his aged mother can give him an insulin shot. Without it, he will take ill or die and will thus be forced to abandon his attempt to kill you.

merely the capacity of a thing to change in a certain way; and no thing changes simply because it has the capacity so to change. Dispositions and capacities are thus enabling conditions, i.e., states whose presence makes it possible for some event to cause a change in that thing. Enablers are events that cause things to be in an enabling condition. Some threats are enablers where others are causes of unjust harm.

²³ This definition and the following example come from Nozick, 35.

²⁴ Jeffrey G. Murphy, "The Killing of the Innocent," in Maltham M. Wakin, ed., *War, Morality, and the Military Profession* (Boulder: Westview Press, 1986), p. 361 n. 15.

Here it becomes less clear as to whether one can kill the mother. However, whether you can kill her or not intuitively seems to depend on the strength of her causal role. It does not seem to depend very much on whether she knows about his activity. This is because the degree of culpability seems to affect her desert and thus whether she deserves punishment, rather than the permissibility of self-defensive force. Nor does it depend on the way in which she is connected to his threatening action. For example, the permissibility of disabling her does not intuitively seem to depend on whether she is injecting him with insulin or cleaning and reloading his gun.

Hence, it seems that a threat is one who has a close causal (or enabling) connection to unjust harm. If threats forfeit some of their rights (at least temporarily), then in some cases they may be justly disabled and in some cases killed. I shall now argue that national leaders are threats and that this forfeiture notion is correct.

B. National Leaders are Sometimes Threats

In some cases, national leaders are not merely causal links in an aggression campaign but intentionally originate (or co-originate) an unjust military campaign. If persons intentionally originate an unjust military campaign against others then intuitively they seem to be unjust threats. This is similar to the way in which Mafia leaders who hire subcontractors who hire contractors who hire hit men intuitively seem to be legitimate targets of self-defense (at least where disabling them will eliminate the threat). There is a difficult question of why the many intermediate agents who plan and carry out the campaign do not result in the leaders being insufficiently close to the threatened harm. However, our intuition that the persons who intentionally originate aggression are threats is so strong here that the criterion for closeness should be chosen, at least in part, by its ability to classify such persons as threats.

C. Threats Forfeit Some of Their Rights

If threats, including leaders of unjust campaigns, forfeit their rights (at least temporarily), then it becomes much more likely that they may be permissibly disabled or killed as part of a defensive war effort. Note that rights forfeiture does not by itself warrant aggressive action, since a person's lacking moral rights is not a reason to injure him, but it does involve the elimination of a major reason not to injure someone. The notion here is the Kantian one that it is important that we do not violate the rights of non-threats regardless of whether or not we intend to do so.²⁵

²⁵ Robert Holmes, for example, focuses on the killing of innocents rather than the

Persons who act on (or are used on) an unjust side are threats. Hence, we need a theory of what happens to a threat's moral rights when the state or a private party kills him as part of its attempt to defend its citizens.²⁶ On one view, the state permissibly infringes upon the threat's rights. The idea here is that the threat retains her ground of rights but the more stringent right of the state overrides them (or perhaps the victim on whose behalf the state acts).²⁷ The problem with this account is that right infringements give rise to a duty to pay compensation. This is why we think that right infringements that produce harm, even justified ones, ground a duty to compensate the injured party. For example, consider the *desperate hiker*. Here a hiker in order to avoid a blizzard and save her life breaks into another's cabin and eats the cabin owner's food and burns the owner's furniture.²⁸ Here the hiker owes compensation even though her action was permissible. This is due to a respect that must be given to a person even where circumstances make it permissible to trespass upon her rights. This duty underlies the particular legal duties in tort and contract law. Since it intuitively seems that there is no duty to pay compensation to the threat for disabling or killing him, this account should probably be rejected.

On a second account, the threat's rights have a narrow scope and hence are not infringed on by justified self-defense.²⁹ The idea here is that self-defense has the following conditional format: a person ought-not-be-given-harsh-treatment-unless-... Here the ... condition may involve a moral condition (e.g., when self-defense is morally permissible) or a non-moral condition (e.g., when a person threatens to harm others in certain ways). This account may rest on the notion that the threat retains the ground of her rights, the notion that rights are not capable of being overridden, or the notion that threats are not owed compensation. The problem with this account is that we often think that rights should explain when harsh treatment is permissible. On this account, however,

intentional killing of innocents. Robert Holmes, *On War and Morality* (Princeton: Princeton University Press, 1989), ch. 6. It should be mentioned that Holmes's work is part of a broader pacifist program.

²⁶ In a different context, e.g., self-defense, Judith Jarvis Thomson lays out these three accounts of what happens to a person's rights. Judith Jarvis Thomson, "Self-Defense and Rights," in William Parent, ed., *Rights, Restitution, and Risk* (Cambridge: Harvard University Press, 1986), pp. 42-47.

²⁷ Philip Montague defends such an account in *Punishment as Societal Defense* (Boston: Rowman & Littlefield Publishers, Inc., 1995), ch. 5.

²⁸ This example comes from Joel Feinberg, "Voluntary Euthanasia and the Right to Life," *Philosophy & Public Affairs* 7 (1998): 93.

²⁹ Such an account is suggested by Joel Feinberg's analysis of a right which he views as a claim which the balance of reasons support recognition, although this may not be entirely fair to Feinberg since he views validity as a justification within a set of rules. Joel Feinberg, "The Nature and Value of Rights," in Steven M. Cahn et al., eds., *Reason at Work* (New York: Harcourt Brace, 1996), pp. 247-261.

the need to fill in the ... condition suggests that we must first determine when self-defense is permissible before we can determine the scope of the right, thereby preventing rights from having an explanatory role. In particular, we would need to fill out the various conditions for harsh treatment in general, e.g., when punishment and self-defense are justified. In addition, to the extent that this account rests on the notion that rights may not be overridden, it rests on an account that will be unattractive to those who reject this notion.³⁰

An objector might claim that the narrow-scope account can provide a condition under which the ... condition can be filled in that will match our intuitions about self-defense, allow the right to explain when harsh treatment is permissible, and not ground a right to compensation. The objector has in mind substituting she-deserves-punishment for the ... condition, thus producing the following conditional right: a person ought-not-to-be-given-harsh-treatment-unless-she-deserves-it.³¹ The problem with this is that there are cases where we think that a person loses the protection of a right but does not deserve harsh treatment. In particular we think that in some cases a person, at least temporarily, forfeits some of her rights in some cases where she is an innocent threat. For example, where a psychotic aggressor attacks a person, the intended victim may if necessary use great force against the aggressor without violating her rights and without owing the aggressor compensation. Once we expand the categories of forfeitures beyond the desert condition, the narrow-scope account will again posit rights that are unable to do the desired explanatory work.

On a third account, the threat forfeits some of her moral rights through her act.³² This account has a number of advantages. First, unlike the first account, it explains why the threat need not be compensated for being disabled. Second, unlike the second account, it allows rights to in part explain why self-defense is permissible and it does so in a way that is compatible with both backward- and forward-looking justifications. Third, the forfeiture account correlates with the creation of a right in another to act in self-defense in a particular context. If the moral right against intentional injury consists of a power (or a claim) over it then

³⁰ The logic of a conditional right is also not obvious. If we conjoin the statements (1) a person A has a right to not-be-treated-harshly-unless-A ... and (2) A ..., it is not clear what follows. This is because the disjunction is contained within the scope of the operator 'has a right to' and this makes the logic less transparent than if rights are forfeited. The idea for this point comes from Jeremy Waldron, *The Right to Private Property* (Oxford: Clarendon Press, 1988), pp. 118-122.

³¹ The idea for this objection comes from Neil Feit.

³² Such a forfeiture account can be seen in Vinit Haksar, "Excuses and Voluntary Conduct," *Ethics* 96 (1986): 321-324; Alan Goldman, "The Paradox of Punishment," *Philosophy & Public Affairs* 9 (1979): 43; A. John Simmons, "Locke and the Right to Punish," in A. John Simmons et al., eds., *Punishment* (Princeton: Princeton University Press, 1995), pp. 238-252; Judith Jarvis Thomson, *The Realm of Rights* (Cambridge: Harvard University Press, 1990), pp. 365-366.

its forfeiture involves the creation of a power (or a liberty) in another. Fourth, the limited scope of forfeiture can explain certain restrictions on self-defense. In particular, it helps explain why self-defense is just only if it is proportional to the threatened harm, necessary to prevent it, and the threatened harm is itself unjust. These restrictions come about because the forfeiture is a limited, temporary, and grounded by participation in an injustice. Fifth, if one thinks that rights are in effect owned by the agent, then it fits with the notion that the agent has the ability to dispossess herself of them through voluntary action in the same way that she can do so with regard to other forms of property. Sixth, this last point also meshes with a view of rights as functioning to protect autonomy, a view that can explain why rights are often concerned with non-interference and why they can be waived or forfeited. This can also account for why innocent projectiles, and perhaps innocent shields, forfeit rights. Such cases involve conflicting spheres of autonomy and our intuitions suggest that the sphere of the person who is part of an unjust threat gives way, however unfair to him.

On this threat-based approach to wartime killing, the assassination of a national leader will be an act of self-defense only if the leader is a threat and the killing or disabling is necessary to prevent an equal or greater unjust harm that the leader helped to set in motion. These conditions will obviously depend on the circumstances but there is no reason in principle that they will not be met.

A concern that might be raised with regard to my argument is that it is unclear how innocent threats could forfeit their rights. An innocent threat is not morally responsible for any action that would result in a right forfeiture and hence it is hard to see why she would forfeit her rights. We need to address two different issues here: whether innocent threats forfeit their rights and why they do so. Evidence for innocent threats forfeiting their rights comes from our intuitions about compensation in such cases such as the *innocent projectile*. Remember this is where you are at the bottom of a deep well, an innocent person is thrown at you, and you defend yourself by disintegrating the falling person with your ray gun. Here it intuitively seems that we do not owe compensation to the projectile (paid to his estate) or his dependents or otherwise respond to him. Right and claim infringements when linked to harm generate a duty to compensate, although an other-things-equal one, or in some other way respond to the residue of the infringed duty. Similar intuitions occur in the *psychotic aggressor* case and cases like it. The best explanation of these intuitions is that no right has been infringed because it has been forfeited (at least temporarily).

The explanation for this forfeiture involves the idea that rights are designed to protect autonomy. The content of a particular right (the persons it relates and its object) is a result of the initial distribution and content of rights as well as the way in which these original rights have been transferred. As a result of this historical process, persons end up with rights to things that they may not deserve. For example, a person may end up via gift or inheritance with a right to

land that he does not deserve.³³ A right to compensation is designed to preserve areas of autonomy (or provide equivalent areas) where there has been an incursion into the perimeter of rights. To see this, let us revisit the *desperate hiker* case, where a hiker breaks into another's cabin in order to avoid a freak blizzard and save her life. There she eats the cabin owner's food and burns his furniture. Here our intuitions are that the hiker owes compensation even though her action was permissible. In having a duty to pay compensation, the hiker in effect forfeited her right against paying money to the cabin owner or otherwise putting the cabin owner in qualitatively the same situation she was in before the break-in. The hiker does not deserve to pay for these things for she has not acted in a blameworthy manner. Nor does the duty to compensate follow from some notion of the comparative virtue of the two parties since for all we know the hiker might be the more virtuous. A rule requiring her to pay is not obviously efficient since under some conditions efficiency favors a negligence rule.³⁴ In addition, formal notions like fairness or equality are incapable of supporting such results in the absence of an underlying argument involving another moral entity like desert or rights. Rather, the best explanation of the hiker's duty to pay compensation is the fact that she infringed on another's property rights. The notion that autonomy, and not desert, grounds rights accounts for this explanation at a more fundamental level by. Desert might still be relevant though in explaining why the hiker should not be punished.³⁵

³³ Here I am assuming that there are pre-institutional rights to property and that these rights can be alienated. Stephen Kershnar provides an autonomy-based argument for these assumptions in "Private Property Rights and Autonomy," *Public Affairs Quarterly* 16 (2002): 231-258. The notion that the function of rights is to protect autonomy is usually linked to the will theory of rights, whereby rights are composed primarily of powers plus other Hohfeldian elements, as opposed to the benefit theory, whereby rights are claims that protect interests. The classic statement of the will theory occurs in H. L. A. Hart, "Are There Any Natural Rights?" *Philosophical Review* 64 (1955): 175-191 and H. L. A. Hart, "Bentham on Legal Rights," in *Oxford Essays in Jurisprudence*, ed., W. A. B. Simpson (Oxford: Clarendon Press, 1973), pp. 171-201. Examples of the benefit theory include David Lyons, "Rights, Claimants, and Beneficiaries," *American Philosophical Quarterly* 6 (1969): 176 and Joseph Raz, "On the Nature of Rights," *Mind* 93 (1984): 370.

³⁴ For example, a negligence rule is preferable to a strict liability rule where the tort victim's level of activity is of greater concern than the injurer's level but where the latter is still relevant. A. Mitchell Polinsky, *An Introduction to Law and Economics* 2d ed. (Boston: Little, Brown and Company, 1989), ch. 6.

³⁵ A further advantage of this account is that it coheres with internalism about forfeiture. This is the notion that the ground of a right forfeiture depends only on internal facts about that person or relations that held between the right-holder and the damaged party. The idea for this notion comes from Shelly Kagan, "Causation, Liability, and Internalism," *Philosophy & Public Affairs* 15 (1986): 51 and 56. This internalist feature is characteristic of an autonomy-based system since it establishes a desirable balance between persons having the liberty to pursue their projects and having protection against invasions of their

D. The Notion of a Threat is not Vague

One objection that might be raised against this focus on threats is that the notion of a threat is a vague one, i.e., it admits of borderline cases. The idea behind this objection is that if a property like being-a-threat admits of borderline cases, then it cannot do the work my theory requires of it, which is to determine whether a person or class of persons has immunity. Consider a farmer who grows wheat that is used to feed an aggressor army and whose agricultural skills make him invaluable to his side. It is unclear the extent to which he endangers the army's targets and thus unclear whether he is a threat.

This objection can be divided into two parts. First, the objection might focus on the fact that there is no particular level of endangerment above which a person is a threat and below which he is not. Second, even if there was such a level, it is not possible to assign to the amount of endangerment to a person who is a causal agent in a joint project. The first objection need not trouble us since natural properties, e.g., height, can be a matter of degree. On this account, then, there are not borderline cases so much as different degrees of threats. The accompanying account of forfeiture may have to be modified to take this into account, perhaps by making the identity of the rights forfeited vary with the degree of threat, but I don't see why this should be problematic. A second response here is that there is some level of endangerment that constitutes a threat but that we don't yet have a theory to specify what this level is. The idea here is similar to the way in which we think that self-defense warrants lethal force only in response to certain attempted crimes, e.g., murder, rape, and not others, e.g., theft, but lack a clear theory as to what distinguishes the two categories. The second objection is not unique to this area. Many issues, e.g., deserved wages among factory workers, require that we assign levels of contribution to persons who contribute to a joint project. Whatever solution is present in these cases (perhaps marginal productivity) is available in this case as well.

E. Some Objections

One objection here is that my argument that vagueness is not a problem for threat/non-threat distinction, then it is also not a problem for the combatant/noncombatant distinction. My argument against the latter distinction, however, was that that the latter distinction failed because it places too much emphasis on the role that a person occupies. This argument is entirely independent of whether or not the combatant/noncombatant distinction admits of borderline cases.

autonomy.

A second objection is that if my account were internationally promulgated, it might cause great injustices to occur. The objector here might note that threats are not tied to specific activities, while the traditional analysis requires the targeted individual be part of the mechanism of war. For example, the objector might note, the Serbian justification for massacring older boys was that they constituted a threat because they were positioned to become combatants. But because they were not, in fact, combatants, the immunity thesis excluded them from direct attack and thus prevented such an injustice. However, under my account older boys are not threats but merely potential threats since they are not part of the causal process that endangers another. Since potential threats retain their rights, my threat-based analysis would not warrant their killing. The objector might be correct in asserting that international acceptance of the combatant/noncombatant distinction would have better consequences than the threat/non-threat distinction. However, my account is concerned with the true criterion for just killing during wartime rather than the account that will bring about the best (or the most just) results if promulgated.

A variant on the second objection is that my account leads to a promiscuous account of threats. The objector might argue as follows: suppose, for example, that the Cuban Revolution had been sustained with none of repressive measures actually used. It might then, be a successful alternative to American capitalism and would be a threat in that its continued existence would be a potential causal link in the chain of events leading to the overthrow of the capitalist system. This objection needs to be fleshed out. If the concern is that Fidel Castro was in the process of creating such an attractive economic state that the American citizenry would have chosen socialism, then neither he nor his fellow revolutionaries were a threat since they did not infringe on anyone's rights. Remember 'threat' here is being used in a justicized sense, by which I mean that includes only links in an unjust causal process. If the concern is that Castro and others were allowing Cuba to serve as a staging ground for missiles and bombers for a country that is waging an unjust aggressive campaign against the United States (and I am not saying this was the case), then Castro or others were threats. Here I would claim that this result tracks our intuitions.

A third objection is that the threat/non-threat distinction rests on the notion of a proximate cause. The idea here is that agents who are aggressors, command them, or supply ammunition to them are clearly causally linked to the unjust danger. The problem is that persons with only distant causal connections also have a causal link to the unjust danger. Consider, for example, the people who make the bolts that are used solely for the scaffolding that construction workers use to make the plant where crates are constructed for the safe transport of ammunition that is to be used in an unjust military campaign. These bolt-makers cause the unjust danger in that they in part bring about the use of ammunition as part of the unjust campaign. An analogous problem arises in tort

law, where a person is liable only if her negligence (or inherently dangerous activity) proximately caused a harm. The theories that explain this cutoff include ones focusing on the limited scope of duty, efficiency, and some feature of causation (e.g., the degree to which an event causes an effect or its necessary link to certain effects). I submit that whichever theory best explains the cutoff in the tort-law context should be the one we adopt in the context of war.

F. Conclusion

Hence, where national leaders are sufficient threats to others they forfeit their rights and may thus be justly disabled or killed. A different theory of assassination does not focus on combatants or threats but instead makes the permissibility of assassinating a leader depend on whether it brings about the best consequences. It is to this theory I now turn.

III. THEORY #3: Killing Some National Leaders Will Bring about the Best Consequences

In some cases the assassination of such leaders will bring about the best results. If a government ought to be removed from power, an assassination can save an enormous number of lives. For example, an early assassination of Adolph Hitler, Mao Tse-Tung, the leaders of the Pol Pot regime, or Saddam Hussein would each have saved hundreds of thousands of persons killed by internal policies, war or the effects of war. For example, in the 20th Century the governments of the Soviet Union, People's Republic of China, Nazi Germany, and Cambodia killed approximately 61 million, 35 million, 21 million, and 2 million respectively.³⁶ In addition, from 1900-1988, governments have killed nearly 170 million people, not counting killings that are part of a war effort.³⁷ These genocidal campaigns would probably have been avoided had the leader or small number of leaders been killed. For example, it is not clear that a leader other than Adolph Hitler would have so relentlessly pushed for the extermination of the Jews. And with the possible exception of Adolph Hitler, assassinations of such past leaders wouldn't have violated the people's right to self-determination since such leaders were not elected and in some cases it is controversial whether they would have had the support of the majority of citizens. Even if a person rejects the central tenet of consequentialism, i.e., she thinks that the right action is not that which maximizes the good, there still appear to be cases in which injustice is permissible where it prevents staggering levels of unjust slaughter. The assassination of tyrannical and dangerous foreign leaders would likely be a

³⁶ R. J. Rummel, *Death by Government* (New Brunswick: Transaction Publications, 1997), pp. 1-28, esp. 4.

³⁷ *Ibid.*, pp. 9, 15.

paradigm of such cases. This is not to argue that the consequentialist approach to assassination is correct, but merely to that to the extent to which consequentialist considerations are relevant they sometimes permit assassination. This relates to my strategy which to show that each of the three main theories about the way in which war may be fought allow that in some cases national leaders may be assassinated.

This is likely true whether the value of consequences is a function of utility or a more complex function that includes such factors as desert, objective-list interests, and desire fulfillment. This is because the government killing or injury to innocent persons produces less objective-list elements and desire-fulfillment. This result occurs regardless of whether interest-satisfaction is calculated via a focus on average or total interest-satisfaction or a system that allows for the diminishing marginal value of persons (or, more accurately, the diminishing marginal value of the interest-satisfaction of successive persons).³⁸ This is true so long as the victims of government killing do not have less than average levels of interest-satisfaction.³⁹ Given the tendency of these governments to target groups that on average are flourishing, e.g., political opponents, rich farmland owners, Jews, this seems likely. Even rule-consequentialist theories might allow such assassinations since the best rule might be: assassinate leaders who are committing or highly likely to commit genocide or mass murder and whose killing will not cause a catastrophe or prevent the bringing about of some important set of benefits.

Such a policy puts U.S. leaders at risk but the expected loss (the value of a particular leader multiplied by the likelihood that he will be killed) pale in comparison to the lives that may be saved. This calculation does not significantly change when we also consider the damage to the US's international reputation, the likely misuse of the policy both by the US and others, and the internal strife caused by the use of assassination. My argument here rests on an empirical claim that there are enormous expected net gains to be had from a policy of permitting

³⁸ For a consequentialist account of desert-adjusted utility see, e.g., Fred Feldman, "Adjusting Utility for Justice: A Consequentialist Reply to the Objection from Justice," in Louis P. Pojman and Owen McLeod, eds., *What Do We Deserve?* (New York: Oxford University Press, 1999), pp. 259-270. An objective-list account of good consequences (which focuses on self-interest) can be found in Derek Parfit, *Reasons and Persons* (New York: Oxford University Press, 1984), pp. 493-502. The average utilitarian claim actually depends on the way in which the averaging is done, e.g., whether the averaging is done first over persons or first over times. The complexities of average utilitarianism are brought out in Thomas Hurka, "Average Utilitarianism," *Analysis* 42 (1982): 65-69.

³⁹ If the targets of genocide are richer than average there is reason to believe that they will not have less than average satisfaction with life as a whole. This is because there is a weak but positive correlation between well-being and wealth for persons within a nation and a stronger correlation between nations. David Myers, *The Pursuit of Happiness* (New York: Avon Books, 1992), pp. 34-41.

assassinations. This is particularly true where the targets are those reasonably believed to be likely to cause an unnecessary war, engage in genocide or other forms of mass killing, or promote catastrophic economic policies (especially agricultural ones).⁴⁰ For example, the leadership of Hitler caused the unnecessary death of millions and an incredible loss in well being for hundreds of millions. An extended defense of this claim would involve an empirical study of the expected costs and benefits of a policy of assassination. Such a study would have to take into account the reliability of the US government in identifying genocidal leaders and proponents of international aggression. Such an exploration is beyond the scope of this essay.

An objector might note that my consequentialist argument does not support my conclusion that the US should adopt a policy of assassination. He might claim that all I have shown is that in some cases the US should assassinate national leaders. A policy in contrast typically involves a legally valid rule that has been publicly announced, whereas a practice is a course of action that that need not have these features. The two have different consequences. For example, a practice but not a policy can be coupled with plausible deniability. I think that the word ‘policy’ is broad enough to include practices, but if not then the objector is correct and that my argument should be understood as an argument for the practice of assassination.⁴¹ Whether the option to assassinate some genocidal and aggressive leaders is best pursued via legally valid and publicly announced laws

⁴⁰ In 1959 to 1961, an estimated 20 to 33 million died in China due to famine. Jean-Louis Margolin, “China: A Long March into Night,” in Stephanie Courtois et al., eds., *The Black Book of Communism* (Cambridge: Harvard University Press, , 1999), 469 citing Justin Yifu Lin, “Collectivization and China’s Agricultural Crisis in 1959-1961,” *Journal of Political Economy* 98 (1990): 1228-1250; Jasper Becker, *Hungry Ghosts: China’s Secret Famine* (London: John Murray, 1996), 270-273. While this famine occurred, the government responded by increasing grain exports, refused aid from the United States, and gave little aid to the need in the countryside. Margolin, “China: A Long March into Night,” 495-496. In 1932-1933, 6 million died of famine in the Soviet Union. Nicholas Werth, “The Great Famine,” in Stephanie Courtois et al., eds., *The Black Book of Communism* (Cambridge: Harvard University Press, , 1999), 159-168, esp. 159 citing A. Blum, *Naitre, vivre et mourir en URSS 1917-1991* (Paris: Plon, 1994), 99. The worst affected were the regions that were the most dynamic agricultural regions. In these regions, the government refused to collect less food despite reports of the risk of famine. In 1931, for example, the government took 42% of the agricultural production from the Ukraine. The government also prevented persons from leaving these regions. Werth, “The Great Famine,” 160-161.

⁴¹ The different definitions of ‘policy’ differ with regard to whether they exclude practices. *Webster’s Ninth New Collegiate Dictionary*, 1990 ed., s.v. “Policy.” For example, among the definitions are “a definite course or method of action selected from among alternatives and in light of given conditions to guide and determine present and future decisions” and “a high-level overall plan embracing the general goals and acceptable procedures especially of a governmental body.”

involves the sort of empirical considerations that are outside the scope of this paper. In addition, the case for such laws increases if one views the satisfaction of democratic procedures as a side-constraint on the pursuit of national goals. This last assumption obviously takes us outside the realm of act-consequentialism. It is also worth noting that a just war might require a policy if justice in going to war requires a competent authority and democratic procedure is a prerequisite for competent authority (although this may be true in only some countries).

If my analysis is correct, then the good to be achieved through assassination will likely justify such a policy not just under a consequentialist system but also under a nonconsequentialist system that allows consequentialist gains to sometimes override deontological constraints. To achieve the best consequences, work must be done to determine the procedure by which targets are selected and pursued, but I leave such issues aside.

IV. Conclusion

In some cases, the US should adopt a policy of assassinating national leaders. On immunity thesis, national leaders are sometimes combatants. This is because some leaders are both causal and logical agents of an unjust military campaign. Such leaders occupy this logical role because in some cases their position has a necessary link to their nation's military projects. In addition, such a policy aligns with some of the policies that motivate the immunity thesis in that assassination does not target innocent persons, is connected to self-defense, and does not violate any international agreements. The immunity thesis should probably be rejected, however, since it rests on dubious claims about the non-contractual constitutive conditions of combatant. On a self-defense theory, some national leaders may be killed because they are threats. They are threats because they originate a causal process that will likely bring about large amounts of unjust harm. In so doing, they forfeit those moral rights that protect them against injurious action and thus remove one of the major constraints against violence and killing. On a consequentialist theory, such a policy would likely bring about the best consequences since it would be a vital tool in the protection against genocide, unjust military aggression, and other horrendous state actions that have characterized the twentieth century. It is unlikely that the harm that would result from such a policy (e.g., its misuse) would outweigh the expected gain from it.⁴²

⁴² I am grateful to Neil Feit, Louis P. Pojman, George Schedler, and the West Point Philosophy Society for their extremely helpful comments and criticisms of this paper.

Does Belief in Ethical Subjectivism Pose a Challenge to Classical Liberalism?

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1. Introduction

While classical liberals agree on many things, e.g. that free markets, limited government and the rule of law are necessary characteristics of any good society, they disagree about whether objective moral facts – i.e. extra-individual, mind-independent, true propositions as to what is right and wrong – exist and can be used to support their ideology. Some – here termed *ethical objectivists* – think such facts do exist, whereas others – here termed *ethical subjectivists* – take the opposite position.¹ But does it really matter whether the one thing rather than the other is believed? Epstein (2003: 66) certainly thinks so, using the term *moral relativism* to denote the view that objective moral facts do not exist:

There are, I think, three major intellectual trends that tend to undercut the viability of economic markets and the social and political institutions on which they depend. The first of these dangers is *moral relativism*, which disputes the capacity to make any kind of objective moral judgments about the relative soundness of alternative legal rules, not only in close cases, but in any case where someone refuses to acquiesce in the claims of his rivals. ... Each line of attack represents a grave and misguided effort to undermine both the rule of law and the principle of individual liberty with which it is usually linked. (Italics in original.)

Other scholars likewise argue for one particular metaethical view on the often implicit presumption that *it*, unlike other views, is important for an adequate defense of classical liberalism: see e.g. Lomasky (1979), Harman (1980), Mack (1981), Rothbard (1982), Machan (1989) and Rasmussen and Den Uyl (1991, 1998).² Many other classical liberal thinkers do not, to my knowledge, deal with

¹ These are views in the realm of metaethics (or second-order ethics), i.e. the study *of* ethics rather than studies *in* ethics. For an introduction, see Couture and Nielsen (1995a).

² From the more general debate, one could mention that MacIntyre (1981) criticizes (one form of) liberalism for entailing a relativistic concept of morality originating with the idea of individual preference satisfaction; and Johnson (1992) seems to largely blame the rise of totalitarianism on belief in ethical subjectivism. Cf. Scanlon (1998: 330-333).

the issue at all.³ That is as it should be, in my view. The thesis I shall argue in favor of is, namely, that it does not matter whether people believe that objective moral facts exist, neither in general nor – and especially not – for a defense of classical liberalism.⁴ Alternatively put, unlike others I think that belief in ethical subjectivism does not pose a challenge to classical liberalism. Below, I shall specify in more detail what differing consequences different beliefs in this area could – but ultimately, I think, will not – entail. To the extent that this thesis holds, it implies that it is unwise to require of an argument for classical liberalism that it has a particular (or even that it has some) type of metaethical foundation.

The structure of the paper is as follows. In section 2, definitions of the central concepts used are offered, along with a discussion. Then, the main analysis is presented in section 3, with a detailed examination of claims to the effect that it matters what metaethical beliefs people have. Lastly, concluding remarks are offered.

2. Preliminaries

Definitions

The most central concepts used are defined as follows:

DEFINITION 2.1. A *moral judgment* is an expression of a subjective (i.e. intra-individual, mind-dependent) proposition as to what is right and wrong.

DEFINITION 2.2. A *moral fact* is a true proposition as to what is right and wrong. An *objective* moral fact is an extra-individual, mind-independent, true proposition as to what is right and wrong. A *subjective* moral fact is an intra-individual, mind dependent, true proposition as to what is right and wrong.

DEFINITION 2.3. A *moral view* is a moral judgment in conjunction with a set of non-moral factual assessments.

DEFINITION 2.4. *Ethical objectivism* (EO) is the view that moral judgments can be objectively true or false since objective moral facts exist.

DEFINITION 2.5. *Ethical subjectivism* (ES) is the view that moral judgments cannot be objectively true or false since objective moral facts do not exist, i.e. ~EO.

Furthermore, there is a large literature addressing the related but logically distinct issue of whether moral facts exist: see e.g. Mackie (1977), Brink (1989), Sayre-McCord (1989), Couture and Nielsen (1995b), Dworkin (1996), Harman and Thomson (1996) and Hare (2000).

³ See e.g. Hayek (1960: 35-36; 1967: 38).

⁴ For general arguments along somewhat similar lines, see Hare (1972) and Tännsjö (1974). For an opposite point of view, see Sturgeon (1986). Dworkin (1996) denies the relevance of metaethical analysis – he regards metaethical statement as statements in first-order ethics – but thinks it important nevertheless to advocate a version of ethical objectivism (without the “normal” metaethical foundations).

DEFINITION 2.6. *Ethical skepticism* (ESk) is the view that objective moral facts cannot be known with any great degree of certainty, at least not by people in general.

A few things need to be clarified before proceeding to the method of analysis. About definitions 2.1 and 2.2: The terms *subjective* and *objective* denote existence internal to or external to individual minds, respectively.⁵ The proposition expressed by a moral judgment is a reflection of a feeling-state or a desire. A moral judgment is *true* when it is identical to a moral fact – be it objective or subjective. In the latter case, truth refers to a proposition as to what is right and wrong reflecting the individual’s feeling-state or desire correctly. Shafer-Landau (1998) clarifies that there are two mutually exclusive interpretations of ES: *normative subjectivism*, which entails holding that moral judgments can be true or false in the *non-objective* sense of accurately reporting the speaker’s feelings, and *metaethical subjectivism*, which entails holding that moral judgments cannot be true or false in any sense. As noted, the former interpretation is the one opted for here.

About definition 2.3: In conjunction with a set of factual assessments a moral judgment forms a moral view, as illustrated in Figure 1.

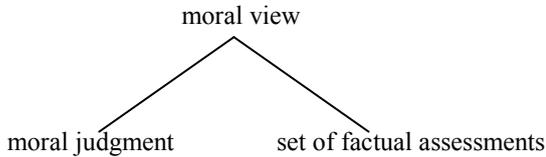


Figure 1. The two components of a moral view

About definition 2.4: On EO, a moral view can be false either if the moral judgment is incorrect, i.e. not in agreement with the objective moral facts, *or* if the set of factual assessments are incorrect, i.e. not in agreement with the non-moral facts. Also, there are other ways to define EO that do not invoke objective moral facts as defined here; see e.g. Scanlon (1998). To the extent that people actually *think* that collective manifestations of individual, subjective moral judgments under some circumstances entail objectivity, then this type of “EO,”

⁵ Nozick (2001, p. 286) lists three marks of objectiveness: “[An objective truth] is accessible from different angles; it is or can be interpersonally agreed to; and it holds independently of the beliefs and experiences of the observer or thinker.” The third mark is stressed here.

which is strictly speaking a type of ES, could be treated as a type of real EO for analytical purposes.

About definition 2.5: On ES, a moral view can be false either if the moral judgment is incorrect, i.e. not in agreement with the subjective moral facts, *or* if the set of factual assessments are incorrect, i.e. not in agreement with the non-moral facts.

About definition 2.6: In the analysis, I shall make use of at least a mild form of ESk, entailing that at least *some* non-trivial cases of moral dispute cannot be settled because convincing moral knowledge is missing.⁶ On ES, this is because there are no objective moral facts to be found; on EO, this is because moral agents are unable to properly perceive the objective moral facts (although they exist). The bases for this epistemological assumption is twofold: i) If this (or any stronger) form of ESk did not hold, it seems to me that it would be possible to know and demonstrate that certain, and not other, moral judgments were the correct ones – and this seems not to be the case (as argued by Ayer, 1967; cf. Posner, 2003, p. 8); ii) If this assumption did not hold, it seems difficult to explain moral disagreement. It is quite clear that such disagreement exists and is nowhere near a solution. Take areas such as the death penalty, abortion, the treatment of animals, homosexuality, sex before marriage, war, euthanasia, cloning, narcotics sales, intoxication, taxation – and it will be obvious that severe and lasting moral disagreement exists, not only on facts but also when it comes to moral judgments. This conclusion is reinforced if we consider the existence of many incompatible ethical theories (such as consequentialist and deontological ones) which stipulate differing evaluative criteria for what is morally desirable. Note that to explain moral disagreement, I do not claim that ES is true (which is sometimes done) but that if EO is true, so is some form of ESk.⁷

Someone may retort that moral agreement does exist on many issues, and of course this is so (as in the case of whether it is morally right and wrong to set fire to a cat). But on ES, this can be explained in terms of intersubjectivity, i.e. that people's feeling-states have converged, for biological, social/cultural or other reasons, in some quite basic cases – *but not on many others*. On EO, there is then an asymmetry present: certain moral truths can be apprehended *whereas others cannot*. An explanation is needed and, again, at least some mild form of ESk seems plausible. As will be outlined below, an alternative (or, really, complementary) explanation could be that people are *de facto* not able or willing to be governed by rational considerations in moral matters and that this may explain moral disagreement.⁸ It does not really matter for my argumentation what the reason is for people not observing objective moral facts. But below, my main comparison, in the end, will be between a belief in ES and a belief in EO in

⁶ A similar point is made by Barry (1995).

⁷ Cf. Mackie (1977, pp. 36-38).

⁸ Cf. Wright (1992) and Huemer (1996).

conjunction with (at least a mild form of) ESk.

Method of Analysis

The method of analysis is a simple form of the utility-function approach of economic theory. The approach is primarily used to facilitate a systematic and compact analysis.

Assume the existence of a person called Claude Lester (henceforth referred to as CL) who is an ideal classical liberal. From the point of view of any classical liberal, CL is a perfectly representative and perfectly informed evaluator of various states of affairs.

CL's utility function can be expressed in the following manner:

$$U_{CL} = f(C, I, E)$$

where C = the *content* of people's moral views, I = the *intensity* of people's moral views, and E = the ability to *evaluate* moral views. These variables have been chosen as they are perceived to entail the most important potential consequences of people believing EO or ES to be true.

CL's goal is to obtain as high utility as possible with regard to the three variables; and it is assumed that these are the only variables that he cares about.⁹ But what, more precisely, do they mean?

First, C refers to the content of first-order moral views. Some (perhaps most) such views are not relevant for CL, since he only cares about those that in some manner or form relate to his own set of moral views. But counting those,

U_{CL} is higher the more people are in agreement with this particular set of views.

Second, I refers to the intensity of the moral views people hold – and is thus a way of describing the character, rather than the content, of their first-order moral views. I is a continuous variable with a threshold value under which the intensity of a moral view is not strong enough to provide enough moral motivation to cause an individual to act in accordance with the view, and above which the intensity is strong enough for a morally induced act to take place.

U_{CL} is higher the more intense moral views relevant for and in line with CL's set of moral views are, but lower the more intense moral views relevant for and out of line with this set of views are.

⁹ CL is hence modelled as a *partial* type of person, since he of course cares about many other things as well. As these other things are not relevant for the present analysis, they are not included; but it is assumed that they do not conflict with the goal specified here.

Third, E refers to the ability to evaluate moral views, and U_{CL} is higher the greater this ability is.

Lastly, U_{CL}^{EO} is the utility of CL when people believe that EO is true and U_{CL}^{ES} as the utility of CL when people believe that ES is true. The hypothesis of this paper, and indeed a criterion for its main thesis, can then be expressed as $U_{CL}^{EO}(C, I, E) = U_{CL}^{ES}(C, I, E)$.¹⁰ Hence, it should now be clear what is meant by the term *matter* in the rubric of this paper – i.e. for whom and in what way metaethical views may matter. It remains to be seen if they do.

3. Claims

This section contains three claims to the effect that it does matter for U_{CL} whether people believe that EO or ES is true.

Claim Concerning C

CLAIM 3.1. "Without a belief in EO anything is permitted."¹¹

I take this to be the most common claim to the effect that it matters whether people hold EO or ES to be true. The idea is that EO ensures that beliefs and behavior that run counter to a desired first-order moral view can be minimized in scope. Without an ability to say that "x is objectively right" or "x is objectively wrong" we cannot influence people to think and act sufficiently morally.

But a first thing to note is that $ES \neq$ ethical nihilism (EN). That is, saying that objective moral facts do not exist and that moral judgments express propositions that are reflections of feeling-states of individuals is not the same as saying that moral judgments should not matter for anyone's attitudes or behavior. Belief in ES certainly allows for moral judgments, and these may be identical in first-order moral content to the judgments expressed by someone adhering to EO – and, if EO is true, they may also be identical to the objective moral facts. This

¹⁰ A stricter criterion for the thesis to hold would be $U_{CL}^{EO}(C) = U_{CL}^{ES}(C)$ in conjunction with $U_{CL}^{EO}(I) = U_{CL}^{ES}(I)$, and $U_{CL}^{EO}(E) = U_{CL}^{ES}(E)$. The difference between this and the criterion specified above is that the latter allows for differential effects of EO and ES on one or more of the three variables *so long as* the effects cancel each other out in utility space.

¹¹ A slight variation of a claim put forth by Ivan Karamazov.

means that an ethical subjectivist can utter a statement of disapprobation of any act or phenomenon he deems to be immoral; that he can try to convince others, including those prone on acting in ways he deems immoral, to embrace his views; and that he can actively try to forestall, prevent, stop and have punished acts that he deems immoral (but presumably, in the last case, only to the extent that these acts are also illegal; if they are not, he could try to make them so, even though it is by no means certain that CL would like many a thing deemed immoral illegal). As Hägerström (1939, p. 128) puts it:

They commit the error of believing that emotional expressions and the ambition of influencing others through these are unjustified if it is not possible to claim the correspondence of one's feelings with certain notions such as true judgments about reality. With the same authority it could then be said that it is not right to breathe or move. Breathing or moving are not judgments that could be said to be true or false either. Life entails much more than judgments. (Own translation.)

Hence, an ethical subjectivist cannot in general be regarded as wanting to permit anything; in fact, he can readily have the exact same first-order moral views as an ethical objectivist. Schumpeter (1976, p. 243) echoes this insight: "To realize the *relative* validity of one's own convictions and yet stand for them unflinchingly is what distinguishes a civilized man from a barbarian." (Italics added.)

But, someone may counter, what if the ethical subjectivist's ability to influence *others'* moral views is smaller than that of the ethical objectivist, *even if* they hold identical moral views? If this holds, then it would matter for *C* and

U_{CL} whether EO or ES is believed true, since CL cares about what first-order moral views people in general have. For it to hold, however, the mere addition of the word "objectively" to the phrase "x is wrong" must influence people's moral thinking in some substantial way – and does it? Assume first that the listeners to this phrase believe ES to be true. In that case, adding the word makes no difference whatever to them.

Assume instead that the listeners believe EO to be true. If it is not true, then there is no way of demonstrating that a particular moral view is objectively right, even though it may be so called, and that means that the word is probably of no importance. In fact, in a setting with many claims about what constitutes an objective ethics, a general disbelief in anyone's ability to discern the right ethics may very well spread, the effect of which will probably will be very similar to what obtains when people believe that ES is true.

If EO is true and if people believe that it is, it is required, for the claim to hold, that

i) they must make be able to observe the objective moral facts just like the propagandist, and

ii) they must be willing to adopt the observable objective moral facts as their own moral judgments.

This needs some further elaboration.

On the first point: If objective moral facts exist they can still be unobservable (at least to people in general), and if so, much the same thing can be expected as in the case of people believing ES to be true and as in the case of people believing EO to be true when it is false. In a setting with competing claims, how could the term *objective per se* offer convincing moral guidance?

In this context, it should be pointed out that there is a distinct risk involved when using objectivity as an argument, if the unique moral truth cannot be identified in a rational manner understandable to people in general (either because ES is true or because EO is true in conjunction with objective moral facts not being observable). If (which, as argued here, is probably not the case) the usage of this term makes people more prone to change their moral views, there is no guarantee, from the point of view of the moral propagandist, that his listeners will change their views in his direction – U_{CL} could in fact then *decrease* if people's C changes as a result of, say, a communist arguing that his views are implied on EO (this idea is explored further below, as something that also affects I).

On the second point: Even if objective moral facts exist and even if they are observable, people may not be willing to adopt them as their moral judgments. Both an ethical subjectivist and an ethical objectivist can hold that all moral judgments are based on feeling-states. It may be that these feeling-states induce people to hold the objective moral facts as moral judgments – but it may just as well be that the feeling-states induce them to hold moral judgments at odds with the objective moral facts. That is, moral motivation may not primarily, or at all, be derived from reason (i.e. what rational considerations dictate) but from people's feeling-states. Acknowledging the existence of facts is another matter than being governed by facts. As Russell (1950) noted:

All human activity is prompted by desire. There is a wholly fallacious theory, advanced by some earnest moralists, to the effect that it is possible to resist desire in the interest of duty and moral principle. I say this is fallacious, not because no man ever acts from a sense of duty, but because duty has no hold on him unless he desires to be dutiful. If you wish to know what men will do, you must know not only or principally their material circumstances, but rather their whole system, of their desires with their relative strengths.

Whatever the metaethical foundation of ethics, desires or feeling-states bring about moral judgments, motivation and action (although cognitive abilities, the

use of logic for consistency purposes and beliefs about the world naturally also play a role and enables rational analysis of a certain kind also in moral matters).¹²

The argument is summarized in Figure 2. It shows a number of alternative situations that may hold for a listener to some EO-based moral rhetoric, the purpose of which is to make him adopt the moral view presented by the speaker.

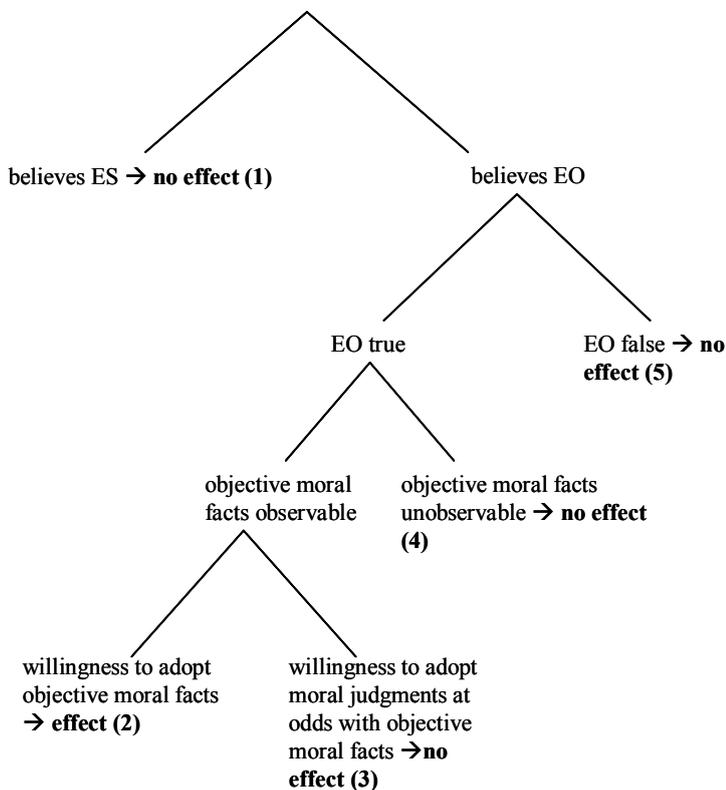


Figure 2. The partial effect on a listener's moral views of adding only the term

¹² Binmore (1994, 1998) strongly criticizes the approach of moral philosophers who think that moral judgments are formed as the result of mere reasoning. The emerging literature on evolutionary psychology offers similar ideas, that moral views are formed through evolutionary processes that have little or nothing to do with rational evaluation: see e.g. Barkow, Cosmides and Toby (1992), Wright (1994), Pinker (1997), Ruse and Wilson (1997) and Dennett (2003, ch. 7). Cf. Ayer (1967), Hume (1984, book II, part iii, section 3), Mackie (1980, chapters III, IV) and Björnsson (1998, 2002).

objective to a moral argument

Note that the figure only looks at the *partial* effect of adding an objectivity component to a moral argument, which means that there may still be a *total* effect of the moral argument even where the figure lists “no effect.” Also note that even if a person is willing to accept *some* moral argument and regard it as objective, the argument here, not least at nodes (4) and (5), is that the acceptance of *any* moral argument is not always enhanced solely by the inclusion of the term “objective.” Now, as is clear in Figure 2, quite a few conditions have to be met in order for there to be an effect. The probable situation in reality is that all these do not hold and that there is no, or at least a small, effect. Thus, whether one adheres to EO or ES does not seem to matter for *C* in the sense that one can hold the same first-order moral views and one can influence others in a similar manner irrespective of which metaethical beliefs people hold. As noted by Russell (1935, pp. 254-255):

Whatever our definition of the ‘Good,’ *and whether we believe it to be subjective or objective*, those who do not desire the happiness of mankind will not endeavor to further it, while those who do desire it will do what they can to bring it about. (Italics added; cf. Rorty, 1999: 83-84, and Blackburn, 2001.)

Claim Concerning *I*

CLAIM 3.2. “On a belief in EO, moral views are taken more seriously.” Williams (1973, p. 219) states the following:

It cannot be denied that an intrinsic feature of moral thought are the distinctions between taking a serious view and a less serious view; having strong convictions and less strong convictions, and so forth. It would be a mark of insanity to regard all moral issues as on the same level.

That is to say, a certain, given moral content *C* may be embraced more or less strongly. In fact, *I* can be regarded as a continuous variable, and at some point, this intensity is sufficiently strong to turn into a moral motivation for action. This is an analysis of the *character* of moral views rather than of their content.

The claim here is that even if someone who believes in ES and someone who believes in EO have the exact same first-order moral views, the latter will embrace them more strongly and be more motivated to act upon them. This,

however, seems dubious – and also like a risky way of thinking for CL.¹³

First: As has been argued above in the context of the content of moral views, adding the concept of objectivity scarcely makes a certain view more attractive to others. This is because moral judgments are not *per se* determined through reflections in metaethics but through the feeling-states of individuals. It appears even more reasonable to think the intensity of moral views the result of feeling-states.

Second: Assume now that people may have different first-order moral views, that the argument that belief in EO better ensures intense adherence to some first-order ethics in fact holds, that ES or EO is true and that if EO is true, some non-negligible epistemological imperfection is present (i.e. ES_k obtains in some way). Here, a risk is involved. The risk is that *some other* first-order ethics than the one favored by oneself is adopted. This is illustrated in Figure 3.

	People believe that ethical subjectivism is true	People believe that ethical objectivism is true
Good first-order ethics	U_{CL}^1	U_{CL}^2
Bad first-order ethics	U_{CL}^3	U_{CL}^4

Figure 3. Combinations of first-order moral views and metaethical beliefs in the general population

The following utility relationship then holds: $U_{CL}^2 > U_{CL}^1 > U_{CL}^3 > U_{CL}^4$. That is, the best outcome is when people agree with CL and do so more intensely; and the worst outcome is when they disagree with CL and do so more intensely. Now, either people believe in ES or they believe in EO. In each of these two mutually exclusive cases, there is a probability for them sympathizing with CL and a residual probability for them sympathizing with ~CL. Hence, the risk arises because there is no way of knowing which of the two options yields the highest expected U_{CL} . Is $p(\text{good first-order ethics}) * U_{CL}^1 + p(\text{bad first-order ethics}) * U_{CL}^3$ larger than, smaller than or equal to $p(\text{good first-order ethics}) * U_{CL}^2 +$

¹³ Cf. Joyce (2001, ch. 8).

p(bad first-order ethics) * U_{CL}^4 ? This way of reasoning is, as a rule, overlooked: people who perform this type of analysis simply presume that if EO is believed, then their particular form of first-order moral views will automatically be accepted. That is naïve, at best.

Claim Concerning *E*

CLAIM 3.3. “On a belief in ES, moral views cannot be questioned objectively.”

If objective moral facts do not exist and moral judgments really are nothing but reflections of feeling-states, how can a moral view ever be legitimately questioned? How can a moral conflict be resolved? *De gustibus non est disputandum*? As Shafer-Landau (1998) puts it:

If our ethical attachments are ultimately entirely up to us, with no supporting reasons needed, and no rationally compelling ones available, then our moral views are arbitrary.

I think this view is largely mistaken, for four reasons.

First, assessments of facts can be analyzed. Any moral view consists of a moral judgment and a set of factual assessments, and even if the compatibility of the former with objective facts cannot be assessed, the latter can be.¹⁴ Hence, if two people have different moral views, this is either the result of their having different moral judgments or of their having made different factual assessments as to what means should be applied to achieve the goal(s) determined by the moral judgment(s).¹⁵ Take, as an example, a person whose moral view is that Asians should not be allowed to vote, whose moral judgment is that people who are unintelligent should not be allowed to vote and whose set of factual assessments are based on the writings of the *National Enquirer*. Upon encountering a person who (for the sake of argument) agrees with his moral judgment but disagrees with his moral view, he is presented with facts in the form of scientific studies that show that Asians are, indeed, more intelligent than the average person – and as a result, he revises his moral view.

Second, standards of logical consistency can be applied to identify and resolve inconsistencies in a person’s set of moral views.

Third, there is another way, hitherto rather overlooked in metaethical

¹⁴ Cf. Blackburn (1971, p. 122).

¹⁵ Russell (1992, p. 349) asserts: “Perhaps there is not, strictly speaking, any such thing as ‘scientific’ ethics. It is not the province of science to decide on the ends of life. Science can show that an ethic is unscientific, in the sense that it does not minister to any desired end.”

discussions, in which I think an evaluation of moral judgments is possible on a belief in ES.¹⁶ To demonstrate this, I will make use of Hare's (1981, ch. 2) idea of there being two levels of moral thinking, the intuitive and the critical levels, but in a slightly different way than he does. The intuitive level refers to the way we think morally in familiar and everyday situations without deeper reflection. The critical level refers to the way we (could) think morally about non-familiar situations or about situations of internal moral conflict. Now, the argument I would like to put forth says that the propositions being expressed in moral judgments, being reflections of individuals' feeling-states,¹⁷ are generally the result of thinking at the intuitive level – but they can be questioned at the critical level by asking: *How did they come about?* That is, feeling-states are not taken for granted but are scrutinized using rational analysis, bringing factual knowledge about the emergence of feeling-states to bear upon the relevance of the moral judgments themselves.

One can imagine at least four (often mutually reinforcing) sources of feeling-states, viz. biological evolution, social evolution/culture, methods of upbringing and illness. The point is that *each of these sources can result in feeling-states that can be questioned on rational and factual grounds*. Biological evolution may have given rise to feeling-states that facilitated survival in some setting but which are not relevant in another. This could concern attitudes towards phenomena such as people different to oneself,¹⁸ certain economic and political issues,¹⁹ certain animals perceived to be dangerous and certain actions.²⁰ To take an example in this area, if a person experiences a feeling-state to the effect that he should acquire as many material possessions as possible, this may be realized to be a remnant of an era when gathering food etc. was a direct matter of survival; in modern days, it might yield higher utility on net to spend more time with family and friends. Hence, the feeling-state that directs a person to amass things *in absurdum* can be questioned on a critical level. Or, to take another example used by Hayek (1978), if a person experiences a feeling-state to the effect that egalitarian policies, incorporating massive redistribution among citizens, should be pursued, it may be that its basis is to be located to an evolutionary stage when people lived in small, communal bands. Today's modern, complex society may be quite unsuited for the same rules as the ones originating in a completely different setting.

Social evolution/culture can influence moral judgments through memes quite quickly, either with an originally biological basis or with roots in some

¹⁶ Cf. LaFollette (1991).

¹⁷ These propositions could be at odds with the subjective moral facts (i.e. the feeling-states or desires), but that type of conflict is assumed away at present.

¹⁸ Cf. Hayek (1978).

¹⁹ Cf. Rubin (2002).

²⁰ Cf. Thornhill and Palmer (2000).

cultural propagandist, whose feeling-states may have been suitable to a certain setting quite different from the present one. These judgments can likewise be questioned, e.g. after having become internalized by many persons. To take an example, the Nazi moral judgments, with lower worth put on some categories of people, were probably internalized by many Germans, inducing them to support persecutions of various kinds. Realizing that these judgments stemmed from a small group of ideologues, and that perhaps popular sentiment was receptive to these judgments due to biological –and not generally rational – factors, inducing them with a propensity to regard strangers with skepticism, could enable a person to question feeling-states of hatred.

Methods of upbringing, to the extent that they propagate moral judgments, simply reflect the feeling-states of parents, family, teachers and other guardians. What reason is there to think these persons' feeling-states especially appealing? They may simply reflect the particular circumstances of *their* upbringing (and so on, going back in time). To take an example, assume that a person knows that his parents never once left their hometown and that they harbored virulent feelings of hatred towards anyone not stemming from their particular part of the world. Upon having moved to a big city, the person experiences feelings of intense dislike upon encountering persons with a different color of the skin. But realizing that these feeling-states were induced by his parents attitudes, in turn shaped by the particular way they lived their lives (reinforced by evolutionary psychology to some degree), he is able, upon critical reflection, to question his own feelings and judgments and downplay the ones he finds are without rational basis.

Illness is a fourth source of certain feeling-states, in particular various forms of mental problems. If the individual affected can be made to realize that he in fact suffers from some objective condition which influence his emotional set-up, he can also, on purely factual grounds, be made to see that all feeling-states and related moral judgments that he experiences are not to be relied on without further reflection.

Now, on this view, it is still not possible to say, on a belief in ES, that a person's moral judgments are *objectively false* – but it is possible to say that they are *inapplicable* (as the underlying feeling-states are irrelevant for the setting in which the person now lives his life) and should actively be resisted and preferably abandoned as a basis for moral views and action. However, if a person, upon reflecting critically in this manner (on his own or as a result of listening to or reading others) does not want to alter the internal priorities of his emotional set-up or eradicate some recurring feeling-state (a want that in itself, of course, would be the result of a feeling-state), then there is nothing more that can be done.²¹

²¹ Perhaps it is the case, if our moral judgments reflect feeling-states brought about by biological evolution, that we *cannot* change them through critical moral thinking. But if this is so, it is so irrespective of metaethical beliefs.

How do these three possibilities of evaluation of moral views on a belief in ES compare to a situation where people believe in EO? The presumption in the claim addressed here is that in the latter situation, a rational evaluation of moral judgments is possible (as these can be compared to objective moral facts that can be shown to be true or false). But if EO is in fact false, or if EO is true but objective moral facts are not observable with any degree of certainty, then a situation very similar to that when people believe ES to be true obtains – i.e. because there are not objective moral facts, or because these cannot be identified, no more rational argumentation is possible than when people believe ES to be true. If people believe EO to be true, if it is true and if objective moral facts are observable, then rational argumentation in the purer sense is possible, but again, the assumption of observability seems optimistic at best – as does, perhaps, the assumption that there is a willingness for moral agents to adopt objective moral facts as their own moral judgments. From the viewpoint of CL, then, it seems as if it does not really matter whether people believe ES or EO to be true. Rational evaluation can go on *to some extent* no matter what.²²

4. Conclusions

Many argue in favor of EO or ES as if it really matters what people believe in this realm of affairs. Here, I have tried to find out whether this supposition is, in fact, true. By looking at three distinct claims, concerning how the three variables of the utility function of CL are affected, the following has been found:

i) On *C*: The *content* of moral views need not and probably does not differ between believers in EO and believers in ES; and it is improbable that one's ability to influence the moral views of others depends on whether they believe EO or ES to be true.

ii) On *I*: The *intensity* of moral views need not and probably does not differ between believers in EO and believers in ES; and even if it does, such that believers in EO hold their moral views more strongly, there is a risk that they hold "bad" moral views, which may render belief in ES just as preferable on net.

iii) On *E*: The ability to *evaluate* moral views is probably as great on a belief in ES as on a belief in EO.

Hence, as there is no reason to expect there to be different effects of a belief in EO compared to a belief in ES on the individual variables of CL's utility function, there is naturally no reason to expect the overall utility level to differ depending on people's metaethical beliefs in this area. However, should one

²² Thereby, Sturgeon's (1986) argument (really about *P*), that a believer in EO can be expected to be more humble than a believer in ES, as the former allows for errors in his moral judgments (i.e. he regards them as fallible), seems to fall.

come to a different conclusion and think that a belief in EO affects one or more of the three components in a different manner than a belief in ES, *it may still be that the different effects cancel each other out* such that $U_{CL}^{EO}(C, I, E) = U_{CL}^{ES}(C, I, E)$ after all. In all, ES does not, in spite of many claims to the contrary, pose a particularly great challenge to or undermine cherished moral views.

The implication of this is clear: advocates of a certain set of first-order moral views, such as classical liberalism, should cease trying to construct and present arguments as to the metaethical basis of these views and concentrate on instilling interest in and support for the views directly. How this could be done – if at all – is, however, another story.

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Property Rights vs. Utilitarianism: Two Views of Ethics

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Introduction

Most discussions of political philosophy revolve around the relationship between the individual and the state or the individual and the masses. But before we can begin such discussions, a few preliminary points need to be addressed. Let's start with property rights. The underlying premises upon which property rights are based include the nonaggression axiom and natural rights, which flows from the nonaggression axiom. The nonaggression axiom states that the initiation of force is never justified. Rothbard states it thus: "that no man or group of men may aggress against the person or property of anyone else."¹ That is not to say that self-defense is never justified,² because it is, if one believes that one has the right to protect one's property (the body, the nose or whatever other body part is being aggressed against) from aggression. It is an objective fact, one that all reasonable men can agree on.

At least one well-known rabbi of a few thousand years ago would (perhaps) disagree with this last statement. He, and some of his followers, argued that we should turn the other cheek rather than resist aggression.³ This pacifist

¹ Murray N. Rothbard, *For a New Liberty* 23 (New York: Libertarian Review Foundation, 1978). Tibor Machan makes the following point in this regard:

Intuitionism holds what is morally right and wrong is not known by way of elaborate theories or arguments. Rather we have a sense of right and wrong and relying on this sense is the best means to obtain moral and political understanding. For example, we all "know" -- in our bones or guts, as it were -- that depriving someone of his or her personal liberty is evil. To assault another, to rob him of what is his, is wrong. We don't need a philosophical theory to discover this -- we know it intuitively. Tibor R. Machan, *Government Regulation of Business*, in Tibor R. Machan, editor, *Commerce and Morality* 161-179 (Totowa, NJ: Rowman & Littlefield, 1988), at 167.

² For a philosophical justification of the use of force in self-defense, see Tibor Machan, *Individuals and Their Rights* (LaSalle, IL: Open Court Publishing Company, 1989), at 169-171.

³ Many, including Gandhi, have interpreted this statement [Matthew 5:38-41] to mean that we should not even defend ourselves against the Hitlers of the world (He actually said so in a 1946 interview). However, recent biblical scholarship has cast doubt upon this interpretation. In two of his books, *Engaging the Powers* and *The Powers that Be*, Walter Wink points out that in order to be struck on the right cheek, which is the cheek

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approach to resist force might work in some instances, but such an approach would likely prove unsuccessful against the Hitlers and Pol Pots of the world. Gandhi and Martin Luther King both used this turn the other cheek approach with some degree of success (for their survivors, not for themselves). The Jews in the Warsaw ghetto did not. If one were to limit oneself to success in this world (Christians would not), then it seems reasonable to conclude that a case can be made for resisting aggression, since not resisting aggression is often rewarded only in the next world.

The nonaggression axiom does not hold that one must not use force if one's body or other property are aggressed upon, although one has that option. It merely asserts that the initiation of force is never justified. The use of force is permitted under the nonaggression axiom, as is coming to the defense of someone else who has been aggressed against. If someone is being beaten or robbed, there is nothing wrong with coming to that person's defense. The rescuer is not guilty of initiating force. The masher is guilty, however, and may ethically be prevented from continuing such behavior. Those who aggress against others forfeit their right not to be aggressed against.

Although the pacifist approach is an option, it could be argued that deciding not to resist aggression constitutes an immoral act. If the ultimate human value is life and its preservation, then failing to protect this right serves to protect and encourage its opposite. "All the reasons which make the initiation of physical force an evil, make the retaliatory use of physical force a moral imperative."⁴

The theory of self-ownership derives from the nonaggression axiom. We own our own bodies. No one else has a superior claim. Thus, whatever we do with our own body is our own business as long as we do not use our bodies to aggress against others. We can rent our bodies to an employer eight hours a day in exchange for some agreed-upon wage. We can rent our bodies to others for sex or for surrogacy or for medical experimentation. If we are a dwarf, we can

mentioned in the biblical passage, it would be necessary to backhand the person with the right hand, since the left hand was not used for such purposes. Backhanding someone was used by someone in a higher position of authority (a master) to hit someone in an inferior position (a servant). People in first century Palestine did not hit with their left hand, since that hand was used for less savory activities. To use a closed fist -- to punch someone -- would only occur in a fight between equals. It might also be pointed out that Jesus resorted to violence when he overturned the tables of the money changers in the temple. So it could be argued that Jesus was not a complete pacifist, because he did use force on at least one occasion.

⁴ Ayn Rand, *The Virtue of Selfishness* (New York: New American Library, 1964), 108, cited in Harry Binswanger, editor, *The Ayn Rand Lexicon: Objectivism from A to Z* (New York: New American Library, 1986), at 442.

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allow others to toss us into a mattress for sport (dwarf tossing).⁵

Where there are rights, there are also duties. If one has the right to one's own body, then all others have a duty to refrain from aggressing against the bodies of others. These rights and duties are reciprocal. Of course, one may give up this right. For example, if John punches Bob in the nose, John gives up his right not to be punched in return or not to be physically restrained by anyone else to prevent further aggression.

If one begins with the nonaggression axiom as the premise, a number of policies and positions flow therefrom. The theory of property rights is one of the most important ideas to flow from this axiom. John Locke⁶ was one of the early proponents of this view in its modern form, although Aristotle and other ancient Greek and Roman philosophers also discussed property rights. Locke's position was that if you mix your labor with unowned property, that property becomes yours. No one has a right to use force to take it from you. Robert Nozick⁷ labels this view the entitlement theory of rights. In fact, no unowned property need be mixed with labor to claim ownership. One may enter into a contract to work for an employer in exchange for wages without any unowned property coming into the picture. Once the work is performed, the worker is entitled to the fruits of his labor -- usually cash -- which were earned either by the use of his muscles or brains, both of which are body parts. No other individual or group of individuals has a superior claim to the fruits of that labor, not even the tax collector.⁸ This conclusion does not change whether the amount received through voluntary exchange is \$4 or \$40 billion.

The right of free speech also derives from the body as property doctrine.⁹ One has the right to use one's vocal cords to communicate the thoughts that are in the brain. Both the vocal cords and brain are body parts. Of course, one may not shout fire in a movie theater, because doing so would violate the

⁵ For more on this point, see Robert W. McGee, *If Dwarf Tossing Is Outlawed, Only Outlaws Will Toss Dwarfs: Is Dwarf Tossing a Victimless Crime?* 38 *American Journal of Jurisprudence* 335-358 (1993).

⁶ John Locke, *The Second Treatise on Civil Government* (1690; 1986).

⁷ Robert Nozick, *Anarchy, State & Utopia* (New York: Basic Books, 1974).

⁸ Nozick points out that the income tax is a form of slave labor, since the fruits of one's labor are being taken by force. If one works 8 hours a day and must pay 50 percent of what one makes to the state, how does that differ, in essence, from being forced to work for the state for four hours a day? Nozick makes a good point, but exploring this view would take us far afield from the main discussion of this thesis. For more than 20 discussions on the ethics of tax evasion, see Robert W. McGee, editor, *The Ethics of Tax Evasion* (Dumont, NJ: The Dumont Institute for Public Policy Research, 1998).

⁹ For a full discussion of the body as property doctrine, see Russell Scott, *The Body as Property* (New York: The Viking Press, 1981).

property rights of the theater owner and the contract rights of those attending the performance. Individuals have the right to speak freely when they are on their own property or when they have permission to speak on someone else's property. There is no right to speak freely on someone else's property because there is no right to be on someone else's property without the owner's consent. This basic, commonsense position gets a bit murky when one tries to assert a free speech right on property that is government owned but that does not detract from the basic argument.

The right to liberty -- to not be confined against one's will -- is also a property right, since it is the physical location and control of the body that are at issue. Contract rights also derive from property rights, since contract rights merely involve trading the property one has for the property one wants. Thus, property rights are the fountain from which other rights flow.¹⁰

Application of the entitlement theory of property rights leads to other conclusions as well. If one is entitled to the fruits of one's labor, then one should be free to enter into contracts and trade labor for cash or other property. One may also trade the property one has justly acquired for other property or one may give away justly acquired property as a gift. Any government that imposes a gift tax or an inheritance tax thus violates rights, since those who have earned or acquired property through voluntary exchange always have a superior claim to it than do those, whether individuals or governments, who have not thus acquired title.¹¹

¹⁰ Ayn Rand puts it somewhat differently. "The right to life is the source of all rights -- and the right to property is their only implementation. Without property rights, no other rights are possible." Ayn Rand, *The Virtue of Selfishness* (New American Library, 1964), 94, cited in Harry Binswanger, editor, *The Ayn Rand Lexicon: Objectivism from A to Z* (New York: New American Library, 1986), at 388.

¹¹ For more on the ethics of evading the estate tax, see Robert W. McGee, *Is It Unethical to Evade the Estate Tax?* 2 *Journal of Accounting, Ethics & Public Policy* 266-285 (Spring 1999). A discussion of when, and under what circumstances, governments may use force to take property from citizens to pay for government services (whether wanted by the citizens or not) would take us far beyond the scope of this thesis. This question has been addressed in Robert W. McGee, *Is Tax Evasion Unethical?* 42 *University of Kansas Law Review* 411-435 (Winter 1994). Some authors have taken the position that tax evasion is always unethical. For examples, see Gordon Cohn, *The Jewish View on Paying Taxes*, 1 *Journal of Accounting, Ethics & Public Policy* 109-120 (Spring 1998); Meir Tamari, *Ethical Issues in Tax Evasion: A Jewish Perspective*, 1 *Journal of Accounting, Ethics & Public Policy* 121-132 (Spring 1998); Sheldon R. Smith and Kevin C. Kimball, *Tax Evasion and Ethics: A Perspective from Members of The Church of Jesus Christ of Latter-day Saints*, 1 *Journal of Accounting, Ethics & Public Policy* 337-348 (Summer 1998); Wig DeMerville, *The Ethics of Tax Evasion: A Baha'i Perspective*, 1 *Journal of Accounting, Ethics & Public Policy* 356-368 (Summer 1998). For a critique of these positions, see Robert W. McGee, *Is It Unethical to Evade Taxes in an Evil or Corrupt*

Two Approaches to Ethics

There are basically just two ways to look at ethics. Ethical systems are either utilitarian based or rights based. Other ethical systems that claim to be a third way usually break down, upon closer analysis, into some variation of utilitarianism. Thus, we need to take a look at the two ethical alternatives to determine which would better result in human flourishing.

Utilitarian Ethics

Jeremy Bentham coined the term utilitarian and is perhaps the first systematic exponent of the utilitarian philosophy,¹² although the concept of utilitarianism goes back to the time of Plato and Aristotle. Bentham's view was as follows:

...it is the greatest happiness of the greatest number that is the measure of right and wrong.¹³

For Bentham, one must take into account the effect an action has on everyone affected by the action when determining the rightness or wrongness of the action.¹⁴ John Stuart Mill, another early exponent of utilitarianism, said:

The creed which accepts as the foundation of morals "utility" or the "greatest happiness principle" holds that actions are right in proportion as they tend to promote happiness; wrong as they tend to produce the reverse of happiness.¹⁵

Henry Sidgwick, another English utilitarian, gives a more precise definition:

State? A Look at Jewish, Christian, Muslim, Mormon and Baha'i Perspectives, 2 Journal of Accounting, Ethics & Public Policy 149-181 (Winter 1999).

¹² William H. Shaw, *Contemporary Ethics: Taking Account of Utilitarianism 7* (Malden, MA and Oxford: Blackwell Publishers, 1999).

¹³ Jeremy Bentham, *A Fragment on Government*, in *The Works of Jeremy Bentham*, Vol. 1, J. Bowring, editor, (New York: Russell & Russell, 1962), at 227, as cited in W. Shaw, *supra*, at 8.

¹⁴ W. Shaw, *supra*, at 8.

¹⁵ John Stuart Mill, *Utilitarianism 7*, G. Sher, ed. (Indianapolis: Hackett, 1979), as cited in W. Shaw, *supra*, at 9. For other editions, see John Stuart Mill, *Utilitarianism and Other Writings* (New York: New American Library, 1962); John Stuart Mill, *On Liberty and Utilitarianism* (New York: Bantam Books, 1993).

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By utilitarianism is here meant the ethical theory, that the conduct which, under any given circumstances, is objectively right, is that which will produce the greatest amount of happiness on the whole; that is, taking into account all whose happiness is affected by the conduct.¹⁶

In other words, "an action is right if and only if it brings about at least as much net happiness as any other action the agent could have performed; otherwise it is wrong."¹⁷

Richard A. Posner, an American jurist and prolific author on law and economics, takes the position that morality and efficiency are consistent.¹⁸ He states that "the criterion for judging whether acts and institutions are just or good is whether they maximize the wealth of society."¹⁹

If these views are to be reconciled, one might say that an act or policy or institution is ethical if it is more efficient than any other alternative. Otherwise, it is unethical. Thus, if the act or policy results in the misallocation of resources, it is unethical because it reduces efficiency.

There are several problems with taking a utilitarian approach to ethical issues. The fatal flaw is that the utilitarian approach ignores property and contract rights. But there are other weaknesses as well.

One weakness with the utilitarian approach is that it is not possible to accurately measure gains and losses.²⁰ So if the goal is to achieve the greatest good for the greatest number, one must work with estimates. Economics textbooks present their examples of the application of marginal utility theory in terms of units, which they call utils. Each util is assigned a numerical value. And with each additional purchase, the marginal utility declines.

For example, let's say that Jane is very hungry. She goes into a fast-food restaurant and orders a hamburger for \$1. Since she is very hungry, the value of the hamburger, to her, is 10 utils. And since \$1 is worth only 3 utils to her,²¹ her

¹⁶ Henry Sidgwick, *The Methods of Ethics* 411 (New York: Dover, 1966), as cited in W. Shaw, *supra*, at 9-10.

¹⁷ W. Shaw, *supra*, at 10.

¹⁸ Richard A. Posner, *Economic Analysis of Law*, 5th edition 284-285 (New York: Aspen Law & Business, 1998).

¹⁹ Richard A. Posner, *The Economics of Justice*, revised edition 115 (Cambridge, MA: Harvard University Press, 1983).

²⁰ For a detailed critique of this point, see Murray N. Rothbard, *Man, Economy, and State* 260-68 (Los Angeles: Nash Publishers, 1970).

²¹ She places a value of 3 utils on one dollar, but other consumers may place different values on one dollar. A high-income person may place a value of 0.005 utils on one dollar, whereas a low-income person may assign a value of 20 utils to one dollar. And the number of utils' value for a dollar may change with the same individual. As the individual

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satisfaction is increased by surrendering the \$1, worth 3 utils, for a hamburger that is worth 10 utils.²² She has gained to the extent of 7 utils. After finishing the first hamburger, she must decide whether consuming a second hamburger would increase her happiness. If she values the second hamburger at 6 utils and the next dollar in her purse at 3 utils, she will decide to purchase a second hamburger because doing so will increase her satisfaction. So she exchanges a dollar, worth 3 utils, for the second hamburger, worth 6 utils. After consuming the second hamburger, she must decide whether to buy a third hamburger. If the value of a third hamburger to her is only 2 utils, she will decide not to buy, since she is better off keeping her dollar, which is valued at 3 utils, rather than exchanging it for something that has a value to her of only 2 utils.

The problem inherent in using this approach is that utils are defined in terms of definite, measurable units, whereas choices are actually ranks. We can say that she prefers two hamburgers to \$2, but we cannot say that she gains 6 utils by making an exchange. Economics textbook writers use utils to illustrate how the marginal utility theory works. But utils actually do not exist.

Attempting to apply the marginal utility theory presents some problems. For example, if a certain protectionist measure is applied to a particular product, we cannot determine by precise measurement whether the gains received by the domestic producers exceed the losses incurred by domestic consumers. And it should also be pointed out that domestic producers and consumers are not the only ones affected by protectionist policies. Foreign producers, their employees, the companies that would otherwise transport the foreign product to the domestic market, the domestic import companies and their employees, and the businesses that would otherwise receive a portion of the import companies' employee salaries are also affected.

Let's say that a particular protectionist measure such as a tariff or quota causes the price of the average shirt to be \$5 higher than would be the case under

spends more dollars, thereby reducing the supply of dollars, the value of the next dollar -- the marginal dollar -- may change. So the value of a dollar to a particular individual can change. It is not necessarily constant. It should also be pointed out that a high-income person does not necessarily derive fewer utils of benefit from a dollar than does a low-income person. This relationship is often assumed by economists (the graduated income tax is based on the validity of this assumption), but this assumption may be invalid.

²² It should be pointed out that these values are subjective. If the seller of hamburgers also valued \$1 at 3 utils and one hamburger at 10 utils, there would be no trade because the seller of hamburgers would be worse off if a trade transpired. The reason any trade takes place is because the buyer and seller place different values on the products or services they buy and sell. Both parties to a trade gain, in their own subjective judgment. The seller of hamburgers would rather have the \$1 than the hamburger and Jane would rather have the hamburger than the \$1.

free trade. So millions of consumers have to pay an extra \$5 for a shirt, and domestic producers of shirts gain as a result. But they do not necessarily gain the same total amount as the loss that domestic consumers incur because some of the shirts consumers buy will be manufactured by foreign producers. So an induced cost increase also might benefit foreign producers (especially if the induced cost increase is the result of a quota rather than a tariff). The presence of a quota will reduce the number of shirts that a foreign producer can sell in the domestic market, but it will increase the unit price the foreign producer can charge, this increasing foreign producer profit margins.

Fewer foreign shirts will be purchased as a result. Which means that the domestic import companies that would otherwise bring the shirts into the United States will lose business. So they will need fewer employees. And the money that these employees would otherwise earn cannot flow into the purchase of autos, clothing, and so forth because these employees do not have jobs as a result of the protectionist measure.

There is really no way to accurately measure the total gains and total losses that result from a particular protectionist measure because it is impossible to predict where the money will flow in the absence of protectionism. But it can be concluded, a priori, that total satisfaction will decrease if consumers have to settle for their second or third choice because some protectionist measure prevents them from buying their first choice.

Another way to look at the effect of a protectionist measure, in an attempt to determine whether the measure is good or bad, is to predict who would gain and who would lose if the particular policy were implemented. In the case of a protectionist measure on textiles, for example, millions of consumers stand to lose because they would have to pay higher prices.²³ But a few domestic textile companies stand to gain by the passage of the measure. Based on this approach, it might be concluded that the protectionist measure is bad because many

²³ Numerous studies have been made that attempt to measure the extent of consumer losses that result from protectionism in various industries. In textiles and apparel, some results have been as follows: Gary Clyde Hufbauer, Diane T. Berliner and Kimberly Ann Elliott, *Trade Protectionism in the United States: 31 Case Studies* 146 (Washington, DC: Institute for International Economics, 1986) (the induced price increase in textiles was 21%); William R. Cline, *The Future of World Trade in Textiles and Apparel*, revised edition 15 (Washington, DC: Institute for International Economics, 1990) (the estimated price increase for textiles was 28%); Hufbauer, Berliner and Elliott 146 (1986) (39% price increase in apparel); Carl Hamilton, *An Assessment of Voluntary Restraints on Hong Kong Exports to Europe and the U.S.A.*, 53 *Economica* 339-50 (1986) (50% increase in apparel prices); Susan Hickok, *The Consumer Cost of Trade Restraints*, Quarterly Review (Federal Reserve Bank of New York), Summer, 1985, 1-12 (46% to 76% increase in apparel prices); Cline 15 (1990) (53% increase in apparel prices).

individuals (consumers) stand to lose something, whereas only a few stand to gain (domestic textile manufacturers). But this analysis is superficial because the unit gains and unit losses are not equal. The domestic textile producers stand to gain much if the measure becomes law, whereas the millions of consumers who lose something would only lose a little bit, perhaps \$5 per shirt.

Another fact to consider is that the textile manufacturers are highly organized special interests, whereas the majority, the consumers, are unorganized. It is in the textile manufacturers' best interest to expend large sums of money to lobby Congress to pass the piece of protectionist legislation. But it is rational behavior for the millions of unorganized consumers not to organize to petition Congress not to pass the bill. The cost of organizing, in terms of time, effort and money expended, is just not worth it. It is better to pay an extra \$5 a shirt than to try to counterbalance the special interest that has the ear of the legislature.

This phenomenon is present regardless of which industry is involved. The steel industry, auto industry, farm lobby and every other producer of domestic goods stand to gain, in the short-run at least, if they can convince Congress to protect them from foreign competition. So it pays them to organize. And it is rational behavior for the consumers of these items not to organize because the cost of doing so exceeds the benefits to be gained by organizing.²⁴ Thus, the special interests have a built-in advantage over consumers.

The Public Choice School of Economics has been discussing this point for several decades. Wherever the costs of lobbying are low and the potential benefits are high, special interests will run to government for protection or special favors. Public Choice economists call this phenomenon rent-seeking -- the seeking of special privileges or protection from government or getting others to pay for your benefits.²⁵ But a better, more descriptive term would be booty

²⁴ There are some exceptions, of course. In some cases, one organized special interest lobbies Congress to pass a piece of protectionist legislation while another, opposing special interest lobbies Congress not to pass it. For example, in some instances, the steel industry's attempt to lobby Congress has been opposed by industry groups that use steel. And domestic auto producers that try to restrict foreign imports have been opposed by foreign car dealerships. So there is sometimes organized opposition, a countervailing power where special interests do battle with each other. For some case studies detailing specific instances where special interest groups have engaged in this kind of activity, see I.M. Destler and John S. Odell, *Anti-Protection: Changing Forces in United States Trade Politics* (Washington, DC: Institute for International Economics, 1987).

²⁵ For more on the concept of rent-seeking, see James M. Buchanan, Robert Tollison and Gordon Tullock editors, *Towards a Theory of a Rent-Seeking Society* (College Station, TX: Texas A&M University Press, 1980); Charles K. Rowley, Robert D. Tollison and Gordon Tullock editors, *The Political Economy of Rent-Seeking* (Boston: Kluwer Academic Publishers, 1988) (Pages 217-37 apply the theory of rent-seeking to trade regulation); Gordon Tullock, *The Economics of Special Privilege and Rent Seeking*

seeking.²⁶

The Public Interest Argument

Another basically utilitarian argument is the public policy or common good argument. Those who would ban sex acts between (or among) consenting adults -- prostitution, anal, oral or homosexual sex -- using drugs such as cocaine, hashish, coffee, crack, or marijuana, smoking in public, selling body parts, charging to rent your womb, ticket scalping, advertising tobacco or alcohol or whatever, often argue that such things are against public policy. Permitting such activity would tear at the social fabric. These things are not in the public interest. If a policy of free trade is good, it is good because it is in the public interest or it is for the common good.

The fatal flaw in this line of reasoning is that there is no such thing as "the public." The public is just a collective term to describe the general citizenry. The public does not eat, sleep and breathe. Only individuals do these things. Only individuals have interests. And in a pluralist society, these interests conflict.²⁷ Different individuals have different interests.

It is in the interest of nonsmokers to have smokefree restaurants and work places. But it is in the interest of smokers to be able to smoke in restaurants and work places. It is in the interest of prostitutes and ticket scalpers to be able to earn a living and it is in the interest of their clients to be able to use their services. But moralists would ban prostitution if they could, and other segments of the entertainment industry would like to see bans against ticket scalping stringently enforced.

Auto manufacturers (their stockholders and employees, actually) have an interest in seeing protectionist legislation passed to protect them from foreign competition. And the millions of individuals who purchase autos have an interest in having low prices and a wide variety of choices. Foreign auto producers also have an interest in selling their products on the domestic market. While it might be concluded that the public interest is in free trade, this conclusion is reached on utilitarian grounds -- the consumers who stand to gain by free trade outnumber

(Boston: Kluwer Academic Publishers, 1989); Gordon Tullock, *Private Wants, Public Means: An Economic Analysis Of The Desirable Scope Of Government* (New York: Basic Books, 1970; Lanham, MD and London: University Press of America, 1987); Gordon Tullock, *Rent Seeking* (Brookfield, VT and Hants, UK: Edward Elgar Publishing Company, 1993).

²⁶ I would like to thank Walter Block for this philosophical insight.

²⁷ Michael Novak points this out in *Free Persons and the Common Good* 19-22 (1989).

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the auto company stockholders and employees who stand to gain by protectionism (the interests of the foreign auto producers, their stockholders and employees are usually ignored in arriving at this determination).

There is no way to reconcile the interests of different, divergent groups without violating someone's rights. If prostitution is banned, prostitutes have their property and contract rights violated. Women who cannot rent their wombs as surrogates have their property and contract rights violated, too. Restaurant owners who are forced to admit anyone who walks through the door have their property, contract and association rights violated.²⁸ There is no way to prohibit activity between consenting adults without violating someone's property, contract or association rights. Yet this fact is almost always overlooked by those who advocate banning or restricting some kind of activity on public policy grounds.

Ayn Rand has the following point to make about the concept of the public interest:

Since there is no such entity as "the public," since the public is merely a number of individuals, any claimed or implied conflict of "the public interest" with private interests means that the interests of some men are to be sacrificed to the interests and wishes of others. Since the concept is so conveniently undefinable, its use rests only on any given gang's ability to proclaim that "The public, *c'est moi*" -- and to maintain the claim at the point of a gun.²⁹

In another place, Rand states:

All "public interest" legislation (and any distribution of money taken by force from some men for the unearned benefit of others) comes down ultimately to the grant of an undefined undefinable, non-objective, arbitrary power to some government officials. The worst aspect of it is not that such a power can be used dishonestly, but that it *cannot be used honestly*. The wisest man in the world, with the purest integrity, cannot find a criterion for the just, equitable, rational application of an unjust,

²⁸ "The Civil Rights Act is inconsistent with the capitalist ideal to the extent that it limits the free choice of employers and -- in the case of personal services -- consumers." Joseph A. Pichler, *Capitalism in America: Moral Issues and Public Policy*, in Richard T. DeGeorge and Joseph A. Pichler, editors, *Ethics, Free Enterprise, and Public Policy* 19-39 (New York: Oxford University Press, 1978), at 31.

²⁹ Ayn Rand, *The Virtue of Selfishness* 116 (New York: New American Library, 1964); see also Harry Binswanger, editor, *The Ayn Rand Lexicon: Objectivism From A To Z* 396 (New York: New American Library, 1986).

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inequitable, irrational principle.³⁰

There are other problems with the public interest argument. For example, which individuals should we consider, only those in some local community or those in the next country, state or country? Should we consider only those who might be directly affected or also those who might be indirectly affected? Should we consider only individuals over the age of 18 or all living individuals? Should the unborn also be considered, since they might some day be affected by any decision that is made? Should foreigners receive the same weight as native born citizens in the decision-making process? Should women receive the same consideration as men (they are not in some societies, either because of culture or religious beliefs)? Should members of the preferred religion have louder voices in the outcome than those of other religions?³¹

In a pluralist society, the only values we can hope to have in common are the protection of life, liberty (in the negative sense of the term) and property.³² Every other value is optional, since individuals have different values. We cannot determine the common good or the public interest by adding up all the values of all members of society, since they have different, conflicting values. And some individuals feel stronger about their values than others, yet we cannot assign a weight to such values to compute some weighted value. For example, 57 percent of a certain community might favor the "right" to abortion while 43 percent oppose this "right." Does that mean that the public policy should be to make abortion legal? What if the 43 percent who oppose legalized abortion are strongly opposed, whereas the 57 percent who approve are only mildly supportive? What if the percentage changes next week, after a visit to the town by the Pope, so that only 49 percent favor legalized abortion? Public policy in such a case should have nothing to do with majority rule or sentiment. Either the

³⁰ Ayn Rand, *Capitalism: The Unknown Ideal* 170 (New York: New American Library, 1966). Also in Harry Binswanger, editor, *The Ayn Rand Lexicon: Objectivism from A to Z* 396 (New York: New American Library, 1986).

³¹ In Israel, people who drive on Saturday (the Jewish Sabbath) might have their cars stoned, since the orthodox segment of the Jewish religion thinks that such activity violates Jewish law. Gentiles (and non-orthodox Jews) stand to have their property rights impinged with impunity for violating other people's moral code.

³² Even property rights are not safe from the mob. Orthodox Jews in Israel can safely throw stones at moving vehicles on the Sabbath without fear of reprisal. Black community "leaders" in Harlem can paint over billboards that contain cigarette or alcoholic beverage advertising and the police not only do not arrest them but actually stand by to keep order. Asset forfeiture laws in the United States allow the confiscation of assets if someone is merely thought to be engaged in the drug trade. These assets are often not recoverable even if the owner of the asset is found innocent. Indeed, the owners of 80 percent of the assets seized by federal drug officials are never even charged with a crime.

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potential mother has rights or the unborn child has rights. Any decision regarding this issue must be based on rights, not public interest, since public interest is just a question of majority rule, at best, and at worst, the rule of a concentrated, highly vocal minority.³³

John Hospers makes the following point regarding the public interest argument:

People speak of "the public interest." But what is the public interest? Strictly speaking, there is no such thing. There is only the interest of each individual human being. There are interests that many or all people share, but these are still the interests of individuals. When politicians say that something is "to the public interest," they usually mean it serves the interests of some people but goes against the interests of others -- and usually the interests of the people with the most political pull win out. Is it to the public interest for some to be forced to die so that others may be saved? Is it to the public interest for a hundred crazed men to lynch one man in the public square? Is it to the public interest for all the citizens of the nation to be taxed to pay for a federal dam in one section of it? In Sweden it takes a couple eight years on the average before they can obtain an apartment of their own (owned by the government, rented by them); but they are not supposed to complain, because "it's in the public interest." Just as there are only individual rights, so there are only individual interests.³⁴

In the area of freedom of association, the public policy argument is used to violate the rights of property owners who do not want to serve or hire members of certain groups. While it would be nice if everyone could go into a restaurant and be served, there is no right to do so. The public policy argument, in effect, says that it is in the "public" interest that the property rights of some be sacrificed for the convenience of others. This position views rights as positive, since there is a winner and a loser. However, any argument based on positive rights theory is *prima facie* invalid.

The public policy argument is also used to support the view that women and minorities should be allowed to be admitted to private clubs even if the owners of the clubs want to exclude them. The property and association rights of

³³ Political scientists would call these minorities who gain control of an issue a "political elite." Actually, majorities do not rule even in a democracy. Rule is always by some political elite. In a democracy, that political elite consists of elected representatives and the special interest groups who influence them. In a dictatorship of the proletariat, it is the nomenklatura.

³⁴ John Hospers, *Libertarianism: A Political Philosophy for Tomorrow* 84 (1971).

some must be sacrificed because some individuals think that the public would benefit by forcing unwanted members down their throats. But "the public" cannot benefit from any action, since "the public" is just a collective term for a group of individuals. As Bastiat pointed out in the 1840s, if a law has the effect of helping someone at the expense of someone else, it is legal plunder, an illegitimate object of government.

Aside from the inherent weaknesses in the public interest argument is the fact that the argument is sometimes used to protect special interests at the expense of the general public. It has been argued that the passage of antimerger legislation is in the public interest, when in fact such legislation often serves to protect entrenched, inefficient management at the expense of shareholders, consumers and the general public.³⁵ The farm lobby argues that it is in the public interest to have a strong farm sector, so Congress passes legislation to subsidize the farm industry and protect it from foreign competition at the expense of the general public.³⁶ Industry leaders whose companies are losing market share from foreign or domestic competition petition Congress to regulate their industry to prevent cutthroat competition, in the public interest.³⁷ But the effect of such legislation is to keep prices abnormally high, compared to what they would be in a free market. Most antitrust actions are initiated not by government, but by

³⁵ For a discussion of this point, see Robert W. McGee, *Mergers and Acquisitions: An Economic and Legal Analysis*, 22 Creighton Law Review 665-93 (1988/89).

³⁶ For more on this point, see James Bovard, *The Farm Fiasco* (San Francisco: ICS Press, 1989). It should be pointed out that the United States government is not the only government that caves in to such pressure from the farm lobby. France was able to convince the World Trade Organization to cut out a special deal for French farmers. England faced a similar problem in the nineteenth century from its agricultural special interests. For more on this point, see Norman Longmate, *The Breadstealers: The Fight against the Corn Laws, 1838-1846* (New York: St. Martin's Press and London: Temple Smith, 1984).

³⁷ The Interstate Commerce Commission and numerous other government agencies were created to protect industry leaders from loss of market share to smaller, more competitive companies. For documentation of this point, see Gabriel Kolko, *Railroads and Regulation 1877-1916* (New York: W.W. Norton & Co., 1965); Gabriel Kolko, *The Triumph of Conservatism: A Reinterpretation of American History, 1900-1916* (Chicago: Quadrangle Books, 1963). A more recent example of using the antitrust laws to destroy the competition is the Microsoft case. For more on this case, see Stan J. Liebowitz and Stephen E. Margolis, *Winners, Losers & Microsoft: Competition and Antitrust in High Technology* (Oakland, CA: The Independent Institute, 1999); Jeffrey A. Eisenach and Thomas M. Lenard, editors, *Competition, Innovation and the Microsoft Monopoly: Antitrust in the Digital Marketplace* (Boston: Kluwer Academic Publishers, 1999); Richard B. McKenzie and William F. Shughart, II. *Is Microsoft a Monopolist?* 3 The Independent Review 165-197 (Fall 1998).

competitors who see their market share eroded by more efficient competitors.³⁸ Members of various professions and occupations such as doctors, lawyers, accountants, hair dressers, electricians, opticians, pharmacists, morticians, auto mechanics, speech therapists, tattoo artists, and so forth petition the legislature to pass licensure laws to protect the general public from quacks, when research shows that the loosening or repeal of such laws results in higher quality service at lower cost.³⁹ Moralists try to have victimless crimes like prostitution, gambling, ticket scalping and dwarf tossing outlawed even though they have no right to interfere with acts between or among consenting adults.

The problem with the public interest argument is that it is conveniently undefinable.⁴⁰ No one can be against the public interest, so anyone or any group that takes the position that the policy they advocate is in the public interest is on the high ground as far as defending their position is concerned. The problem is that the public interest argument has been used to lobby government to support

³⁸ Dominick T. Armentano, *Antitrust and Monopoly: Anatomy of a Policy Failure*, second edition (New York and London: Holmes & Meier, 1990); D.T. Armentano, *Antitrust Policy: The Case for Repeal* (Washington, DC: The Cato Institute, 1986). For an in-depth discussion of how the antitrust laws have been used by rent-seekers to feather their own nests at the expense of the general public, see William F. Shughart II, *Antitrust Policy and Interest-Group Politics* (New York and Westport, CT: Quorum Books, 1990).

³⁹ Milton Friedman, *Capitalism & Freedom* 137-60 (Chicago: University of Chicago Press, 1962); Simon Rottenberg, editor, *Occupational Licensure and Regulation* (Washington, DC: American Enterprise Institute, 1980); S. David Young, *The Rule of Experts: Occupational Licensing in America* (Washington, DC: The Cato Institute, 1987); Robert Albon and Greg Lindsay, editors, *Occupational Regulation and the Public Interest* (Australia: The Centre for Independent Studies, 1984); S. Gross, *Of Foxes and Henhouses: Licensing and the Health Professions* (1984).

⁴⁰ Donna J. Wood makes the following point in *Strategic Uses of Public Policy*, in S. Prakash Sethi and Cecilia M. Falbe, editors, *Business and Society: Dimensions of Conflict and Cooperation* (Lexington, MA: D.C. Heath and Company, 1987), at 83-85:

... in political terms, the public interest is a very useful concept for defending and justifying almost any action or decision; it expresses a deeply held if poorly defined value in American culture. It can be an almost irrefutable justification; no one can be against the public interest.

However, no one has been able to precisely define *public interest*... therefore, it must be used with great caution by analysts and scholars...the public interest is little more than a bad faith concept, both analytically and in practice...

The public interest...is not useful as an analytical or theoretical concept. But as a condensation symbol...it has been extremely useful to various interest groups and policy-making bodies precisely because of its broad appeal and its intransigence to specific definition.

Special-interest groups...allegedly representing the public interest, are often accused...of acting against the public interest.

numerous programs that are really in the interest of some small group, usually or always to the detriment of the majority. It cannot be in the public interest to have government provide funding to cure rare children's diseases, for example, since such a small segment of the total population is affected. Yet it is difficult to argue against providing funding for diseases that kill small children, even if the disease in question only kills five or ten of them in any particular year or decade.

If the public interest argument can legitimately be used at all, the only place where it might be used without distorting reality is when it is used to defend negative rights such as the right not to be killed or robbed, since 100 percent of the population would find such prohibitions to be in their interest. Once one falls below unanimity, the public interest argument quickly loses credibility because, at that point, the interests of some individuals conflict with the interests of other individuals, which results in a regress into utilitarianism.

The Balancing of Interests Argument

Another, related argument is the balancing of interests argument, or the balancing of rights argument. This argument takes the position that the interests or rights of some individuals or groups must be balanced against the interests or rights of other individuals or groups. But this argument is just another variation of the basic utilitarian argument. It is grounded in positive rights theory, which we have already seen is fatally flawed.⁴¹

The balancing of rights argument, when applied to trade theory, argues that the rights of foreign producers to sell their products on the domestic market must be balanced against the rights of domestic producers to be protected from dumping or unfair competition. There are several weaknesses with this line of reasoning. For one thing, the rights of consumers to buy the products of their choice from the sellers of their choice is often ignored. But more importantly, this argument assumes that domestic producers have some inherent right to sell their products even though consumers do not want to do business with them. Domestic producers do not have their rights violated when a foreign producer "dumps" products on the domestic market.⁴² Although they may be harmed by

⁴¹ The balancing of rights theory is often discussed in connection with the First Amendment. For a discussion on this point, see Ronald A. Cass, *The Perils of Positive Thinking: Constitutional Interpretation and Negative First Amendment Theory*, 34 U.C.L.A. Law Review 1405 (1987).

⁴² Many foreign producers that are accused of dumping their products on the market are not really dumping, in the sense that they are not selling for less than the cost of production. And even if they are, so what? Consumers benefit by the practice. Foreign producers can also be found guilty of dumping if they sell their products for less than "fair value." But aside from the fact that "fair value" is a completely arbitrary concept, this practice also does not harm consumers. And it does not violate anyone's rights.

foreign dumping, their rights are not violated because they have no property rights in transactions that consumers do not want to enter into with them.

If a supermarket opens up across the street from a mom and pop grocery store, there is no doubt that the mom and pop store will be harmed by the competition. It may even be driven out of business. But it cannot be said that their rights are violated by having the supermarket set up shop across the street. The supermarket has every right to open a store across the street (not to mention the fact that consumers will benefit by lower prices and a larger selection) and mom and pop have no right to prevent consumers from taking their business across the street if they want to.

Government has no right to prevent the supermarket from opening because there are no rights to "balance." Although the interests of mom and pop are diametrically opposed to the interests of the supermarket, government has no business balancing these interests in one direction or the other. The real issue is rights, not interests. When people speak about balancing "interests," what they really mean is balancing "rights." But in a negative rights regime,⁴³ rights can never conflict.⁴⁴ You have the right to property and so do I. You have the right not to be killed or confined and so do I. It is only in a positive rights regime that rights can conflict because the right of one individual or group must be sacrificed so that another individual or group can gain something. Thus, the balancing of interests argument suffers from several structural weaknesses.

Perhaps one of the best points that has been made against the balancing of interests doctrine was made by Justice Douglas in his dissenting opinion in *Scales v. United States*:⁴⁵

In recent years we have been departing, I think, from the theory of government expressed in the First Amendment. We have too often been "balancing" the right of speech and association against other values in

⁴³ Negative and positive rights are discussed below.

⁴⁴ Some political theorists would disagree with the view that rights cannot conflict. For example, Bowie and Simon state:

...rights may clash. My right to ten dollars from Jones and your right to ten dollars from Jones cannot both be honored if Jones has only ten dollars. Moreover, if Jones has only ten dollars, perhaps none of us is justified in claiming it in the first place, all things considered. Norman E. Bowie, and Robert L. Simon. *The Individual and the Political Order*, 2nd edition 50 (Englewood Cliffs, NJ: Prentice Hall, 1986).

The problem with this argument is that the authors confuse rights with remedies. While both parties have a right to the ten dollars, only one of them, at most, will be able to actually get it because there is not enough to go around. But this fact does not mean that their rights conflict. There is simply no equitable remedy.

⁴⁵ *Scales v. United States*, 367 U.S. 203, 270-272 (1961).

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society to see if we, the judges, feel that a particular need is more important than those guaranteed by the Bill of Rights⁴⁶ ... This approach, which treats the commands of the First Amendment as "no more than admonitions of moderation" (see Hand, *The Spirit of Liberty* (1960 ed.), p. 278), runs counter to our prior decisions.

It also runs counter to Madison's views of the First Amendment as we are advised by his eminent biographer, Irving Brant:

When Madison wrote, 'Congress shall make no law' infringing these rights, he did not expect the Supreme Court to decide, on balance, whether Congress could or could not make a law infringing them...If they are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.⁴⁷

Once it is seen that the balancing argument is just another positive rights argument,⁴⁸ it quickly falls apart. I have the right to life and so do you. I have the right to property and so do you. If you violate my right to property, you are acting unjustly. It cannot be said that an unjust act, such as violating my property rights, can be balanced against your right to take my property, because you have no right to take my property. The public accommodation argument, that you have a right to trespass on my property, is invalid because you have no right to set foot on my property without my permission. The fact that you might have to eat somewhere else or might have your career advancement short-circuited is not an issue, since you have no right to force me to serve you or advance your career at my

⁴⁶ The specific cases Justice Douglas referred to were *Dennis v. United States*, 341 U.S. 494, 508-509; *Communications Assn. v. Douds*, 339 U.S. 382, 399-400; *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 463-466; *Uphaus v. Wyman*, 360 U.S. 72, 78-79; *Barenblatt v. United States*, 360 U.S. 109, 126-134; *Bates v. Little Rock*, 361 U.S. 516, 524; *Shelton v. Tucker*, 364 U.S. 479; *Wilkinson v. United States*, 365 U.S. 399; *Braden v. United States*, 365 U.S. 431; *Konigsberg v. State Bar*, 366 U.S. 36; *In re Anastaplo*, 366 U.S. 82. Douglas also discusses the right of association and the balancing test in *W. Douglas, The Right of Association*, 63 COLUMBIA LAW REVIEW 1361-83 (1963).

⁴⁷ *Scales v. United States*, 367 U.S. 203, 270-272 (1961).

⁴⁸ For a discussion of this point, see R. Cass, *The Perils of Positive Thinking: Constitutional Interpretation and Negative First Amendment Theory*, 34 U.C.L.A. Law Review 1405-91 (1987).

expense.⁴⁹ The argument that my right not to associate with you must be balanced with your right to associate with me is ludicrous because you have no right to associate with me unless I agree to the association.

The Rights Approach

A major problem with any utilitarian argument is that it is impossible to precisely measure the total gains and the total losses. So it is not possible to determine in many cases whether a particular policy results in the greatest good for the greatest number. But the fatal flaw in any utilitarian approach is that utilitarian approaches ignore individual rights. If the good outweighs the bad, a utilitarian would not be concerned that someone's rights have to be violated to implement the policy.

To illustrate this point, let's take an example. Let's say that John is, and always has been, a sex-craved maniac. He has just been released from prison after ten years of incarceration. During that time he has not had sex. And he is prowling the streets with the goal of making up for lost time. He comes upon a prostitute who is lying on the sidewalk in a drunken stupor. He drags her into an alley and rapes her. While he is ripping off her clothes, she protests by mumbling that he should stop. But she does not put up any resistance and actually falls asleep while he is committing the crime.

She has experienced almost no discomfort or disutility as a result of John's act. But John has experienced a great deal of pleasure. Has society benefited by the act? A utilitarian would conclude that it had. One person gained and one person lost as a result of the rape. So it appears to be a zero-sum game. But the person who gained, gained a great deal, whereas the person who lost, lost only a little. So the gains exceed the losses, even if John's utility gain and the prostitute's utility loss cannot be measured precisely, and the act can be declared to be good on that account. Legislators who base their legal philosophy on utilitarianism could easily conclude that governments should pass laws allowing people to rape drunken prostitutes because society stands to gain by the passage of such laws.

The example is outrageous, but the thought process a utilitarian uses to arrive at a conclusion cannot be faulted on utilitarian grounds. The reader may be quick to point out that the prostitute's rights were violated in a very personal way

⁴⁹ It should also be mentioned that employers might recognize this drawback to their employees' career advancement and make it a corporate policy not to support organizations that do not admit women or minorities. But that is a matter of individual choice.

by John's action. But rights violations are of no concern to a pure utilitarian theorist. All that matters to a utilitarian is whether the gains exceed the losses. The idea that someone's rights might have to be violated to achieve the goal is not worthy of consideration.

But violating someone's rights is never necessary to achieve a worthy goal. If someone's rights must be violated to achieve a goal, the goal is not a worthy one in the first place. Utilitarian approaches all begin with the premise that the end justifies the means. Rights approaches begin with the premise that it is the process that is important, not the destination. A trade policy based on utilitarianism can have protectionist elements if it is determined that the gainers from the policy exceed the losers, or if it is determined that "society" benefits as a whole. Under a rights approach to trade policy, for example, "society" is not even at issue. The issue is whether someone's rights, properly defined, are violated by the policy. If rights are violated, then the policy is a bad one. If no one's rights are violated, then the policy is not a bad one.

Which brings us to another important question: What exactly are rights, anyway? Philosophers over the centuries have viewed rights from two different and diametrically opposed perspectives. Negative rights include the rights to life, liberty and property, among others.⁵⁰ Stated in negative terms, they would be the right not to be killed, the right not to be involuntarily confined, and the right not to have your property taken from you without your consent. Negative rights are inherent. They are not rights that are granted by government. They are rights that come before government. Governments are instituted to protect these rights. It might even be said that governments that disparage these rights lose their legitimacy.⁵¹

Positive rights advocates view rights from a different perspective. Examples of positive rights include the right to medical care, the right to subsidized rent, and so forth. Positive rights are rights that are granted by government. They are not inherent. And they are rights that are gained at someone else's expense.

Under a positive rights regime, the rights of some must be sacrificed so that others may have rights.⁵² In the case of medical care, for example, those who

⁵⁰ It is not my intent to attempt to make an exhaustive list of all the negative rights. Suffice it to say that all negative rights are derived from property rights. This point is discussed below.

⁵¹ Bowie and Simon state the following viewpoint: "The state calls its own reason for being into question when it violates the fundamental rights of its citizens." Norman E. Bowie and Robert L. Simon. *The Individual and the Political Order*, 2nd edition 73 (Englewood Cliffs, NJ: Prentice Hall, 1986).

⁵² A number of writers have made this point. For example, see Henry B. Veatch, *Human Rights: Fact or Fancy?* (Baton Rouge and London: Louisiana State University Press, 1985), at 179.

claim a right to medical care gain this right at the expense of others, who must provide it. Free medical care does not mean that medical care is costless. Someone (the taxpayer) has to pay. But it is free to the recipient because the recipient incurs no out of pocket costs.

Forcing some to pay cash for the medical benefits others receive is only one way that medical care might be provided. Under a positive rights regime, one might argue that, since some people have two kidneys and since they need only one kidney to live, that some individuals must be made to give up a kidney lest some other individual die for the lack of having at least one functioning kidney.⁵³

The individuals who must relinquish a kidney may be chosen by lottery to make the theft of property "fair" or they may be chosen from among the prison population. In a Nazi-like regime, perhaps Jews could be used for body parts. Under a Stalinist regime, perhaps capitalists could be chosen as donors. Under the Turkish regime of the early twentieth century, perhaps Armenians could be chosen. In ancient Greece or Rome, perhaps they could have used captured soldiers if they had had the relevant technology.⁵⁴

Under a positive rights regime, the premise is that some individuals have a claim on the property of others. What property is to be transferred or how it is to be transferred is just a matter of need and administrative detail.

Rent control laws are another example of applying positive rights theory to transfer property from those who are entitled to it to those who are not. If the law prevents a landlord from charging \$800 a month (the market rate) for an apartment, the difference between the actual rent and the market price for the apartment is, in effect, a forcible transfer of property from the landlord to the tenant. If the maximum rent that can legally be charged is \$500 and the rent that could be charged in a free market is \$800, then the landlord is, in effect, having \$300 of his property confiscated each month and having it transferred to the tenant. The tenant's "right" to affordable housing comes at the expense of the landlord. If the tenant lives in a government subsidized housing project, the result is the same, except that it is the taxpayer rather than the landlord who has to pay for the tenant's right to affordable housing.

Losses always exceed gains under a positive rights regime if for no other

⁵³ For another discussion of kidney transfers as part of a positive rights regime, see Fred D. Miller, Jr., *The Natural Right to Private Property*, in Tibor R. Machan, editor, *The Libertarian Reader* 275-285 (Totowa, NJ: Rowman & Littlefield, 1982).

⁵⁴ One might be more "humane" in the kidney harvesting by giving people options. For example, in the case of prisoners, the State might give them the option of a reduced prison sentence in exchange for a kidney. Thus, prisoners would have the option of buying their freedom through the use of a noncash transfer (a kidney). But if such transactions were permitted, there would be no reason why other prisoners, those who could afford to buy their way out of prison with cash (like wealthy drug dealers), should not be able to do so. So the State would be faced with a dilemma and no logical solution.

reason than the fact that there are transaction costs. The landlord will not voluntarily write out a \$300 check to the tenant each month. There has to be an enforcement authority around the corner that is ready to enforce the law if the landlord does not want to comply. And an army of bureaucrats has to be retained to see that the various redistributive laws are properly administered and enforced. So it cannot be said that a positive rights regime is a zero-sum game, because the losses do not exactly offset the gains. The landlord loses \$300 a month and the tenant gains \$300 a month, but the cost of maintaining the enforcement authority must also be counted, which leads to a negative-sum result. Economists call this net loss a deadweight loss.

But whether this policy or that is a zero-sum game, a negative-sum game or a positive-sum game is really beside the point. Discussions about whether a policy is a negative-sum or positive-sum game are utilitarian because the object is to determine whether the gains exceed the losses. In a rights regime, gains and losses are irrelevant. All that matters is whether rights are violated -- in the negative sense of the term. There is no way to morally justify depriving some individuals of justly acquired property and transferring it to other individuals who are not entitled to receive it.

Are Natural Rights Nonsense on Stilts?

Right is the child of law; from real laws come real rights, but from imaginary law, from "laws of nature", come imaginary rights. Natural rights is simple nonsense, natural and imprescriptible rights rhetorical nonsense, nonsense upon stilts.⁵⁵

Are natural rights nonsense on stilts? Jeremy Bentham asserted that they were. Of course, if one wanted to refute Bentham's claim without going into further detail, one might just as easily assert that utilitarianism is nonsense on stilts.⁵⁶ But this approach at refutation might not satisfy some utilitarians, so

⁵⁵ Jeremy Bentham, in *Anarchical Fallacies*, reprinted in J. Bowring (ed.), *The Collected Works of Jeremy Bentham* (London 1843), at 2: 501, as quoted in Antony Flew, *Could There Be Universal Natural Rights?* 6 *Journal of Libertarian Studies* 277-288 (Summer/Fall 1982), at 277.

⁵⁶ Actually, Ayn Rand begins her attack on utilitarianism in a similar manner with her statement that " 'The greatest good for the greatest number' is one of the most vicious slogans ever foisted upon humanity." Ayn Rand, *Textbook of Americanism*, pamphlet 10, cited in Harry Binswanger, editor, *The Ayn Rand Lexicon: Objectivism from A to Z* (New York: New American Library, 1986), at 518. She elaborated by stating that the slogan has no concrete, specific meaning. The good is not determined by majorities and "is not achieved by the sacrifice of anyone to anyone." Utilitarianism is a bankrupt moral philosophy because it can entail the sacrifice of some individuals to others.

further analysis of this claim is called for.

For a utilitarian, people have rights because having rights results in the greatest good for the greatest number. Humanity tends to flourish more if murder is outlawed than if it isn't. There is more human flourishing when theft is punished than when it is not. End of argument.

There is a problem with this view, although the problem may not be readily apparent. If individuals have a right to life -- a right not to be killed without their consent -- a utilitarian would argue that it is because "society" deems that individuals should be "allowed" to live free from the fear of being killed against their will. The individual right not to be killed is based on the majority view. Thus, if some majority thinks that a certain individual (Robespierre) or a certain group of individuals -- Royalists, Jews, Gypsies, Poles, Kulaks, communists, capitalists, blacks, etc. -- should not live, then these individuals and groups no longer have the right not to be killed against their will.

In a negative rights regime, majorities are irrelevant. Under a negative rights regime, the individual has rights that no majority can disparage.⁵⁷ Even if the entire population, save one (the proposed victim) decided that some individual should be killed, the individual could not be killed.⁵⁸

Let's say that some society decides that it would be best to take all individuals who reach a certain age to some place where they will be humanely killed and their bodies harvested for useful chemicals (or perhaps their body parts could be harvested for use by other human beings). The utilitarian benefits would be immense in terms of reduced health care costs, since health care costs increase as people get older.⁵⁹ The harvested chemicals or body parts would also provide

⁵⁷ This point reminds me of an illustration attributed to Benjamin Franklin. Democracy is when two wolves and a sheep vote on what's for dinner. Justice is when a well-armed sheep protests the vote.

⁵⁸ There are exceptions, of course. For example, if the individual in question has unjustly killed someone else, he has given up his right to life.

⁵⁹ Killing individuals once they reach a certain age would reduce health care costs but it would also have negative effects from a utilitarian perspective. Some of the individuals who would be killed would still have some good years left in them. They would still be able to produce goods or services. Even if retired, they would be able to baby sit their grandchildren, leaving their children free to go out and work. Thus, a utilitarian would have to determine at what point it would be better to kill certain individuals rather than to permit them to continue living.

Other, secondary effects would also occur if people knew that the State would kill them at a certain age. For example, if someone knew he was going to be exterminated in five years and if he had saved enough money to live off of his savings for five years, he might decide to quit working five years before his extermination date, thus depriving others of the products and services he might produce. A smart utilitarian legislator might foresee of this possibility and pass some law limiting the amount of savings people could

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benefits to society (or rather to individuals). This example perhaps best highlights the result that can occur when utilitarianism is followed to its logical conclusion. Of course, if the victims are willing, if they voluntarily give up their right to life because of some belief that it is the right thing to do, then their rights are not violated. But if even one person objects to being killed and having his body made into useful chemicals or distributed piecemeal to others, the utilitarian regime collapses.

For an Aristotelian, the ultimate question might be: Which regime results in greater human flourishing, a utilitarian regime or a negative rights regime? This question can be answered by looking at a few historical examples. Under the Nazi regime, Gypsies, Jews and Poles were systematically exterminated because of the belief that the world would be a better place to live if these groups were eliminated. Under the communist regime in the former Soviet Union, Kulaks were systematically killed because Stalin believed that small capitalists should be killed so that greater goals could be achieved. Pol Pot killed perhaps one-fourth of Cambodia's population to achieve his version of utopia. China's Mao, the greatest killer of the twentieth century, killed untold millions, both through outright murder and by economic policies that resulted in starvation, to achieve a communist society.

Of course, none of these regimes made their decisions to kill millions of people by popular vote, although the individuals who made these decisions were quite popular, at least within a certain segment of the societies in which they lived. Hitler gained power through the democratic process. After the collapse of the Soviet Union, many people were hoping to find a leader who could restore order and stability like Stalin did in the 1930s and 1940s. Stalin was popular (and feared) while he was still alive, both in his own country and in the United States (F.D.R. was one of his biggest fans). Mao is still highly regarded in China in spite of all the atrocities he committed. All of these monsters had popular support. An argument might even be made that their actions, at the time at least, were in accordance with the utilitarian concept of the greatest good for the greatest number, as these leaders perceived the greatest good. Perhaps Stalin said it best when he stated that you can't make an omelet without breaking a few eggs. Yet it would be difficult to argue that their actions resulted in or enhanced human flourishing.

accumulate. But if such a law were passed, economic growth would necessarily slow down or even stop completely, which would not result in the greatest good for the greatest number. The State could overcome this lack of capital accumulation by forcing people to save a certain portion of their income, which is exactly what the government of Singapore does.

The problem with any utilitarian solutions is that it would involve the passing of additional laws, which have the effect of limiting individual choice. If the goal were to maximize individual choice, the solution would be to repeal laws, not to multiply them.

If one looks at regimes that are based on negative rights, one is more likely to find human flourishing. The United States, for example, was founded on negative rights principles, which were clearly stated in its Declaration of Independence (1776). Now, more than 200 years later, this once underdeveloped country has one of the highest per capita gross domestic products in the world and a population that is many times larger than at the time of its founding. The average American or Western European today lives much better than the French kings lived a few hundred years ago.⁶⁰ For generations, people have been "voting with their feet" to move to the United States, whereas in the former Soviet Union and its satellites in Eastern Europe, people were prevented, under threat of death, from voting with their feet to leave. Thus, it seems clear that a negative rights regime results in more human flourishing than does a utilitarian based regime.⁶¹

The Legal System

In order to secure individual rights, the legal system must be based on the protection of rights rather than the greatest good for the greatest number principle. Of course, in many cases, a utilitarian-based system and a rights-based system will have the same result. In the area of trade, for example, a utilitarian-based system would allow free trade because the wealth of society would be more enhanced with free trade than with protectionism. Under a negative rights regime, government would have a policy of free trade because that is the only policy that does not violate the rights to property and contract.⁶² However, in some instances,

⁶⁰ The food is better. Medical care is better. People live much longer. Anyone with a few thousand dollars can travel anywhere in the world, unless prevented from doing so by some government. Louis XIV was unable to get the lice out of his hair at Versailles. Practically no one has lice problems these days, at least in the West, and it is easy to get rid of lice. Louis XIV at times had to break a thin layer of ice off the surface of his wine glass before being able to drink because there was insufficient heat at Versailles. Practically no one in the West has such problems today.

⁶¹ Gilbert Harman makes the following argument for rights based on the concept of flourishing: "I ought to develop my own potential for flourishing. So, others ought not to prevent me from developing my potential. So, I have a right not to be prevented from developing my potential. So, by the principle of universalizability everyone has such a right." Gilbert Harman, *Human Flourishing, Ethics, and Liberty*, 12 *Philosophy and Public Affairs* 307-312 (Fall 1983), as quoted in Henry B. Veatch, *Human Rights: Fact or Fancy?* (Baton Rouge and London: Louisiana State University Press, 1985), at 165, n. 26.

⁶² It might be pointed out that, in the area of trade at least, very few governments have either a utilitarian or rights based policy. The majority of the world's governments are protectionist when it comes to trade. Neither the North American Free Trade Agreement (NAFTA) nor the World Trade Organization (WTO) agreements are about free trade. They consist of thousands of pages that do little more than protect existing markets and prolong the day when tariffs and quotas will cease to exist. There are even escape clauses

the results under a utilitarian regime would be different than the results under a rights regime. Where results would differ, the rights regime is superior.

There is no place for positive rights in a (negative) rights regime because granting positive rights to one group must necessarily result in the disparagement of someone else's negative rights. When government goes beyond these basic functions of protecting life, liberty and property, it becomes a redistributive state.⁶³ In order to give something to some individuals or groups, it must first take something from others. That is because governments have no resources of their own. Whatever resources they have they must first take from someone.

It is perhaps Frederic Bastiat, the nineteenth century French philosopher, who summed it up best when he elaborated on the kind of law that governments should not adopt.

See if the law takes from some persons what belongs to them, and gives it to other persons to whom it does not belong. See if the law benefits one citizen at the expense of another by doing what the citizen himself cannot do without committing a crime. Then abolish this law without delay, for it is not only an evil itself, but also it is a fertile source for further evils because it invites reprisals. If such a law -- which may be an isolated case -- is not abolished immediately, it will spread, multiply, and develop into a system.⁶⁴

Such laws constitute legal plunder for Bastiat because they allow some individuals to use the force of government to rob others.⁶⁵ Modern welfare states abound with examples of such redistribution. People who live in subsidized housing do so at the expense of the landlord. Domestic producers who convince

that permit governments to prolong protectionist measures beyond the scheduled date of expiration. For detailed documentation on this point, see Bryan T. Johnson, Kim R. Holmes and Melanie Kirkpatrick, *1999 Index of Economic Freedom* (The Heritage Foundation and The Wall Street Journal, 1999); James Gwartney and Robert Lawson, *Economic Freedom of the World: 2000 Annual Report* (Vancouver: The Fraser Institute, 2000); United States Trade Representative, *Foreign Trade Barriers: 1999 National Trade Estimate* (Washington, DC: U.S. Trade Representative, 1999).

⁶³ For a detailed philosophical critique of the redistributive state, see Bertrand de Jouvenel, *The Ethics of Redistribution* (1952).

⁶⁴ Frederic Bastiat, *The Law* 21 (1968). This book was originally published in 1850 as a pamphlet, *La Loi*, reprinted in *Sophismes Économiques*, Vol. I of *Oeuvres Complètes de Frédéric Bastiat*, 4th ed. (Paris: Guillaumin et C^{ie} 1878), at 343-94.

⁶⁵ For some modern examples of such laws, see Dean Russell, *Government and Legal Plunder: Bastiat Brought Up to Date* (1985); Doug Bandow, *The Politics of Plunder: Misgovernment in Washington* (1990).

the legislature to protect them through quotas or tariffs gain at the expense of consumers, who must pay higher prices than would be the case under a free trade regime. People who receive "free" medical care are able to do so only because others are forced to pay for their care through taxation. People whose children are educated for free in government schools enjoy this benefit at the expense of those who are taxed to support education. Asserting that there is a right to education merely means that some individuals have the right to ask government to take the property of others to educate their children. When stated in this manner the unfairness of a positive rights regime becomes obvious.

Another point also needs to be made. While governments start to lose their legitimacy when they pass laws that take property from some individuals and groups and give it to others who have not earned it -- when they go from being the protectors of property rights to the redistributors of other people's property -- a distinction needs to be made between the legitimate role of government and private morality. While most people would agree that a legitimate function of government is to protect property rights,⁶⁶ there is disagreement over the legitimacy of other functions of government, and whether governments should be used to enforce morality.

It is immoral to take a person's property without that person's consent. So, in a sense, laws that make theft illegal are legislating morality. But it cannot be said that governments should attempt to legislate morality in areas other than the protection of life, liberty and property. To do so would be to violate the rights of some individuals or groups. For example, if there were laws that forced people to go to church on Sunday (or Friday or Saturday), as was the case in colonial America, the property rights of those individuals who would not otherwise go to church would be violated because they would not be free to use their bodies as the saw fit.⁶⁷ Their bodies would have to be in church instead of being able to stay in bed or go to the local race track or tavern.

A number of other laws, some of them quite popular, also disparage property rights. For about 75 years it was illegal to drink coffee in Sweden because of the belief that caffeine was bad. During the 1920s it was illegal to buy alcoholic beverages in a bar in the United States because a group of temperance advocates convinced Congress to pass a constitutional amendment making the practice illegal. Perhaps drinking coffee and alcohol are bad for people, but it

⁶⁶ Some people would disagree with even this function. For example, communists would disagree with this role for government because they believe that personal property should be illegal. Anarchists would disagree with the property protection role of governments because they think that all governments are illegitimate and anything they do is illegitimate. We will leave discussion of these points for another day.

⁶⁷ Their liberty rights would also be violated. However, liberty rights are a subset of property rights, as was discussed above.

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does not follow that prohibiting such practices should be a function of government. Where no one's rights are violated, governments should leave people alone to seek their own form of happiness, even if doing so might be considered immoral by some small or large segment of the population.

A whole range of victimless crimes falls into this category of illegal, (perhaps) immoral activity, from prostitution and cocaine use to ticket scalping and dwarf tossing.⁶⁸ The reason why these kinds of activities should not be illegal is quite simple. Making them illegal violates someone's property, contract or association rights, whereas keeping them legal violates no one's rights. Women (and men) have a right to rent their bodies for immoral purposes such as prostitution. Individuals have the right to harm themselves, or even kill themselves, which might result if they take drugs like cocaine or coffee. But no one's rights are violated by these activities. But the rights of those who take these drugs are violated if some government prevents them from ingesting these substances into their bodies. To the extent that some government punishes individuals from taking the drugs of their choice, it claims a property right in their bodies.

Thus, properly speaking, the laws of men do not primarily aim at promoting virtue, but only at securing a peaceful living together: they do

⁶⁸ I say "perhaps" because it is not always clear that certain activities are immoral. People who are licensed as sexual surrogates may legally have sex with their clients. It is considered a legitimate form of therapy and beneficial to recipients. Yet if some unlicensed person takes money for having sex with a client it is considered prostitution, and therefore immoral. The only substantive difference between the two individuals is that the state has sanctioned the therapist but not the prostitute. Thus, one may logically reach the absurd conclusion that the state can make an immoral activity moral by licensing it. A similar argument can be made for gambling. It is supposedly immoral to gamble but it is somehow acceptable if the state grants a license to sell lotto tickets.

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not forbid all that is evil, but only that which imperils society;⁶⁹

By now it should have become clear that a negative rights regime is morally superior to either a positive rights regime or a utilitarian regime. Utilitarianism suffers from several fatal flaws, as does a positive rights regime. A regime that does not violate rights is morally superior to a regime that does violate rights. Only a negative rights regime passes the rights test.

⁶⁹ A.P. d'Entrèves, *Natural Law: An Introduction to Legal Philosophy*, second edition (London: Hutchinson University Library, 1970), 84.

Radical Libertarianism: Applying Libertarian Principles to Dealing with the Unjust Government, Part I

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Late one night in Washington, D.C. a mugger wearing a ski mask jumped into the path of a well-dressed man and stuck a gun in his ribs.

"Give me your money!" he demanded.

Indignant, the affluent man replied, "You can't do this. I'm a United States Congressman!"

"In that case," replied the robber, "give me my money!"¹

1. Introduction

The present paper attempts to trace out the implications of the libertarian philosophy for the proper relationship between an inhabitant of a country, and its unjust government.

Part I of this paper includes section 2, in which the stage is set for answering this challenging question, section 3, in which the essence of the state is discussed, section 4, in which libertarian punishment theory is introduced and the beginning of section 5, in which the concept of the libertarian Nuremberg trial is explored, and in 5a. the assumption that all citizens are guilty of the crimes of the unjust state is rejected.

In Part II of this paper, we begin with section 5b. which considers the possibility that all and only minions of the unjust state are guilty for its crimes, in a continuation of our libertarian Nuremberg trial analysis, and 5c. introduces libertarian ruling class theory. Section 6 traces out the proper relations between the subjects and the unjust government, section 7 asks if it is ever legitimate to disrupt such an institution, and we conclude in section 8.

¹ The present author wishes to express a debt of gratitude to N. Joseph Potts for editing this paper. All remaining errors are the author's, alone. The present paper is an academic study of the implications of the libertarian philosophy. It makes no threats against anyone. As the title implies, there is nothing in the present paper that is inconsistent with the existence of a just government. This paper is written in memory of Ragnar Danneskjold. May he never be forgotten.

2. Libertarian Implications

What is the proper relationship between an inhabitant of a country, and its unjust government?² This is an interesting and important question for the libertarian or objectivist philosopher, one to which not much attention has been paid in the literature.

In what is to follow I do not *advocate* that anyone do anything; certainly not anything illegal under the laws of the country concerned. I confine myself merely to legal speculation; I attempt only to explore the logical implications of libertarian theory in this area. Nevertheless, as per the Star Trek motto, it is my intention that this quest shall enable us to "go boldly where no man has gone before."

Libertarianism is based upon the building blocks of self-ownership, private property rights, the non-aggression axiom, and Lockean homesteading theory.³ In this philosophy, it is improper for governments, private criminals, or anyone else, to initiate violence against innocent persons or their property. All interaction is to take place on a voluntary basis.

That is to say, the individual can do whatever he wants to do. In the libertarian society, he has complete freedom. Except; he cannot violate the equal rights of all others, by attacking their bodies (murder, rape, assault and battery), or their property (theft, fraud, counterfeiting), or even threaten such activities⁴. To put this in another way, there would be no uninvited border crossings between one person and his property and another. Invited ones, in contrast, e.g., voluntary sadomasochistic acts, would be legitimate. Another way to put this is that in addition to social or sexual acts between consenting adults being lawful, this would apply, also, to "capitalist acts between consenting adults"⁵. This does not mean that anything devised by people on a voluntary basis would be moral; merely that there would be no warrant under the libertarian legal code to initiate violence against them, for example, by incarcerating them. The only legitimate titles to property would stem from creation of them by one's own hands, trade, gifts, gambling, or any other voluntary mutually agreeable way of transferring

² As examples, think in terms of Nazi Germany, the U.S.S.R., Cuba, North Korea, etc. There are other states to which the appellation "unjust government" might apply, but for safety's sake I do not wish to discuss any I may ever live in, or even visit.

³ For more on this see Hoppe, Hans Hermann, *The Economics and Ethics of Private Property. Studies in Political Economy and Philosophy* (Boston: Kluwer Academic Publishers, 1993).

⁴ The fatwa issued against author Salman Rushdie for writing a book found insulting by certain theocrats would be illegal in a free society. Anyone who offered support for this dicta, too, would be found guilty under libertarian law.

⁵ Nozick, Robert, *Anarchy, State, and Utopia*, New York: Basic Books Inc., 1974, p. 163).

property.

This may sound unobjectionable to all men of good will, but if followed, fully, a large part of what now passes for legitimate law would have to be repealed. For example, discrimination of whatever kind or variety would be allowed, since refusing to deal with people on the basis of their sex, or race or national origin does not constitute a physical attack on them, the only thing proscribed by libertarian law. Thus, the Civil Rights Act of 1964 would have to be eliminated. Similarly, virtually all of labor law would fall by the wayside, as most of it is predicated upon forcing the employer to deal fairly with unionized workers. But suppose he does not wish to deal with them at all? That is part and parcel of his right of free association, under the libertarian legal code. There would of course be no victimless crimes concerning sex, drugs, pornography, prostitution, since by definition, if they are voluntary, they involve no uninvited border crossing. Nor would there be any economic crimes, such as disobeying rent controls, maximum hours, minimum wages, zoning, tariffs, for such laws are themselves violations of the right to buy and sell at any mutually agreeable terms.

I do not intend to fully rehearse the anarchy vs. limited government libertarian controversy, which debates whether there *could* be a legitimate state apparatus. For present purposes, I shall assume, with the minarchist libertarians, simply for the sake of argument, that this concept is not an internal self-contradiction; that is, that there could be such a thing as a government that does not violate libertarian rights. However, I shall also assume that there are at least *some* states that *are* illegitimate⁶. The purpose of the present paper is to discuss

⁶ Could it be claimed that the present paper is incompatible with Rand's notion of government? Nothing could be further from the truth. This is a serious misreading of not only my paper but also of Atlas Shrugged. It cannot be denied that for Rand, governments are not criminal gangs per se (that is, when they limit themselves to their proper role of protecting rights via armies, police and courts). However, when governments exceed their proper authority, when their scope goes beyond the protection of man's rights, then they most certainly *are* akin to criminal gangs; this is a direct implication of her political philosophy. How else can we account for the fact that Ragnar, a hero of her novel if ever there was one, utilized force against the government depicted in Atlas, which *did* (vastly) exceed its proper authority? To claim that I am in opposition to Rand on this point, e.g., that I am herein advocating anarcho-capitalism, is to confuse how Ragnar treated excessive government with how he would have dealt with a properly limited state. That is, he would never have used violence against minarchism. That he *did* use force against the "People's State of America" definitively shows she thought this was an improper government. The present paper may thus be interpreted as an attempt to unearth the logical implications of Ragnar's justified actions. Please do not interpret this footnote as evidence that I agree with Miss Rand on all issues; to the contrary, in Block, Walter. 2002. "The Libertarian Minimal State?" A critique of the views of Nozick, Levin and Rand, *Journal of Ayn Rand Studies*, Vol. 4, No. 1, pp. 141-160, I do take issue with her views on anarchism.

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how the citizen of one of the *latter* may properly act, in a manner compatible with libertarianism.

In any case, similarities between these perspectives are more important than their differences, regarding our present analysis. For both variants of libertarian thought agree that when the government exceeds its proper role, the presumption is that it is illegitimate. For the anarchist, of course, all states necessarily violate this stricture. However, even for the limited government libertarian a state may usurp power not properly belonging to it, specifically, if it organizes manages and runs anything more than courts, armies and police. In this case, both varieties of libertarian, anarchist and minarchist, would unite in declaring such an entity improper.

But this does not at all imply that *every* act undertaken by an agent of an illegitimate state is improper. Suppose a cop employed by an illicit government stops a murderer from killing an innocent victim. That is, a Nazi policeman saves this particular person from death. Now, while it is indeed true that the Nazis themselves are guilty of mass murder, and that this particular representative of that regime may well be implicated in such injustice in other contexts (to be discussed below), it cannot be denied that in the present situation, the one where our Nazi cop is about to foil a different non Nazi murderer, his actions are entirely appropriate from a libertarian point of view.

I intend to examine a plethora of government activities and programs, and to determine what the libertarian point of view on each should be. Private property and the non-aggression axiom are necessary guidelines for our analysis. Also helpful will be what has been called "taxi cab" theory⁷.

Suppose you are in the southern part of a city, and want to go to the western sector. You get in a taxi, and say, "Please take me to such and such an address, in the western part of the city." The driver replies, "I only go to the northern and eastern areas. Sorry, I can't take you to the west." What do you do? Do you choose the northern part of the city, on the ground that, if it is not exactly where you want to go, at least it is closer to the west than your other option, the east? Not a bit of it. Instead, you get out of that cab, bid the driver a curt adieu, and take another one to the west. The point is, as a libertarian, you do *not* compromise with libertarianism. If you do, you are no longer a member of this particular club.

There are many political economic controversies that, seemingly, offer us *only* a choice between two options, neither of which is compatible with libertarianism. The key, here, is to keep our eye on the ball; *not* to be deflected

⁷ I owe this insight to Michael Edelstein and Nando Pelusi. For a further treatment of this concept, see Whitehead, Roy and Walter Block, "Direct Payment of State Scholarship Funds to Church-Related Colleges Offends the Constitution and Title VI," *Brigham Young University Journal of Public Law*, Vol. 14, No. 2, 2000, pp. 191-207.

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from the one true political philosophy.

Let us consider a few of them.

Should public school children be forced to wear uniforms? The arguments in favor of such a policy are reasonable. Such a policy promotes esprit de corps amongst children. There appears to be a correlation between the wearing of such uniforms and a reduction in truancy and fighting; as well, marks on exams rise and graduation rates increase. On the other hand, self-styled civil libertarians object to forcing youngsters to adopt school uniforms. There are claims that this is a violation of free speech. So which is it? Do libertarians favor this policy, or not?

The answer, of course, is that we reject both horns of this dilemma: in the free society, there would be no such thing as a public school, there would be only private ones. And the student uniform policies of private institutions would be no more a public policy issue than are the table-cloth colors of restaurants at present⁸. Admittedly, this sounds like a "cop out." We are, after all, refusing to enter into the lists on this important debate of the day. But to do so would be to go "north," or "east," when "west" is the only proper direction for us to travel in. Libertarians must not be seduced from their philosophy by the siren song of relevance. Both public school uniforms, and public school non-uniforms policy are contrary to freedom. *Both* must be rejected.

A similar analysis applies to whether K-12 public schools should embrace phonetics or whole language teaching methods, the "new" math or the old. With no public schools, the question does not arise, and private educational enterprises can and should make these decisions for themselves, and then sink or swim on the basis of how their customers evaluate these choices. Ditto for sex education, condom distribution, and the burning question of whether 7 year olds should be exposed to lesbian feminist texts such as *Heather Has Two Mommies*.

This perspective also sheds light on the issue of school vouchers vs. the status quo manner of financing public schooling: taxes and neighborhood schools.

We want to go west (full private schooling). There is no sense debating whether vouchers or the present system is north or east, closer to the full and complete separation of education and state. Milton Friedman, an advocate of vouchers⁹, notes that at present the government both finances and manages public schools. His plan would eliminate the latter while retaining the former¹⁰. But the Nazis

⁸ In countries with government provision of restaurants, this might indeed be an equally vexing problem in need of solution. Libertarians would absent themselves from this debate, too, and counsel immediate privatization of all restaurants.

⁹ He also calls himself a libertarian, a claim that cannot be sustained based on the analysis of this paper.

¹⁰ <http://www.cato.org/pubs/pas/pa-269.html>;
<http://www.salon.com/news/feature/2000/03/27/vouchers/>;
<http://pw1.netcom.com/~garretc/politics/friedman.html>;

both financed and managed their concentration camps. Would it be libertarian to advocate their continued financing by the Nazi government, while giving over actual operation to private hands? Hardly.

Should there be academic tenure in public universities? Again, each side has something to be said for it. On the one hand, tenure allows academics free rein to express their beliefs. Out of this process, it is alleged, will come greater insights than if they have to look over their shoulders, in fear of their jobs, were they to express an unpopular opinion. On the other hand, some professors use tenure as an early retirement guarantee. Secure in their jobs, they become so much intellectual dead weight, making no further intellectual contributions, and slackening off on everything else (e.g., teaching) as well.

The libertarian answer, here, is easy to see. Privatize all universities, and allow them to determine these essentially labor management decisions for themselves. Perhaps the market survival test will point in the direction of one or the other of these options; perhaps both will survive. In any case, the question does not even arise in the absence of public institutions of higher learning. And, as for the private colleges, they should be free to choose either of these options¹¹.

This steely determination *not* to see both sides of such debates will be of help in revolving numerous other public policy issues. Should this highway be widened or straightened? Should a bridge or tunnel be built here or there? The answer is to privatize the industry of road building and management, and allow private owners to make all such decisions, in conjunction with the owners of private property.¹² Should the government install air-conditioned subway trains,

<http://www.ncpa.org/pi/edu/july98c.html>

¹¹ For more on this, see McGee, Robert W. and Walter Block, "Academic Tenure: A Law and Economics Analysis," *Harvard Journal of Law and Public Policy*, Vol. 14, No. 2, Spring 1991, pp. 545-563.

¹² For the case in favor of private roads, see Beito, David T., "From Privies to Boulevards: The Private Supply of Infrastructure in the United States during the Nineteenth Century," in Jerry Jenkins and David E. Sisk, eds., *Development by Consent: The Voluntary Supply of Public Goods and Services* (San Francisco, 1993): 23-48; Beito, David T. and Linda Royster Beito, "Rival Road Builders: Private Toll Roads in Nevada, 1852-1880," *Nevada Historical Society Quarterly* 41 (Summer 1998), 71-91; Beito, David T. "Voluntary Association and the Life of the City," *Humane Studies Review*, Fall 1988; Beito, David T. "Owning the Commanding Heights," *Essays in Public Works History*, vol. 16, 1989; Block, Walter, "Free Market Transportation: Denationalizing the Roads," *Journal of Libertarian Studies: An Interdisciplinary Review*, Vol. III, No. 2, Summer 1979, pp. 209-238; Block, Walter, "Congestion and Road Pricing," *The Journal of Libertarian Studies: An Interdisciplinary Review*, Vol. IV, No. 3, Fall 1980, pp. 299-330; Block, Walter, "Public Goods and Externalities: The Case of Roads," *The Journal of Libertarian Studies: An Interdisciplinary Review*, Vol. VII, No. 1, Spring 1983, pp. 1-34; Block, Walter, "Theories of Highway Safety," *Transportation Research Record*, #912, 1983, pp. 7-10;

Block, Walter "Road Socialism," *International Journal of Value-Based Management*, 1996, Vol. 9, pp. 195-207; Block, Walter and Block, Matthew, "Roads, Bridges, Sunlight and Private Property Rights," *Journal des Economistes et des Etudes Humaines*, Vol. VII, No. 2/3, June-September 1996, pp. 351-362; Block, Walter, "Roads, Bridges, Sunlight and Private Property: Reply to Gordon Tullock," *Journal des Economistes et des Etudes Humaines*, Vol. 8, No. 2/3, June-September 1998, pp. 315-326; Foldvary, Fred, *Public Goods and Private Communities: The Market Provision of Social Services* (Edward Elgar, 1994); Cadin, Michelle, and Block, Walter, (1997), "Privatize the Public Highway System," *The Freeman*, February, Vol. 47, No. 2., pp. 96-97; Cobin, John, M. (1999), Market Provisions of Highways: Lessons from Costanera Norte. Planning and Markets, Volume 2, Number 1; De Palma, Andre and Robin Lindsey, "Private toll roads: Competition under various ownership regimes," *The Annals of Regional Science*, 2000, Vol. 34, pp. 13-35; De Palma, Andre and Robin Lindsey, "A Model of Curb Rights In Private Urban Transit Markets," *Canadian Transportation Research Forum*, Proceedings of the 36th Annual Conference, 2001, pp. 581-596; Klein, Dan, "The Voluntary Provision of Public Goods? The Turnpike Companies of Early America," *Economic Inquiry*, October 1990, pp. 788-812; Klein, Dan, Majewski, J., and Baer, C., "Economy, Community and the Law: The Turnpike Movement in New York, 1797-1845," *The Journal of Economic History*, March 1993, pp. 106-122; Klein, Dan, Majewski, J., and Baer, C., "From Trunk to Branch: Toll Roads in New York, 1800-1860," *Essays in Economic and Business History*, 1993, pp. 191-209; Klein, Dan and Fielding, G.J., "Private Toll Roads: Learning from the Nineteenth Century," *Transportation Quarterly*, July 1992, pp. 321-341; Klein, Dan and Fielding, G.J., "How to Franchise Highways," *Journal of Transport Economics and Policy*, May 1993, pp. 113-130; Klein, Dan and Fielding, G.J., "High Occupancy/Toll Lanes: Phasing in Congestion Pricing a Lane at a Time," *Policy Study*, No. 170, Reason Foundation, November 1993; Lemennicier, Bertrand, "La Privatisation des rues," *Journal des Economistes et des Etudes Humaines*, Vol. VII, No. 2/3, June-September 1996, pp 363-376; Semmens, John, "Road to Ruin," *The Freeman* (December, 1981); Semmens, John, "The Privatization of Highway Facilities," *Transportation Research Forum*, (November, 1983); Semmens, John, "Highways: Public Problems and Private Solutions," *The Freeman* (March, 1985); Semmens, John, "Intra-urban Road Privatization," *Transportation Research Record* 1107 (1987); Semmens, John, "Using Competition to Break the U.S. Road Monopoly," Heritage Foundation (December 14, 1987); Semmens, John, "Privatization: Saving While Serving the Public," Goldwater Institute (April 25, 1988); Semmens, John, "Taking Over the Roads," *Liberty* (November 1988); Semmens, John, "Why We Need Highway Privatization," Laissez Faire Institute (March 1991); Semmens, John, "Private Highways? They're Cheaper, Better, Fairer," *Phoenix Gazette* (April 3, 1991); Semmens, John, "The Rationale for Toll Roads: You Get What You Pay For" *Phoenix Gazette* (December 16, 1992); Semmens, John, "Highway Privatization: What Are the Benefits for Arizona?," Goldwater Institute (December 1992); Semmens, John, "From Highways to Buy-Ways," *Spectrum* (Fall 1993); Semmens, John, "How to Solve Mandatory Auto Insurance," Goldwater Institute (July 1995); Semmens, John, "Highway Investment Analysis," Arizona Department of Transportation (December 1994); Semmens, John, "Privatize Driver's License, Registration System," *Tribune* (December 25, 1994); Semmens, John, "Privatizing Vehicle Registrations, Driver's Licenses and Auto Insurance," *Transportation Quarterly* (Fall 1995); Semmens, John,

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a catamaran or regular ferry, and/or hinged busses? Transportation should be completely a private matter, with government limited to (at most) upholding the law against criminals, whether foreign or domestic.

Should this given patch of land be used for a golf course, a housing development, a recreational area or a national park? All acreage should be privately owned, and the landlords should make all such decisions.¹³

Milton Friedman is perhaps the most thorough going and determined violator of taxi cab theory of all quasi free enterprise commentators. He is responsible for a large number of policies which are neither defense of governmental status quo, nor, yet, compatible with full free enterprise. For example, he advocates, in addition to school vouchers, a 3% monetary rule instead of the entire elimination of the Federal Reserve System¹⁴. He favors flexible exchange rates between the various fiat national currencies instead of free market money, e.g., gold¹⁵. He champions the negative income tax, eschewing the complete elimination of the welfare system; he has been associated with the withholding tax, an attempt to make an illegitimate tax system more efficient; he favored the volunteer military during the Viet Nam War, as a means of more effectively pursuing this unjustified act of aggression¹⁶.

The radical libertarian perspective enables us to see another panoply of issues in a different light. I refer here to the question of activist courts, legislatures, presidents, states rights, decentralization, subsidiarity, etc.

"Selling the Roads: Privatizing Transportation Systems," *Liberty* (1996); Semmens, John, "Goodbye, DMV," *Liberty* (January 1996).

¹³ The only exception would be for the limited government libertarian, and for land needed to accommodate courts, armies and police.

¹⁴ Friedman, Milton, *Studies in the Quantity Theory of Money*, Chicago: University of Chicago Press, 1956; Friedman, Milton, *A Program for Monetary Stability*, New York, Fordham University Press, 1960; Friedman, Milton, *The Optimum Quantity of Money, and Other Essays*, Chicago, Aldine Pub. Co., 1969; Friedman, Milton and Anna J. Schwartz., *Monetary Trends in the United States and the United Kingdom, Their Relation to Income, Prices, and Interest Rates, 1867-1975*, Chicago: University of Chicago Press, 1982; Friedman, Milton, *Money and Economic Development*, New York, Praeger, 1973; Friedman, Milton, *Money Mischief: Episodes in Monetary History*, New York: Harcourt Brace Jovanovich, 1992.

¹⁵ For a critique, see Block, Walter, "The Gold Standard: A Critique of Friedman, Mundell, Hayek, Greenspan," *Managerial Finance*, Vol. 25, No. 5, 1999, pp. 15-33;

¹⁶ Friedman, Milton, and Friedman, Rose D., *Two Lucky People*, Chicago: University of Chicago Press, 1998; Friedman, Milton, *There's No Such Thing as a Free Lunch*, LaSalle, Ill.: Open Court, 1974; Friedman, Milton, *Tax Limitation, Inflation and the Role of Government*, Dallas, Tex.: The Fisher Institute, 1978; Friedman, Milton, Friedman, Rose, *Free to choose: a personal statement*, New York: Harcourt Brace Jovanovich, 1980; Friedman, Milton, *Capitalism and Freedom*, with the assistance of Rose D. Friedman; Chicago: University of Chicago Press, 1982; Friedman, Milton & Rose Friedman. *Tyranny of the Status Quo*, San Diego: Harcourt Brace Jovanovich, 1984

Remember, we are talking about criminal *gangs*. Surely, the only relevant issue for libertarians is to reduce their depredations by the greatest degree possible, and to undermine their much-vaunted authority. It matters not one whit, then, which *level* of this criminal conspiracy undertakes which act; the only desiderata is to *reduce* statism to the greatest degree possible. Or, rather, it only matters if there is a systematic causal relation, say, between greater decentralization and more freedom. But in any given case, if greater centralization is coupled with more freedom, then it is incumbent upon us to *favor* the policy.

For example, how do we stand on a president withholding funds from a city that practices rent control? This would undoubtedly tend to centralize power.

However, rent control is undeniably a blatant evil. Therefore, we must favor this presidential initiative. We are *not* in the business of accepting a lesser evil, now (e.g., rent control) so as to obviate a later and greater abomination (whatever it is that greater presidential power and centralization will lead to). Rather, we are in the business of opposing all present wrongdoings, period. In any case, without interpersonal comparisons of utility¹⁷, there is simply no way to make such trade offs in any case¹⁸.

¹⁷ For the importance of subjectivism in economics, see Barnett II, William, "Subjective Cost Revisited," *Review of Austrian Economics*, Vol. 3, 1989b, pp. 137-138; Buchanan, James M. and G.F. Thirlby, *L.S.E. Essays on Cost*, New York: New York University Press, 1981; Buchanan, James M., *Cost and Choice: An Inquiry into Economic Theory*, Chicago: Markham, 1969; Mises, Ludwig von, *Human Action*, Chicago: Regnery, 1949, 1963, 1966; Rothbard, Murray N., *Man, Economy and State*, Auburn AL: Ludwig von Mises Institute, 1993; Rothbard, Murray N., "Toward a Reconstruction of Utility and Welfare Economics," in *The Logic of Action: Method, Money and the Austrian School*, Vol. I, Cheltenham, UK: Edward Elgar, 1997.

¹⁸ For an alternative view on this matter, penned by a leading libertarian theorist, see Hoppe, Hans-Hermann, "Introduction to the Ethics of Liberty by Murray Rothbard," in Rothbard, Murray N., *The Ethics of Liberty*, New York: New York University Press, 1998, pp. xli-xlii, who states: "Libertarians, Rothbard stressed ... must be opposed, as are traditional conservatives ... on principled grounds, to any and all centralization of state power, even and especially if such centralization involves a correct judgment ... It would be anti-libertarian, for instance to appeal to the United Nations to order the breakup of a taxi-monopoly in Houston, or to the U.S. government to order Utah to abolish its state-certification requirement for teachers, because in doing so one would have illegitimately granted these state agencies jurisdiction over property that they plainly do not own..."

In contrast, the thesis of the present paper is that it would be entirely justified to appeal to the very devil himself, in order to get rid of rent control, or to break up Houston's taxi-monopoly, or to rid Utah of its state-certification requirement. The argument is that there are really two gangs at war with one another: the local and the more centralized. Neither has any moral inner track over the other (albeit the local is to be presumptively preferred on practical grounds, but this presumption can be overcome when it is stipulated, as it is in this case between Hoppe and myself, that the central, not the local government, is in the right on any particular case). The motto of libertarianism, at

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On the other hand, we would also favor a municipality withholding funds from the central government, if the goal was to stop the latter from pursuing an unjust foreign war. This of course promotes decentralization vis-a-vis centralization, but this is irrelevant to our main purpose.

What of activist vs. strict constructionist courts? Again, this is not our battle. We are sublimely indifferent to such considerations. For us the only thing of relevance is what the activist and strict constructionist courts *do*. If it is in the direction of libertarian principle, well and good. If not, not.¹⁹

2. The State

There are two possible views of the state with which libertarians have associated themselves. One I shall call the moderate libertarian perspective, the other the radical. In the former case, the government means well. It may be inefficient (it *is* inefficient), and perhaps bumbling, in that it does not benefit from the market test of survival²⁰, but, at least in some meaningful sense, it is *us*. That is, it is composed of friends, neighbors, people with whom we went to school, fellow members of the PTA, the Kiwanis Club, etc. It may be prone to err, particularly when it oversteps its proper bounds, but these are sins almost of benevolence, certainly not of viciousness. This moderate view includes both libertarian anarchists²¹ and minarchists.

least the way I see it, is "Justice though the heavens fall!" If the U.N. could have intervened on the justified (e.g., southern side) of the War of Northern Aggression, or in behalf of the Jews in the Nazi concentration camps, or ... my claim is that this would have been entirely compatible with libertarianism. True, the U.N. would have thereby increased its powers, but that is the problem for another day. We do what is right, this minute, and damn the consequences. The alternative is to refuse to do what is justified, at present, because in the future something worse might occur. But suppose that the Martians threatened to blow up the entire earth unless we killed innocent person Smith. The proper libertarian response, I contend, would be to say, "Bomb us and be damned; not a penny, nor a single innocent life, in tribute to evil."

As for "illegitimately grant(ing) these state agencies jurisdiction over property that they plainly do not own," the point is that *neither* level of government has any libertarian legitimacy. This being the case, it is difficult to understand why, purely as a matter of principle, the decision to favor one side or the other can be made on the basis of anything *but* being "in the right on any particular case."

¹⁹ See on this Barnett, Randy E., *The Structure of Liberty: Justice and the Rule of Law*, Oxford: Clarendon Press, 1998; Barnett, Randy E., 1978, "Toward a Theory of Legal Naturalism," *The Journal of Libertarian Studies*, Vol. 2, No. 2, Summer, pp. 97-108; Barnett, Randy, "Pursuing Justice in a Free Society Part One: Power vs. Liberty," *Criminal Justice Ethics*, 4: 50-72, 1985.

²⁰ Hazlitt, Henry, *Economics in One Lesson*, Arlington House Publishers, New York, 1979.

²¹ The only libertarian anarchist who falls into this category is David Friedman. See his

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In the radical world-view, the government is nothing like a doddering old uncle who is well intended but somewhat accident-prone. In sharp contrast, the state is a predatory gang. In earlier days, it attacked peaceful villages, engaged in theft, murder and rapine, and then stole back to its highland hangout. With increasing sophistication, it gave up its hit and run tactics. The next time it attacked the peaceful settlement, it stayed there, taking on the role of the mayor and the town council. The iron fist was still there, but it now became wrapped in the velvet glove of democracy²². And along the way this band of thieves bought out the academic and religious classes, paying them to weave apologetics about its wise and benevolent rule.

This radical view also includes both libertarian anarchists and minarchists, as Chart 1 makes clear. That is, there are radical anarchists (A), moderate anarchists (B), radical minarchists (C), and moderate minarchists (D). The first group (A) would eliminate the government entirely, and interprets it as a predatory gang of criminals. The second group (B) also wishes a total end to the state, but does not see it as a group of crime lords; rather, as bumbling. The third group (C) wants government to be limited to armies, police and courts, and perceives government as a veritable "Murder Inc." when it oversteps these bounds. The fourth group (D) calls for state limitation to the same three functions, but does not at all interpret it as a criminal gang when it exceeds these roles.

Chart 1

	Libertarians	
	Radical	Moderate
Anarchists	A	B
Minarchists	C	D

The usual debate, within libertarian circles, is between A and B on the one hand and C and D on the other. For purposes of the present paper, however, the disagreement is not so much AB vs CD, as it is AC vs BD.

In the BD perspective, the correct attitude toward the state is to rein it in toward its proper role (nothing in the case of B, something limited for D). In sharp contrast, the attitude of AC is pretty much hatred and seething indignation. After all, not only does the state engage in theft on an enormous scale and in

Friedman, David, *The Machinery of Freedom: Guide to a Radical Capitalism*, La Salle, IL: Open Court, 2nd ed., 1989; see also Friedman, David, "How to Think About Pollution; or, Why Ronald Coase Deserved the Nobel Prize," *Liberty*, Vol. 5 No. 3, January 1992, pp. 55-59.

²² For a libertarian critique of this particular curious institution, see Hoppe, Hans-Hermann, *Democracy - The God That Failed: The Economics and Politics of Monarchy, Democracy, and Natural Order*, Rutgers University, N.J.: Transaction Publishers, 2001

massive murder²³, but it has the effrontery to pose as a benevolent institution²⁴.

A word about the seemingly anomalous groups, B and C. One might expect B to take a radical position; after all, they are anarchists. But anarchism, for purposes of this paper applies only to the proper role for government envisioned. It has nothing to do with the perspective from which one views those who violate this limit. Thus, it is a logically consistent position to push for the end of the government, with no wish, whatsoever, for retaliation against the perpetrators. Similarly C. Here, since there is no call for a total end of the government, for its complete elimination, one might think that a desire for revenge would be entirely lacking. But this need not be so; to think that it is, is to confuse what a philosophical perspective considers the proper scope of government with how it views the standing of those guilty of exceeding this scope.

4. Libertarian punishment theory

Suppose it was not the U.S. that had liberated the victims of Nazi Germany, but rather Libertariana, an entity based on libertarian principles²⁵. How would the trials have differed, and in what way might they have been similar? The short answer is that there would have been broad congruencies between the two, but the latter would have been far more extensive. After all, libertarianism consists of a theory of just initial ownership, the proper transfer of property, and thus rectification for its improper transfer, e.g., the return of stolen property. However, this applies not only to physical property, but to human life as well. Say what you will of the Nazis, it cannot be denied that they violated human life on a massive scale, and were guilty of theft of a gargantuan dimension as well. If anyone deserved the hand of justice raised against them, it was they.

²³ Conquest, Robert (1990) *The Great Terror*, Edmonton, Alberta: Edmonton University Press; Conquest, Robert (1986), *The Harvest of Sorrow*, N.Y.: Oxford University Press; Courtois, Stephane, Nicolas Werth, Jean-Louis Panne, Andrzej Paczkowski, Karel Bartosek and Jean Louis Margolin, *The Black Book of Communism: Crimes, Terror, Repression*, trans. from French by Murphy, Jonathan and Mark Kramer, Cambridge, MA: Harvard University Press, 1999; Rummel, R. J., *Death By Government*, New Brunswick, NJ: Transaction, 1994; Rummel, R. J., *Democide: Nazi Genocide and Mass Murder*. Rutgers, New Jersey: Transaction Publishers, 1992; Rummel, R. J., *Statistics on Democide*. Center on National Security and Law, University of Virginia, 1997; Rummel, R. J., *Death By Government*, New Brunswick, NJ: Transaction, 1996.

²⁴ Let it be repeated here: we are now discussing governments such as Nazi Germany, the now happily defunct U.S.S.R., North Korea and Cuba. Nothing herein should be interpreted as applying to the U.S., Canada, Europe, Japan, Australia or any other country I might ever be resident of, or even visit.

²⁵ For the radical minarchists, this would be a libertarian government; for the radical anarchists, this would be a private group of cooperating people.

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Another similarity is that there definitely would have been a Nuremberg type trial had Libertarianism conquered the Nazis, and been placed in a position of trying out justice to them. There is no barrier in this philosophy to ex post facto law. The axiom proscribing aggression against innocent people is the absolute bedrock of civilization. All of those who violate it do so at their peril, in this view, whether they acknowledge this or not, whether they themselves enact legislation incompatible with this principle or not.

In order to probe the extent of libertarian concerns in this venue, it is necessary to first discuss the punishment theory of this philosophy. In encapsulated form, it calls for two teeth for a tooth, plus costs of capture and a premium for scaring. How does this work?

Suppose I steal a TV set from you. Surely, the first thing that should occur when I am captured is that I be forced to return to you my ill-gotten gains. So, based on the first of two "teeth," I must return this appliance to you. But this is hardly enough. Merely returning the TV to you its rightful owner is certainly no punishment to me the criminal. All I have been forced to do is not give up my own TV to you, but to return *yours* to you. Thus enters the second tooth: what I did (tried to do) to you should instead be done to me. I took your TV set; therefore, as punishment, you should be able to get mine (or some monetary equivalent). This is the second tooth.²⁶

But this is only the beginning of the attempt to turn the future back into the sort of place it would have been had the theft not occurred in the first place, the ultimate (and of course impossible) goal of libertarian justice. For so far we have ignored the costs of searching for the criminal, capturing him, trying him, etc. These, too, must be taken into account, apart from the rare exception where the guilt struck criminal turns himself in to the authorities immediately, with a full confession. But even here there is the fourth dimension of crime to be considered. For when I entered your home, in order to steal your TV, you didn't know *what* I was capable of, or intended. In short, I scared you half to death, in addition to making off with your valuable property. Where is the compensation, the "making whole" for that bit of wickedness? In contrast, when I am punished under the rule of law²⁷, there is no such risk. That is, punishment²⁸ is clear and

²⁶ It should be clear why the libertarian punishment theory calls for exactly two teeth, not 1.9 nor 2.1. The first one comes from returning stolen property, the second from doing to the thief what he tried to do to the victim.

²⁷ See Hayek, Friedrich A., *The Constitution of Liberty*, Henry Regnery Company, Chicago, 1960; see also Hamowy, Ronald, "Law in the liberal society: F.A. Hayek's Constitution of Liberty," *The Journal of Libertarian Studies*, Vol. 2, No. 4, Winter 1978, pp. 287-297.

²⁸ This is apart from that "little" matter of the authorities being either so incompetent, vicious and/or both so as to allow the inmates to conduct homosexual rape, beatings and murders against one another.

foreseeable.

In order to make good this imbalance, the libertarian code of justice requires that the perpetrator pay for the fear he imposed upon his victim, in addition to the more objective costs. To this end, all criminals shall be forced to play a game of Russian roulette, with the number of bullets and the total number of chambers to be determined by the severity threat he imposed on his victim. For example, for a relatively minor crime of TV theft, when the owner was not home and the criminal unarmed, with no record of past violence, there might be 1,000 chambers and only one bullet. But, with the victim at home, who is tied up, an armed criminal, a violent background, etc. -- as the risk increases, so does the punishment -- the number of bullets increases and the number of chambers decreases.

So far, we have not mentioned the criterion of crime prevention. That is because the libertarian is not a utilitarian theory of punishment, designed to limit *future* crime. Rather, it is totally backward looking, to the past crime itself. It asks only what is the requirement of justice for that particular rights violation. However, as can be seen, the freedom philosophy implies a far more Draconian approach to crime than most. Crime prevention thus enters the libertarian equation not directly but indirectly. We do not ratchet up the penalties until the optimal rate of crime is reached.²⁹ Rather, we allow the "punishment to fit the crime," and consider such benefits as retardation of future criminality to be much beside the point of justice. As long as justice is done, the future will likely take care of itself.

To whom is the penalty for crime owed? It is to the *victim*, not to "society" or to the state, or to the office of the attorney general, or to any other such entity. As such, the victim is free to forgive the perpetrator for the crime³⁰, or to charge a mutually agreeable monetary fee in lieu of imposing any part of it. For example, the criminal may escape having to play Russian roulette by paying off the victim.³¹

What of the crime of murder? Although this may be more complicated from the libertarian point of view, the very same model, of theft, is employed. What, then, did the murderer steal? Why, he stole a life, of course. Applying the two teeth for a tooth model, then, we arrive at the conclusion that the first tooth

²⁹ For this utilitarian approach, see any mainstream economic treatment of "optimal" crime rates.

³⁰ A pacifist might adopt this as a general policy.

³¹ If there is any fear on the part of victims against further retaliation from the criminal or his friends if the full penalty is imposed, the victim can sign a prior agreement with the private defense agency giving up this right; a limited government police force might be able to offer this service, since it would not be so busy doing everything else under the sun.

would be to transfer the life the murderer stole from the victim, back from him and into the body of the dead victim.

At this point, no doubt, the detractor will criticize that there is simply no way to transfer a life from the body of the live murderer into that of the dead victim. There are several ways to deal with this spurious objection. First, we are here staking out the requirements of justice. The mere state of reality at any given epoch is of no moment whatsoever; justice is timeless. Second, we can posit a machine that can do just that task³². Perhaps, in 10,000 or 100,000 or 1,000,000 years science will arrive at this point. Then, for the concrete bound, there will be a way of actually attaining full justice, as opposed to merely sketching out its contours, as at present. However, this machine, whether or not it ever comes into being, can already play an important role as heuristic device. For with its aid we can now see that the life of the murderer is forfeit. Plain and simple, he took a life; he owes a life. Whether or not this can be transferred to the dead body of the victim, the murderer is no longer the appropriate owner of his own life. If it cannot be transferred to the dead victim, at least it can be given over to his heirs, to do with as they wish. Perhaps they can enslave him for life. Or hang him publicly, charging admission for the spectacle. Whatever.

Of course, with this machine, the case is more direct, at least for the first tooth. However, we need the further assumption that man is like the cat in having nine lives in order for the full panoply of libertarian justice to come into its own. Then, we take one life from the murderer in order to return it to the dead victim, as before. We take a second life from him in order that what he did to another be done to him.³³ We still charge him for the costs of capture, we may conceivably worth a third life, and we certainly force him to play Russian roulette with as many bullets as there are chambers, which yields, for sure, a fourth life. Call it 3 and a half for one; no matter the exact number, it is a reasonably steep price.

This analysis also sheds light on so called mitigating circumstances such as accident, mental handicap, extreme youth of the perpetrator. We can now more clearly see that these are the merest of excuses to evade justice. The difficulty is that the focus is placed almost entirely on the killer. What of the victim? With the latter in the picture (whether through courtesy of the life transfer machine or of the libertarian concern with the return of stolen property), we can see not one but *two* people; not only the person who killed by "reason of insanity"³⁴ or drunkenness, or accident, but also the *victim*. Given that there is

³² See Nozick, 1974, for arguments based on imaginary machines.

³³ This also addresses the issue of whether mass murderers would pay a greater debt than killers of a single innocent victim: yes, they would. They owe a life for *each* of the ones they shed. Too bad cat-humans have but nine lives to give up for this purpose.

³⁴ For an antidote to this sort of thinking, see Szasz, Thomas Stephen, *The Myth of Mental Illness: Foundations of a Theory of Personal Conduct*, New York, Hoeber-Harper [1961]; Szasz, Thomas Stephen, *Law, Liberty, and Psychiatry: An Inquiry into the Social Uses of*

only one life available, but *two* not merely *one* candidates for it, which of them is the *more* deserving of it? Is it the killer, who is at least somewhat responsible, or the victim, who is *totally* innocent of any wrong doing whatsoever? To ask this is to answer it. Consider, even, the two-month old baby who somehow finds a pistol in his crib, pulls the trigger, and kills a passerby³⁵. Who should keep the life now under the control of the baby: the infant, or the victim? It is not a matter of blame³⁶. The baby, certainly, is not blameworthy; but he *did* kill someone³⁷.

5. Nuremberg trials, libertarian style

With this as a background, we are now ready to launch into a consideration of our forthcoming libertarian Nuremberg Trials. It will be remembered that we are concerned with far more than murder or outright theft. *Every* violation of the libertarian code is potential grist for our mill.

a. All are guilty

Suppose that Nazi Germany had a law against the manufacture, sale, transport and use of alcohol. This is clearly incompatible with the libertarian legal code, in that beer, wine and liquor are not invasive weapons. Their use, by adults, is certainly a non-aggressive act. Anyone who used violence against those involved in this industry, whether on the supply or demand side, is thus guilty of criminal behavior. At least as a first approximation, *every* German involved in the promulgation, adjudication, promotion and enforcement of this unjust law is thus guilty of a violation of libertarian principle, and should be treated as a thief, kidnapper, or worse.

Or consider a Nazi German minimum wage law. Surely, it is the right of people to work at whatever wages to which they can mutually agree. Perpetrating a law prohibiting this, such as one mandating wage minima, is thus a criminal act. All those responsible for enacting it, enforcing it, incarcerating violators of it, etc., would therefore have to be considered law-breakers by libertarians.

Another case. It is impermissible for the government to own, manage, run, develop, or have anything to do with roads, streets or highways. For neither

Mental Health Practices. New York, Macmillan [1963].

³⁵ I owe this example to Matthew Block.

³⁶ Intent is not entirely absent from libertarian criminal law. Its presence implies two teeth for a tooth, plus additions; its absence, e.g., accident, calls forth only one tooth, compensation. Also, intent is crucial in distinguishing between a guilty accomplice to a crime, and someone who innocently sells the criminal something necessary to commit his nefarious deed, e.g., food or clothing. I owe this latter point to Michael R. Edelstein.

³⁷ In a real case of this sort, presumably the person who would have to give up his life would be the one who put the gun in the crib, or the guardian who failed to ensure that such an occurrence did not take place.

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minarchists nor anarchist libertarians would the state be involved in this vehicular industry. One possibility, then, is that *any* motorist who uses a highway, along with all those responsible for the improper nationalization of this industry, would be considered guilty of a crime by the libertarian Nuremberg judges. But there are many other facilities typically organized by government which are equally improper under the libertarian legal code: libraries, schools, museums, Post Offices, parks, welfare, social security, socialized medicine, anti trust, rent control, etc.

The problem with arresting and incarcerating all those who have had anything to do with these laws or institutions (and there are many many more) is that virtually the entire Nazi populace would be then found guilty of criminal behavior. The only exceptions might be children, or those long ensconced in mental institutions. But surely there is something profoundly wrong with labeling as criminal virtually an entire society. This is all too similar to the leftist complaint that "we are all guilty" for the sins of modernity. If so, there are some who are much more responsible for social failings than others, so much so that it is only the former who should be considered guilty, and the latter as victims. This is, further, all too similar to the invalid idea that "we are all" the state, or that "Government Are Us." Not only have we already rejected this notion as not compatible with radical libertarianism, it is to be further (rejected) in that if we are *all* guilty, then, none of us really is.

The Law of Peoples and the Cosmopolitan Critique

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In *The Law of Peoples*, John Rawls extends the domestic version of his political conception of justice as fairness to the relations among peoples at the international level. Rawls argues that not all peoples accept liberal values,¹ but this does not require liberal peoples to leave all nonliberal peoples² outside the international community—the society of peoples endorsing the law of peoples. If a society is not aggressive and is respectful to human rights, and yet nonliberal such as a “decent hierarchical society,”³ liberal peoples can tolerate it, and delegates of liberal peoples accept to enter into an international original position with its delegates. Rawls then contend that delegates of decent hierarchical societies would agree on a set of principles of international law, such as the principle of non-intervention, respect for treaties and human rights.

The distinction Rawls made between political liberalism and comprehensive doctrines in *Political Liberalism* is crucial for the law of peoples: “... there are many reasonable comprehensive doctrines that understand the wider realm of values to be congruent with, or supportive of, or else not in conflict with, political values as these are specified by a political conception of justice for a democratic regime.”⁴ Individuals or groups of a liberal society might have different conceptions of a good life or religious, philosophical and moral doctrines but they have some political values,⁵ which unite them as members of the same society. The separation of political liberalism from liberalism as a

¹ Central to liberal values are “belief in the supreme value of the individual, his freedom and rights” and “advocacy of toleration in matters of morality and religion.” See Roger Scruton, *A Dictionary of Political Thought* (New York: Hill and Wong, 1982), p. 265.

² Rawls distinguishes five kinds of political regime, the three of which are excluded from the membership of a reasonable society of peoples. In addition to liberal and decent hierarchical societies, there are societies “burdened by unfavorable conditions. These societies are handicapped by lack of natural resources or appropriate political culture. In the fourth category are “benevolent absolutisms,” which honor some human rights but do not consult their citizens in any way. Finally, Rawls mentions outlaw societies that are aggressive and may infringe upon human rights in *The Law of Peoples* (Cambridge: Harvard University Press, 1999), pp. 4-5.

³ Such societies do not apply the principles of justice as fairness to their basic structure; yet, their systems of law satisfy a common conception of good in that their rulers take the main interests of all citizens into account while making laws.

⁴ John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), p. 169.

⁵ Political values are values such as justice, the general welfare, and equality of opportunity. See Rawls, *The Law of Peoples*, p. 144.

comprehensive doctrine allows Rawls to include nonliberal peoples in the society of peoples.⁶ Just as a citizen of a liberal society respects other citizens' comprehensive doctrines within the limits of a political conception of justice,⁷ so a liberal society must respect other societies, which have comprehensive doctrines different from liberalism, provided that the terms of the law of peoples are secured.

Rawls has been charged with inconsistency, however, as he appears to advocate tolerating some illiberal practices at the international level while denying to tolerate similar practices at the domestic level. To accord equal respect to decent hierarchical societies, whose members do not have a right to freedom of expression and conscience equally, the critics argue, is to be "excessively differential to societies with discriminatory or undemocratic institutions."⁸ In this paper, I shall argue that Rawls's extension of his idea of toleration to nonliberal peoples does not result in a serious flaw in his account. To exclude nonliberal peoples from the society of peoples just because they hold "philosophically unreasonable" ideas or have some illiberal practices is to be "politically unreasonable." Leaving nonliberal peoples outside the society of peoples is also inconsistent with the liberal idea of toleration. If nonliberal peoples are to comply with common political values specified by the law of peoples and to avoid imposing their philosophical conception of the good on other peoples, they must not only be tolerated in the narrow sense of accommodation but also be recognized as equally participating members of the society of peoples with certain rights and obligations. In what follows, I first state Rawls's idea of the law of peoples and toleration. Having examined basic tenets of the law of peoples and Rawls's view on tolerating nonliberal peoples, I shall encounter a number of arguments made against Rawls's attempt to extend his notion of toleration to nonliberal peoples. I try to show that Rawls's theory has adequate resources to dismiss the challenges of his cosmopolitan critics.

⁶ Rawls provides Kant and Mill's liberalisms as examples of comprehensive liberalism and states the difference of political liberalism as follows: "Beyond the requirements already described [requirements for children's education including knowledge of constitutional and civil rights] justice as fairness does not seek to cultivate the distinctive virtues and values of the liberalisms of autonomy and individuality, or indeed of any other comprehensive doctrine." In *Political Liberalism*, p. 200.

⁷ Questions of political justice are questions about political rights and liberties as well as questions concerning basic economic structure of society and social justice. See Rawls, *The Law of Peoples*, p. 133.

⁸ See Charles Beitz, "Rawls's Law of Peoples," *Ethics* 110 (2000), p. 687.

I

Rawls describes liberal societies as having three basic features.⁹ Firstly, a reasonably just constitutional democratic government of a liberal society is effectively under political and electoral control of people, and it serves its people's main interests. Secondly, the citizens of a liberal society are united by common sympathies based on a common language, historical consciousness, and political culture.¹⁰ Lastly, liberal peoples have a certain moral character, i.e., the citizens of a liberal society are to cooperate on fair and reasonable terms with one another.

Rawls uses the procedure of the original position and the veil of ignorance a second time as a model of representation for liberal peoples in selecting the principles of the law of peoples.¹¹ The reasonable representatives of liberal peoples are, as in the domestic case, situated symmetrically, i.e., they are free and equal and thus fairly situated. In addition, the representatives ignore any knowledge of their peoples' comprehensive doctrine of the good. Another parallel to the domestic case is the recognition of social and economic inequalities in various cooperative institutions among peoples.¹² The representatives of liberal peoples situated in this way would then agree on the following principles:

1. Peoples are free and independent, and their freedom and independence are to be respected by other peoples.
2. Peoples are to observe treaties and undertakings.
3. Peoples are equal and are parties to the agreements that bind them.
4. Peoples are to observe a duty of non-intervention.
5. Peoples have the right of self-defense but no right to instigate war for reasons other than self-defense.
6. Peoples are to honor human rights.
7. Peoples are to observe certain specified restrictions in the conduct of war.

⁹ See Rawls, *The Law of Peoples*, pp. 23-5.

¹⁰ Though Rawls is aware of the difficulty of finding a country whose people are united by common sympathies such as common language, he suggests the idea as a kind of simplification or as a concept of a general theory in expecting it to be a ground of a more complicated and realistic theory. *Ibid.*, pp. 24-5.

¹¹ In the domestic case, Rawls uses the notions of the original position and the veil of ignorance to advance a conception of justice as fairness that could be accepted by individuals who share certain political values. See John Rawls, *A Theory of Justice* (Cambridge, Mass.: The Belknap Press, 1971), p. 12.

¹² *Ibid.*, pp. 32-5.

8. Peoples have a duty to assist other peoples living under unfavorable conditions that prevent their having a just or decent political and social regime.¹³

Rawls claims that decent hierarchical societies would accept the same law of peoples, and like liberal societies, they deserve equal respect and tolerance as members of a reasonable society of peoples.¹⁴ He defines “decency” in terms of a weaker notion of reasonableness and sees the fulfillment of basic human rights as a necessary condition of decency: “Their [human rights] fulfillment is a necessary condition of decency of a society’s political institutions and of its legal order.”¹⁵ He states the characteristics of a decent hierarchical society as follows:

... a decent people must honor the laws of peace; its system of law must be such as to respect human rights and to impose duties and obligations on all persons in its territory. Its system of law must follow a common good idea of justice that takes into account what it sees as the fundamental interests of everyone in society. And, finally there must be a sincere and not unreasonable belief on the part of judges and other officials that the law is indeed guided by a common good idea of justice.¹⁶

If a hierarchical society has these features, then liberal peoples should tolerate that society and accord equal respect to it. To tolerate nonliberal peoples, Rawls notes, means not only to refrain from applying political sanctions but also to “recognize them as equal participating members in good standing of the Society of Peoples with certain rights and obligations.”¹⁷

II

Like a just constitutional democratic government of a liberal society, the government of a decent hierarchical society has an obligation to honor human rights, to take a group’s political dissent seriously and to give a conscientious reply.¹⁸ Yet, there are differences between liberal and nonliberal societies. A decent hierarchical society does not have an individualistic conception of a person with one vote. In addition, although no religion is persecuted, the established religion of a decent hierarchical society may have some privileges, which implies some unequal restrictions on liberty of conscience. Another

¹³ Ibid., p. 37.

¹⁴ Ibid., pp. 69-70.

¹⁵ Ibid., p. 80.

¹⁶ Ibid., p. 67.

¹⁷ Ibid., p. 59.

¹⁸ Ibid., p. 72.

difference is the representation and the status of women in a decent hierarchical regime, which is incongruent with the liberal ideal of equality of opportunity.¹⁹

Having these features, decent hierarchical societies should not be recognized as equal members of the society of peoples, according to the cosmopolitan critics of Rawls's account. If a decent hierarchical society does not treat its members as free and equal citizens, the critics argue, why should liberal peoples accord equal respect to that society? The Universal Declaration of Human Rights declares equality and freedom of all human beings from the birth and everyone's equal right to take part in the government of his or her country, directly or through freely chosen representatives. All individuals have equal basic rights and liberties. Suppose, says Bruce Ackerman, liberals who believe these ideals are majority in a decent hierarchical society and governed by the representatives of nonliberal oppressive minority. "Given these facts," he goes on to argue, "the west must choose, and why should we choose to betray our own principles and side with the oppressors rather than the oppressed?"²⁰ Human rights do not merely consist of basic rights such as freedom from slavery and security of minorities from mass murder. All democratic rights guaranteed by a liberal government must be guaranteed by any other society in order for liberal societies to count that society as a legitimate member of the society of peoples.

Rawls provides several reasons as to why liberal societies should accord equal respect to decent hierarchical societies. First, to require all societies to be liberal is an indication of a failure to recognize that the idea of political liberalism entails toleration for other acceptable ways of ordering society. A liberal society respects its members' comprehensive doctrines so long as these doctrines are pursued in ways congruent with its political conception of justice. As an example, he provides the Catholic and Congregational churches—unlike the latter, the former has a hierarchical organization.²¹ If a liberal society tolerates such hierarchical organizations in the domestic case, consistency requires that it should also tolerate hierarchical ordering of some nonliberal societies, provided that they fulfill conditions necessary for the protection of "urgent" human rights²² and for a common good idea of justice. Second, decent hierarchical societies do not reject their citizens' right to be consulted; the citizens of a decent hierarchical society might play a significant role in political arrangements because the basic structure of the society is a *decent consultation hierarchy*.²³ That is, even if a decent

¹⁹ Ibid., pp. 75-8.

²⁰ Bruce Ackerman, "Political Liberalisms," *The Journal of Philosophy* 91 (1994), p. 383.

²¹ Rawls, *The Law of Peoples*, p. 69.

²² By "a special class of urgent rights," which are respected by both liberal and decent hierarchical societies, Rawls means rights such as freedom from slavery and serfdom, liberty (but not equal liberty) of conscience, and security of ethnic groups from mass murder and genocide. Ibid., p. 79.

²³ Rawls describes a fictional decent hierarchical society, Kazanistan, where different

hierarchical society is not fully egalitarian, it has mechanisms that secure a more or less free and equal participation of all citizens in political arrangements concerning themselves. Finally, the facts of history do not confirm the claim that only liberal governments can ensure the protection of human rights, and that decent hierarchical societies are always oppressive and do not protect these rights.²⁴ From the mere possibility of the existence of oppressive hierarchical societies, it does not follow that there cannot be decent hierarchical societies, whose basic structure complies with political values of a liberal conception of justice. It is a mistake to set aside all hierarchical societies and regard them as oppressive without closely inspecting the constitutive principles of these societies and their political arrangements. The congruence of the constitutive principles of a hierarchical regime with the law of peoples is to be decisive as to whether or not liberal peoples should accept nonliberal peoples to the society of peoples. “Without trying to work out a reasonable liberal Law of Peoples,” he notes, “we cannot know that nonliberal societies cannot be acceptable.”²⁵

III

As noted before, the cosmopolitan critics of Rawls’s theory argue that all individuals must be treated equally and impartially for their respective goods and interests, and the recognition of decent hierarchical societies as equal members of the society of peoples amounts to overriding this universal principle. By recognizing decent hierarchical societies as equal members of the society of peoples, liberal peoples would have approved of some illiberal practices incompatible with the equality of all human beings. Political institutions of a society are justified if they protect equal freedom and well being of their members. Since hierarchical societies are based on the principle of inequality among individuals, they are morally unjustified and must be kept outside the society of peoples. The immediate question is what does it mean to leave hierarchical societies aside?

As rights and obligations of members of the society of peoples are determined by the law of peoples, to leave hierarchical societies outside the society of peoples implies that hierarchical societies do not have some rights and obligations that liberal societies have. Accordingly, the members of the society of peoples may apply political sanctions to a decent hierarchical society. They may not ask opinions of the representatives of the decent hierarchical society while taking political decisions about the society, its territory, its natural resources, and so on. They could laterally impose obligations on the society without recognizing any one of its claims. But all such plausible ways of exercising power on a decent

groups are represented by legal bodies in the *consultation hierarchy*. Ibid., pp. 61, 77.

²⁴ Ibid., p. 79.

²⁵ Ibid., p. 83.

hierarchical society are inconsistent with liberal values and principles, including equality of individuals, freedom of expression, and other liberties. Moreover, human rights constitute a serious limitation on intervening decent hierarchical societies by political or economic sanctions or military force.²⁶ Liberal states cannot apply economic or political sanctions to nonliberal societies, even if intervention is, to a certain extent, justified, if applying such sanctions infringes upon nonliberal peoples' right to subsistence, health care, etc., and causes further violation of human rights by endangering their lives. Rawls is certainly aware of the dangerous repercussions of a plausible intervention: "Their [human rights] fulfillment is sufficient to exclude justified and forceful intervention by other peoples, for example, by diplomatic and economic sanctions, or in grave cases by military force."²⁷

A critic of Rawls's law of peoples might argue that excluding from membership does not necessarily involve exercising political sanctions over decent hierarchical societies. If delegates of liberal societies sign a treaty among themselves, parties to the treaty may have some privileges and rights that other societies, including decent hierarchical societies, do not have, but this is justified on the basis of reciprocity and the articles of the treaty. To avoid recognizing decent hierarchical societies as "equal participating members in good standing of the society of peoples" means primarily to accommodate them. Liberal societies are to be in minimal relations with decent hierarchical societies; liberal states could at most accept a *modus vivendi* with the oppressor states. Due to some practical constraints, liberal states might "tolerate" some illiberal practices of decent hierarchical societies but this by no means entails to judge these practices as morally acceptable. Thus, all a liberal state can be required to do is to postpone an action against a decent hierarchical society for a while²⁸, because of some restraints, rather than to respect and recognize the decent hierarchical society as an equally participating member of the society of peoples.

To accommodate a society with its comprehensive doctrine as a whole must, a Rawlsian could point out, be distinguished to accommodate some of its illiberal practices while recognizing the society as a full-fledged member of the society of peoples. The former requires minimal relations with the society and perhaps the application of political sanctions when practical constraints are

²⁶ Recall that to tolerate nonliberal peoples partly means to refrain from applying political sanctions for Rawls. By criticizing his idea of toleration, cosmopolitans indirectly suggests that political sanctions must be applied to nonliberal states because of their illiberal practices, and intervention is justified for the same reason.

²⁷ Rawls, *The Law of Peoples*, p. 80

²⁸ For some cosmopolitans, like Kok-Chor Tan, as soon as the relevant restrictions on liberal societies are removed, an action toward decent hierarchical societies is justified on the ground of liberal values. See Tan, *Toleration, Diversity, and Global Justice* (University Park: The Pennsylvania State University Press, 2000), p. 33.

removed. In the latter case, the society has equal membership and all rights and obligations that other members of the society of people have. This does not mean to accept all practices of the society as legitimate; rather it means to overlook some illiberal practices of the society for a while and perhaps change them in the future through interaction with the members of the society of peoples.²⁹ Rawls rightly holds that a society can be altered by influencing it through interaction, trade, and cooperation. It is thus reasonable to accommodate some illiberal practices in the expectation of a future change.³⁰ Since the citizens of a decent hierarchical society are supposed to be rational, they themselves are to be willing to change their illiberal practices as they see and experience positive outcomes of exercising liberal principles in their interaction with liberal peoples: “If a liberal constitutional democracy,” Rawls notes, “is, in fact, superior to other forms of society, as I believe it to be, a liberal people should have confidence in their convictions and suppose that a decent society, when offered due respect by liberal peoples, may be more likely, over time, to recognize the advantages of liberal institutions and take steps toward becoming more liberal on its own.”³¹ By force a society can hardly be changed; political sanctions and coercion encourage violence and violence brings further violence instead of cooperation and peace. Imagine that decent hierarchical societies impose a certain way of dressing for women and men on liberal peoples and threaten them by political sanctions in order to ensure the realization of their imposition. Liberal peoples would certainly find such an imposition on themselves outrageous, and probably react violently if they were forced to adopt the new style of dressing. In a similar fashion, if nonliberal peoples are compelled to espouse a liberal way of life, they might resist and respond violently. In the absence of granting equality and respect from the beginning, there would not be any place for further civil discourse. Furthermore, if the majority of the citizens of a hierarchical society are happy with the regime, it is just illiberal to force them to accept liberal practices in the name of the rights of the minority, provided that basic human rights of minority

²⁹ Will Kymlicka makes a similar distinction by emphasizing liberalization of some practices of a cultural community without jeopardizing the existence of the cultural community in *Liberalism, Community, and Culture* (Oxford: Clarendon Press, 1989), p. 169.

³⁰ The same idea guides Rawls’s thought in the domestic case: “... at the first stage of constitutional consensus the liberal principles of justice, initially accepted reluctantly as a *modus vivendi* and adopted into a constitution, tend to shift citizens’ comprehensive doctrines so that they at least accept the principles of liberal constitution. These principles guarantee certain basic political rights and liberties and establish democratic procedures for moderating the political rivalry, and for determining issues of social policy. To this extent citizens’ comprehensive views are reasonable if they were not so before: simple pluralism moves toward reasonable pluralism and constitutional consensus is achieved.” In *Political Liberalism*, pp. 113-14.

³¹ Rawls, *The Law of Peoples*, p. 62.

groups are secured. To compel majority to accept all precepts of a liberal regime just because minorities believe in these precepts and want to live accordingly is to approve of the tyranny of minority over majority, which is inconsistent with the majority rule of liberal constitutional democracies.

IV

Not to tolerate decent hierarchical societies, a cosmopolitan critic might contend, simply means to disregard the opinions of their representatives or not to invite them to the table to ask their views on international political arrangements. And this is justified on the ground that the representatives hold unreasonable beliefs and exercise immoral practices in their respective societies. One can legitimately disregard opinions of an insane person who does not know what constitutes his best interest or who is unable to articulate rational arguments for his demands. Likewise, a child is not asked to vote in times of elections because she is unable to take political decisions on the ground of her will and intellect; she is immature and not adequately autonomous. So is the case with decent hierarchical societies. The citizens of hierarchical societies do not have freedom of action or thought; their minds are not independent enough of some negative prejudices toward liberal societies and false beliefs. They are, in other words, intellectually too undeveloped to have a right to a say on political arrangements on the global order. Nor do their comprehensive doctrines allow them to think freely and take rational decisions on international affairs. Therefore, it is appropriate to keep them outside the society of peoples.

Nonetheless, the denial of membership of decent hierarchical societies to the society of peoples on the ground of an analogy to an insane or a child is a serious mistake. Decent hierarchical societies are full-fledged societies with their political, legal and other social institutions. They govern themselves on certain rules and regulations. They not only legislate themselves on internal affairs but also make treaties with each other. Their citizens are not immature persons, nor do they lack capacities to think rationally. Like any adult of a liberal society, some citizens may hold false beliefs and have some prejudices that may hinder them to take rational decisions. But this by no means reduces them to the status of an insane or a child. Besides, some citizen's holding unreasonable beliefs can by no means be generalized and attributed to all citizens of a decent hierarchical society.

Perhaps the analogy that is made in refusing to recognize decent hierarchical societies as having equal standing with liberal societies is based on a pretended resemblance of a decent hierarchical society to an immoral person. A person who deceives a friend of hers is criticized for her wrongful deed. If the

person infringes upon another's legal right, she is probably imprisoned. In the same way, decent hierarchical societies, one might say, would count as immoral and indeed as committing a crime unless they applied liberal principles in their respective territories. Like the immoral person, they must be criticized, and punished by political sanctions for their failure to exercise liberal principles. If such a punishment is not possible due to practical constraints, the only liberal solution of the problem is to deny their equal standing as members of the society of peoples and not to respect them.

Nevertheless, a Rawlsian could say, in a liberal society, a person who commits a crime by infringing on others' legal rights is still treated as a person and accepted as a citizen. Her misdeeds are not respected; rather, they are criticized. But however wrong her actions are, she does not thereby lose her right to be treated as a person. She cannot be tortured or left hungry; she receives sufficient health care if she is sick. She cannot be humiliated by others' assault on her personality, and her rational choices are respected within legal limits. Nor does she lose her citizenship due, let us say, to stealing money from a bank. So is the case with the membership of nonliberal societies to the society of peoples. Nonliberal societies can be criticized for their wrongful practices; but they do not lose their right to be respected and treated as equal members of the society of peoples. Moreover, the law of peoples relies on a gradation between totally unreasonable and wholly reasonable. A totally unreasonable society may be subject to the treatment of exclusion from membership of the society of peoples. But it would be both unreasonable and unfair to treat a decent society in the same way. If a person does not lose her citizenship for stealing money from a bank, a society must not lose its membership for its some wrongful practices while honoring basic human rights.³² Recall that decent hierarchical societies "have certain institutional features that deserve respect."³³ As liberals do not approve of every practice in a liberal society and still respect its members, its reasonable and just institutions, they should also respect nonliberal peoples and their reasonably just institutions if they believe in liberal ideals of equality and toleration. Rawls quite correctly emphasizes: "denying respect to other peoples and their members requires strong reasons to be justified."³⁴ To exclude a nonliberal society from the

³² Preston King's remarks on tolerating prisoners in this context is instructive: "To imply in any way (as by depriving the prisoner of his right to vote) that one who violates a law should be deprived of *all* rights under the law, is not only contradictory to an intuitive sense of fairness, but contradictory equally to legal practice.... It is plainly inconsistent, in a system of professing attachment to the equal rights principle, to deprive a whole section of the community (defined minimally by reference to the assumed commission of at least one offence) of that most basic and enduring of rights within the system—the right to vote." In *Toleration* (New York: St. Martin's Press, 1976), pp. 209-10.

³³ Rawls, *The Law of Peoples*, p. 84.

³⁴ *Ibid.*, p. 61.

membership of the society of peoples because of its some illiberal practices might in the end render the society of peoples memberless—as it is hard to find a real society, which thoroughly realizes principles of liberalism—if the strict application of liberal principles is taken as a criterion of membership.³⁵

An advocate of Rawls's account might also point out that the exclusion of nonliberal peoples from the society of peoples must be justified in a coherent manner with the liberal ideal that everyone has equal right to participate in decisions on political arrangements concerning his or her life. As Erin Kelly and Lionel McPherson accurately stressed: “The idea that justification of political arrangements need not be addressed to unreasonable persons should be rejected, for these persons could be due a say in the arrangements of institutions binding them.”³⁶ A global order arranged according solely to comprehensive liberal principles would influence lives of nonliberal peoples who share the same order with liberal peoples and the former have a right to a say and to vote on political arrangements concerning themselves as much as liberal peoples. From the fact that decent societies do not accept equal participation of their citizens to the political decisions concerning themselves, it does not follow that equality must be denied to decent peoples at the global level. If it is a mistake to exclude individuals' active participation to political arrangements concerning themselves at the domestic level, it is also a mistake to exclude decent peoples from the society of peoples on the same grounds. A mistake cannot be corrected by repeating it at another level.

V

A liberal state, cosmopolitans insist, cannot be politically tolerant or neutral to religious, philosophical and moral doctrines other than liberalism. The world might have various liberal and nonliberal societies but its order can hardly be organized in a variety of ways. Thomas Pogge, for instance, urges that:

If the Algerians want their society to be organized as a religious state consistent with a just global order and we want ours to be a liberal

³⁵ Germany and Japan, for instance, deny citizenship to some residents on the ground of ancestral birth. In many liberal societies the prevalent religion of the society has some privileges which minorities' religions lack. Lastly, women in liberal societies may have some rights officially that women of hierarchical societies do not have such as the right to vote. But women are unofficially marginalized in most liberal societies by discriminatory policies both at home and at work. In some Scandinavian countries, for instance, women are paid less than men for the same job.

³⁶ Erin Kelly and Lionel McPherson, “On Tolerating the Unreasonable,” *The Journal of Political Philosophy* 9 (2001), p. 39.

democracy, we can both have our way. But if the Algerians want the world to be organized according to the Koran, and we want it to accord with liberal principles, then we can *not* both have our way.³⁷

The hierarchical order of a decent society is compatible with the denial of a just constitutional democracy. Tolerating “private” intolerant practices, such as denying the right to vote to everyone equally, ends up with a resolute insistence of hierarchical societies on arranging the world order according to such practices in the political sphere. A global order organized according to authoritative hierarchical principles would deny its members equal opportunity to hold official positions, equal job opportunities, and so on.

Rawls could repel this charge by stressing that the law of peoples states minimal conditions of cooperation among liberal and nonliberal peoples rather than the conditions of a full-fledged global order. It is true, he might say, if we tried to organize the world according to the principles of a comprehensive liberal doctrine or according solely to the principles of a hierarchical regime, one would exclude the other. But if we start with the conditions of a minimal base upon which the world order is to be structured, then conflict can be avoidable at least at the beginning. A decent hierarchical society is accepted to the society of peoples because it satisfies the minimal conditions of a politically just liberal world order. If a decent hierarchical society satisfied none of the conditions that are required by political values of liberalism, it would perhaps be unreasonable to accept that society to the membership of the society of peoples. The global order has accordingly a basis arranged according to the principles of political liberalism rather than to the principles of a hierarchical regime or of liberalism as a comprehensive doctrine.

The liberal commitment to public reason³⁸ and deliberative democracy, moreover, presupposes the denial of the rationality of every practice in a liberal society as much as in a hierarchical society. The existing political culture of a liberal society and the comprehensive doctrines it relies upon must be subject to a dialogical critique in order practices of the liberal society to converge on the precepts of political liberalism. Rawls applies the notions of public reason and deliberation to the society of peoples, as well.³⁹ Public deliberation prepares the ground for dialog between the representatives of various comprehensive doctrines. In addition, it gives way to a platform for the representatives of all

³⁷ Thomas Pogge, “An Egalitarian Law of Peoples,” *Philosophy and Public Affairs* 23 (1994), p. 217.

³⁸ For Rawls, a reason is public in three ways: “as the reason of free and equal citizens, it is the reason of the public; its subject is the public good concerning questions of fundamental political justice ... and its nature and content are public.” Rawls, *The Law of Peoples*, p. 133.

³⁹ *Ibid.*, p. 55.

comprehensive doctrines an opportunity of self-criticism and revision of their foreign policies.⁴⁰ Representatives of peoples are, in other words, to be answerable to one another for pursuing or changing their ongoing relations. Guided by a political conception of justice, representatives of various societies would reach an overlapping consensus⁴¹ as a result of public deliberation and discourse. A world order based on selected truths of various comprehensive doctrines would obviously be much more peaceful and rational than a world order based on a single comprehensive doctrine with all its false premises and wrong practices side by side with its, so to speak, universal truths.

One could maintain that Rawls's attempt to extend the notions of public reason and deliberative democracy to the society of peoples does not guarantee a world order based on principles of political liberalism because given the undemocratic appointment of the delegates of hierarchical societies and their background political culture, it is highly unlikely that these delegates will endorse the kinds of global principles the delegates of liberal peoples will endorse. Pluralism at the international level is significantly disanalogous to reasonable pluralism obtained at the domestic level, which unlike the former, is a sheer outcome of the exercise of reason and dialog. Rawls's treatment of decent hierarchical societies as the international analogue of domestic organizations with their comprehensive doctrines is a false analogy. While it is possible for free citizens of liberal regimes to arrive at a consensus on certain points and to tolerate reasonable disagreements on other issues after public deliberation and discourse, the same cannot be said to hold at the global level. Although decent hierarchical societies are not tyrannical, their members lack equal freedom of expression, conscience, assembly and so on, which are essential conditions of reasonable pluralism.⁴² Accordingly, there are primarily two obstacles to extend the notions of public reason and deliberative democracy to the society of peoples, among whose members are decent hierarchical societies. First, the delegates of hierarchical societies will not allow free discussion of every element of their comprehensive doctrines because they are undemocratically appointed and seriously constrained by their negative prejudices toward liberal peoples. Second, disagreements between delegates of liberal peoples and of nonliberal peoples would be

⁴⁰ Ibid., p. 56.

⁴¹ For the issue of the scope and dept of an overlapping consensus, see *Political Liberalism*, pp. 164-65. Although the dept and the scope of a consensus to be reached after initial accommodation may vary from one society to another, it is highly likely that political interests of peoples would play a significant role in this determination.

⁴² Rawls distinguishes simple pluralism from reasonable pluralism. Simple pluralism represents the original plurality or plurality of individuals before endorsing the principles of a constitution whereas reasonable pluralism represents the idea of pluralism after a consensus is reached on constitutional principles.

unreasonable because the delegates of nonliberal peoples would stick to their comprehensive doctrines, false beliefs and prejudices from the beginning; they would not agree to disagree with their opponents on some points after public deliberation and discussion. They would not, in other words, sincerely subject their comprehensive doctrines to criticism. Even if they pretended to participate in public dialog, their disagreement with liberal delegates would not be a result of a clear comprehension of fundamentally incommensurable values. As a result, it seems improbable that the outcome of public deliberation at the international level would be an overlapping consensus on major issues about the world order and a reasonable disagreement on some other issues.

It might be correct to say that the delegates of hierarchical societies would not allow every element of their comprehensive doctrines to be subject to public criticism such as, for example, their belief in the existence of God. But there is no substantial reason to hold the pessimistic view about their sincerity in participating public dialog and in disputing on some important beliefs and claims of their respective comprehensive doctrines. Recall that decent peoples respect human rights and have a right to express their dissent to wrongful practices of the political authority of their societies, and that their representatives come from a tradition, which not only requires members of decent hierarchical societies to tolerate other comprehensive doctrines within their respective territories but also requires governors to take disapproval of some current political practices into account sincerely.⁴³ Even if they were insincere in participating the public dialog of the society of peoples, however, this would not eliminate the possibility of a rational consensus. After all, decent hierarchical societies are not aggressive, and they probably would be willing to cooperate with liberal societies and to make sacrifices to have the advantage of cooperation. And on the points that any sacrifice is implausible for both liberal and nonliberal delegates, they would accommodate each other. There is no good reason to doubt the plausibility of such a bargaining process among rational and reasonable agents.

VI

The bargaining model mentioned above, according to some cosmopolitans, is pretty un-Rawlsian in that unlike this model, the Rawlsian model is quite one-sided. In the Rawlsian model liberal delegates, who want to build up a world order together with delegates of decent hierarchical societies, design the law of peoples in a manner that surrenders the egalitarian principles and some human rights to accommodate hierarchical societies.⁴⁴ There is no

⁴³ Ibid., p. 72.

⁴⁴ Pogge, "An Egalitarian Law of Peoples," p. 216.

bargaining process in the Rawlsian model; rather, liberal delegates one-sidedly sacrifice their equal standing with the delegates of hierarchical societies by giving up their egalitarian claims. There is no corresponding sacrifice on the part of the delegates of hierarchical societies. The illiberal practices of hierarchical societies are silently accepted by liberal delegates in order not to leave hierarchical societies outside the society of peoples.

There are several problems with this objection, however. First, what characterizes the relationship between liberal and hierarchical societies in the case of disagreement is some sort of accommodation⁴⁵ rather than surrender. Accommodation of illiberal practices should not be conflated with surrender, which implies giving up all egalitarian claims not only at the international level but also at the domestic level. Accommodation implies the denial of declining egalitarian principles and a suspension of struggling for them—which need not necessarily be a struggle by appeal to force; the struggle might be in the form of subjecting certain practices to rational criticism and discourse—for a while due to practical constraints. Besides, liberal delegates are free to apply egalitarian principles to their societies. If liberal delegates sacrificed their equal standing with nonliberal delegates at the international level and adopted illiberal practices of hierarchical societies at the domestic level, a talk of surrender of egalitarian principles would be appropriate. But this is not the case. Furthermore, it is dubious that the Rawlsian model is one-sided because Rawls defines the boundary conditions of the recognition of decent hierarchical societies as members of the society of peoples. Decent hierarchical societies should respect human rights and satisfy other terms of the law of peoples. Finally, it is correct to say that bargaining model mentioned in the previous section is not what Rawls describes in *The Law of Peoples*. But there is no internal barrier for Rawls to incorporate such a bargaining schema into his account, which can be developed after the recognition of the law of peoples by each party as a platform or background conditions of further bargains.

Simon Caney propounds that by calling his model utopia, Rawls undercuts the possibility of such a development. A utopia is an ideal that cannot be bettered further, and Rawls's presentation of the law of peoples as a utopia undermines the plausibility of its revision and/or elaboration in further detail. Though for Rawls too, the articles of the law of peoples state "minimum standards" or a "moral threshold," the utopist character of these conditions constitutes an inner obstacle to the idea of their further development and

⁴⁵ Rawls's distinction between public life and private life on the one hand, and between political liberalism and comprehensive doctrines on the other leads us to think that he associates the idea of overlapping consensus on the basic structure of the world order with his conception of public life and political liberalism and the idea of accommodation on the points of disagreement with issues concerning private life and comprehensive doctrines of peoples.

betterment by a bargaining process.⁴⁶

Nonetheless, the Rawlsian notion of utopia need not be identical with Caney's conception of utopia. Rawls could introduce the idea of degrees of being utopist by claiming that what makes his model utopist is its commitment to some ideal moral principles rather than its unalterable perfectness⁴⁷, which seems to be the notion of utopia Caney has in mind. In fact, the list of principles of the law of peoples is provisional and incomplete, according to Rawls. New principles need to be added to the list and some principles such as the fourth must be qualified for him.⁴⁸ Besides, his model is realistic, which implies that his notion of utopia does not exactly match Caney's. To be able to fit the imperfect nature and variability of social reality, a realistic model would presumably lack the characteristics of a perfect and absolute ideal model. Even if Rawls's idea of utopia were compatible with Caney's, however, this would not hinder the development of Rawls's model further. As minimal conditions of an unfinished project, the terms of the law of peoples can be conceived as complete and ideal in themselves. The betterment of the model in this case would be adding new and detailed articles to the law of peoples rather than revising or changing the minimal conditions stated as ideal.

VII

Behind the criticisms of cosmopolitans are two main assumptions and false attributions to Rawls's account. First, it is claimed that practices of a hierarchical society are quite compatible with practices of a despotic regime, and to tolerate hierarchical societies amounts to tolerating illiberal practices of a tyrannical regime. A regime based on hierarchical relations among social groups, it is alleged, squares with intolerance. The rulers of a hierarchical society may consult their citizens and still disregard their opinions. The governors may listen the objections made against their policies and yet continue to apply their oppressive policies.⁴⁹

But this argument does not touch upon Rawls's account, which presupposes that political dissent in a hierarchical society is to be taken into account seriously and to be given a conscientious reply. The plausibility of the presence of hierarchical societies where political dissent has no influence on governmental policies does not indicate that Rawlsian theory, which denies the legitimacy of such a practice, is mistaken. Rawls does not explicitly state whether or not a regime, which does not take political dissent of its members into account

⁴⁶ Simon Caney, "Cosmopolitanism and the Law of Peoples," *The Journal of Political Philosophy* 10 (2002), p. 111.

⁴⁷ Rawls, *The Law of Peoples*, pp. 17-8.

⁴⁸ *Ibid.*, pp. 38-7. For a similar interpretation of the law of peoples, see also Beitz, "Rawls's Law of Peoples," p. 672.

⁴⁹ See Caney, "Cosmopolitanism and the Law of Peoples," p. 104.

seriously, will be accepted to the society of peoples but his emphasis on this point suggests that he thinks it as one of the preconditions of a hierarchical society's recognition as a member of the society of peoples. Even if most hierarchical societies were oppressive, this would barely create the difficulty the critics worry about for Rawls's law of peoples. In that case, one could at most argue that Rawls's theory relies on rather unrealistic assumptions about hierarchical societies. It is, however, one thing to say that Rawlsian account is unrealistic, and as such it is far from the actual practices of hierarchical regimes, it is quite another thing to say that Rawls's model tolerates some illiberal practices, which it obviously refutes.

Second false attribution to Rawls's account is that it accedes cultural relativism. Accordingly, Rawls thinks that each society has its own conception of the good, and there can be no universal truths of moral theory. Each society's values backed up by historical, political and cultural practices are radically different from others and incommensurable; moral principles and values, on Rawls's view, vary from one society to another, according to the critics. The Rawlsian model, in short, entails the irreducibility of a conception of the good adopted by a society to universal moral principles. By committing to cultural relativism, the critics go on to argue, Rawls simply approves of false beliefs and wrong practices of nonliberal societies in the name of respecting them.⁵⁰

The attribution of cultural relativism to Rawls is simply wrong, however, because Rawls does not say that comprehensive doctrines of hierarchical societies are as correct as tenets of liberalism. His view is that if a liberal constitutional democracy is the correct regime to advocate, and he believes that it is, it will be a good example for the members of a hierarchical society, who will appreciate rational principles of liberalism as more advantageous for themselves over time by interacting with liberal peoples. For Rawls, the particularistic preferences and conceptions of the good life are justified not as being good or right in themselves; rather they are justified as means to the universal moral principles such as advancing overall equality. Such a universalistic justification of particularism is incongruent with contentions of particularism according to which each society has its own conception of the good in itself as an end.⁵¹

The law of peoples that liberals would favor might not exactly be the same as the Rawls's law of peoples. Yet, liberals' commitment to tolerance, equality of opportunity and human rights make it highly plausible that they would endorse Rawls's law of peoples as minimal conditions of cooperation and interaction with nonliberal peoples. Nonliberal peoples who appreciate the value and importance of a peaceful cooperation with liberal peoples would also accept the law of peoples, whose conditions are already realized to a great extent in their

⁵⁰ Ibid., p. 108.

⁵¹ See Alan Gewirth, "Ethical Universalism and Particularism," *The Journal of Philosophy* 85 (1988), p. 289.

political culture. They are respectful to basic human rights and diversity of opinions. They take political dissent seriously and not only allow its expression but also feel encumbered to give conscientious reply to dissenters. A world order based on the law of peoples does not amount to giving up liberal principles; nor does the recognition of hierarchical societies as members of the society of peoples.

In conclusion, Rawls has quite consistently articulated his commitment to individual liberty with his notion of toleration. Individuals are not atomic entities isolated from the rest of society without any cultural identity and a comprehensive doctrine. The recognition of differences among individuals, along with their diverse cultural backgrounds, does not necessarily involve a commitment to relativism; nor does respecting individuals having different comprehensive doctrines amount to acceding all their beliefs and actions, including wrong ones. So is the case with societies having diverse comprehensive doctrines. The recognition of differences among societies, like that of diversity among individuals, is rather compatible with the liberal idea of reasonable pluralism. The law of peoples states the preliminary conditions to obtain such a pluralism within the framework of political liberalism at the international level successfully.

El Fadl, Khaled Abou. *The Place of Tolerance in Islam*. Boston: Beacon Press, 2002.

Khaled Abou El Fadl is the rising star in the contemporary search for a moderate Muslim intellectual who will reassure liberal Americans of the essentially unthreatening nature of Islam. Currently the Omar and Azmeralda Alfi Distinguished Fellow in Islamic Law at UCLA, he is also the author of *And God Knows the Soldiers* (2001), *Speaking in God's Name* (2001), *Rebellion and Violence in Islamic Law* (2002), *Reasoning With God* (2002), and other works on Islamic law, theology, and politics. Given the events of 9/11 and their aftermath, and given his views, El Fadl has attracted a good deal of media attention, getting favorable coverage in *The New Republic*, *National Review*, the *Los Angeles Times* and elsewhere, and having also been featured in the PBS Frontline Documentary, "Faith and Doubt at Ground Zero." (The most detailed journalistic account is Franklin Foer, "Moral Hazard," *The New Republic*, Nov. 7, 2002).

The Place of Tolerance in Islam (TPTI) is a book-length reprinting of an extended discussion between El Fadl and eleven commentators for the magazine *Boston Review*. The book begins with a short Preface by the Editors, followed by a twenty-page title essay by El Fadl, defending the compatibility of Islam with a virtue of tolerance; the eleven commentaries, totaling 65 pages and averaging about six, constitute the bulk of the book, and are followed by a short Reply by El Fadl. Six of the commentators are believing Muslims (Sohail Hashmi, Abid Ullah Jan, Amina Wadud, Akeel Bilgrami, Mashood Rizvi, and Qamar-ul Huda), although in one case, Bilgrami's, the commentator's beliefs are enigmatic enough to raise "Straussian" questions about what it is that he really believes. A seventh commentator, Tariq Ali, is an Anglo-Pakistani "apostate" of Marxist sympathies ("apostate" in scare quotes because it's not clear he ever was a genuine believer); the rest are outsiders to the faith, invited to comment in virtue of their academic expertise (Milton Viorst, Stanley Kurtz, John L. Esposito, and R. Scott Appleby).

As far as I can see, *TPTI* is a failure with respect to virtually every goal it sets for itself. El Fadl's opening essay is unconvincing, and the commentaries responding to it are of a pretty low caliber. Having successfully rebutted his critics in the Reply at the end of the book, the fact remains that El Fadl establishes nothing of philosophical or political significance in the book, and ultimately does nothing to respond to the real questions an intelligent layperson might have about the connections between Islam, terrorism, and theocracy. The book is about nine parts hype to perhaps one part substance.

Part of the problem here is structural. Whatever one thinks of his views, El Fadl is an able and intelligent theoretician with substantial expertise in the subject at hand. Given the opportunity, I'm sure he would have been able to offer a respectable defense of the thesis he defends in this book. But he isn't given the

opportunity: there is no way to defend the thesis he wants to defend in the twenty pages allotted to him here. Unsurprisingly, little that he says in those pages convinces the skeptical reader. The commentaries confront the same problem, but more acutely. What sense does it make to invite *eleven* commentators to write *six* pages a piece on a *twenty* page essay? None that I can think of, and it's no surprise that given these constraints, none of the commentators says anything of substance in the few pages at his or her disposal.

A more sensible volume would have given El Fadl at least sixty pages for his opening essay, cut the number of commentators down to two or three, and then given El Fadl another thirty or forty pages for a proper rebuttal. That would have made the book longer and more expensive, but it would also have made it worth reading.

Structure, however, cannot by itself account for the deficiencies of the book. The problem with its content is precisely its content, and the problems begin with El Fadl's opening essay. El Fadl begins with a ten-page historical sketch that takes up about half of his space, and spends the remaining ten pages or so on his direct argument, which discuss the necessary preconditions of a proper interpretation of the Quran. The first of these is the possession of a "moral sense" cultivated prior to and independently of any contact with the Quran, which serves to regulate one's interpretation of its text. The second is a historically-informed sense of context, so that one knows what is essential to the message of a given Quranic verse and what is not. With these two interpretive tools in hand, El Fadl claims that we discern an "ethic of diversity and tolerance" in the Quran, a defensive and proportional conception of *jihad*, and a means of explaining away the otherwise troublesome ethico-political prescriptions one finds in the Quranic text.

Limitations of space preclude an extended discussion of El Fadl's argument, but the problems with it are easily enumerated. For one, El Fadl seems unaware of the way in which his appeal to a "moral sense" subordinates the Quran to a humanistic ethic not found within it. Consequently, he neither accounts for this moral sense nor explains what is distinctively Islamic about it. Nor does he have a good answer to the Islamic fundamentalist who resists his interpretive procedures and insists that Islam be treated as a self-contained normative system divorced from humanism. Second, to the extent that El Fadl seeks textual warrant for his claim of an "ethic of diversity and tolerance" in the Quran, his readings are simply implausible (15-16); the Quran recognizes diversity, but contrary to El Fadl, does not in the least "endorse" or "sanction" it. Third, with respect to *jihad*, even if we accept the thesis that the Quranic conception of *jihad* is defensive and involves a principle of proportionality (a generally but not wholly convincing thesis on textual grounds), I don't see what El Fadl has to say to the Islamist terrorist or fellow-traveler who claims that such terrorism *is* defensive and proportional, as they often do. Such a person may

wrongly be applying the criteria of self-defense and proportionality, but neither the right reasons nor the right criteria are to be found in the text of the Quran. Fourth, El Fadl himself concedes that his reading of the texts is not the only legitimate one; others are possible. But if so, it's hard to see why his reading should carry the day except insofar as it coheres with his "moral sense"—which leads us right back to the initial problem.

The failure of El Fadl's project is instructive, and the diagnosis, I think, is that the Quran is, at the end of the day, a poetically powerful but normatively indeterminate text. To look to it for a viable ethics or political theory is like looking to find the same in, say, the Homeric epics. An ingenious interpreter could, I suppose, find an "ethic of diversity and tolerance" in the *Odyssey*, as easily as she might find an ethic of "holy war" in the *Iliad*. But there would be something quixotic about either enterprise, and there is something similarly quixotic about El Fadl's. It's obvious to anyone who has read and thought about the Quran that El Fadl's interpretation of it is not an exegetic attempt to tell us what the Quran says in its own terms, but a Procrustean attempt to impose his own humanistic assumptions on it. At a certain point of following this project, one wonders why El Fadl doesn't just ditch the Quran altogether and argue for his favored moral conception in just the way that the rest of us do—without a Scriptural safety-net. Why use the Quranic text as a safety-net if it's ultimately going to end up subordinate to the interpreter's "moral sense" anyway? And what normative work is the *text* doing if the project is driven so thoroughly by that moral sense?

If El Fadl's essay fails to convince, the commentaries do less. John L. Esposito and R. Scott Appleby function as cheerleaders for El Fadl, wasting about fifteen pages to congratulate him for the sheer act of having put pen to paper. There isn't, to use a Quranic phrase, an atom's weight of substance in these essays, nor is there any point in reading them—except perhaps as documentary evidence of the sad fate of secular criticism in the American academy. Tariq Ali, Stanley Kurtz, Amina Wadud and Mashood Rizvi seem frankly uninterested in what El Fadl actually says in the book, devoting the space allotted to them to unrelated topics that they found more interesting: that's another twenty pages down the drain. Milton Viorst and Qamar-ul Huda produce tangentially-relevant commentaries that discuss logistical problems involved in implementing El Fadl's prescriptions; though interesting, neither essay deals with El Fadl's central interpretive claims, and so neither really addresses the main issues. Finally, Sohail Hashmi's essay serves to confuse as many issues in as little space as possible—making it, in a way, the most efficient piece of writing in the book. That leaves two on-topic essays from widely-divergent perspectives, one by Abid Ullah Jan, the other by Akeel Bilgrami.

Jan, an open sympathizer with Islamic terrorism and theocracy, thinks that El Fadl has conceded too much to critics of Islam. El Fadl makes short work

of Jan's fallacy-strewn and historically-illiterate essay, but never raises the question of how it is that such a person got to write for *Boston Review* in the first place. A look at Jan's website tells us that he's an open ally of the most reactionary, anti-Semitic and militarist factions of the Pakistani military and secret service (go to <http://www.icssa.org>, and note the favorable reference made to the notorious General Hamid Gul). It's not clear to me whether the editors were aware of any of this: if they weren't aware, it's not clear why not; if they were aware, it's unclear what, if anything, the knowledge meant to them. In any case, they say nothing about it.

Akeel Bilgrami makes the interpretive recommendation that we read the Quran by distinguishing sharply between the "spiritual" verses associated with the so-called "Meccan Revelation," (i.e., those verses revealed early on in the Prophet's career, when he lived in the city of Mecca) and the "legalistic" ones associated with the so-called "Medinian Revelation" (i.e., those verses revealed after the Prophet's exile to Medina). The Meccan Revelation, Bilgrami argues, supersedes the Medinian one; since the problematic texts are located in the Medinian Revelation, we can do away with the largest textual problems in the Quran simply by discarding the texts that get in the way.

El Fadl raises some obvious semi-technical criticisms of Bilgrami's view, but one doesn't need those criticisms to discern its brazen absurdity. In plain speech, what Bilgrami's thesis amounts to is the assertion that God revealed his will to Muhammad and "perfected" the Islamic faith so that Muslims would one day decide arbitrarily to divide the revelation in half, throw out one half, and treat the favored half as uplifting poetry—on the grounds that the favored half coheres better with "our" secular/left-wing political commitments in reflective equilibrium (for elaboration, see Bilgrami's "What Is a Muslim? Fundamental Commitment and Cultural Identity," *Critical Inquiry*, 18:4 [Summer 1992]). Bilgrami claims to find textual warrant for this interpretation, but doesn't cite a single Quranic verse that does so. Inference to the best explanation: there isn't one. Of all the absurdities that theism has produced, I don't think things get any better than the idea of a divine revelation based on planned obsolescence.

TPTI is, in short, a feel-good volume intended for those raised in the Church of Multicultural Neutrality, eager to be absolved of the need to grapple with fundamental theological or philosophical questions, eager to think well of "the Other," and incapable of imagining that Islam as such might figure in a causal explanation of the current travails of the Islamic world. It functions principally as a document of what has gone wrong with contemporary English-speaking scholarship on Islam, and only secondarily, if that, as a guide to "the place of tolerance in Islam"—or for that matter, to anything else about Islam, terrorism, war, or theocracy. It will not convince orthodox Muslims or hard-core secularists of its claims, and I doubt it will *convince* anyone else. But then, I doubt it was meant to. The task of persuasion requires an effort at argumentation,

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and that is precisely what is missing from this book. For what it's worth, that is also the key to understanding the book's content, its purpose, and its intended audience.

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Hitchens, Christopher. *A Long Short War: The Postponed Liberation of Iraq*. New York: Plume/Penguin, 2003.

Christopher Hitchens's *A Long Short War (ALSW)* is a chronicle and justification of "Operation Iraqi Freedom," consisting of twenty-four brief essays written (mostly) for the online magazine *Slate* between November 2002 and April 2003. The idea behind the book, Hitchens writes in the Preface, "was to test short-term analyses against longer-term ones, while simultaneously subjecting long-term positions or convictions to shorter-term challenges" (v).

By the time this little book is in anybody's hands, there will have been more developments, forbidding as well as encouraging. One cannot hope to write as a historian about the present, but one can hope to contest, as an essayist, the dishonest, ahistorical view that some events or tendencies that followed the intervention would otherwise never have occurred. "In dreams begin responsibilities," and those who kept alive the dream of a free Iraq must accept the responsibility of the logical and probable consequences of their demands (v-vi).

Having set this rather severe standard for himself, Hitchens brings a characteristic ferocity and rigor to the task of delivering on it—managing, in about a hundred breezy pages, to rebut virtually every argument against the war, assemble the arguments for it, and raise some interesting philosophical questions along the way.

More nonsense has been written about the Iraq war than on almost any subject since the Clinton-Lewinsky scandal, and it's merely stating a fact that the bulk of this nonsense has come from the Left, even when the Left's lapdogs on the Right have slurped it up and regurgitated it. Self-contradiction, defamation, disinformation and evasion: seek and ye shall find it all in the pages of Cairo's *Al Ahrām Weekly*, *Counterpunch*, *The Nation*, or for that matter the pages of *The Washington Post* and *The New York Times*. Never have so many obscured so much by saying so little—and by saying it so badly. Hitchens, no stranger to polemical dust-ups, lets loose here with an impressive barrage of munitions, hitting the right targets without much collateral damage.

The Introduction, written on the eve of the war (March 18, 2003) is practically worth the price of the book in this respect, compressing into sixteen pages a deft riposte to virtually every anti-war cliché or slogan you've heard in the last year or so. I, for one, would like to hear those who condemn the war on behalf of "the Arab world" deal intelligently with widespread Iraqi-American support for it (1-3). And it would be interesting to hear the "Israel-is-behind-everything" conspiracy-mongers confront Hitchens's terse annihilation of their insinuations (6-7). "It's that Straussian-Jewish neo-conservative cabal that's

hijacked U.S. policy,” we’re told. How that accounts for the support of a nominally Jewish Marxist like Hitchens is anybody’s guess, not that it does very much to explain why the Straussian-Jewish neo-conservative Paul Wolfowitz took a stubbornly anti-Saddam line right through the Reagan Administration (2, 17-18), when Jewish neo-conservatives like Daniel Pipes were counseling a tilt *toward* Saddam, and big-name Straussians (Bloom, Jaffa, Pangle, etc.) were obsessively focused not on Baghdad, but on “the closing of the American mind.” “We have to give the inspectors more time.” And how much more time would be sufficient—another twelve years, say, with a four-year vacation stuck in the middle of it? Or how about just waiting until May 2003, when Iraq had had “enough time” to assume chairmanship of the U.N. Committee on Disarmament (10)? “But Saddam can be deterred.” Aha—so *that* must be why he responded to our dire military threats by blowing up the Kuwaiti oilfields (9)....

Hitchens is the master of the thought-provoking one-liner, but one of them really ought to take the prize both for audacity and insight. “Four million Iraqis,” he writes, “have been forced to take their talents overseas and live in exile. They should have the right of return” (15). This little jab, as subtle as it is powerful, could use a bit of elaboration.

Recall that partisans of the Palestinian cause insist on their “right of return” while being among the most vocal and vehement opponents of the war on Iraq. Recall also that they never tire of “linking” the issue of Palestinian rights with their anti-war stance. Bearing this and Hitchens’s one-liner in mind, one begins to wonder a bit about cognitive dissonance and unasked questions: Why, for instance, do Palestinians have a right of return but not Iraqis? If the 1948 Arab invasion of Israel was an act of “liberation” (a widespread assumption among hard-core partisans of the Palestinian cause), why was the 2003 invasion of Iraq a “crime against humanity” (another assumption, widespread among the same people)? Putting the same point another way: why was it *just* to wage the 1948 war in *violation* of the 1947 UN Partition Plan for Palestine, but *unjust* to wage the 2003 war to *enforce* a series of UN Resolutions stretching from 1991 to 2002? It’s “all history,” I know, but what *isn’t* in the Middle East?

Anyway, don’t wait too long for an answer to such questions from International ANSWER, the Palestine Solidarity Committee, the American-Arab Anti-Discrimination Committee, the Edward Said Fanclub, or any of the periodicals operating out of Cairo, Beirut, Amman, or Karachi. Just compare the moral posturing of such sources with their capacities for consistency, and you begin to see the value of that one little sentence, and of a dozen others like it throughout the book.

I’ll mention without belaboring some of the other polemical triumphs of *ALSW*, many them focused on the Left’s propensity for specifically lexicographical obscurantism. “Most of *Long Short War* is given over to parsing words,” writes one of Hitchens’s critics with no small insinuation of contempt.

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Indeed it is, and in ways that don't exactly flatter those who use words without being able to "parse" or define them. A fair bit of Left discourse proceeds by the mindless repetition of mantras based on undefined and indefinable terms—"anti-concepts" as Ayn Rand described them—which, while denoting nothing in particular, gradually come to shock and awe the careless, the craven, and the gullible. It takes a certain self-consciousness and self-confidence to see through the semantic confidence games here (intelligence helps, too) and more often than not, Hitchens has what it takes to do the job. His essays on "multilateralism and unilateralism" (34-36), "evil" (40-42), Bush as "cowboy" (57-59), the "drumbeat to war" (69-72), and the "no war for oil" mantra (85-88) are venomously astute.

My favorite of these word-parsings is "Inspecting 'Inspections'" (66-68), which makes the crucial point that by the UN's definition of that term, inspections place the burden of proof

squarely on Iraq to prove that it has complied. There is no mention in the resolution [i.e., UN Resolution 1441] of any requirement for the international community to furnish more evidence. Inspection is the term of art employed to describe the monitoring of compliance, not the unearthing of empirical proofs. As it happens, more empirical proofs have been unearthed, but no *investigation*, in the strict sense has been carried out. If the United Nations was to call for an investigation of Iraq's arsenal, complete with inventory and accounting, it would logically have to call for the dispatch of armed peacekeepers, at the very least, in order to ensure access. Such a job could never be carried out by a small posse of civilians. And given the square mileage of Iraq, the number of those armed peacekeepers would have to be pretty high. This would not be an invasion by most definitions, but it would very much resemble an occupation (67, his emphasis).

Keep this passage in mind for the next time you confront some jeering ignoramus who tells you that the war was all a fraud because "no weapons have been found." Actually, what's fraudulent is precisely that claim. This, too, could use some unpacking, as most of the relevant history seems to have been lost to the memory hole.

The truth is that Iraq has a uniquely sordid history of using chemical weapons against civilians, having racked up a casualty count in the tens of thousands during the 1980s in its various crusades to annihilate Saddam's ethnic enemies, the Kurds and the Iranians. By invading Kuwait in 1990 but losing the subsequent war, Iraq incurred the obligation via UN Resolution 687 (1991) of divesting itself of its weapons of mass destruction (WMD), incurring in the same resolution the burden of *proving* its compliance. To say that it *failed* to do so is a monumental understatement: for more than a decade, it thwarted every effort at

disarmament—lying, concealing, spying, bribing, and intimidating its way past UN inspectors until in 1998 it finally just expelled them for their pains (see Richard Butler, *The Greatest Threat: Iraq, Weapons of Mass Destruction, and the Growing Crisis of Global Security*, [New York: Public Affairs Press, 2000]). Worse yet, it succeeded twice at wrangling “verification” from those inspectors on blatantly false pretenses, only to be caught red-handed a bit later: first in the 1980s when it got its nuclear program past Hans Blix, then in the 1990s when it got a clean bill of health from the United Nations Special Commission on Disarmament (UNSCOM). Given a “final chance” to comply via UN Resolution 1441 in November 2002, it failed yet again by issuing a fraudulent “declaration” of its weapons programs to UN inspectors on December 7 of that year. Despite all that, the inspectors nonetheless found numerous weapons violations a few weeks later anyway—i.e., the “empirical proofs” to which Hitchens alludes in the preceding passage (for the fraudulence of Iraqi declarations, see *UNMOVIC Twelfth Quarterly Report* [Feb. 2003], paragraphs 6-11, 38; for weapons violations, see paragraphs 15, 30-34, and 40-45; for Iraq’s non-cooperation on substance, see paragraph 73).

No one has yet *demonstrated* Iraq’s compliance with its disarmament obligations, nor has anyone ever accounted for its missing weapons stocks, much less disputed that they *are* missing. Nor has anyone conclusively explained why a nation under sanctions for failing to comply with its disarmament obligations was for twelve years incapable of documenting its supposed compliance after claiming to comply. And yet somehow, in a truly Orwellian inversion, the burden for finding Iraqi WMDs has become ours, not Iraq’s, to discharge.

As for the rules of evidence in this game, the discovery of open Iraqi weapons violations (January-Feb. 2003), hidden gas centrifuges (June 2003), weapons blueprints (June), a vial of toxin (September), admissions of complicity in proscribed programs and concealment activities (September) are all deemed by “critics” to be insufficient reason for worry. Nor is Iraq’s past involvement in WMD use, production or concealment deemed relevant to how we view such evidence as we have. The suggestion seems to be that in order for a genuine threat to exist, the threat must in some undefined sense be “imminent”—meaning, I suppose, that no *real* threat can be said to exist until we can verify with Cartesian certainty that catastrophe from the source of the threat is just around the corner. Alternatively, the idea seems to be that there’s no point in looking very hard for Iraqi weapons unless we can absolutely certify their existence *before* starting to look for them, a conception of inquiry that gives new meaning to Meno’s paradox (and from which it evidently follows that if you don’t immediately find them, you should immediately stop looking). Whatever the interpretation, the bottom line here seems to be that a nation or organization now has a foolproof strategy for acquiring WMDs: *count on the epistemology of mass evasion*. In other words, if you conceal your weapons long enough and well

enough, it will take even the most determined and expert investigator years to figure out what you've done; since world opinion is too addicted to instant gratification to wait for the results of such an investigation, you can always make an ally of its impatience, ignorance, and plain old stupidity to win the WMD game. Of all of the journalistic writing I've done on the WMD issue, Hitchens's essays are virtually alone in addressing the essential issues here alongside those of Rolf Ekeus, Charles Krauthammer, Daniel Pipes and a few others. What he says in *ALSW* is dead-on as far as it goes; I only wish that he'd gone farther in the book to dispel the ignorance that clouds this dismally-misunderstood topic. (He's done so in several essays for *Slate* since the book's publication.)

While *ALSW* is aimed principally at the Left, widespread claims about Hitchens's "apostasy" from the Left are exaggerated; this is decidedly not a book written "from the Right," in any clear sense of "from" or "the Right." And to be blunt, I think that's to Hitchens's credit. As he notes, one encounters a mindless exuberance nowadays on the Right about the idea of "empire" from writers who seem to think that empires rise and sustain themselves by some grand equivalent of the invisible hand. For my own part, as the grandson of a survivor of the Amritsar Massacre of 1919 (a notorious massacre by British-commanded troops of some 379 Indian civilians), I never know whether to laugh or to cry when conservatives blithely offer the British Raj as the optimistic "blueprint" of the American future, as with lamentable frequency they do (cf. Stanley Kurtz, "Democratic Imperialism: A Blueprint," *Policy Review*, [April 2003].) Hitchens's skepticism about empire in "Imperialism" (30-33)—bolstered, incidentally, by decades' worth of intelligent writing on the subject—is a welcome foil to the usual right-wing cant on this topic, as are the essays on regime change (46-48) and the fall of Baghdad (89-104). I hope conservatives will take some of this to heart, but I somehow doubt they will. (While I'm in a quixotic advice-giving mood, I might also recommend two other Hitchens essays on imperialism: the magisterial "A Sense of Mission: *The Raj Quartet*," pp. 213-227 in *Prepared for the Worst*, [New York: Hill and Wang, 1988], and "The Perils of Partition," in *The Atlantic*, [March 2003]).

Similarly, one senses none of the ethnocentrism and chauvinism in Hitchens's writing that one so often finds on the Right. I find it difficult to read right-wing journalism about the Arab/Muslim world without getting the sense that the people who write it do so for audiences that regard themselves as *ipso facto* superior to "non-Westerners"—and superior, principally by having been *born* in "the West." To his credit, Hitchens never writes that way, even when he's criticizing Arabs or Muslims; no non-Westerner is required to abase himself or herself before the omnibenevolence of "the West" in order to accept his arguments.

This is, to be sure, an issue that bores partisans of "political incorrectness," conservative, libertarian, and Objectivist—but perhaps it

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shouldn't. Am I really the only person who cringes when I read, in the writings of an alleged defender of "inalienable property rights," that the Arabs of Mandate Palestine had no property rights worth respecting because they were little more than "nomadic tribes meandering across the terrain" of the future Jewish state (Leonard Peikoff, "Israel's – and America's – Fundamental Choice," <http://www.peikoff.com/essays/israel.htm>)? Or how about the hearty advice, proffered by the libertarian activist Jack Wheeler, that all Arabs be expelled from Jerusalem ("The Toleration of Evil," March 25, 2002; <http://www.albertarepublicans.org/wheeler.htm>)? (To the best of my knowledge, it was Wheeler, comically enough a former gun runner for the Afghan *mujahidin*, who first publicly floated the idea of "nuking Mecca" in retaliation for 9/11.) And then there's the charming advice of libertarian writer Vin Suprynowicz that we train our soldiers to follow Genghis Khan's advice: rape Muslim women, and teach their offspring to be like us (*Las Vegas Review-Journal*, Sept. 23, 2001). The ubiquity of such anti-human drivel on the Right is an undeniable fact, and those suffocated by it but unwilling to turn Left may well find relief in Hitchens's writing.

Though I found Hitchens's critique of the anti-warriors persuasive, I was less satisfied by the way he put the case *for* war. In a cantankerous essay called "Chew on This," he lists three reasons:

The first is the flouting by Saddam Hussein of every known law on genocide and human rights....The second is the persistent effort by Saddam's dictatorship to acquire weapons of genocide....The third is the continuous involvement by the Iraqi secret police in the international underworld of terror and destabilization (54-5).

The second and third reasons, I think, combine to produce a fourth reason more compelling than either of the two on their own: if Saddam's Iraq had acquired WMDs, it's entirely plausible to think that those weapons could have been used against Americans with massive and lethal effect. Think, in this context, of the March 1995 sarin gas attacks on the Tokyo subway (11 dead, 5500 injured), or the as-yet unresolved anthrax murders of the fall of 2001; what, besides a *full* accounting of Iraq's WMD programs, would have precluded an Iraqi version of these attacks, perhaps on a larger scale?

It's worth bearing in mind that Hans Blix & Co. repeatedly and explicitly stressed—in hundreds of pages of otherwise cautiously bureaucratic prose—that they could provide no *certain* accounting of Iraq's WMDs. On dozens of issues discussed in UNMOVIC's 173-page "Cluster Document" of March 2003, the UN inspectors candidly confessed their "uncertainty" regarding this or that issue—where the "issues" in question included Iraq's possession or non-possession of anthrax, ricin, botulinium toxin, VX nerve gas, sarin, tabun,

and the like (go to “Cluster Document” at <http://www.unmovic.org>; “UNMOVIC” is the United Nations Monitoring, Verification, and Inspection Commission that replaced UNSCOM in 1999). A typical sentence from an UNMOVIC report (one of hundreds like it) tells us that the inspectors could not “reduce uncertainty” about Iraq’s possession or non-possession of WMDs until they began interviews, not-yet organized as of February 2003, of possible Iraqi personnel possibly involved in the alleged unilateral destruction of the weapons—gleaned from a list of personnel given to inspectors by...Iraq, which admittedly, had provided a fraudulent 12,000-page list of its weapons programs to the inspectors just three months earlier (paragraph 70[e] of *UNMOVIC Twelfth Quarterly Report*). Not exactly what I’d call a truth-tracking research program. We might fairly ask, then, how we were supposed to make provision for our national *security* if the best we were going to get from UNMOVIC was certainty of uncertainty. The only way to *approximate* certainty on these issues was armed intervention, a fact that Blix himself obliquely and grudgingly conceded in an interview with the *Toronto Star* (Sept. 21, 2003).

In this light, one trouble I have with Hitchens’s argument is the priority he gives to the liberationist as opposed to disarmament rationale for war, a priority loudly trumpeted by the book’s subtitle. The liberation of the Iraqi people, Hitchens suggests, was the only genuinely “moral” justification for war (18, 51); national self-interest, by contrast, has no specifically *moral* standing (14). He indulges in some grating anti-isolationist rhetoric in this connection. It was “naïve,” he remonstrates, for Americans to want to enjoy their “peace dividend” after the Cold War (3): “there is a self-satisfied isolationism to be found,” he continues, wagging his finger at us, “which seems to desire mainly a quiet life for Americans” (56).

Oh, come now. Is there really something so shameful about not wanting to go around invading foreign countries, occupying them, reconstructing them at a cost of \$87 billion, and incurring a daily-mounting toll of dead and mangled bodies? It is after all Hitchens who bears the burden of explaining why the desire for a quiet life must yield to the duty to place that life at risk, and his specifically liberationist argument is not the most compelling reason I’ve ever heard for wanting to spend time in the Sunni Triangle. The question is: why, exactly, was the liberation of Iraq *for Iraqis* a good enough reason to throw away *our* peace dividend and *our* quiet lives? I don’t see that it was, and I’m simply not convinced by Hitchens’s table-thumpings on the matter.

Sometimes Hitchens half-heartedly suggests that liberation was our responsibility because our government set Saddam Hussein’s regime up in the first place and propped it up along the way (6, 47-48). The latter part of that is nauseatingly true, but we were hardly alone in the sin; if past complicity in Ba’ath socialism were the basic argument for regime change, the responsibility would be corporate, not individual, and we could legitimately have begged off from

righting our errors through war by pointing to the reluctance of the other involved parties to make their contribution. Iraq is as much a Euro-Arab mess as it is an American one, and it's not clear why we have to fight and die for the sins of others as they insult us from the sidelines.

Sometimes Hitchens suggests that we simply have a responsibility to liberate those suffering from a regime as vile as Saddam's on the sheer altruistic grounds that they are suffering and we can help (51). But there are problems here that Hitchens overlooks. First, how does he reconcile this gung-ho altruism with the generally non-interventionist stance he took during the Cold War, when he spent much of his time (sometimes sensibly, sometimes intemperately) telling us *not* to do for the victims of Sino-Soviet socialism what he thinks we now *ought* to be doing for the victims of (Soviet-supported) Ba'ath socialism? In other words, why the imperative to liberate Iraq today but not Cuba in the 1960s, Cambodia in the 1970s, or Afghanistan in the 1980s? Second, how does Hitchens reconcile his liberationist commitments with the idea of limited government? The Constitution makes provision for the "common defense" of *Americans*, not the liberation of an open-ended series of non-Americans. So does the Constitution override liberation or is it the other way around? Third, a liberationist justification is simply unfair to the soldiers who have to fight the war, and can hardly be expected to function as cannon fodder for the effectuation of liberationist daydreams. A soldier by definition gets benefits from a war of national self-interest that he can't get from a war of altruistic liberation. Fairness, I think, demands a tighter connection between expected risk and prospective benefit than Hitchens acknowledges here.

Also puzzling to me is Hitchens's confident claim that the liberation of Iraq was "postponed." The suggestion seems to be that, in fighting the 1991 war, we should have used that occasion to invade and occupy Iraq right from the start. Here again, Hitchens fails to acknowledge the discontinuity between his recent views and those he expressed in the not-so-distant past. Hitchens's earlier writings seem to imply (more by tone than by explicit declaration) that we shouldn't have been meddling in the Gulf at all, whether to liberate Kuwait or to invade and occupy Iraq (cf. "Realpolitik in the Gulf: A Game Gone Tilt," *Harper's*, January 1991). I have to wonder whether Hitchens is now overcompensating for what he regards as his past errors. Though I agree with the need to fight the 2003 war, it's not clear to me that the anti-war arguments of 1990-91 were wrong back then. Had we not fought Iraq in 1991, we would not have assumed responsibility for the region thereafter, and might have avoided fighting the present war. Surely not fighting any wars beats having to fight two.

There are a few miscellaneous problems in *ALSW*—all relatively minor, but each somewhat annoying. In "Armchair General" (20-22), Hitchens bitterly criticizes the idea that those who advocate war in Iraq ought to be prepared to fight there themselves. He has a legitimate point, but neglects to mention that he was himself responsible for giving respectability to the idea he now criticizes

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(“Chicken Hawks,” pp. 273-275 in *Prepared for the Worst*). Similarly, in “Terrorism: Notes Toward a Definition” (23-26), Hitchens reverses the view he advanced earlier, to the effect that “terrorism,” being indefinable, is a mere right-wing propaganda term without determinate meaning (“Wanton Acts of Usage,” pp. 297-304 in *Prepared for the Worst*). It seems to me that Hitchens’s definition of the term in “Notes” is about as weak as his previous attempts to prove that it can’t be defined (23); both essays raise interesting questions but neither really bears out Hitchens’s case.

The one genuinely deficient essay in *ALSW* is “Prevention and Preemption” (43-45) which argues, paradoxically, that we lack an objective standard for determining who has initiated force in contexts of war, and thus lack a standard for the application of such concepts as “preventive” and “preemptive” war. Apart from undermining the whole point of the book—was the 1990 invasion of Kuwait morally on par with the 2003 invasion of Iraq?—the essay is too short and oversimplified to do justice to the issues. In any case, given Iraq’s wholesale violations of its post-Kuwait agreements, Operation Iraqi Freedom could with perfect accuracy be described as a mission of *enforcement*, thereby obviating any urgent need to discuss either prevention or preemption.

Having made these criticisms, however, let me add that there is a good deal more to cheer in this book than to criticize. And it’s a measure of the inverted priorities of our political culture that the book will undoubtedly be criticized more than it’s cheered. That, in fact, is less a prediction than a description: one doesn’t have to go far to encounter the abuse that’s been flung at Hitchens for the stance he’s taken in this book, or for that matter for his views on terrorism, Islamism and the malfeasances of the Left. “Racist,” “gunboat militarist,” “Orientalist,” “drunk,” “snitch,” and “sell-out,” are the standard accusations, made in the first two cases by people whose reputations Hitchens went out on a limb to defend (Noam Chomsky and Edward Said respectively) and in the last case by a scholar whose career he promoted when it wasn’t exactly a fashion statement to do so (Norman Finkelstein).

Those ugly facts make one of the opening passages of the book all the more poignant:

At the evident risk of seeming ridiculous, I want to begin by saying that I have tried for much of my life to write as if I was composing my sentences to be read posthumously. I hope this isn’t too melodramatic or self-centered a way of saying that I attempt to write as if I did not care what reviewers said, what peers thought, or what prevailing opinion might be....I am sincere when I say that the idea of the posthumous never quite deserts me (4-5).

It sounds self-serving, but it happens to be true. An insincere man could not have

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written a passage like that, and, I think, would not have written a book like this. It's a rare combination of sincerity, intelligence, and courage that makes this book the candidate for the "posthumous" that Hitchens has made it.

But I found myself wishing the book posthumous success in the more literal sense as well. A hundred years from now, "Operation Iraqi Freedom" will most probably be ancient history, covered, I suspect, in layers of falsehood perceptible only to the conceptual equivalent of an archaeologist. I can't predict the future, but I'd like to think that Hitchens's little book will serve as a sort of Rosetta Stone—the indispensable tool for translating the hieroglyphs of 2003 to the puzzled inquirers of the twenty-second century. I don't have the highest hopes that those inquirers will make sense of what this war was about, but if they do, they'll undoubtedly have Christopher Hitchens to thank for it.

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Liébert, Georges. *Nietzsche and Music*, translated by David Pellauer and Graham Parkes. Chicago: The University of Chicago Press, 2004.

Georges Liébert's *Nietzsche and Music* is a deceptive book, and I don't mean that in a good way. His operating thesis is interesting and deserves to be explored more fully: that Nietzsche's experience with music and musicians influenced his life and his writings to such a degree that the latter need to be understood and interpreted through that experience. But instead of approaching this thesis in a objective, scholarly fashion, Liébert seems to have a different agenda. In effect, the book is largely an apology for Wagner and an attack on Nietzsche. So, when in the Preface Liébert says: "Perhaps... I have sinned against Nietzsche out of an excess of severity, but, as [Nietzsche] wrote at the end of *The Case of Wagner*, 'this essay is inspired, as you hear, by gratitude,'" we shouldn't miss the irony. Nietzsche is often savage against Wagner. The difference, however, between Nietzsche's attacks on Wagner and Liébert's attacks on Nietzsche is that Nietzsche wasn't pretending to do objective, academic scholarship (he had long previously abandoned that mode), while Liébert does have such pretensions.

The book is as much (or more) biography as it is an examination of Nietzsche's works, and Liébert sifts through Nietzsche's letters and his prose, often using the latter's penchant for hyperbole against him¹, often stretching evidence beyond its natural conclusions (sometimes into absurdity). In all this, Liébert's contempt for Nietzsche is plain. Thus, Nietzsche comes across as a dilettante (35, 95); a traitor, like Brutus, against Wagner (60, 129, 180); crafty (100); short-winded (115); a casuist, with the "casuist's duplicity" (130, 164); a Puritan (133); "an expert at self-mortification" (139); really a Christian (141); petulant [in a note] (145); habitually duplicitous (201); and "pathologically Romantic" (153), amongst other things.

Liébert includes detailed discussion of Wagner's importance as a musician and composer, which is undeniable, but his defense of Wagner against Nietzsche often consists in one version or another of the genetic fallacy, in which an idea or claim is rejected because of the source of that claim. While not explicitly saying so, Liébert clearly implies or suggests that because of Nietzsche's inferiority as a musician, he was in no position to judge Wagner or his music. Nietzsche was a dilettante, Liébert says, and "That he felt no embarrassment in submitting [a musical composition he'd written] to the composer of *Tristan* indicates that he also lacked the clairvoyance and tact proper

¹ The most egregious example of this is when Liébert takes Nietzsche at his word in *Ecce Homo* when he says that "it was not just in *Richard Wagner in Bayreuth* but throughout his whole work that every time the name Wagner appears, we should not hesitate to substitute his" (112).

to the ‘first psychologist of Europe,’ as he one day will flatter himself to be.” (49) Here Liébert sarcastically turns Nietzsche’s hyperbole against him, and suggests that Nietzsche was such a bad composer that he shouldn’t have dared or presumed to show the great Wagner something that he’d written. The further implication is, again, that such a dilettante has no business criticizing a great artist like Wagner.

Liébert also employs “psychologism,” a version of the genetic fallacy in which the claim or belief of someone is rejected because of the psychological origin of that belief, i.e., how he or she came to believe it. Specifically, Liébert implies that Nietzsche’s views of Wagner spring from hostility and from the Oedipal complex and thus that they ought to be dismissed. For example, since “only hostility was creative” for Nietzsche, Liébert suggests, he broke with and turned on Wagner (perhaps only) in order to fuel his own writing (57). Consequently, after Wagner’s death, Nietzsche was free to express his “rancor” and “hostility” openly (128). The implication, again, is that Nietzsche’s criticisms needn’t be taken seriously, since they spring from such dubious origins.

However, Liébert goes even further than this and employs what we might call “physiologicalism,” for lack of a better term, in which we reject a person’s beliefs or ideas because he isn’t healthy or physically strong enough to believe/accept the contrary view. To be specific, Liébert implies that Nietzsche became too sick to be able to appreciate Wagner’s music, and *that’s* why he objects to it. “[I]llness diminished [Nietzsche’s] attentive capacity,” (91) and he consequently turned an infirmity of his body into an aesthetic principle (70). Indeed, in *The Gay Science*, Nietzsche himself claims that he has “physiological objections” against Wagnerian opera. But “It is left to the ‘enlightened Wagnerian’ whom Nietzsche addresses in this aphorism,” Liébert says, “to *quite rightly* reply: ‘Then you really are merely not healthy enough for our music?’” (69, emphasis added).

Consequently, because of his ailments, because he can’t physically take Wagner’s music, Nietzsche comes to appreciate lighter music, particularly operettas. “Coming after Wagner, this light-hearted music had [a] restorative effect on Nietzsche” (189). He appreciated this “diverting entertainment,” (194) and his “will to light-heartedness, joined to an increasing sensitivity to external impressions, was at the time so strong that he did not hesitate in finding Offenbach (and even Audran) ‘more inspired’ than Wagner” (190). In fact, Nietzsche found Audran’s *La Mascotte* especially moving and he heard it “several times in Turin *while enjoying ice cream*” (190, emphasis added). One couldn’t possibly think of enjoying ice cream while watching a Wagnerian opera—grand, magisterial, noble as they are. Liébert’s contempt and his dismissive attitude here are clear: Nietzsche, his health ruined, feeble in mind and body, could no longer take Wagner’s profound music, which is real art. The only thing he could really handle anymore was light entertainment, a pleasant

diversion, while perhaps having an ice cream. And *this* is why he rejects and excoriates Wagner.

But Liébert is not content with defending Wagner. His larger aim seems to be to attempt to explain away as much of Nietzsche's brilliance and originality as he can. This is where his thesis—that Nietzsche's works must be understood in relation to his musical experiences—comes most into play, and where it is stretched and abused past the point of believability and good sense.

The argument here consists in first making the link between Nietzsche's music and his writing—that he wrote as if he were composing music; or he tried to make his writing as musical as possible. “[M]usical discourse would be for him...his model for all discourse, even for philosophical discourse” (3). “[Nietzsche's] thinking begins with music. It is the ultimate, sensible, physical ground of his reflections” (9). And: “Nietzsche did define the dominant tonalities of his future philosophical work almost as though music was its clumsy prelude” (52).² This is already overstating the case, but Liébert goes further and says that Nietzsche's ideas often derived from his musical experiences. So, for example, “At the piano, the young Nietzsche above all taught himself to interpret, a notion that will occupy a central place in the thought of the philosopher. ‘No, there are no facts, only interpretations.’ This well known formula, which expresses what has been called Nietzsche's perspectivism, is first of all that of a musician” (14-15). Liébert also attempts to explain in the same way Nietzsche's rejection of the ego (16); the Dionysus/Apollo duality (27); the overman (38); and the eternal return (165). Aside from the Apollonian/Dionysian duality, which is inherent in music, Liébert's claims about the links between music and Nietzsche's ideas are quite forced for the most part.

The second step, then, is to remind us continuously how poor a composer and musician Nietzsche was. His “imagination exceeded his capacities for composition” (21). “[B]etween Wagner and Nietzsche, it is Nietzsche who ‘seemed a born dilettante’” (36). Knowing that Nietzsche (foolishly) gave Wagner a copy of one of his own compositions, “We can understand that Wagner must have smiled at the clumsy mistakes of a short-winded improviser” (49). Liébert also reminds us of a well-known incident in which Nietzsche gave one of his compositions to Hans von Bülow³, who trashed it mercilessly, saying that if it wasn't a joke or a parody, then it was “the equivalent of a crime in the moral realm,” and “more detestable” than Nietzsche understood (51).

The conclusion we're supposed to draw, then, is that since his writing

² Also: “[M]usic constitutes a constant reference as well as an invisible framework [in Nietzsche's work]” (2). And: Nietzsche transposed “with an increasing mastery his talent as an improviser to the art of words” (22).

³ Von Bülow (1830 – 1894) was an important musician and conductor. He was a student of Liszt, whose daughter, Cosima, he married. Cosima had an affair with Wagner while married to Von Bülow, then divorced the latter and married Wagner.

and his music are so inextricably linked, if his musical compositions were poor, then his written compositions, and the ideas they contain, must be poor as well. Nietzsche, Liébert says, lacks the capacity for development and organization. This is a kind of “impotence” that is tied to his poor health (97). As in his musical efforts, as a writer, he was “merely an improviser, capable only of brief efforts, despite his ambition to write a classic book, a monument, not just collections of aphorisms and essays” (98). “To tie things together—this was Nietzsche’s constant difficulty, since he no doubt lacked sufficiently strong ‘artistic gifts’ to counterbalance the vigor of his critical faculties” (98). Consequently, “From book to book, none of which from *Human, All Too Human* on were really finished; his aphorisms become merely disjointed fragments, provisional inklings of a thought process that was always underway” (98). Consequently, Nietzsche is a man of *ressentiment*⁴ himself, and “the ancestor of a swarming posterity of failed creators who, incapable of works, denounces every completed work as an illusion or imposture” (100).

However, Liébert tends to forget (willfully or not) that the music/writing analogy is just that—an analogy. Nietzsche may indeed have quite consciously attempted to make his prose more “musical,” and some of his ideas may indeed have sprung from his experiences as a musician, but in the end music is one thing, and writing prose and doing philosophy is something really quite different. As a playwright, for example, I may attempt to make my scenes more “visual,” more “painterly,” but these are metaphors, and if I am a poor painter, that has no bearing at all on the quality of my plays.

Second, to say that Nietzsche’s works were unfinished is either an empty or an unjustifiable claim. Because Nietzsche consciously abandoned the form of long, sustained treatises in favor of shorter essays or collections of aphorisms, the work of shaping his books, integrating the different elements to produce the desired effect could potentially go on ad infinitum, just as one might say that poems are never really finished—they can be continuously revised. If *this* is what Liébert means when he says Nietzsche’s works were never really finished, then the claim is empty—it’s almost a tautology. If, on the other hand, what he means is that Nietzsche’s books are just collections of random sayings, and that he failed to create the long, extended argument that he wanted because he was incapable of doing so—and *that’s* why they’re never really finished, then his claim is unjustifiable, if not ridiculous. Given Nietzsche’s aims, and the fact that the form reflects the content of his ideas, works like *Beyond Good and Evil* and *On the Genealogy of Morals*, for example, are as complete (and revolutionary and brilliant) as most any other works in the history of philosophy.

Third, I’ll mention in passing that far from being the hack that Liébert portrays him to be, Nietzsche was actually a fine musician with a flair for

⁴ Liébert follows Nietzsche in using the French for “resentment.”

improvisation and was a good composer—it's just that he was an amateur, not a professional. And if you were to compare any amateur to a serious professional, and especially to a giant like Wagner, the former would come off poorly in the comparison. Nietzsche had thoughts about becoming a professional, but indeed he lacked the necessary musical gifts to be the kind of musician he wanted to be, and consequently he went into philology and philosophy, for which his gifts were immense. If we were to compare Wagner as a philosopher to Nietzsche, the former would likewise come off badly in comparison—but why should we want to do that in the first place? Wagner wasn't a professional philosopher.

But Liébert's attempts to explain away Nietzsche's originality go further. As much as he can, he tries to attribute Nietzsche's ideas directly to others or to the influence of others, most often to Wagner, and especially the ideas in the *Birth of Tragedy* in the case of Wagner.⁵ So it was "through animated conversations with the composer, that the *Birth of Tragedy* took shape" (40). "Without Wagner's example...and without the hold his music had over him, Nietzsche would surely not have attributed primacy to Dionysus" (44). And thus Nietzsche was being original "in that when he borrowed Wagner's ideas, he showed himself to be more Wagnerian than Wagner" (44). Liébert pays this unusual compliment more than once.⁶

Indeed, Nietzsche's relationship with Wagner "was the central episode in Nietzsche's life" (54), Liébert says; he never really broke with Wagner, but always had a "love-hate" relationship with him (58); and "Nietzsche followed Wagner's advice so well that he became a philosopher" in the first place, thus "freeing up the true music to be found in him: that of language..." (50). *Thus Spoke Zarathustra*, Liébert says, is really the only book that Nietzsche completed after *Human, All Too Human*—but that was really due to Wagner's influence: "Nietzsche compared his book to a 'symphony' (the only one, by the way, that he succeeded in orchestrating from end to end). But to a reader endowed with a 'wicked ear' it sounds rather like a pastiche of Wagner that has withstood the passage of time less well than the original, no doubt owing to the lack of music" (102).

This last claim is particularly silly and sums up well the main problem with Liébert's book. He is implying that Nietzsche's work is somehow derivative of Wagner—that *Zarathustra* is "a pastiche of Wagner," but that it's a poor

⁵ Wagner "in many ways was a more perceptive psychologist than [Nietzsche]," says Liébert (56).

⁶ Also, the free spirit, the new European man Nietzsche dreams of in his late works is modeled on Wagner's Siegfried (124). And "many pages" of *Human, All Too Human* are infused with the "personal element," i.e., they're really about Wagner and his wife. Elsewhere, Liébert says that Nietzsche's criticisms of Wagner were prefigured in Eduard Hanslick's work (156, 171), and that Nietzsche borrowed the word "nihilism" from Paul Bourget (158).

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imitation, and it has “withstood the passage of time less well than the original.” But, it’s not clear how Nietzsche’s book *could* be a pastiche of musical pieces—that seems absurd on the face of it, unless Liébert means that the book is derivative of the librettos of Wagner’s operas and the ideas they contain; but in that case the claim would simply be false.

Throughout *Nietzsche and Music* Liébert performs these kinds of gymnastics, trying to imply and argue that Nietzsche’s work is derivative and unoriginal, and that his criticism of Wagner are completely unjustified, the product of sickness if not madness. And there are places where Liébert’s scholarship is shoddy. For example, he mistakenly reports that Nietzsche was born in February of 1844 (13), when Nietzsche’s birthday was in fact October 15th.

Worse, Liébert, in trying to convince us of Nietzsche’s mental frailty, reports rumors and suspect claims as facts, and in a manner unworthy of a serious scholar. The most unforgivable example of this is when he passes on the dubious (and by now mythical) claim that Nietzsche suffered and died from syphilis, and—even worse—that he contracted it from a prostitute. “Nietzsche no doubt reproached himself for not having resisted the advances of the ‘flower-maidens’ as calmly as Parsifal” (136), he says. And, reminding us of the occasion on which Nietzsche was accidentally led to a brothel, and, extremely embarrassed at finding himself in that environment, simply played the piano, Liébert says: “There wasn’t always a piano available to allow Nietzsche to turn away from the apparitions ‘of spangles and gauze,’ of ‘flashing skirts promising many things.’ And his health, as is well known, suffered cruelly as a result” (136-137). That is, Nietzsche contracted syphilis from a prostitute and that’s why he had poor health and why he went mad. This is an unsubstantiated rumor at best, purely malicious fiction at worst, and Liébert reports it as fact (note though that, like a good politician might, he doesn’t actually come out and say it).

There is no doubt that music was of great interest to Nietzsche throughout his life; that Wagner had a profound impact on Nietzsche as a young man and continued to be a subject of some of his writings throughout the latter’s mature life; and that (some of) Nietzsche’s attacks on Wagner are personal, unwarranted, and hyperbolic. However, while Nietzsche was concerned with “musical” elements in his writing—the tempo and rhythm of his prose, for example—it is quite a stretch to say that ideas such as the overman and eternal return derived from Nietzsche’s experience of music; and it is wholly unjustifiable to imply that because Nietzsche was a poor musician, that he was likewise a poor writer and philosopher.

In the end, there are much better and more scholarly methods of defending Wagner and criticizing Nietzsche than those Liébert employs in *Nietzsche and Music*. And, what’s more, Nietzsche deserves much better than this hatchet job.

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