

# **Libertarianism Defended**

**Tibor R. Machan**

# LIBERTARIANISM DEFENDED

*In Memory of Jim Rosse*

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ASHGATE

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# Preface

Ever since the late Robert Nozick penned *Anarchy, State, and Utopia* in the mid-1970s, libertarianism has been treated with some measure of respect within political philosophy, science, and economics circles. But libertarianism and Nozick's version of it have been regarded as nearly identical, resulting in little attention to ideas and arguments other than his – despite the fact that Nozick himself acknowledged that there are impressive libertarian thinkers other than himself.

Yet while Nozick's version of libertarianism has occupied stage front, he has not formally responded to the many critical discussions of his work. Meanwhile, though, other libertarians have continued to talk. Jan Narveson, Loren Lomasky, Eric Mack, Douglas B. Rasmussen and Douglas J. Den Uyl, and many others have marshaled impressive arguments in support of the libertarian idea that a political system is just when it successfully secures the rights of individuals as understood within the Lockean tradition of (or the regime of individual liberty as conceived of by Adam Smith, John Stuart Mill, Herbert Spencer and other) classical liberals. I have contributed to the discussion as well. So, why yet another work in defense of libertarianism?

When a proposed 'paradigm' is not widely favored in a discipline, those who do find it promising need to advance their arguments – and apply them to innumerable problems and controversies – if their view is to achieve visibility and, perhaps, prominence. Proponents of the mainstream view are certainly not under any great pressure to hash out the implications of the minority view. Meanwhile, the mainstream positions gain constant support and exposition from think tanks, research centers and, most of all, academic scholarship. Thus, for example, wherever public finance is studied, tax policy will be a very well traveled area of discussion, while those who regard taxation as unsavory can expect little such academic work devoted to their ideas. So it is up to research centers and scholars supporting the contrarian paradigm to keep churning out the studies and the arguments that can give their position a chance.

There is another fate such fringe – or radical – positions must endure: the fate of being dismissed with offhand comments in major books and other publications, as if their contribution could be dispatched so easily. And it is my awareness of innumerable such nettling offhand dismissals that prompted me to work on the present book. The introduction addresses several examples of these cursory comments, while the body of the work takes up other topics that fail to be discussed from a libertarian standpoint in mainstream forums.

I wish to thank the publishers of *The Freeman*, *International Review of Social Economics*, *Economic Affairs*, *World & I*, *Academic Questions* and



*Res Publica* for the use of materials in this book that appeared in their journals. Jim Chesher, Douglas J. Den Uyl, Douglas B. Rasmussen, Randy Dipert, Nick Capaldi, Tom G. Palmer, J. Roger Lee and quite a few others deserve thanks for the many discussions we had that helped me to get clear on some of the ideas in this book. Some of these were developed and scrutinized in the course of my work as public policy advisor for Freedom Communications, Inc. of Irvine, California. I am grateful for the cooperation of many of the current and former associates of this company – in particular the late Jim Rosse, Sam Wolgelmouth, Ken Grubbs, Steve Greenhut, Cathy Taylor, Skip Foster, Steve Buckley, Ray Sullivan, Jennie Lambert and other editors and publishers of FCI's newspapers across the USA – for their very helpful criticism and challenges of my rendition of libertarian ideas.

I thank Freedom Communications, Chapman University, and the Hoover Institution for their continued support of my work. I also wish to thank David M. Brown for his editorial help.

People, I thought. These are people. Their general uniformity was interrupted only by their individual variety.

Steve Martin, *The Pleasure of My Company*

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## Introduction

# Defending Libertarianism

[P]olitical philosophy, when it has an impact on the world, affects the world only indirectly, through the gradual penetration, usually over generations, of questions and arguments from abstruse theoretical writings into the consciousness and the habits of thought of educated persons, and from there into political and legal arguments and eventually into the structure of alternatives among which political and practical choices are actually made.

Thomas Nagel, 'Justice, Justice, Shalt Thou Pursue, The rigorous compassion of John Rawls' *The New Republic* (October 25, 1999), pp. 36–37

When I speak of defending libertarianism, I have in mind taking up various challenges of the position and showing why they are misguided or unfounded. Most of the chapters that follow address one or another more or less widely entertained charges against the fully free society. But some deal with issues that any political position needs to address, and still others consider certain controversies within the libertarian school of political thought itself.

Often, people who tend to be taken quite seriously simply dismiss libertarianism with a kind of wave of their intellectual hand, making only the briefest reference to some line of argument they are relying upon – as if it were axiomatic that the libertarian option can't cut it. I will show in this work that the libertarian alternative deserves better treatment and that these dismissals stem from wishful thinking that aims to hoodwink rather than rationally persuade. I will also take on some of the more developed criticism of libertarianism.

In our time libertarianism has gained notoriety, if not always respect. Not only is there a political movement afoot by that name across the globe – with academicians, pundits, publications, and think tanks helping to forge its ideas – but there are also libertarian and classical liberal political parties fielding candidates throughout the United States and elsewhere. Moreover, there is a rich literature of libertarian theory in nearly all the social sciences and humanities, even though in political theory proper it is almost exclusively the position of the late Robert Nozick that receives any serious attention.<sup>1</sup>

All this has led to public discussion of the substance of this political viewpoint, as well as some serious misrepresentations of it. The most clear-cut example of the former have been books and scholarly papers in which the position is briefly mentioned and dismissed; and of the latter, the charges leveled by some communitarians – for example, Thomas A. Spragens, Amitai Etzioni, Charles Taylor, Michael Sandel, and others – that libertarianism (or

its previous incarnation, classical liberalism) rests on an untenable and indeed ridiculous rationalism, scientism and, especially, atomism.

According to this charge, libertarianism assumes human beings to be almost preternaturally self-sufficient and able to choose whether or not to take part in social life at all. In other words, libertarianism supposedly assumes that human beings are asocial atoms. The association of libertarianism with such atomism has been repeated so often that among certain thinkers it has become a mantra, in no need of elaboration or support.<sup>2</sup> This, what some call the rugged-individualist approach, deriving from the work of Thomas Hobbes, is taken to be the only one given in support of libertarianism.

Others claim that libertarianism is hedonistic; or that it lacks an honorable political creed; or that it cannot support patriotism; or that it does support patriarchy; or that it promotes recklessness toward the environment and crass corporatism, spawning business scandals.

More ingeniously, some claim that what libertarianism's philosophical underpinnings support is not a free-market, *laissez-faire* system at all but rather something libertarians routinely oppose: the welfare state. By this account, libertarians are confused.

As an example of these dismissive cursory attacks on libertarianism, consider Cass R. Sunstein's criticism of free-market economics:

A familiar problem with unrestricted free markets is that they can produce pervasive injustice. A less familiar problem is that free markets often trap people, including the well-off, into wasteful and continuing struggles for better positions. It is in the very nature of the problem that even reasonable people may be unable to extricate themselves from those struggles without collective help. In the face of struggles of this kind, free markets should not be identified with freedom, properly understood.<sup>3</sup>

Did you get that? Not only is freedom unjust, but it isn't even freedom proper – a claim Marx made repeatedly in his own critique of classical liberal ideas:

This kind of liberty [free competition] is thus at the same time the most complete suppression of all individual liberty and total subjugation of individuality to social conditions which take the form of material forces – and even of all-powerful objects that are independent of the individuals relating to them. The only rational answer to the deification of free competition by the middle-class prophets, or its diabolisation by the socialists, lies in its own development.<sup>4</sup>

Both of these are indeed pregnant assertions, even if in Sunstein's case they are offered as an apparently self-evident aside. His statement has the virtue of revealing the basis for much antagonism toward not only the free market or capitalism, but also toward the United States of America (which rhetorically, at least, stands for the free market). It also shows how persistent the Marxian conception of capitalism continues to be among American intellectuals.

The alleged ‘pervasive injustice’ of the free market has nothing to do with injustice as ordinarily understood. Injustice in the political realm involves the violation of individual rights – not, as some prominent theorists have claimed, unfairness or inequality or even indecency. To commit an injustice is to kill, assault, kidnap, rape, enslave, molest or steal from someone – to treat him or her other than is due to a human being as such. It is to burglarize someone’s home or business or trespass on their property (including, some would argue, their intellectual property). All of this is prohibited and severely punished in the courts of a free capitalist society, which pursue justice when they function as they ought to. Cass Sunstein cannot be ignorant of this. So why is he saying that the free market by its nature produces injustice?

Because he uses the term ‘justice’ idiosyncratically or in a question-begging way. He deploys what has come to be prominent in academic political theory since the publication of the late John Rawls’s *A Theory of Justice* in 1971, according to which ‘injustice’ in the sense of rights violation became influentially transformed into ‘unfairness.’ Rawls’s famous motto, ‘justice as fairness,’ guides the thinking of the bulk of academics on political economic matters.<sup>5</sup> Here’s where the question-begging comes in. It isn’t that the free market does – or rather encourages – anything really *unjust*, only that it fails to provide everyone with what is ‘*fair*’ or rather with what many academics believe would be right if only the world could be managed fairly. And what would that come to?

Accordingly to Rawls, taking justice as fairness requires that no one in a society possess more than another, except where that ‘more’ would also result in more for those who are the worst off – by giving incentives to producers, for example. This idea of justice as fairness makes sense because for Rawls, quite idiosyncratically, there is nothing anyone has that he or she deserves to have; let alone more than what others have.

The most fundamental reason for this is that Rawls discounts free will entirely. For him, ‘Those who have been favored by nature, whoever they are, may gain from their good fortune only on terms that improve the situation of those who have lost out.’<sup>6</sup> To those who might protest, motivated by common sense and a long-embraced conception of justice, that this is to neglect the frequent justice of greater gains in a free market system and how those who create those gains are responsible for them, Rawls replies that the assertion that we ‘deserve the superior character that enables us to make the effort to cultivate our talents is ... problematic; for such character depends in good part upon fortunate family and social circumstances in early life for which we can claim no credit.’<sup>7</sup>

When social life is understood this way, everyone is seen to be a member of a team, equally significant and thus equally deserving or due equal consideration of his or her needs, wants, hopes, aspirations, capabilities and the like. One person’s advance is determined by factors that might just as easily have promoted the advance of another. It is all a matter of luck. So to take the wealth from those who happen to have it and treat it as common to

all makes perfect sense, except when some inequality could foster a common advantage.

Per Rawls himself, the free market is much more fair than other more collectivist economic orders. For while not everyone enjoys the same level of wealth in a free market, the discrepancies do tend to improve the lot of everyone. By Rawls's own standards, the free market, though unfair, can make people much better off than alternative and fairer systems.

But despite the prominence (and often exaggeration) of Rawls' ideas, 'fairness' is not the right standard of justice in a legal order. Because of that prominence, the libertarian idea, which takes very seriously the possibility and denies the injustice of numerous inequalities, is often given short shrift. Yet character is not, *pace* Rawls, mostly a matter of luck. It is instead the result of how persons act in the world and what they thus freely choose to make of themselves, very often in the face of major obstacles (including the lack of advantageous family circumstances). Yet this possibility is deemed naïve by many Rawlsians, probably because their understanding of the world rests on a rather strict determinism according to which none of us can really make any *bona fide* choices at all. Presumably, we are all driven or molded to be who we are. What we do is a necessary consequence of that molding, not a matter of choice.

Furthermore, the world is *inherently* 'unfair' – and, thus, 'unjust' in Rawls's (and Sunstein's) sense of the term. Some are born more beautiful, more talented, healthier, in better locations, in nicer times, and/or with greater material resources than are others. This is the main complaint of egalitarianism: nature itself is not 'fair', and never mind whether a moral concept such as 'fairness' can, strictly speaking, apply to nature at all. But somehow all ought to be made fair, via politics.

The paradox of how fully determined people, lacking any power of choice or *self*-determination, can remake the world seems not to bother most Rawlsians. In any case, contrary to what egalitarians believe, there is a significant kind of human equality in nature, at least most of the time: we are all faced with our lives to run. And how well or badly we do this will leave its mark on us for better or for worse. In this sense, we are all in the same boat. The beauties of the world can make a great mess of their lives, as can the rich and talented. Or they can do the best they can or just slide by in mediocre fashion. No human, at least not under normal circumstances, can escape the quintessentially human task of having to attend to life to have a chance at flourishing in it.

Nor is it the case that if some do enjoy advantages as a matter of luck others become justified in 'rectifying' this, engaging in evening things up, as it were. Someone's good health, numerous talents or great looks is no justification for taking from that individual what it gains and turning it over to someone less fortunate. At most it could occasion a moral imperative to share some of it, which is by no means facilitated by coercive wealth redistribution, quite the contrary.<sup>8</sup>

An unavoidable problem with any collective-coercive attempt to eliminate unfairness – a problem even from the radical egalitarian’s own perspective – is that it introduces the most dangerous form of unfairness, namely, giving some people power over others. How do you equalize things without creating powerful equalizers? These equalizers must be armed, otherwise many of those who are deemed to be advantaged will not yield to the effort to be equalized. The only result must be some version of George Orwell’s fable *Animal Farm*, in which although all animals are supposed to be equal, some end up far more equal than others.

What about the claim that ‘free markets often trap people’? The fact is, we do often allow ourselves to develop bad habits when we are free. We splurge when we go shopping; we might not save enough money for rainy days; we purchase goods that we do not really have much use for simply because this is what we did before; we fail to be prudent as we buy or sell our labor and products; we indulge in numerous vices such as greed, gluttony, immoderation, intemperance, and so forth. Indeed, free men and women often fall prey to temptations like this.

Now all this is true but what of it? Arguably, the most addictive habit of all is political power. Thus the collective help that Sunstein recommends as a remedy for such temptations poses precisely the worst temptation of them all.

Instead, what we need is common sense, civility, friendly reminders, maybe a harsh talking to once in a while from friends, family, editorialists or social and religious leaders. Above all, the fact of our own individual responsibility for our own lives, and for the consequences of our choices, should be acknowledged and respected. The last thing we need to combat bad habits is for a bunch of people to arm themselves and impose their idea of prudent living on the rest of us by force. Such enforcers are exactly what a free society must seriously resist.<sup>9</sup>

The possibility of lapsing into bad habits is just the sort of risk that free men and women face all the time. We need not be victimized by it. Responsible conduct is evident enough in the area where Sunstein himself does so much of his work, namely, scholarship, which is relatively free of bureaucratic edict. In the realm of intellectual expression there is virtually no government regulation, at least not in the United States, in virtue of the First Amendment. Thus this sphere affords us an instructive illustration of how men and women who are free will likely fare. They in fact perform their share of untoward and blameworthy deeds, but they also produce extremely varied and worthy works. And they cope with all this in a (relatively) civilized fashion, namely, through vigorous criticism and without recourse to coercion and the activities of vice squads (although there is growing evidence of some of this in the name of political correctness). There aren’t many conferences at which the participants take shots at each other aside from those that are verbal. Only if one believes men and women to be inherently impotent, merely impelled by circumstances beyond their control, will one be tempted to intrude upon



them with one's utopian plan and prevent them from making their own plans. Yet, why blame anyone then, even those who allegedly perpetrate unfair manipulation via advertising or marketing? They, too, are helpless, after all, in carrying on as they do!

In two respects, the price of our capacity for free action is, indeed, eternal vigilance. We need to be vigilant both to keep our freedom safe from those who would act aggressively against us for various high sounding reasons, and also to deal responsibly with our precious liberty. In the first instance, of course, it is in response to people like Rawls, Sunstein, Nussbaum and all their followers, as well as those in government who carry out their interventionist task in the belief that they are acting properly, that we need to be vigilant. In the second instance, it is our own weaknesses and temptations that require vigilance from us.

The number of distinct stances that can be taken against individualism and the free market is quite wide-ranging and prolific – a tribute to the creative ability of humankind, really. Yet many of them boil down to the same assumption that along with freedom comes helplessness rather than empowerment. Some, for example, claim that while men may benefit from unfettered freedom – or at least middle-class men – women do not, or at least not as much. Martha Nussbaum charges: 'A simple "get the state off our backs" position may look attractive when we are thinking about the sex lives of middle-class men, but it is clearly inadequate to deal with the situation of women and other vulnerable groups. There is no consent where there is pervasive intimidation and hierarchy.'<sup>10</sup> Such a stance implicitly disparages the ability of women to join in voluntary efforts to fend off male 'intimidation and hierarchy.' While in some cases, when women are being coercively assaulted, Nussbaum is right;<sup>11</sup> she is wrong if she conflates these, as many feminists do, with cases such as insulting women or not paying them high enough wages.<sup>12</sup> Such equivocations invite the intrusions of the Nanny State, not the protection of women from those who would violate their rights. Furthermore, is there any good reason to think that if the culture embraces such intimidation, the state, with all its men, wouldn't also embrace it? In fact, to the extent that there is such prejudice, less centralized spheres of the culture could often offer ways to escape it. When relations are voluntary, options are expanded, not shrunk.

Other criticisms of libertarianism are less substantive and cannot be dealt with at any length in this Introduction. Some, in fact, are worth only a mention here because of their curiously hostile tone and *ad hominem* character. For example, social philosopher Alan Wolfe, in a discussion of the values of conservatism, states that the 'young and the childless are rarely conservative, but they are often libertarians. Libertarianism is a political philosophy for Peter Pan, an outlook on the world premised on never growing up ...'<sup>13</sup> Such comments – actually, they are best dubbed *slurs* – cannot be answered apart from noting that they serve to dismiss the substance of libertarianism, perhaps because the author has little or no interest in dealing with the arguments

and so prefers the way of insults and intimidation. They do alert us to the distressing fact that some of the most prolific and industrious public thinkers are utterly contemptuous of the tradition of individual liberty, a fact that may be of greater concern today than it was a few decades ago. Since September 11, 2001, there has been much consternation about how others in the world not only misunderstand but actively resent, even hate, the central elements of Western liberalism, namely, its individualism, capitalism and at least rhetorical commitment to the ideal of individual rights to life, liberty and the pursuit of happiness. But the plain fact is that many in the United States of America do so as well.

There are many other challenges the libertarian must cope with, including some that focus on how certain prominent classical liberals, whose arguments are sometimes deployed to help support the libertarian position, did not advance a fully consistent or pure case for negative liberty. Thus, for example, Filimon Peonidis, a philosopher from Aristotle University of Thessaloniki, Greece, has argued that John Stuart Mill permitted major exceptions to his version of limited government. One area was education, another circumstances in which ‘by the force of opinion and even by that of legislation’ people’s freedom appears to be limited – especially by media companies that present to their customers the fare the companies want them to experience.<sup>14</sup> In such cases, Peonidis argues, Mill would allow government to interfere. Ergo, the case for a complete *laissez-faire* in the media business must be unsuccessful.

Of course, Mill has never been a pure classical liberal, let alone libertarian, so a strenuous claim that he was inconsistent is somewhat beside the point. There has always been his famous, though usually misunderstood, example of ‘paternalistic’ interference, as when one prevents someone without consent from stepping on a bridge about to be blown up. (This, however, cannot reasonably be construed as an example of anti-libertarianism in his thought.<sup>15</sup>) More significantly, Mill argued for some measure of state redistribution of wealth as well as government monopoly for certain ‘natural’ monopolies such as public utilities. Mill’s compromises with respect to individual liberty are well known and don’t tell us whether some case might be made against such compromises. We can in any case note that ‘hard cases make bad law,’ so that while certain exceptions might be made to the principles of limited or minimal government as a matter of juridical discretion, they should not be officially encoded in the legal system.

Even apart from the work already extant in which libertarian ideas are developed and shown to have certain public policy implications, it is now time to mount a rebuttal to some of these assaults. This book aims to address many such charges and anticipates questions.

One fact about the intellectual defense of libertarianism to keep in mind is that not all elements of a *defense* of libertarianism need be elements of libertarianism *per se*, which is a political position barring coercion from human social life. Just why coercion should be barred from social life is

a complicated matter. The best answer may emerge from various areas of philosophy, economics, sociology, history, and other disciplines. This is one reason that sometimes very different – though not all equally successful – defenses can be advanced for libertarianism. What I say here is, of course, not the last word, nor is it set forth as such. I believe my approach is more successful than many others, a matter in any case the reader will have to assess, however.

I hope that with the responses that follow on the record, the discussion of the libertarian position will be advanced. And perhaps also its adoption. Once the misrepresentations are cleared up, it will at any rate be possible to consider whether the position is sound on its own merits. For that is really what is most important about a political idea.

## Notes

- 1 Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974). This work by a Harvard University professor, educated at Princeton University and formerly someone with Leftist credentials, was an anomaly in the 1970s, even though it became widely discussed and even popular (winning, as it did, the National Book Award). Arguably Nozick broke through in part because of his pedigree, which is not to take away from his ingenious and brilliantly articulated arguments. But since Nozick did not return to political theory during the rest of his sadly short life – he died at 63 from stomach cancer – the discussion of libertarianism by the prestigious statist in the field ended with consideration of his original position alone. The likes of John Rawls, Ronald Dworkin, Thomas Nagel, and others who treat the topic paid attention only to Nozick and continue to do so. Yet dozens of other political theorists also became convinced of libertarianism and produced numerous works making a case for it. This suggests that a kind of Kuhnean sociology of knowledge phenomenon has been at work, with prominence of a position being treated as more important than substance.
- 2 Most notable among these is Amitai Etzioni, a prominent academic who has been a widely published popularizer of communitarianism, and Charles Taylor, a much more formidable critic of radical individualism and defender of communitarianism. See Amitai Etzioni, *The Spirit of Community* (New York: Crown Publishing Co., 1993) and Charles Taylor, *Philosophy and the Human Sciences* (Cambridge, England: Cambridge University Press, 1985), especially his essay ‘Atomism.’ See also Robert Bellah et al., *Habits of the Heart* (New York: Harper & Row Publishers, 1985).
- 3 Cass R. Sunstein, *The New Republic*, March 29, 1999, p. 45. It is odd how readily intelligent folks will dismiss freedom in light of the fact that when we are free, we do face some temptations that may result in regrettable consequences. People who are free are subject to all sorts of pressures, inclinations, habits and oversights. Yet, as public choice theorists have observed, getting ‘collective help’ – that is, government regulation – to prevent these is far more hazardous than letting free people deal with the problems in their own various creative ways. We can’t get around the fact that human survival and well-being is a complex matter, and one that hinges most basically on our ability to make individual choices. You can’t get it out of a box of Crackerjacks.

The trust in coercive power rests, probably, on the belief that to guarantee the achievement of a desired goal, brute force is the best approach (as when we finally slap a friend who is being hysterical). The libertarian admits that in personal relations such a technique may work now and then. The libertarian denies, however, that it is at all productive as a long-range approach to dealing with human problems. For more, see

- Tibor R. Machan, *The Passion for Liberty* (Lanham, MD: Rowman & Littlefield, 2003), Chapter 3, 'Against Utilitarianism – Why not Violate Rights if it would do Good?'
- 4 Karl Marx, *Grundrisse* (New York: Harper & Row, 1970), p. 131. Marx, too, had no confidence in the creative initiative of free men and women as far as solving their personal and social problems is concerned. Instead, he thought we are captives of (mostly economic and technological) forces that act upon us and that these forces had to be met with even greater force, namely, that of the state. This has been a powerful legacy of not just socialist but modern liberal politics: when a problem arises, invoke the power of the state to solve it.
  - 5 Even for Rawls 'justice' can have other senses. It's only that he had wanted to explore it as it relates to fairness.
  - 6 John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971), p. 101. This idea is extensively developed in Serena Olsaretti, *Liberty, Desert and the Market, A Philosophical Study* (Cambridge: Cambridge University Press, 2004), suggesting that the thrust of the defense of the free market rests on the belief that all those who own wealth or assets deserve it. (I will return to this point in several sections of this book.)
  - 7 Ibid. , p. 104.
  - 8 See, Tibor R. Machan, 'Why liberty is necessary for morality,' *Think*, Issue Nine (Spring 2005), pp. 87–89.
  - 9 Just how influential this line of thinking has become, consider the currently popular practice of legal prosecution of those who make available, via the market place, a source for yielding to the temptation to overindulge – in immoderate smoking, eating, and who knows what else. The thesis advanced by John Kenneth Galbraith, in his famous book, *The Affluent Society* (Boston: Houghton Mifflin, 1958), that consumers lack sovereignty, has made its impact by now into the legal order (as per Thomas Nagel's point at the beginning of this Introduction).
  - 10 Martha C. Nussbaum, 'Experiments in Living' (review of Michael Warner, *The Trouble with Normal*), *The New Republic*, January 3, 2000, p. 33.
  - 11 Nussbaum suggests, quite properly that 'We need to protect people not only against physical force, but also against intercourse accomplished by threat or intimidation, and by the abuse of positions of authority. [Thus] a high school principal who said to a student "Pay me \$500 or you will not graduate" would surely be convicted of a crime; but a principal who said "Sleep with me or you will not graduate" was acquitted of rape because the woman did not say "no." Extortionate offers should be criminal, Schulhofer argues, in sex as in other realms of life, whether we call such cases rape or criminal assault. And Schulhofer extends his analysis to a defense of sexual harassment laws in the workplace, and of professional bans on intercourse between doctors and patients, lawyers and clients ... . Warner never wrestles with these difficult cases. Had he spent more time confronting a wide range of feminist writings, he would have had to face the fact that law does not just compromise sexual autonomy, it also protects it. A simple "get the state off our backs" position may look attractive when we are thinking about the sex lives of middle-class men, but it is clearly inadequate to deal with the situation of women and other vulnerable groups. There is no consent where there is pervasive intimidation and hierarchy.' None of this warrants attributing to libertarians an attitude of 'who cares' since it is indeed mainly by dint of their conception of individual rights that such untoward conduct can come under legal scrutiny and resistance.
  - 12 See, for example, Catherine MacKinnon, *Only Words* (Cambridge, MA: Harvard University Press, 1993).
  - 13 Alan Wolfe, 'The Revolution that Never Was,' *The New Republic*, June 7, 1999, p. 41.
  - 14 Filimon Peonidis, 'Mill's Defense of Free Expression – Its Contemporary Significance,' *Journal of Social Philosophy*, Vol. XXXIII, No 4 (Winter 2002), pp. 606–613.
  - 15 See, Tibor R. Machan, 'Prima Facie v. Natural (Human) Rights,' *Journal of Value Inquiry*, Vol. 10, No. 1 (1976), pp. 119–31, for why there are extraordinary circumstances in which even the most basic rights may be *disregarded*.

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# INDIVIDUALISM AND LIBERTY

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## Chapter 1

# Is It Responsible to be Free?

‘Why all the focus on rights? What about obligations?’ Or ‘What makes rights supposedly more important than responsibilities?’ This kind of question is often asked of those who consider the free society to be the best and most just.

It is misleading on many fronts, however. For one thing, it presupposes that while the questioner cares about moral conduct, the proponent of freedom and individual rights cares only about leaving people unconstrained and, presumably, unguided by anything other than what these unfettered persons (arbitrarily) choose. While it is true enough that some advocates of rights may also be advocates of arbitrary conduct, such a stance is far from logically mandated by concern for a *particular principle* of social morality, the principle of individual rights!<sup>1</sup>

Indeed, quite the opposite. The requirements of exercising moral responsibility are what justify the concept of rights and the active defense of rights to begin with. We need a concept of rights to specify and safeguard the sphere within which we may function without fear of being routinely interfered with.<sup>2</sup> A responsible person not only asks that his own rights be respected, but also takes care to respect the rights of others – not primarily because he fears punishment but because he respects the peaceful choices of other individuals, values good relations with them and wishes to enjoy the benefits of the just society that are essential to his own flourishing.

A right is a kind of justified (social) moral claim. It does not exhaust the realm of moral claims or principles. But it is one of them. A right designates a sphere of freedom, a circumstance or environment in which one is authorized to act in a certain way.

If you have a right to use your company’s printer, it means that nobody may stop you from doing so – at least not so long as you abide by any of the relevant provisos attending that right. You may have a right to operate it only when, say, nobody else is using it. And only during working hours. And only if you refill the paper tray if the paper happens to run out while you’re doing a print job. But within the reasonable constraints that attend the right, nobody is justified in stopping you from using the printer.

Note, by the way, that the mere fact of possessing a right does not entail any obligation to exercise that right. Nobody is justified to point a gun at you to force you to print out a document merely because you are entitled to do so, just as no one can force you to occupy a house you own merely because you are entitled to do so. Rights that one gains by contract – such as the right to use the company printer – may, of course, have been granted only



on the stipulation that the grantee then accepts certain obligations. But these obligations, even if fulfilling them depends on exercising the rights one has thus contractually gained, are not the same thing as those rights. It is not the possession of the right that in such a case obliges one to exercise the right, but the fact of the obligation (here, as a term of employment). This may seem like a painstaking elaboration of the obvious. But the distinction between a voluntarily accepted obligation and a coercively imposed one tends to get blurred in much discussion of our rights.

By the same token, having a right to vote means no one may stop you from voting if you choose to vote. It doesn't mean one is obligated to vote – not even that one necessarily has the personal responsibility to do so. After all, there may be no one or nothing worth voting for. Similarly, having a right to publish newspapers, to speak or to worship, means one is free either to do it or not do it. And even if one ought to vote or publish something, one has the authority to abstain. Free men and women have the right not to do what they should, so they may not be forced by others to comply with their moral responsibilities other than to respect everyone's rights.

A right pertains to what other people may do to one. It designates realms and circumstances in which you may not be coercively interfered with. A fundamental right – like the right to life, liberty, and the pursuit of happiness; that is, the right to make decisions and take actions as one sees fit, unmolested, so long as one does not tread on the same right of others – is a right to be enjoyed by all peaceful citizens within a community, and in virtue of the individual's humanity as such. A fundamental right is not an acquired right, in other words.

It is also not a made-up or fictitious right. Humans observe the basis for such fundamental rights in our own actual nature as conceptual, choosing beings. We observe that an environment of freedom is one in which beings like us can live right, and thrive. We can identify and theorize about such rights. But we do not invent them, just as we do not invent our own natures. In fact it would be foolhardy and counterproductive to try to concoct 'rights' out of whole cloth; for to the extent we attempt to practice them, such fabricated rights, by failing to take into account our actual nature, must work against our nature and undermine rather than support our way of living right.

Yet some people advocate and attempt to impose fictitious rights anyway. These fake-rights advocates are able to ignore or downplay the destructiveness of their efforts by focusing on only one aspect of the results. If I assert a phony 'right to medicine' and steal a bottle of cough syrup from you, use the cough syrup, and succeed in assuaging my cough, it is only by regarding the situation very selectively that I can say the fake right I have thus asserted 'promotes human living' on net. For I am ignoring a few things: about myself, about the person from whom I stole, about the kind of society I am promoting.

With respect to the person from whom I stole, I am ignoring the fact that he is now a victim of theft. The victim's own success at living well – well-being – cannot have been enhanced by what I did. Perhaps he would have given

me the cough syrup voluntarily, had I asked. But I have deprived him of that choice. I have deprived him of the ability to make up his own mind about the matter and go by his own judgment. By my coercion, I have violated the fundamental social condition that he requires to promote his own life. (And I have also, perhaps, exacerbated his cough.)<sup>3</sup>

I am also ignoring something about myself: that by acting as a thug I undermine my own moral capacity to flourish in a social context. For human beings, rational animals, the means of proper survival is our faculty of reason; we are not the non-coughing animal, who survive mainly by not-coughing. If I reflect honestly on what I did, I cannot ignore the fact that the cough syrup was not mine to take, that it in fact belonged to someone else. But I can evade that fact. I can pretend that I acted as a rational, considerate human being, who had every 'right' to the cough syrup. I can pretend that my victim deserved what he received at my hand, and that, really, he too is better off as a result of my having robbed him. I can argue that it's a good thing if people, all people, treat each other as prey and simply take whatever they need, whenever they need it, simply *because* they need it. I can pretend that we'd all be better off in a society of looters instead of in a society of producers. I can pretend that all the good and complicated, life-serving man-made things like cough syrup come about by magic rather than by hard, rational effort.

I can pretend all these things and by so pretending undermine my capacity to reason, and thus my capacity to serve my own well-being – even as I invite the same kind of assault against my person that I have perpetrated against the owner of the cough syrup. I can erode my own self-respect and the respect for me from others. This is a very high price to pay for a little cold relief. We don't pay the full price if we do such a deed only once, in a moment of weakness or desperation, and repent and determine not to do it again. We do pay it more and more as we adopt such practices as a way of life. It is not in anyone's true, human interest to either become a career criminal or to live in a society of widespread mutual criminality. (Now and then it may appear otherwise but that's a mistake.)

Yet some people do advocate the adoption of such habits, and as a matter of formal social policy; and they even call this demand for institutionalized criminality a demand for 'rights.'

Why do people who advocate systematically violating the rights of others characterize these violations as acts of *respecting* rights? In part, it's because we have reached the stage of civilization at which actual rights have been discovered, are widely talked about, and have earned a certain enduring respect. These rights are still in force, and sustain our civilized life even as they are chronically contradicted and undermined. They are part of the ingrained cultural heritage of the West and certainly of the United States. The function of our government is explicitly to 'secure rights.'

So it is hard to argue outright, 'Let's enslave others. Let's run riot and destroy each other. No more rights!' And perhaps it is impossible for anyone posing as a friend of society to admit, even to himself, that this is what he is

pushing for, at least in some degree. So those who oppose genuine rights seek to steal the respect accorded to them along with all the other things they're seeking to steal. It's not that they're against the rights that government was established to secure, they might say; it's just that they want to add more 'rights' to the list. Just as hypocrisy is the compliment vice pays to virtue, so the doctrine of pseudo-rights is the compliment welfare statists pay to genuine rights.

A pseudo-right to health care, welfare or social security implies that one is free either to obtain or not to obtain these benefits, that others may not prevent one from getting them. My right to health care means no one may stop me from obtaining such care if that is what I want. In this respect, the pseudo-right is similar, superficially, to an actual right. But actual rights do not inherently contradict each other as pseudo-rights do. Do I, as a taxpayer or doctor, retain a right to freedom over my actions or income if you are entitled to rob me or enslave me for the sake of satisfying your 'right' to health?

By contrast, respecting the right to speak out or to worship does not require me to do anything for (or to) people, only to avoid intruding on them. To recast these rights on the pseudo-right model, one would have to insist on the 'right' to enjoy the mass in one's home, even if that means legally compelling the church to send you a priest; or the 'right' to have your opinions published in somebody else's newspaper. If we rarely think of perverting freedom of speech and worship in these ways, it's precisely because we acknowledge the crucial value that these rights have in sustaining a tolerant society and enabling us to act in accordance with our own consciences in these arenas. We don't mess with these rights because they're too important. What we need to recognize is that *every* manifestation of the right to 'life, liberty and the pursuit of happiness' is too important to inflate out of existence with an ever growing list of pseudo-rights that always come at the expense of somebody else's rights and liberty.

The social attempt to protect our (genuine) fundamental rights through government entails provision for these fundamental rights. As per the Declaration of Independence, this is what government is supposed to be for: to secure our 'negative' rights. Such provision does, of course, involve expenses which need to be secured by some, but properly only voluntary, means. It is this fact – the evident cost of government – that has rendered the institution of taxation immune from properly harsh criticism. It is widely but mistakenly believed that without taxes to fund the governmental protection of rights, this protection is impossible. This isn't necessarily the case.<sup>4</sup> But even if taxes are viewed as an unavoidable means of 'positively' providing for the functions of government that protect our 'negative' rights, that would not then warrant extracting moneys from the citizenry to fund all manner of 'positive' pseudo-rights. With no moral basis shown for the enforcement of pseudo-rights, the government's revenues may be used only to protect actual basic rights. The government empowered to protect us from criminality may not engage in criminal conduct toward the very citizenry it is charged to protect.

Where do responsibility and obligation come in, if rights do not obligate us to devote all our time and resources to anyone who happens to demand them?

The concept of ‘responsibility’ pertains to our ability to make moral and rational decisions on our own, decisions for which we can be held accountable precisely because we choose them. Responsibilities, as ordinarily understood, are not a matter of law but of morality or ethics, of how we ought to live. They are everywhere in our lives. With any role we have assumed, that of friend, parent, corporate officer, cabby or athlete, we have, in effect, agreed to fulfill numerous responsibilities. But these need have nothing at all to do with laws.

Some responsibilities you have simply in virtue of being human and alive – for example, the responsibility to sustain our lives, the responsibility to understand and cope with the world around us. Other responsibilities are more specific, undertaken in the course of fulfilling the more fundamental responsibilities: the responsibility for a job, a house, a marriage, children. All of these are matters of choice. Some of these choices result in obligations. But if you hadn’t made the choice, the obligations would not exist either.

The concepts of responsibility and obligation are allied, but obligation is the narrower concept; it means a responsibility that is binding, especially legally binding. The *American Heritage Dictionary* defines obligation as ‘A social, legal, or moral requirement, such as a duty, contract, or promise that compels one to follow or avoid a particular course of action.’

A civilized person’s sense of responsibility for his own well-being naturally subsumes respect for the rights of others that he hopes to receive for his own rights. But in a just society, respect for rights is not a matter only of mutual moral consideration and good will among responsible persons, but also of law and force – a matter of legal obligation. Such obligations, in a free society, are ‘negative’ in the sense that they prohibit rather than require certain conduct. They include, for example, prohibitions against the committing of violent crimes. Ideally, the legal obligation to respect rights only bolsters or codifies the moral responsibility to respect rights that every civilized adult person gladly accepts anyway. But even normally responsible people are not always so; more important, some persons, those we call thugs and criminals, chose to be irresponsible when it comes to the rights of others. The principle of self-defense justifies acting forcibly to resist such persons who would ride roughshod over the rest of us and enacting laws to guard against such conduct.

The proponent of the free society recognizes that there is a difference between a responsibility and a legal obligation, that these concepts are not co-extensive, that not everything you should do is to be done under threat of fine or jail. You may have a responsibility to be polite to people, or generous and charitable toward them when they are in dire straits. But statist assert that if people are in dire straits, you have an enforceable obligation to help them. They contend that you may be conscripted to help others. What they are arguing for is not akin to the obligations of a nurse or butler, who

voluntarily accept work that requires them to become a kind of ‘servant’ of their employers; it is akin to the obligations of a serf, doomed by birth to a life of involuntary servitude.

No person should be manacled in this way for the crime of having been born. The guarantee of moral conduct desired by the critics of freedom does not exist. That doesn’t mean in a free society you lack moral responsibilities, or cannot be evaluated with respect to how well you fulfill them. If you treat your friends callously, that’s your choice, but you will be judged by that. You may lose a friend and gain a bad reputation. At any rate, you will be a bad friend. But there’s no law, and ought be no law, that you must be a good friend. And thank goodness! If such a thing could be enforced it would tend to taint our friendships and leech them of the value they have for us only in virtue of being voluntary. Would we like to live in a society in which we were all assigned friends, and our designated friends had no choice but to meet with us for a certain minimum amount of time each week? Who wants to wonder whether his friends are behaving considerately because, otherwise, they might be fined or jailed?

Thus the notion of a dichotomy between rights and responsibilities is patently absurd. They entail each other. In fact, I can be *responsible* for making moral choices only if I am *free* to make moral choices. Only a social environment in which rights are routinely respected is conducive to the exercise of one’s responsibilities in all areas of life. The flip side of the coin is also true: a social environment in which rights are routinely ignored or abrogated fosters irresponsibility – for it buffers those who behave irresponsibly from consequences they would otherwise suffer. Perhaps in a free society I can’t rob the corporate offices of a tobacco company at gunpoint myself, without risking jail; but it seems that as society becomes less free, I can pretend I had no idea that smoking is hazardous to my health, blame my conduct on the tobacco companies, and commit the robbery via lawsuit, instead, and with no concern at all about being legally penalized for this theft. (This isn’t to say that there aren’t circumstances in which you might be legitimately held liable for harm to another, because of your own negligence. But deliberately ingesting poison that you know to be poison isn’t quite in the same category as having a shoddily constructed roof collapse on you.) I might not be able to rob my neighbor at gunpoint to fund a personal project I care about, but perhaps the government will perform the coercive extracting of funds for me, through taxes, and hand me a subsidy. To the extent that a society’s institutions enable such conduct, it rewards and fosters irresponsibility.

Under a political system of liberty, people are left alone to assume moral responsibilities for themselves. That’s what freedom means. Human beings are different from the lower animals precisely in that we confront each other’s complaints, demands, and requests in a civilized way, as opposed to growling and leaping. To be ‘civilized’ means to act without initiating physical force. When we say ‘this is a civilized discussion,’ we mean that people are not shouting at each other or shoving each other about; that they seek to persuade

each other rather than bully each other. They are being civil. A civilized neighborhood doesn't have much crime or any oppressive laws – people do not deploy force while interacting with each other. Those who favor a fully free system simply endorse this ideal of civilization consistently and say that only in cases of self-defense is force warranted. All other matters must be handled through peaceful persuasion, or even peaceful pressure, but not by bullying and coercion. That, in any case, must be a rule of law, even in rare cases, in emergencies, resorting to coercion could be justified.

Perhaps parents are at least sometimes justified in requiring a child to behave with the form of responsibility – to brush his teeth or to apologize for some wrongdoing, perhaps – even if the child assents only from fear of disapproval or penalty. It may be better for a child to at least mimic the form of responsibility, lest he never become acquainted with the idea at all. But this can only be an interim and unsatisfactory state of affairs. For if the child never does actually begin to assume responsibilities on his own, he never really matures. True responsibility is an expression of individual autonomy. It is not a matter of evading a sharp word or evading prison, but of considering for yourself what actions you should take, in light of the requirements of your own life and the standards that ought to guide you in living it. It means you are thinking for yourself. This thinking-for-yourself is how human beings survive and thrive.

A society which demands that you obey orders with respect to the alternatives you face instead of thinking them through on your own is not only depriving you of the benefits and pleasures of independent thought, but is actively undercutting your most basic means of survival as a human being. There is no greater responsibility than that of exercising your own capacity to reason. And doing so requires freedom.

## Notes

- 1 I develop the underlying moral support for the free society in Machan, *Classical Individualism* (London: Routledge, 1998). How basic rights, including the right to liberty, rest on a sound ethics may be gleaned from Machan, *Individuals and Their Rights* (Chicago: Open Court Publishing Co., Inc., 1989). I should stress that there are defenders of a free society who do not advance the same argument and there are some who would insist that the principle of the individual's right to liberty that underlies such a society does not require defense (that is, that the ban on all aggression is self-evidently sound, even axiomatically true). See the works of such thinkers as Milton Friedman, Ludwig von Mises, David Friedman, Richard Epstein, Murray N. Rothbard, Loren Lomasky, and others for different approaches to defending the free society. Others, such as Douglas B. Rasmussen, Douglas J. Den Uyl, Eric Mack and Fred D. Miller, Jr. advance supporting arguments akin to my own.
- 2 There is no way to guarantee complete security from rights violations – sometimes the most that can be done is to punish violators and compensate victims.
- 3 Jeffrey Friedman, in 'What is Wrong with Libertarianism?' (*Critical Review*, Vol. 11, No 3 [Summer 1997]), claims (but does not argue) that 'all legal systems, including

libertarianism, coercively enforce rules that assign the 'ownership' of all persons and all bits of the world. Every legal system throws a net of coercion over the entire society it covers, prohibiting by force any deviations from its definitions of rights' (p. 428). This is also the thesis of critical legal studies, the neo-Marxist school of jurisprudence, which equivocates between coercion and plain force and holds that the protection of private property rights amounts to coercive imposition of arbitrary rules in favor of the ruling class. (See Tibor R. Machan, 'How Critical is Critical Legal Studies?' *Academic Questions*, Vol. 1, No 4 [Fall 1988], now reworked as Chapter 12 of this book.)

True enough, all legal systems deploy *force*, but not all force is the same. Thus those who defend themselves from violent attacks use force but do not initiate it, so theirs is by no means coercive force. Coercion is the sort of force that's invasive, that violates individual rights. And when a legal order and authority is constitutionally confined to using force non-coercively – defensively or in retaliation – it is not coercive. (For more on this, see Randy E. Barnett, *Restoring the lost constitution: The presumption of liberty* [Princeton, NJ: Princeton University Press, 2004].) Friedman's entire critique of libertarianism rests on this basic error of equivocating between force and coercion (which is to say, between actions or public policies that protect individual sovereignty and actions or policies that violate it). It is, also, a perfect illustration of bloviation and a startlingly convoluted effort at producing erudition.

Friedman also fails to appreciate, in his skimpy discussion of actual libertarian arguments against 'government interference in the market economy,' just how significant a role *prior restraint* plays in such policy. (For more on that particular point, see Tibor R. Machan, *Private Rights and Public Illusions* [Oakland, CA: Independent Institute, 1995], and 'The Petty Tyrannies of Government Regulation,' in M. Bruce Johnson and Tibor R. Machan, eds, *Rights and Regulation* [Boston: Addison-Wesley, 1983], pp. 259–88. This work contains many discussions of government interference, by libertarians and others. One is especially noteworthy, namely, J. C. Smith, 'The Processess of Adjudication and Regulation, A Comparison,' pp. 71–96. Unfortunately Friedman's discussion, despite its confident, even conclusive, tone, does not benefit from a consideration of arguments presented in these or similar works.) For a reply to Friedman along lines of the libertarianism of this work, see Tom G. Palmer, 'What is *Not* Wrong with Libertarianism: Reply to Friedman,' *Critical Review*, Vol. 12, No 3 (Summer 1998), pp. 337–58.

- 4 See Tibor R. Machan, 'Dissolving the Problem of Public Goods: Financing Government Without Coercive Measures,' in Machan, ed., *The Libertarian Reader* (Lanham, MD: Rowman & Littlefield, 1982).

## Chapter 2

# The Principles of the Declaration: Here to Stay?

Do the principles laid out in the American Declaration of Independence have lasting significance? Are they stable? Do they accord fundamentally with how we ought to live in each other's company no matter where and when we are? Do they accord fundamentally with our basic nature? Or are they applicable only to a given time and place?

Of course, the answer also depends on whether there is an enduring 'human nature as such.' Because what if our basic identity as human being does indeed change from town to town and era to era? Of course, it may be that in some far-flung era human nature could change in a drastic and fundamental way that we cannot now imagine. But this isn't what the controversy is about. It's about whether who we are as human beings has changed so fundamentally over the course even of a couple of centuries that the most fundamental political principles no longer apply, even if they did apply when originally formulated.<sup>1</sup>

One of the most influential critiques of the very idea of stable and lasting principles of political economy comes from Karl Marx. Marxism contended that humanity is on a kind of unknowing journey, at each stage of which different principles of political organization apply – just as different principles govern the development of an infant as versus a teenager. To try to live today by the principles that governed us, say 250 years ago, would then be a mistake, he claims.<sup>2</sup> Of course, not everyone who holds this view is a Marxist; but even non-Marxists have been influenced by the understanding of humanity and history that Marx did so much to propagate.

In deriving their political principles, the American Founders examined truths about human beings and society that they regarded as *enduring*. Only after these studies did the Founders affirm these as stable lasting ideas and ideals and encapsulate them in the Declaration of Independence. The Declaration is not a treatise on political theory but an announcement to the world of what the Founders held to be certain political truths, to be taken as self-evident in such a public announcement: namely, that all of us are created equal and are endowed by our creator with certain unalienable rights, among which are life, liberty and the pursuit of happiness; and that governments are instituted amongst us to secure these rights.

This was a revolutionary idea. In most lands, government was regarded as the ruler of the people, the sovereign. Kings were looked upon, at least



officially, as endowed with divine rights entitling them to order their subjects to conform to their will, almost regardless of what that will might be. Even today, in civilized and advanced societies like Holland, Norway and Sweden and England, nationals are referred to as subjects. They are not officially seen to exercise an independent will of their own. By law or by public policy, they are subject to the will of the sovereign. This is true in many countries of the western world – let alone in realms ruled by sheiks and dictators.

The ideas summarized in the Declaration of Independence rejected and replaced that belief. The American Revolution is called a revolution because it removed power from the government and turned it over to individual members of the community. The conviction was that these kings are not basically different from you or me: they, too, are human beings. So why should we accept that they must have paramount authority over us? The Founders identified every person as a self-ruler, that is, as a citizen rather than a subject. This principle made the United States a revolutionary country, even if not all of its revolutionary ideas were successfully applied and incorporated into the Constitution, nor were all fully and consistently embraced.<sup>3</sup> The Constitution harbors many serious compromises of the principles of the Declaration. Southern states, for example, wanted slavery to be legal. Eventually slavery was abolished, at great and, some would argue, unnecessary cost. But for a while, the Constitution was not fully loyal to the Declaration. Nor are many of America's present laws strictly loyal to the spirit and letter of the Declaration of Independence.

Is there anything wrong with such contradictions, however? Some argue that times have changed and the Declaration has become obsolete. Must we now accept that the Declaration should be put on a shelf and treated as if it were a set of antique ideas or a 'living document' – one that, like an adolescent, is always in process of developing and does not embody any lasting principles?

Many aspects of society do change. The ways we now dress, the instruments we use, how we raise our children, our means of transportation, our cuisine. But are honesty, loyalty, integrity among these fashionable and easily outmoded things? Yet this is what many critics of our political tradition maintain: that everything is fashion. They argue for the proposition that just as with all these other ephemeral things, our basic political principles too must change. There is nothing permanent here, nothing sacrosanct, nothing worthy of our enduring loyalty.

To see the error here, it is important to distinguish between what is fundamental to human nature and what is not so fundamental. After all, it is *fundamental* human nature that the authors of the Declaration sought to account for and accommodate; they were not prescribing etiquette or dress codes. If human nature at the most fundamental level changes from era to era, the disparagers of the Declaration might have a point.

But they don't. Although practices and customs may change, basic human nature and human needs do not. In any era, for example, it is understood that

parents have the responsibility to ready their children for adulthood. The specifics might change, but the general truth is universal. Anywhere and any time, there are certain norms that apply in virtue of the fact that the being whose life they are to govern is human. Nor should we be surprised by this cross-cultural stability of certain principles. Those who accept the basics of Darwinian evolutionary theory also generally accept that certain life forms develop and become stable and basically unchanging while they last. Thus stable lasting principles of botany, biology and psychology, as well as ethics and political economy, can be identified without in any way contradicting the tenets of evolutionary theory. The study of our civilization (brief in biological terms), too, confirms that our nature and the moral needs have persisted from age to age. We're still all *homo sapiens* here.

Principles of ethics and politics are not in all respects like the principles of gravity or photosynthesis, which cannot be violated. Laws pertaining to the bulk of inanimate and even much of animate nature are necessary and incontrovertible. In contrast, while moral and political laws spell out what is required, incontrovertibly, for human well-being, they can indeed be ignored. We *ought to* follow such principles but we have the freedom of choice to try to evade them.<sup>4</sup>

The situation is analogous to the principles of physical health. Even though consuming strychnine is bad for us, we are quite able to act, at least for a little while, as if it were not so. Both common sense and the criminal law accept our ability to choose wrongly by failing: we should refrain from stealing but some of us refuse to do so. Even our judges and supreme court justices can act wrongly and thus fail to make the law conform to the appropriate principles.<sup>5</sup>

I don't mean to imply by any of these observations that Americans have been chronically loyal to the principles of the US Declaration. There were periods in American history when there were just as many – and even more – violations of individual rights as there are now. Examples include slavery, conscription, the exclusion of women from the political arena, and failures to recognize the full personhood of women under the law. Such practices violated the very principles laid down by the Founders.

There is a cardinal difference, though, between today and the early years of our history with respect to the status of these principles: these principles were once of major public concern. Thomas Jefferson, Alexander Hamilton, John Marshall, Abraham Lincoln and others may not have agreed about them. But they did regard them as principles by which a human community ought to be governed. In our own time, however, what seems to concern most politicians is how to divvy up the proverbial pie. Today the idea has taken root that in some unexplained way *the country* has acquired a lot of wealth and that the proper business of government is to dole out this inexplicably acquired wealth, presumably 'fairly.' The preoccupation with 'fair' pie-divvying has largely superseded concern for justice and rights, not only in the minds of most political thinkers but also in the minds of many ordinary citizens.

Another source of violence against the country's founding principles is the fact that people are more concerned now about safety and security than about liberty. This concern is a manifestation of human nature, but not of any fundamental change in human nature! Panicky people tend to abandon concern for basic principles. It is not the only factor in the sociological mix, but it is an important one. It's mostly when one is in dire need that one is most tempted to commit an act of theft – even if one knows theft to be wrong. Similarly, when our security as a nation seems particularly threatened, people begin to think that maybe we should not abide by such principles as due process of law. Maybe we should instead treat everybody as guilty whether guilt can be shown or not, on the assumption that doing so will help make us more secure. Yet, paradoxically, once we think this way, the very idea of defending our freedom against enemies becomes moot insofar as we ourselves give up on our free system. What's the point of defending the American political tradition if you forsake that tradition in the very process of defending it?

Moreover, pitting the right to liberty against other values is a conceptual error of enormous magnitude. F. A. Hayek made it very clear why this is so:

That freedom is the matrix required for the growth of moral values – indeed not merely one value among many but the source of all values – is almost self-evident. It is only where the individual has choice, and its inherent responsibility, that he has occasion to affirm existing values, to contribute to their further growth, and to earn moral merit.<sup>6</sup>

If we grant that there are indeed enduring principles of justice, grounded in human nature, then even in the most dire circumstances we should maintain our commitment to these principles, however much we might debate exactly how they apply in given circumstances.

The Founders spoke of unalienable rights – not intermittent or disposable rights that governments and others may ignore at will. True, on occasion in our early history major figures have also done so, including even Thomas Jefferson and, more significantly, Abraham Lincoln. The former compromised his philosophy of limited government when he undertook some of his policies, including the Louisiana Purchase, the latter when he suspended the writ of habeas corpus, the greatest protection a free country can offer its citizens against arbitrary search and seizure. But the sheer historical fact of such actions does not mean they are justified.

It is because our basic humanity doesn't change from year to year and place to place that we can still read the ancient authors such as Plato, Aristotle, Hobbes and the rest and recognize what they are talking about, even if we disagree with them. The historians, poets, novelists, scientists, explorers and jurists of every age continue to speak to us. Our shared humanity enables us to understand each other, and if we somehow managed to resurrect them, we could sit down and have a discussion. Maybe not about the Internet, but about raising children, friendship, politics, beauty, integrity and virtue. Whatever

created us, whether God or evolution, once our species came into existence, its members shared a specific identity.

What is that identity? For one thing, all human beings, in all ages and places, are creative. We invent things. We manipulate our environment to make things better for us. We don't just rely on what surrounds us 'as is' like other living things. Plants and non-human animals survive and flourish by following the directions of built-in, hard-wired prompters of behavior, akin to what some of our own physiology follows. But most other living things are unable to exercise initiative to figure out how things are and how they might contribute to their lives. Only we can think, only we have the capacity to choose between right and wrong. And we properly credit and blame people for their freely chosen actions. We are able to abide by or neglect our needs or responsibilities. It's a choice; it's not hard-wired.<sup>7</sup>

Clearly, this aspect of our humanity is invariable, beyond any reasonable doubt. It has persisted from prehistoric times, when men and women began to fend for themselves by making complicated tools and designing their habitats themselves, to the birth of civilizations as they began to speak and write, compose music, embark on trade, and devise philosophies and theologies, all the way on through to the modern era with the development of movies, spaceships and computers. The forms of expression and invention have changed, but what endures is the fact of our creative capacity as such, and our need to be free to exercise it.

What the American Declaration of Independence gave eloquent voice to is the fact that certain basic principles of community life rest on these lasting and fundamental facts of human nature. Accordingly, those principles, too, are lasting and fundamental. They apply whenever and wherever humans congregate and seek to flourish, in Germany, South Africa, Afghanistan, China, Russia, or Madagascar, two thousand years ago and tomorrow. And even if they are openly rejected by the ruling authorities and perhaps even by most of the people. After all, human beings can be wrong – which is also one of our lasting and fundamental attributes.

What follows from this? To start with, that when Nazis kill Jews or Soviets kill kulaks or terrorists kill anybody, it isn't because they happen to live by different but equally sound principles of community life. Their different ways are not on the order of, say, preferring goulash to fish soup while others prefer fish soup to goulash. The political corruptions of those regimes are not even comparable to 'we like the impressionists and they like the surrealists' in art. Optional matters of taste or disputes over aesthetics are by no stretch on a par with matters of life-and-death ethical principles that immediately affect the ability of human beings to coexist with each other and even survive at all.<sup>8</sup>

When fundamental principles of human relationships are violated, by, say, genocidal murder – a massive and obvious denial of the human rights of the victims – this is fundamentally and objectively wrong. This is an 'easy case' ethically, because the action is so extreme and unambiguous. Any good person, even if not very knowledgeable about ethical principles, would recoil

and call it wrong, based on the awareness any healthy human being would have of the value of human life.<sup>9</sup> The confidence to set forth a full ethical philosophy and to determine even complex or indirect implications is certainly possible as well, but must be earned through hard study and examination of history, philosophy, theology and through adherence in practice to the basic principles that have come to be discerned.

Armed with the knowledge that certain principles do hold firm, we know that it is proper to resist confidently and without apology when people assail our rights or even our very lives, as did the hijackers of 9/11. We know that it is proper to declare that those who consistently and persistently reject these principles are living a bad life and making evil choices. And if someone were to claim that such a moral assertion amounts to inappropriately imposing our standards on others, we would need to remind him that, among other things, being righteously indignant about the wrongness of moral claims is in itself an act of relying on moral principles thought to apply to everyone; in this case, the principle of an agnostic ‘tolerance’!<sup>10</sup>

The Declaration speaks of the rights to ‘life, liberty, and the pursuit of happiness.’ Let us assume that the immorality of murder is not in question. Everyone who respects the rights of others also has the right to be free from the forcible intrusion of others. Granted, this is not widely observed in practice, especially by governments. Nonetheless there is a moral-political equality among us, just as the Declaration of Independence states. It is grounded in the fact that as human beings, we require freedom to exercise independently our capacity to reason to further our own lives.

What about the right to the pursuit of happiness? It means that we are all entitled to conceive of what kind of life we should lead and then proceed to pursue that life without interference, unless in the course of doing so we violate the rights of someone else. It is not so much an addition to the right of liberty as an elaboration of why we all ought to be free. One might want to pursue farming, philosophy, Internet wizardry, racecar driving, or a combination of all these things. And it is up to each person whether to pursue these goals. The right to the ‘pursuit of happiness’ does not imply that everyone’s conception of happiness is equally right or valid or sensible;<sup>11</sup> one could certainly misconceive what will make one happy and choose to live badly. It implies only that the road should be left open, a road which it is then up to each of us to travel.

Is the idea that the government’s job is first and foremost to protect our rights as stable and lasting as the principles of rights themselves? Is even the idea of government something as basic as the rights the Founders thought it ought to secure?

Some contend that while it may be true that human beings have basic rights, the protection of these rights requires extensive government intervention in society. If everyone possesses not only ‘negative’ rights (that is, to life, liberty, and the pursuit of happiness), but also positive rights (that is, to health care, social security, fair treatment in the marketplace), then government’s job is

quite extensive. It will be obliged to work to secure provisions that are owed to all. Extensive taxation, wealth redistribution, social regimentation and the like would entail a nearly unlimited government rather than the limited kind sufficient to secure negative rights.

Others argue that precisely because of the above, governments are themselves illegitimate, immoral institutions and only anarchy is politically justified. Governments are now involved in regulating everything: tobacco farming, milk production, the building of sports arenas, drug consumption, and much more. This is true, of course, in most countries of the world, which do not rest their public affairs on the precepts of the Declaration of Independence. But this is also the case now in the United States, where the government has evolved into a universal social manager, with public policy expanded to handle everything that some sufficiently influential segment of the population wants government to handle. The seeds of this expansion were sown early in the republic's history, under the leadership of Alexander Hamilton's view of government. It accelerated after the Civil War and, even more so, under the leadership of such presidents as Woodrow Wilson, Theodore Roosevelt and Franklin D. Roosevelt, becoming nearly the default view since then.

In the meantime, the American government routinely fails to do what it was appointed to do, namely, be the peacekeeper within the realm in which it was instituted to secure our negative rights. Under such protection of our negative rights, citizens could and did undertake all the tasks now expected of governments, through various voluntary associations – churches, clubs, corporations, orchestras, and sports teams – with no one being conscripted against his will. The assumption was that we did not need the government to hold a gun to our heads to do the right thing, even if we do sometimes fail to do what is right. Who are politicians and bureaucrats, after all, to imagine that they may make that choice for us, as if we were children or invalids? The government is comprised of other adult human beings and thus whatever their proper task, it cannot include coercing us without our consent. But today, the 'negative rights' that actually do reflect basic human nature and the requirements of human flourishing are chronically violated and undercut by the attempt to secure the so-called 'positive rights.'

So, is it to be either a near-totalitarian government or no government at all? Some critics insist that the principles laid out in the Declaration are ephemeral. Social-political-economic principles, per Hegel–Marx, serve purposes confined to a given historical framework. For example, when the Constitution was framed, it stressed the need for the government to promote the 'free flow of commerce,' and for a new nation that makes very good sense. Laissez-faire or something close to it would, then, be the right public policy to follow. But in later eras, different tasks arose for governments that required substantial expansion of the scope of its jurisdiction and authority. In time, the massive bureaucratic regulatory system that has almost completely abandoned the task of securing negative rights has become the right system

for the country. Yet if the Founders and their teachers were correct that the rights we have are based on our human nature, and if our human nature is substantially unchanged over the course of human history, then this historicist view of the function of government is wrong.

It is also wrong to believe that assigning to government the role of securing our negative rights is unrelated to the stable and lasting principles the Founders identified. If we do have the rights of life, liberty and the pursuit of happiness, and if the institution of government – that is to say, a legal order in which such rights are to be protected, updated, and maintained – is justified in order to secure them, then unless somehow those rights have been lost or our human nature has changed substantially, the task of government that the Declaration identifies would also remain stable and lasting.<sup>12</sup> But the argument that human nature has changed so radically – that we really are all children or invalids by nature these days, perhaps – cannot be persuasively made. Men and women had moral capacities and rights in 1776, and we have them now.

## Notes

- 1 For a good and succinct statement of the issue, see Isaiah Berlin, 'A Letter on Human Nature,' *The New York Review of Books*, Vol. LI, No 14 (September 23, 2004), p. 26. Berlin distinguishes between a 'fixed' and a 'common' nature, rejecting the former (after identifying it with Rousseau and the position of innatism) but embracing the latter.
- 2 This, indeed, was Marx's central criticism of capitalism, namely, that it was propounded as a universal rather than a temporary political economic system. The best source for seeing his views about this is the posthumously published volume *Grundrisse* (New York: Harper & Row, 1970).
- 3 Thus while the Revolution disposed of the concept of 'subject' and, certainly, 'serf,' it left the policy of taxation, also conceptually contingent upon the feudal system, intact. See, Tibor R. Machan, 'No Taxation, With or Without Representation,' in Robert McGee, ed., *Taxation and Public Finance in Transition and Developing Economies* (New York: Springer Verlag, 2005).
- 4 For why the idea of free will is not unscientific, see Tibor R. Machan, *Initiative – Human Agency and Society* (Stanford, CA: Hoover Institution Press, 2001).
- 5 Indeed, for certain reasons having to do with the function of the supreme court in a democracy, justices are restricted to doing only case-by-case legal analysis. The general principles must emerge from these and may not be simply announced by the court.
- 6 F. A. Hayek, 'The Moral Element in Free Enterprise,' in Mark W. Hendrickson, ed., *The Morality of Capitalism* (Irvington-on-Hudson, NY: The Foundation for Economic Education, 1992), originally written for *The Freeman*, 1962.
- 7 There is much dispute about this. See, for example, Filipe Fernandez-Armesto, *Humankind, A Brief History* (Oxford, UK: Oxford University Press, 2004), who maintains that the dividing line between human beings and some other animals, such as great apes, is too blurred to be taken seriously for any normative purpose (such as assigning rights to humans but not to other animals). For a contrasting view, see Tibor R. Machan, *Putting Humans First* (Lanham, MD: Rowman & Littlefield, 2004).
- 8 Even the issue of whether artistic judgments are based on some fundamental standards of artistic excellence could be debated but I will leave that aside here.

- 9 For a discussion of how some ethical principles are seen to be common to us all, see Bernard Gert, *Common Morality: Deciding What to Do* (Oxford, UK: Oxford University Press, 2004).
- 10 Of course, to make such a criticism of such declarations is itself paradoxical since the criteria on which it relies will be treated as stable and worth observing for us all.
- 11 For more, see Tibor R. Machan and Douglas J. Den Uyl, 'Recent Work on the Concept of Happiness,' *American Philosophical Quarterly*, Vol. 21 (1984), pp. 1–31.
- 12 For why the anarchist arguments fail to show that any type of government must violate the very rights the Founders held it ought to secure, see Tibor R. Machan, 'Anarchism and Minarchism, A Rapprochement,' *Journal des Economists et des Etudes Humaines*, Vol. 14, No 4 (December 2002), pp. 569–88. See also Roderick Long and Tibor R. Machan, eds, *Anarchism/Minarchism: Is a Government Part of a Free Country?* (Burlington, VT: Ashgate, forthcoming).



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## Chapter 3

# Justice, Self and Natural Rights

‘A man is said to be just because he respects the rights (*jus*) of others.’

Thomas Aquinas

The intellectual arena is alive with arguments and controversies concerning a perennial moral and political problem, much more fundamental than whether one or another practice in our society is just or right. These controversies concern whether there exist basic standards for human personal and community life as such. Perhaps no such standards exist. In that case do various communities, cultures, regions of the globe or other groupings of people decide on such matters, with no objective standard to rely upon in the last analysis?<sup>1</sup>

Developments in Eastern Europe and the former Soviet Union, in South Africa, Nicaragua, Chile, China and other parts of the geopolitical sphere have thrust this question into virtually any thinking person’s life. Can we judge the South Africans by objective standards or only those by which we happen to apply to institutions in North America or in Western Europe? Can we say that the Chinese or the South African government ought, in fact, to institute democratic processes or is that just a wish we happen to have that others simply do not share and have no reason to take seriously unless they wish to? Can we say with conviction and confidence that, for example, a more individualist system of economic organization is more suitable to human community life than a collective command system? Or is it all really quite relative and indeterminate how a human community should be constituted?<sup>2</sup>

My plan in this chapter is to defend the position in political philosophy that the right to liberty or negative freedom is the proper standard of justice in human community life. It will also be argued that in a good or just human community moral virtue is not only accidentally possible but is necessarily enhanced. Furthermore, it will be shown that this conception of political justice rests on an objective and at a basic level universalizable foundation. That foundation is naturalism, including naturalistic ethics and rights theory.<sup>3</sup>

My task will be somewhat laborious, since so much about the position I wish to present is currently in dispute. The first step will be to examine some metaethical and metapolitical challenges a naturalist approach faces in our time. Next a case for a sound (objectively valid) idea of human nature will be advanced, one showing that human life is teleological and normative –

it is goal-directed and involves moral responsibilities. From this it will be maintained that given the moral nature of human beings, political justice must be grounded in the effort to establish, maintain and preserve what our moral nature requires in a social-political-legal context. In conclusion some critical objections to this position will be taken up.

## **Current Philosophy and Naturalism**

Before developing the case for the natural rights classical liberal position on justice, it is worth noting some metaethical and political problems that stand in the way of such a task. During the last two and a half decades, a lively discussion has ensued about natural law ethics. In the mid-twentieth century most prominent philosophy departments espoused some variety of noncognitivism. When one mentioned natural or human rights, one was quickly directed to read Margaret Macdonald's famous emotivist essay, 'Natural Rights,'<sup>4</sup> This was essentially an application of A. J. Ayer's logical positivism to political morality.

The philosophical climate has undergone some changes since. By now there does not exist a comparably firm orthodoxy in metaethics or metapolitics. Yet, even today the more prestigious philosophers and departments tend to look with disdain toward naturalist ethics and politics. What's more, the naturalist politics that we associate – albeit somewhat problematically – with John Locke has come under fire from several classical liberal and conservative political theorists from whom one might expect support.

Locke's natural rights theory has also been deprecated recently by some admirers of Plato's political thinking.<sup>5</sup> These thinkers essentially lump John Locke's political views with those of Thomas Hobbes, at least at the basic philosophical level.<sup>6</sup> A more recent line of criticism of the natural rights classical liberal stance is deeply skeptical and more broadly based.<sup>7</sup> It would avoid Platonism even more than natural law classical liberals or libertarians for the very reason that it finds fault with naturalism as such.<sup>8</sup>

The criticism of naturalism advanced from some of these positions will be taken up later. Let us see, for now, the position these critics believe justifies their disdain for naturalism.

Judging by some of its champions, it would appear that they find the idea of human nature without foundation.<sup>9</sup> Some of this is owed to the philosophical orientation of Karl Popper.<sup>10</sup> Just as positivists, such as Macdonald, as well as most Existentialist critics of the Platonic–Aristotelian tradition, these critics reject the concept of 'the nature of X' if it is supposed to involve anything that is not purely conventional. Accordingly, human nature is not objective but nominal and even historically or culturally relative and conditioned.

There is another recently revived doctrine antithetical to naturalism. This is political intuitionism, combined with the claim that one is able to reach substantive moral and political conclusions without any reliance on work

in other branches of philosophy. This thesis of ‘the independence of moral theory’<sup>11</sup> has had considerable influence. One need only read the major journals of ethics and political theory, where papers often begin with a claim about our ‘considered moral judgments’ and proceed from such intuitive beginnings to various moral and public policy conclusions.

In advancing a naturalist foundation for political justice, it would be imprudent to avoid confronting the metapolitical positions sketched above. A kind of Kuhnian result is in evidence from the widespread promulgation of these views. Most prominent ethicists and political theorists share this attitude. This is made evident, in a slightly different but not entirely unrelated context, by Russell Hardin, when he notes that ‘Anyone who tries to defend an unvarnished right of contract for any two parties to do whatever they want to do under any circumstances will be met with vacant stares from most moral and political theorists today.’<sup>12</sup>

Naturalists in the classical liberal school aim at uncovering some objective ground that would enable us ‘to defend an unvarnished right’ to life, liberty and property – including, derivatively, freedom of contract (though not of the type caricatured by Hardin). Thus, not facing up to the challenges placed before naturalism by these various prominent theorists will render it impossible to make convincing advances. The paradigm of noncognitivist, anti-naturalist metaethics and metapolitics needs to be shown to be inadequate before the naturalist position can even gain a hearing. That will be my first task in this chapter.

## Naturalism

Why is there so much skepticism about the idea of ‘the nature of X’? The doubtfulness is similar to that which motivates deconstructionists in contemporary literary criticism. We can go all the way back to Heraclitus and, especially, his pupil Cratylus to locate the lineage of this school of thought.<sup>13</sup>

The skeptic’s persuasiveness can be understood, given one version of naturalism that has *bona fide* historical roots. This is a troublesome doctrine. It could justifiably lead classical liberals and British conservatives – that is, those who are weary of leviathan for various reason (especially in the United States of America and in the United Kingdom) – to fear dogmatism and authoritarianism.

The naturalism in question, linked to the Platonic natural law tradition, posits the existence of transcendent, permanent or timeless, and perfect natures for every being.<sup>14</sup> Yet, with this Platonic idea of what the nature of something must be, we are stymied from the start. If to know ‘the nature of X is a, b, and c,’ would also require knowing that the proposition is a timeless truth, a temporal human being could not affirm this. Forever there would have to be doubt about any proposition affirming that kind of truth.

Therein lies one of the major objections to naturalism. I will argue, later, that the Platonist conception of what ‘the nature of X’ must mean is not the best way to understand what ‘the nature of X’ must mean. There is a neo-Aristotelian approach – which may be called, following Ayn Rand, contextualism<sup>15</sup> – that has a far better prospect.

## **Human Nature**

If there is an objective moral foundation to the classical liberal system of polity, its earliest (albeit still halting and by no means fully consistent) expression is to be found in the natural rights theory of John Locke. Contrary opinion exists, of course – some claim that Thomas Hobbes is the actual grandfather of this polity.<sup>16</sup> But it is widely admitted, at least, that if this republic (the USA) rests on a normative political framework, it is that which was inherited from the political works of John Locke. Such other thinkers as Thomas Hobbes or Adam Smith either did not advance a sufficiently normative theory or did not exert sufficient (early) influence. Locke, as other thinkers, borrowed from others (for example, the Levellers). But he put together the most coherent position favoring the idea that each human individual is politically sovereign, in possession of basic rights that it is the proper task of government to secure.

I stress the normativity of the Lockean legacy because it is in Locke that we find the defence of such ideas as that every person ought to respect every other person’s equality, freedom and independence and that each individual human being should have a sphere of personal authority accorded to him. The rights Locke claims everyone possesses are political norms, not, as in the case of Hobbes, innately prompted strategies for survival. Locke not only held – though he did not prove – that such social–political norms were binding on all persons in a human community. He also believed that these norms were themselves based on more basic edicts of personal conduct, namely, ‘the law of Nature.’ Individuals are free, in the sense that they, in adulthood, are able to bring it about on their own to follow these laws. ‘The state of Nature has a law of Nature to govern it, which obliges everyone, and reason, which is that law, teaches all mankind who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty or possessions’ (*Second Treatise on Civil Government*, Chapter II, Sec. 6).

Now the Lockean view has come under attack from both the Right and the Left.<sup>17</sup> The Right sees basic rights as mere individualist artifacts, invented in defiance of the much more reliable streams of tradition and custom that grow, through trial and error over the centuries, to become the most dependable devices for social living. The Left takes these rights to be (in Marx’s phrase) ‘insipid illusions,’ beliefs produced so as to legitimize certain historically inevitable impulses of human beings at a given time period. They are mere rationalizations, not genuine philosophical–moral foundations.

The most severe damage to the doctrine of natural rights has arisen from the philosophical system that has given rise to the scientism found mostly in the social sciences. This view denies that a normative outlook on human community life even makes sense. It is empiricist and skeptical. It mostly yields conservative conclusions about politics since, in the absence of convincing guidelines for public policy, the best guide is the past – including class structures, coercive laws, and other edicts based on tradition and custom.

I will try to cast the Lockean perspective in a contemporary light, without losing any of its crucial features and power. I will spell out, in several paragraphs, what the natural rights perspective is. This will make it possible to judge whether dismissing it, as many philosophers and social scientists do, is warranted. The last section of this chapter will focus on some objections, advanced recently by utilitarians, skeptics, and historicists.<sup>18</sup>

## **Natural Rights in Outline**

What is a natural rights theory? It is an answer to a question that arises in connection with human community life, namely, ‘How, in the most general terms, should we (human beings) live with each other?’ In particular, this answer rests on an investigation of human nature. The community in question embraces people who are unrelated – that is, may not stand to each other as kith and kin, friends, colleagues, and so on. Among family members, friends, colleagues, and so forth, special, narrower ethical principles could probably handle the problems a theory of natural rights aims to handle among human beings unknown to each other. But the situation of large human communities, with strangers as members, is familiar enough, so it isn’t difficult to imagine why our question would arise. How should we interact with human beings as such, never mind other ties?

Now this question has been answered in very different ways, for very different reasons. I won’t canvass all. It is probable that most people have some familiarity with them.

For example, one answer has been to model human community life on some such life in heaven – the city of God. Another has been to advise the community to ensure the equality of all of its members (at least in terms of crucial goods and services), or to purify the race, or to serve God, or to help the forces of history. These have all been defended, in elaborate treatises, as answers to the question addressed by natural rights theory, namely, ‘How should we live as a community?’

Numerous questions that arise in the various areas of human inquiry have a bearing on the study of politics. This shouldn’t really be surprising. Politics concerns the basic principles of human community life. The issue is certainly complicated by all sorts of factors about human beings: their relationships, environment, health, sustenance, goals and purposes, and so on. Political theory subsumes virtually all other fields of inquiry.

Here is the natural rights approach to answering our question. First we need to grasp some points about reality and our knowledge of it. Then we need to learn how we would best understand what is meant by such judgments as ‘We should act so and so,’ ‘He should not act so and so,’ ‘This is good,’ or ‘This is evil.’ The reason is that in politics we are, after all, concerned with how we *should* or *should not* act, as to the institutions we can support for governing communities. So we need to consider how to answer normative questions. So we need to explore the application of the ideas of ‘should’ and ‘should not’ to human conduct and, especially for our purposes, human institutions. For this we will first need to consider what is human nature and identify standards of personal, social and political norms – the realm of ethics or natural law – and whether it is even possible to speak of what individuals morally should do in their own lives and toward their fellows. We need, mostly, to consider the *framework* for good conduct within a social-political context, that is, what we ought to support as a *system of justice*, the basic principles of community life.

By following this naturalist approach, we will come to the topic of basic human rights theory, our main concern.

### **Some Basic Philosophical Issues**

First, existence cannot be inherently confusing – we may be confused about it but it must make sense once closely studied. If this is denied, then all bets are off, not just in human affairs and the studies of them but in all realms of inquiry, including the denial itself. The words we speak, even as we affirm or deny anything, will lack clear and unambiguous identity and the meanings of our concepts will be indeterminate. This will include whatever we ourselves might wish those meanings to be as a matter of our intentions. For example, as we state that by ‘rights’ we only mean social devices invented by us, we will have to admit that these devices may or may not be what we want them to be. If reality is itself something in total flux, all the way to its most basic structure, our statement that this is so cannot be depended upon. It will mean nothing firm or stable. And, not insignificantly, in the realm of ethics and politics that will tend to imply that the powerful – by virtue of their power and not the clarity and truth of some ideas that justify some conduct – must rule, and no check on them, based on what is really right and wrong, is possible. So, insofar as we admit that we can make sense of even the minimum of our lives, we affirm that reality hangs together in a reasonably orderly fashion, at least at the most basic level.<sup>19</sup>

Moreover, we can know the facts above well enough. We can also know a lot more than that, if only we work hard to find things out. Knowing reality as it is is not impossible, as some people have claimed, provided we do not have an impossible ideal as a conception of what is meant by doing so. From what

we have already learned we can infer that we can learn about reality. The task is one of finding out about it, through extensive and hard work.<sup>20</sup>

Among other areas of reality of the greatest interest to us is human nature itself, that is, what we are as human beings, quite apart from our individual identity, our special origins, gender, race, professional competence, and so on. These can be crucial in some contexts but for now what concerns us is human nature. The reason for this concern is that we are interested in how human beings should conduct themselves toward each other *qua* human beings, and that cannot be answered without knowledge of what human beings are simply as human beings. Once we have got a glimpse of human nature, as it were, we can then ask how considerations of 'should' apply in the case of human beings as such. And that provides us with the basic material needed to determine the norms of interpersonal conduct, that is, the norms of political life.

The point about the general integrity of reality is complicated but perhaps a clue or so would suffice so that it can be understood without much difficulty. Everything that exists abides by some very minimal principles, namely, those that pertain to existence itself. That is, just for being something, anything at all, whatever exists abides by certain principles, namely, the principles of existence – the necessary conditions for something being at all, whatever it is then identified to be. Those principles are, as might be suspected, very general in character, since they apply to everything, past, present, future, and even the possible. (The very possibility of the existence of something involves these basic principles.) And because of this generality, these principles have to be extremely broad in scope but limited in content, in what they imply. This is because – granted that all existence, necessarily, exists – there is a great deal of variety in all of what does exist.

The most basic principle of existence is that what exists must be something specific, something definite. A chair must be a chair, a table a table, a dog a dog, a person a person, an act of justice an act of justice. This sounds terribly broad, even 'empty', but that is because the point bears on everything whatever, so it cannot include very much in the way of variations. Things are what they are, and this is true about everything, contrary to what may appear to be true. However, there is quite a lot embedded in this point, the main thing being that no contradictory situations can exist in reality – that is, it cannot be the case that, for example, something both *is* a table and *is not* a table.

Perhaps a quick example will show how deeply we all need this point in our understanding of reality. Thus, when in a court of law some testimony is subjected to cross-examination, if the testimony is shown to contain contradictions – for example, someone is found saying both that he was in New York on 4 June 1988, and that he was not in New York on 4 June, 1988 – then we have found something terribly wrong with the testimony. The same would be the case if he said that he had a hat on yesterday afternoon and that he did not have a hat on at that time. Or that he is married to Susie as well as that he is not married to Susie. This is all wrong because such things simply cannot be.



Now this and some related considerations about reality inform us of the absolute requirement of keeping our understanding of reality consistent. There is a lot else we need, but this minimum requirement is entirely indispensable. Everything else about our way of dealing with reality requires that this central point be adhered to.<sup>21</sup> That is why, for instance, if a theory, say of natural rights, contains a contradiction, it cannot be considered even possibly right, let alone true. The same is clear of any scientific theory, a legal contract, or a plan of action. Reality does not tolerate – that is, embody – contradictions, that is, facts that are of one kind and not of that kind all at once in the same fashion.<sup>22</sup>

From the above remarks very little follows except for a few points already hinted at. Knowledge may not involve contradictions or inconsistencies. This general point about knowledge follows the general point about existence, because knowledge is our correct awareness or identification of existence, whatever else it is. The way we obtain knowledge differs from one area of study to others – for example, in history the records left to us, involving trusting others a great deal, give us knowledge; in biology experimentation with members of the same species of living beings, and our awareness of differences and similarities in the behavior of these members and their various parts, will provide us with knowledge; in sociology the careful observation of how groups of people behave and the interpretation of this observation by reference to our knowledge can be found in each case of knowledge, some in only a limited case, depending on what it is we study. This is important because sometimes it is thought that unless the knowledge in one field of inquiry abides by the standards of knowledge in all others, it is impossible that we have knowledge in the former.<sup>23</sup>

That is why some people think that we can have knowledge only in the physical sciences, because they believe that knowledge must always and exclusively rest on our awareness of physical properties and attributes. Here is why empiricism is so popular – because knowledge that is guided by the dictates of the empirical sciences is taken to be the only kind of knowledge.

But then we would rule out at the start any knowledge of whatever lacks strictly physical properties. And that would be a prejudice. Such prejudice is encouraged by theories of knowledge that require that all cases of knowledge be exactly like all others. There is no justification for this, even though it is a widespread view. (The same affects our problem with beauty or moral goodness – a theory demands that all things beautiful or morally good be identical, and we cannot confirm this, so it is concluded that beauty or moral goodness is purely relative, even subjective.) Yet just as there can be trees, equally healthy, that are very different yet still trees, so there can be knowledge, equally sound, yet different and still knowledge.

A few other, more special, points need to be made about knowledge. First, to know something is to have correctly concluded on the basis of the relevant evidence that something is the case (even if this means only that something is probably so and so, or that something is possibly so and

so). Second, the evidence involved is something we may obtain by various means at our disposal – for example, simply looking; looking and touching; looking, touching, and hearing; looking, touching, hearing, and comparing to something else; and so forth. The minds we have, and our sensory organs, working together at our direction, is how we obtain knowledge. And even if we don't get knowledge immediately but only well-supported beliefs, even good or educated guesses, it is by way of the mind in its highly complicated ways of operation with the senses, that we get this much.

Basically, when we attempt to obtain knowledge we aim for knowing what is what and how something becomes (or became, or will become) another thing; why this has occurred and not that; and where things have occurred, and so on. In all our efforts we need to recall that contradictions are prohibited and that different kinds of evidence may have to be used to discover different facts about the world.

The above is extremely brief but necessary. From there we can take a very long jump to something much closer to what interests us here, namely, politics. What we need to turn to is a consideration of the place of norms in existence. We are familiar enough with knowledge about facts concerning inanimate and animate existence – rocks are hard, dogs often bark, penicillin can prevent disease, governments often wage war. These kinds of facts can be known without much debate about them, although very soon after we have come to admit that we know something along these lines, we find that other matters we might think we know are extremely controversial. But that is not what is at issue – controversy is a social problem that anyone who wishes to tell others what he knows (or claims to know) will encounter. First, we need to find out whether there is anything we know about controversial topics. Such a topic is the topic of norms, principles of human conduct. That Napoleon should have prepared his men better for the battle at Waterloo, or that Teddy Roosevelt should not have led the US into war, or that President Bush should have fought against inflation by refusing to print more money, or that one should respect the wishes of one's spouse when we consider where to live – all these are facts or alleged facts about which much controversy arises. Yet that is not the issue, but how we might come to know about these matters. The natural rights theory (which I find sound) answers this question by noting, first, that considerations of what one should or should not do pertain to considerations of what is good and evil. That which is good (and possible) for one to pursue is something one should pursue, and that which is evil (and possible) for one to pursue one should not pursue, to put the matter plainly. But this just shifts our problem.

How do we come to know what is good? Here we need to consider what 'good' means. It means the fullest realization of some particular thing as an instance of its kind – for example, a good peach is a fully realized peach, or a peach that has most fully completed the nature of being a peach. A good tennis game is a fully realized tennis game, or a tennis game that has fully reached the crux of a tennis game. The idea is not a very simple one, but

whenever we appraise tomatoes, peaches, apples, chickens, parking lots, or whatever, we can learn whether we should praise it or criticize it by reference to the fact that the thing (or activity or whatever) in question has more or less fully reached its distinctive nature in the given case at hand. This tennis game is a good one if the players play by satisfying the central ingredients of tennis and whatever those ingredients imply for the particular game at hand. (The particular game at hand may require realizing the game somewhat differently from another particular game.) A good skiing slope or a good knife or a good source of light – all these pertain to how fully some particular case realizes the essence of what it is in its own instance. We don't always talk of a good this, a good that or a bad this, a bad that; but such expressions as 'great,' or 'neat,' or 'swell,' or 'far out,' or 'fantastic,' and numerous others make the same point for us, as do 'lousy,' 'rotten,' 'poor,' and so on. When we consider what good is most generally, it has to do with whether something has realized its nature in the case at hand. The nature of something – what it is that makes it the kind of thing it is – for example, a tennis game, a golf ball, or a Christmas tree – is the place or category it occupies in the most rational way of classifying attributes, properties, and whatever else we perceive about existence. This process yields our knowledge of trees, chairs, furniture, balloons, time, days, weeks, months, space, fields, meadows, galaxies, the mind, memory, imagination, an idea.<sup>24</sup>

There is nothing mysterious about the point that everything has a nature, since everything that exists is most successfully classified as one kind of thing or another, and it must be so classifiable for it to exist and for us to understand it and for it to be anything at all. (This follows from the previous discussion.) In the case of human beings, this all leads to the issue of the relationship between their action and being good. Being a good human being, like being a good anything, requires the fullest possible realization of human nature in the particular case of a given person. Thus we – that is, some widely read or heard human beings, at least – need to know what human nature is so we can tell what it is to be good at being a human being. In other words, some clear enough idea of human nature is required for anyone to be able to judge, with reasonable success, what it is to be a good human being.

What then is a human being as such, that is, what is human nature? This is where the naturalism of natural rights theory comes into full focus. Natural rights theory can produce an understanding of the rights human beings have by reference to an understanding of human nature. That is why they are called natural rights – rights someone has (or we are justified to ascribe to someone) by virtue of his or her human nature.

Human nature is the set of facts that are true of human beings just insofar as they are human beings, nothing else (for example, not as students, mothers, Germans, and those 25 years old, or as animals, objects, geometrical figures, and so on). What is that set of facts?

Without repeating my earlier points, it includes that human beings are animals (with a biological nature and all of what that involves) and capable

of rational thought (that is, having the capacity to think in terms of principles, to think at the level of general ideas or concepts and what these imply). The ancient idea that man is a rational animal is still sound, although some of it, and what exactly it implies, has had to be modified in the light of our greater understanding of some of the issues involved. Still, the crucial point is that human beings are by nature animals and capable of rationality. A good human being would, then, be one who, speaking very generally (with all the very important details deliberately left out, so this can apply to everyone), is biologically healthy and fully alert (except, of course, when continued alertness requires rest). As to what this implies about how we should conduct ourselves personally and in public, we come to next.<sup>25</sup>

The first normative area we are concerned with is personal ethics – that is, the code or laws of nature that pertains to how we should conduct ourselves. By nature we live a most fully human life by being rational. We thus achieve well being on all possible levels (which excludes any interference that we cannot control). But here is the rub. To the best of our knowledge the bulk of the animate world behaves as guided automatically – for example, instincts, drives, reflexes, and so forth (given the environment surrounding it). Human beings, however, are not compelled by their inner drives, instincts, and so on, to behave as they do. To put the matter plainly, they are able to choose between genuine alternatives. Maybe some animals can, too. Those cases are rare enough not to pose a problem here. Human beings may also have some instincts, but this too is negligible. The point is that people in maturity are able to choose what they will do. (We are not discussing childhood, even adolescence, although a fuller discussion would have to consider those stages, as many other things.)

Now it is central that human beings enjoy the freedom that other animals lack just in the area of thinking. Human beings, unlike other animals, cope with reality mainly through the medium of ideas, theories, principles, concepts, and so on. To live, even to the minimum degree of viability, a solitary adult needs to figure things out, and then he can take the actions his life requires for sustenance. An adult, of course, can choose to wither away, to die, not to live, in which case thinking is not required for him. But we are not concerned about those human beings who do not choose to live and thus have no interest in the principles of human conduct, of human action, of human living. The norms we are interested in have application for us because we haven't got innate drives, and so on, to guide us in living; but if we will not live, then the norms are beside the point.<sup>26</sup>

The first point, then, about basic moral norms is that they are required only for the living. But this is inseparable – in the case of an investigation of the human good – from the fact that our capacity for thought needs to be initiated or put into effect by us. If we don't put thinking into effect, we merely coast or drift – usually on the opinions of others – voluntarily at the disposal of others. In the morality underlying natural rights theory, living requires thought, rational observation, reflection, consideration, recollection, assessment, evaluation, comparison, and so on. Without choosing this kind

of activity we in fact also reject the requirements of human life, and to the extent that we fail to engage in rational thought, and so on, we are failing in the commitment we make when we choose to live, namely, to live as fully as is possible to us.<sup>27</sup>

For a rational being to choose life is to choose a rational life, and one that isn't rational just now and then. This is a choice one can renege on, but to that extent one will be less than a good human being. Not living in accordance with one's nature is to fail to be good. The requirements for being good, then, include, first and foremost, the exercise of one's rational faculty, something that human beings must do by choice. It is now clear that goodness is being in full accord with one's nature. That is the function or point of the concept, as it were. Thus, given our human nature – namely, being a rational animal – it is possible to understand what being a good human being is.<sup>28</sup> It is to be in full accord with the requirement of rationality and biological health. It is clear from an understanding of human nature that one's capacity for rationality, one's distinctive humanity as it were, is kept in force by choice.

So the first moral responsibility of any human being who has chosen to live is to be mentally alert, to think rationally, and to act accordingly.<sup>29</sup> This is a responsibility of each individual person. It is a matter of personal choice that one does what one should do, otherwise it makes no sense that one should do it. What one cannot help but do cannot be something one should do. Choice is of the essence of moral responsibility.

But this is not all there is to it. To live our lives according to our nature is the human good. Only individual human beings can make the act so as to achieve or neglect human moral good. Others cannot do it for them. All that can be done even for children is to provide them with good examples and shield them from gross errors.

Alongside the universal moral responsibility to live a human life rationally, there are endless diverse details. They are less crucial for now because they can vary. What will be rational for one person at one time need not be for another. Numerous general principles are pertinent outside the norm that we should think and act rationally. For example, it is generally rational to be honest, productive, generous, prudent, well-integrated, and courageous. These are the virtues one will find articulated by most moralists. What they differ on is what comes first and why. Suffice it to summarize that human life requires that a person live rationally because that is what living the life of a human being amounts to and that is to what a person commits himself when he chooses to live.

The natural rights theory outlined here is based on an ethical view in terms of which the morally good human life consists of a person living rationally. Success, excellence, or happiness (in the sense of full flourishing), as a human being, is best pursued by living in accordance with the requirements of one's nature as a rational animal.

What, if anything, does this tell us about human community life? That only a human community the fundamental organizing principles of which

incorporate the basic facts of human morality can be said to accord with human nature, be conducive to human moral goodness and thus be characterized as just. Just communities are not those populated only by good human beings.<sup>30</sup> That could come about by way of accident: people might accidentally gather together and all at once be at their best, regardless of the organizational characteristics – constitution – of their community. A good human community is such that it makes moral goodness more than accidentally possible; indeed, it enhances human goodness. This is where natural rights surface.

The just political community is what it is because it accurately reflects the requirements of human nature within the context of community life – that is, it meets the requirements of morally sovereign individuals by means of respecting and protecting individual human rights to life, liberty and property.<sup>31</sup> These rights are the standards of justice for the organization of a human community – the criteria for how to establish, maintain and promote justice in community life.

That these negative rights can be the foundation of justice is disputed often on the grounds that justice requires greater activism, not merely protection from untoward acts. A just state or government would, accordingly, engage in certain promotional activities – legislate appropriate conduct, further the good behavior of its citizens, repair past social wrongs, and so on. How, then, could the administration of a system of basically negative rights – that is, protecting against murder, assault, robbery, fraud, embezzlement, kidnapping, and the adjudication of charges for the commission of such deeds – count as the maintenance of justice?

If one appreciates that adult human beings possess a moral nature, whereby it is crucial that they make decisions within their sphere of authority, circumscribed by their negative rights, then one can see why a just political and legal system would provide primarily protective rather than active or legislative policies. Given the naturalist basis of this idea of justice and given the idea of human nature that makes the best sense, it would appear evident that a just system must be engaged in securing peace and the respect of negative rights rather than promoting certain ends or objectives, something only individual choices may facilitate.<sup>32</sup>

Consider in contrast Rawls's conception of 'justice as fairness.' The central difference between the Lockean individual rights perspective and that offered by John Rawls is that for Rawls human beings are cast into situations from which they cannot extricate themselves of their own free will – even their moral character is determined by luck. Accordingly, it is not possible to envision human beings as autonomous, sovereign and morally responsible<sup>33</sup> and, therefore, in need of what Nozick has called 'moral space.'<sup>34</sup> Rather, all persons are in the same boat of having been cast into a situation quite apart from their choices or best alternatives. To remedy the unfairness that is experienced by them, justice is needed *via* the establishment of equality of circumstances.<sup>35</sup> This involves the active promotion of certain states of affairs, ends or objectives, as the substance of justice.

The Rawlsian conception of human nature is unjustified – it would be unable to explain the enormous advances human beings constantly make in their own lives, their successful creative accomplishments, even the philosophic and scientific innovations that characterize so much of human living. The kind of passivity ascribed to humanity by Rawls and his followers does not even square with how Rawlsians behave, namely, as creative political partisans of the down-trodden, the poor, and needy.

Instead of this passive conception, the institutions of a political community should rest on the more accurate view that human beings are by nature creative free agents, capable of self-direction in nearly any circumstance, except where political justice is not possible, for example, in the midst of an earthquake or when they are crucially incapacitated. The range of their creativity may not be identical, but in normal circumstances each person has ample opportunity to initiate the effort to advance his or her own life, to become more able to cope and to succeed at the innumerable tasks that may provide fulfillment to human individuals.<sup>36</sup>

Within the present framework, however, basic negative rights are the standards or principles of just human interaction that arise from nature.<sup>37</sup> Of course, conduct in line with these standards can give rise to rights that arise from contract, promises and familial relations. A child has rights which parents or equivalent agents must respect, and parents, too, have rights children must respect.<sup>38</sup>

Rights, then, are those principles which govern some of the basic relations between human beings, but their source may be varied. The most basic source of rights, however, is human nature which implies moral requirements for community life such that every person may be forced to abide by certain principles: it is everyone's natural right to be respected for what one is, namely, a human being, capable of choosing to live, to think, and to act rationally, and to interact by respecting the rationality of all others.

The rights to life, liberty, and property state these points somewhat cryptically, meaning:

- 1 since it is one's basic nature to be able to choose to live, one's life (as the outcome of one's essential human choice) is something no one other than the agent is permitted to terminate or take (except once the person is refusing to respect the life of another and elicits self-defensive action that may kill);
- 2 since the choice to live entails the commitment to think and act rationally, it is unjustifiable that others who have explicitly or implicitly<sup>39</sup> joined a community would be authorized to subvert one's liberty to make this choice (it would be the negation of another's humanity to subvert his choice between rational thought and action or irrational mental life and behavior);<sup>40</sup>
- 3 since rational choice should lead one to interact with others, who also will find it rational to associate with others, the association of individuals and

the results of such association (for example, cooperation, competition, trade, bequeathal, and so forth) may not be violated.

All told, then, the rights to life, liberty, and property – not to be murdered, not to be assaulted or coerced, and not to be robbed or have one's property expropriated – are natural rights. They emerge because we are human beings, we have the power of choice, as such, to live and to flourish, and we should do so in societies. The crucial point is that natural rights theory rests on the moral nature of human life, on the requirement of each person to choose life and flourishing for him- or herself. The main complaint against this idea is that if another lives badly, neglects his or her life or suffers misfortune, help may be forced upon or demanded of him or her. But this is to destroy the human dignity of the person, however needy or earnest he or she might be. Nor may others force someone to engage in the sort of conduct often deemed to be honorable – namely, charitable conduct – since coerced charity is not charity but robbery. Those who urge such measures fail to observe the requirements of human nature. That failure only *appears* to be useful, helpful, necessary, moral, nice, unavoidable, and so on. Once these matters are carefully considered, the alleged welfare state is not really one that promotes welfare at all. It is impossible to be of value to human beings – promote their overall welfare – if one acts out of accord with human nature (except, perhaps, entirely accidentally).<sup>41</sup>

Let me summarize my points. First, natural rights theory aims to address the central question of political life, namely, what norms should guide us in our basic relationship to other human beings? Natural rights theory aims to answer this basic question by consulting nature, specifically human nature. It adheres to certain fundamental points about reality and our knowledge of reality, and it has a certain view about what goodness is, namely, the flourishing of something in accordance with its nature. With respect to ethics or how morally we should conduct our lives, the question is what human nature amounts to and how it may be fully actualized in an individual human being (which is to say, by an individual human being who possesses the capacity to realize this human nature consistently in his or her case). By choosing life and rationality, one commits oneself to act in a morally proper manner. A community is good – a just human community – if its principles are in accord with the moral requirements of human (personal and social) life. The libertarian political stance stresses the primary significance of human freedom or liberty ('negative freedom'), that is, the foremost significance of each person's right to liberty of conduct in the context of social or interpersonal conduct. Respecting the right – and taking measures to resist its violation – is warranted on the basis of the ethics and natural rights theory outlined in this discussion.



## Some Points of Criticism

At least an outline of the case for the natural rights classical liberal position has been spelled out so as to secure the soundness of the very idea of human nature. The case for the objectivity of the moral foundations of a natural rights theory with libertarian content has also been sketched in sufficient detail so that the position can be plainly considered. It is now possible to take a critical look at some of the objections raised against the naturalist – that is, natural law, natural rights – stance of which the present position as a variant.

Let me turn first to a critic who combines two vital elements of contemporary conservatism, namely, a belief in the significance of tradition with a commitment to a utilitarian value theory. The former belief keeps such a critic close to some of the individualist features of the American polity since, after all, that polity has for more than two centuries embodied such features – that is, it has become traditional to embrace individualism in America. The latter is the view implicit in David Hume's anti-rationalist conservatism, whereby the values to be pursued by us find their overarching justification in their public utility. The only element of contemporary conservatism not directly present in this approach is religion; however, religion is presupposed within the traditionalist element, since by reference to tradition religion emerges as a vital feature of culture.

A conservative utilitarian criticism of the natural rights position involves the following points: it may be true that there are various necessary conditions that are required for human existence and flourishing or excellence. Yet it does not follow at all that from these (or from knowing these) it is possible to infer norms or virtues or principles of human conduct. (This is plainly a restatement of the is/ought gap thesis of David Hume and the subsequent empiricist/positivist movement in epistemology and metaethics.<sup>42</sup>)

From this position it would seem both hopeless and undesirable to forge and sustain a free society or legal system by relying on natural laws or rights (whether in the Aristotelian/Thomistic or Kantian/Gewirth tradition). Assuming negative freedom is in most cases a good thing (that is, it is good when human beings do not intrude on each other's lives and properties),<sup>43</sup> there is reason to believe that within the framework of natural law or essentialist ethical and political thinking this good thing would be jeopardized. We are reminded of the historical fact that most thinkers who have supposed that we can derive 'oughts' from the 'is' of what human nature comes to, have promulgated ethical and political views that have given scant respect to negative liberty. Plato, Hegel, and Marx, to name but three outstanding figures, have all advocated holistic or totalist moral-political systems.<sup>44</sup> While that does not prove natural law or essentialist/naturalist views wrong, the critics would wish us to consider the matter as perhaps suggestive and warn those fond of negative freedom against the temptation to rely on anything like the naturalist tradition.

To put it more succinctly, conservative utilitarian critics of the natural law/natural rights position firmly cling to the Humean is/ought argument against the possibility of naturalist ethics and politics. So they claim that our better theoretical alternative is utilitarianism which does not insist on the full, uncompromising protection of negative rights and allows plenty of room for various paternalistic and welfare policies by governments of human communities.

Now every theory that is flawed needs in the end to be provided with a substitute that holds up. For merely lacking full adequacy – completeness and consistency – will not be fatal to a theory while no better one is available. Some critics of natural rights liberalism also defend – as well as consider problems with – the sort of ethical/political doctrine we may expect from a utilitarian or consequentialist approach. Here, following a prudent strategy of not denying the troublesome aspects of the view being favored, utilitarians pre-empt the sort of criticism of the positivist/utilitarian ethical/political stance which has led John Rawls and Robert Nozick, among others, toward its rejection. This is that the position does not guarantee public policies that are in perfect accord with our moral intuitions. For example, one major criticism of utilitarianism is that the pursuit of the greatest happiness of the greatest number (or the general welfare or Pareto optimality) may lead to policies in law and politics which are on their face morally intolerable<sup>45</sup> – solving the population problem by means of random killing, giving important and widely admired people (VIPs) organs from the bodies of those no one cares about, and so on.<sup>46</sup> Utilitarianism, thus, makes possible the justification of what would normally be considered moral callousness. And it is extremely doubtful that any theory can hope to justify such callousness.

But it can be replied that these impressions are essentially unjustified because the position won't generate any more callousness when carefully understood than would other ethical positions. In short, a utilitarian critic of the natural rights stance can hold that the theory provides us with better results in our efforts to understand our moral problems in life than does the natural rights theory. The reason is mainly that the latter view is philosophically flawed while the former is no worse when it comes to handling difficult moral problems.

Another criticism important to address comes from out and out skeptics. The objection to the present thesis advanced by some of these critics has three main parts. First, it claims that naturalism has been invalidated by contemporary empirical science.<sup>47</sup> This is especially true as far as the naturalist depends on some type of teleological thesis. Second, it finds fault with the attempt to develop a case for liberalism based on an ethics of individual flourishing, drawn from Aristotle. One such critic tells us, for example, that

Writing in an age of mass democracy and wage-labour, Aristotle's latter-day liberal followers prescribe a life of bourgeois virtue – of thrift, industry, prudence, and creative work. However one assesses these ideals, the salient point is that in

each of them the content given to human flourishing is taken wholly from the conventional norms of the theorist's local culture. It is far from clear what is the claim on reason attributed to these ideals.<sup>48</sup>

He also maintains that 'The attribution to Aristotle of a belief in the moral centrality of choice-making (made by Machan and others) is all the more incongruous in that the belief plainly presupposes an affirmation of the freedom of the will which Aristotle does not make.'<sup>49</sup>

Third and last, the skeptical critic is doubtful about applying the ideals of classical liberalism to different cultures, thus denying their universalizability, certainly implicit in natural (human) rights theories. The critic can claim, for example, that the individualism involved in the West's political legacy will probably not – and certainly need not – apply to a tribal culture. Therein, the critic can point out, individuals – or, at least, their freely chosen goals, projects, tastes, desires, preferences, and so on – are not regarded to be important. Individuals are important only as members of the group.<sup>50</sup>

This is a point very similar to that made by certain historicist critics of the natural rights position. Their criticism of Western political thought centers on the alleged fallacy of seeking some stable, trans-historical foundation for political justice. They argue, implicitly at least, that standards of justice, goodness, and so on are going to have to be relative to given stages of human historical development.

The historicist objections of the natural rights tradition rest on the premise that the individualism implicit in the Lockean doctrine is false to the facts and is merely an invention of a certain historical period.<sup>51</sup> This criticism, reminiscent of Marxist objections to bourgeois politics and law, contends that the self or ego is an invention, something intellectuals created so as to rationalize certain public institutions and policies. Based on what we have learned from the history of ideas, political history, and cultural anthropology, we can see, the argument goes, that the idea of the individual self, the autonomous or sovereign person, is a modern contrivance, instead of a successful identification or true discovery of some fact about the human species.<sup>52</sup>

Of course when fully elaborated, this criticism goes on to maintain that human beings are by nature collective. It is maintained that the human individual is a part of a larger whole and thus the good life for the human being is never anything that is derivable from his or her nature as an independent, sovereign, morally equal being. Let me now take a look at these objections to natural rights.

## **Against Utilitarian Criticism**

There are two lines of argument that I will suggest against the utilitarian position. First, I will refute the objections to naturalism. Second, I will argue

that the position itself requires something of a naturalist foundation to be coherent and complete. Since what I have presented earlier – in my outline of the natural rights position – should provide the grounding of the refutation of these two criticisms, I will be somewhat brief.

The is/ought gap troubles moral philosophy only if we accept a questionable, albeit prominent, theory of what it is both to be something and to know something, as well as the belief that a rational argument must have a deductive form. Thus, first, the empiricism underlying this skepticism begs the question of what there can be – to wit, it holds that only beings which are capable of being sensed can be ascertained to exist.<sup>53</sup> This rules out any type of existence that could involve characteristics we associate with values and morality. Since the empiricist view is open to serious doubt and there is reason to believe that a more pluralistic ontology would be more sound – based on common sense and its integration into a logically coherent order of existence – the is/ought gap suggested by empiricism need not be accepted as binding on a serious effort to inquire into the issue of values.<sup>54</sup> Furthermore, the deductivism assumes that the formation of valid concepts could only proceed by way of deducing ideas from other ideas that fully contain them already – which basically denies any kind of growth of knowledge. So accepting the sting of the is/ought argument cuts much too deep – it undermines not just morality but all substantive (non-tautological) claims to knowledge.<sup>55</sup>

There is, of course, an additional problem with the subjective utility or positivist approach to understanding justice. This is that it leaves it entirely undecidable whether to embrace that theory. For, after all, whether a theory should be embraced is itself something of a normative question. The positivist – in economics or in law, not to mention in ethics – is, after all, advocating something. The positivist is addressing us with the proposal that what we ought to do is to embrace a theory about values and virtues that has it that values and virtues are all subjective, a matter of personal taste or preference. But then why would not the positivist's own theory come to anything more than something we ought to embrace if we like it but not if we do not?<sup>56</sup>

As to the suggestion some make that the natural law (that is, objective morality) position poses a threat to human ('negative') liberty, that is a justified concern only with an intrinsicist conception of values and moral goodness. This view has it that, in and of themselves, by virtue of certain innate traits of characteristics or properties, some items in nature are good, and they command support from those capable of seeing their goodness. The stress is on an enforceable, obligatory command which may be acted on by anyone, including someone who understands the command as it bears on another and can coerce this other's adherence.

The crucial difference between this intrinsicist conception of goodness and the present naturalist view is that the former omits from consideration the relational element of choice involved between a human individual and the values appropriate for him or her to pursue.<sup>57</sup> In other words, regardless of whether one chooses to act in certain ways, the mere behavior or movement

furthering some goal can count as morally adequate in this intrinsicist framework, since that alone will satisfy the implication that the good should be pursued. Yet, of course, if 'ought implies can,' as it must, this intrinsicist view stumbles very badly. Having made someone behave so that this behavior promotes some goal has not succeeded in producing *moral* value, since the latter is dependent on *freely choosing* the appropriate behavior, that is, on acting rightly. It is clear, of course, that here there appears only a somewhat cumbersome technical difference between some authoritarian conceptions of moral and political virtue and the libertarian position presented above. But sometimes a lot hinges on small differences.

At this point I must discuss ethical and political anomalies since some utilitarians believe that their defense of the anti-naturalist/positivist stance is helped a great deal by recalling them. They seem to think that these sorts of cases cannot be handled by the natural law/rights position, which would be a failing since they evidently occur and need to be handled by us. If a moral/political/legal framework cannot guide us in this task, that framework is seriously flawed.

There are peculiarities about anomalous cases. These may cast them in a different light from that which favors the utilitarian position. To begin with, each anomalous case involves an emergency. That is to say, it places people in unique circumstances that no ethical theory is able to render manageable. Typical are desert island or lifeboat examples so often raised in judging ethical theories. Ethical theories are general guidelines for human conduct. Thus if they cannot handle the desert island or lifeboat examples, they must fail as ethical theories. So, even though it is argued, for example along Kantian lines, that honesty is a duty, if there is an imaginable case where it is not, the theory that so maintains must fail. Prudence is a virtue but sometimes one ought, first, to practice the virtue of courage. Moderation is good policy but clearly not always. It is not possible to find any kind of specific behavior or conduct, outside of following the very general policy of being rational, that will always be the right one for the situation, especially when the situation is extraordinary.<sup>58</sup>

One point to recall about natural rights is that they are supposed to guide the formation of law and government, not personal conduct. Natural rights are the application of ethics to public policy, so necessarily they apply only in circumstances where public life is possible. Some examples of the alleged inadequacy of natural rights theory as applied in practice presuppose that such rights are to guide conduct at the individual, personal level, thus they simply fail to appreciate the purpose of natural rights theory.

Libertarian natural rights theorists have taken their clue from John Locke who distinguished between situations 'where peace is possible'<sup>59</sup> as distinct from those where it is not. Rand, too, has addressed the issue of the relationship between circumstances in one's life that are exceptional and the moral position that is most suitable to human life in general. Are the principles or virtues that are to guide ordinary human conduct and relationships identical

to those that might help with the bizarre? The same type of question may be asked of a scientific theory.<sup>60</sup> In all of its realms, especially in that which is open to choice (as that involving human beings), nature can confront us with odd cases in which principles designed to treat normal circumstances do not apply smoothly.

But there is also the consideration that some anomalies illustrate that moral wrongs of the past produced the character of the case such that we seem to be faced with a dilemma. Thus one might be persuaded that someone's rights should be violated so as to correct a previous wrong – as in affirmative action policies – and so accept the view that rights are not compossible.<sup>61</sup> And even though libertarian natural rights theorists have actually addressed the class of such cases, many utilitarians, following Hardin's lead, have not found their work compelling enough to indicate how they have gone wrong.<sup>62</sup>

The general thrust of the natural law/rights approach in handling anomalies may be summarized as follows: the purpose of ethics or moral systems is to provide for the guidance of human living, with political ethics and law to provide for the guidance of human life in the company of other human beings. To the extent that an ethical and/or political system helps achieve the purpose it naturally has – that is, the purpose assumed in asking the question that gives rise to it as one of the many competing answers – it is a sound system. But even a sound system of ethics and/or politics can face difficulties, so the question is whether one or another faces them more successfully – more comprehensively, with greater integrity, and so on.

What of the relationship between the ethical system and the political one (the principles of which would form a constitution or set of common laws on which positive law would most appropriately be made to rest in human community aimed at justice)? Ethics is prior to politics – how I should live is logically prior to how we should act together. So the relationship between ethics and politics is best seen in the light of the fact that each person, as an adult, faces questions of living concerning oneself logically prior to those questions of living with others who are strangers to oneself. (Of course, there are ethical questions pertaining to living with members of one's family, neighborhood, and so on; these are not political but social in the sense of pertaining to rather intimate or specialized yet close human interaction, not to the organizational principles of a large human community.) This is a matter of the ontology of the situation. That is, because one is the initiator of one's own behavior, in need of guiding one's conduct, one needs to have the answer to what one should do, how one should carry on *per se* before advancing to the problem of what one should do or how one should carry on *vis-à-vis* others. The ethical dimension of one's life has priority and the political is subsidiary to it, so when a conflict arises the ethical is decisive. (The political realm is nearly always subject to ethical or moral scrutiny, whereas political principles are not invoked in evaluating ethical principles.) For official representatives of the political dimension it may not be advisable to stress this publicly, of course, and as far as their own conduct is concerned, given their personal

loyalties, the priority issue may not arise at all. (The point is well played out in Melville's *Billy Budd*.) The natural law is prior. The natural rights each person has *vis-à-vis* others (who are strangers to one but are members of one's human community) may on occasion have to be disregarded in the face of the responsibilities of natural law. Anomalous cases seem to me all explainable in terms of the naturalist stance just sketched.

Of course, this sketch immediately calls to mind some elements of utilitarianism's consequentialist character. There is one major difference, however, between utilitarianism's and natural rights theory's teleological position. Utilitarianism is entirely uncommitted to some definitive conception of the human purpose and, therefore, of the *summum bonum*. With the human good left essentially subjective, the question of moral right and political rights is also undecidable. The escape clause – namely, that what right and justice and the like come to is 'stipulated along the lines of Ulpian's maxims, or along Roman or Common law lines'<sup>63</sup> – just cannot make clear sense, in utilitarianism's own theoretical terms, of the assertion, for example, that there is 'a right or even the moral duty to be unjust to individuals in certain circumstances.'<sup>64</sup>

The point here is not to deny that difficulties can arise in reconciling principles of morality with principles of politics and law. There is some reason to doubt that such difficulties must turn into moral dilemmas for all normative frameworks.<sup>65</sup> There is no good reason to even identify basic human rights as *prima facie* rights just so as to accommodate the alleged conflicts that can exist between different basic human rights.<sup>66</sup> Wherever it is suspected that such difficulties face us, the proper course that would seem to me warranted would be to attend very carefully to the intricacies of the circumstances. (The positive law is itself indicative of this point, when we consider how it handles alleged wrongdoings in exceptional circumstances, such as those involving shipwrecks, famine, earthquakes, and so on.) Such cases tend to beg for the fullest possible knowledge of all the factors, since only then can we learn if the persons involved made full use of their faculties so as to arrive at the most rational – that is, morally most suitable, given the nature of man as a rational being – decision under the unusual circumstances. Sketching such cases won't suffice.

Some utilitarians give us the clue to the last criticism I wish to level at the positivist elements of the utilitarian stance. They inform us that 'The legal never exhausts the moral'. What we could learn from this is that the law has a narrower scope and might very well be aimed at guiding us through normal elements of our lives, with its very general and very few edicts, compared to morality which bears on every aspect of life under our volitional control.

## **Against Political Skepticism**

Both of the central points advanced by the skeptic can be answered. First, Aristotle, as the representative of the objectivist and universalist stance in ethics and politics, is the first to admit that not everything that is morally right and wrong is universalizable, even though fundamental virtues may be. And in my own position, as well as in the positions of those who share it, rationality is the central virtue – just as in Aristotle, right reason fills that role. Other virtues are more contextual – which is entirely consistent with Aristotle and with an Aristotelian approach to moral theory. Moreover, all the virtues spelled out by ‘latter day liberal followers’ can be conceptually related to the original virtues spelled out by Aristotle. (Whatever is added, can be defended, as well, and this may simply show some learning in the field, not relativism at all.)

Second, Aristotle does address the issue of choice-making in his distinction between the intellectual and the moral virtues. The latter require choice – which makes sense, since morality involves self-responsible conduct or neglect, something that could not be without the capacity for choice.<sup>67</sup> Aristotle did have a doctrine of free will – only it was not a major aspect of his moral theory. He located freedom of the will in the process of deliberation. As Jeager notes, ‘Aristotle’s notion of free will is the exact complement of the notion of most perfect deliberation in the *Epinomis*.’<sup>68</sup> And David Ross notes that ‘On the whole we must say that [Aristotle] shared the plain man’s belief in free will but that he did not examine the problem very thoroughly, and did not express himself with perfect consistency.’<sup>69</sup> This suggests clearly that a conception of justice based on an Aristotelian understanding of human nature may include the idea that human beings have free will. This idea is, of course, central to the conception of human morality that requires a free society.

In the main, most skeptics do not bother to investigate these issues at any greater length<sup>70</sup> and thus it is not possible to argue with them. Suffice it to say that many of the skeptical claims advanced directly against natural rights theory are unsupported and some are evidently false.

We should add that, no doubt, a normative naturalist would have to invoke a teleological conception of human behavior – where else would the standards of right and wrong, good or evil come from? If by nature human beings are not destined – that is, it would not be more healthy or suitable or fitting for them – to be doing one thing rather than another, why insist that doing it is a good or right thing? The only alternative would be a theistic doctrine, which of course also embraces some variety of teleology and would, thus, come under similar fire from some allegedly devastating empiricist thesis.

However, there is no such devastating empiricism around, no decisive blow against teleology, and it is no surprise that one of those skeptics who directly attacks natural rights theory did not even offer a footnote to indicate why naturalists ought to abandon their project. Given all the new philosophizing about metaphysics, epistemology, philosophy of mind, and so on, one



would have to be rather steeped in a discredited logical positivism to think that teleology can be dismissed so cavalierly and thus normative naturalism (that is, natural law and rights ethics and politics) swept away with ease. Furthermore, anti-naturalists are also afraid of free will, once again because of their scientism – thinking that somehow the belief in free will is anti-science, anti-empirical, anti-cool! Poppycock! No more so than many other doctrines and, by my lights, far less so than any other. Science is fully compatible with the free will idea.<sup>71</sup> Empiricism in epistemology need not be taken as decisive about anything.

Finally, there is that old saw about how natural law and rights theory is a danger to political liberty. It is odd that people so wedded to scientism and determinism would worry about political liberty – why not just say *que sera, sera*? But then to claim that having some idea of human nature must endanger human liberty is really difficult to fathom.

Presumably, as Popper argued in *The Open Society and its Enemies*<sup>72</sup> – and as virtually all of his followers argue – a stable idea of human nature authorizes us to force people to conform to the standards we may derive from this idea.

First of all, it is a curious position to take in philosophy or any other discipline that aims to learn the truth about the world that we shall avoid some theory if it has certain consequences we do not favor. That is precisely the ideological thinking so many believe liberals are guilty of. If learning about human nature does happen to justify coercion, so much the worse for liberty. That this seems unwarranted to me is not here the issue. What matters is that philosophers have to follow the argument, not evade those results they fear.

As another prospect, however, what if, as in the case of Locke and most natural law classical liberals, precisely the opposite is warranted by reference to what we learn is human nature? What if it turns out that human beings ought to live the sort of life that places them in a position of moral responsibility, thus precluding the forcible imposition of any but the most minimal standards (that is, protection of their basic rights so that justice may prevail and self-governing virtue can flourish)?

Even if there were any problem with naturalism along these lines, certainly noncognitivism or skepticism cannot help – if there is no reason for imposing standard *A* (which limits liberty because human nature so requires), surely there is no reason to impose standard *B* (which protects liberty because human nature requires). Without standards nothing can be concluded, either for or against intrusive action, but the right standards may give aid and comfort to the champion of liberty – which is just what I think is the case. (Some skeptics, for example, Gray, seem to exemplify this point.)

Maybe what is wrong is that naturalism is a morally demanding position, after all, and many classical liberals just don't want to hear about that. Let us all be free, they want to cry out, but they don't much want to know about what to do with their liberty. Never mind that no one has the authority to make

them do anything within the Lockean naturalist tradition. They don't even want to know about what they might be morally obligated to do as free agents. (The problem is that often those who claim to know what someone ought to do, jump quite illogically to the conclusion that they are justified in forcing another to do the right thing. But this is wrong. What is also wrong, however, is the belief that being a free agent, sovereign or autonomous, means that the standards of right conduct are invented by oneself rather than derivable from an understanding of one's nature and who one is.)

The trouble with the skeptical defense of liberty is that it can boomerang right back at those with a preference for liberty – if it is no more than a preference. (This point is made astutely in Renford Bambrough.<sup>73</sup>)

So natural law theorists need not be taken aback all that much by the dismissal they experience from Popperians and other skeptics. (Some of these, by the way, have stopped being great friends of political liberty.<sup>74</sup>) Once they have made the points I have hinted at here – and added some of the nuances one needs with each new incarnation of the basic skeptical thesis – it is time to move on to more constructive work. It should not have to be pointed out that the world could use a good deal of it now.

As we have seen, when skeptics claim that teleology is obsolete and that empiricism is the right theory of knowledge, they are off-base. Such a position is untenable, not to mention odd for a skeptic to embrace.

It is worth adding that for a long time mechanistic materialism had been the reigning metaphysics. It was believed, at least by secular philosophers, that here lies the foundation for the solution to many human problems. Thomas Hobbes placed all his hopes on this view, as did many others. Even Kant accepted that at least the phenomenal world – what science is concerned with – yields fully to the laws of mechanics. Only the mysterious noumenal world escapes it – though we are left in the dark as to just how this is possible.

But mechanistic materialism is not the favored ontology even in physics. Any of the varieties of reductionism is certainly not self-evidently true. Arguably, also, a much more pluralistic metaphysics – akin to what I outlined earlier – makes much better sense of what we find around us as well as within us in reality.<sup>75</sup>

This leads us to the following conclusions: if there are different kinds and types of beings – substances – that have a fundamentally irreducible nature, the explanation of how they behave could also be very different. Efficient causality – the mode of the action of one thing upon another that is favored by reductive materialism and physicalism – need by no means be the only form of causality. Teleological causation – such as we invoke when we explain much of human (but a good deal of plant and animal) behavior – cannot be ruled out.

It is a matter of discovery, not a fundamental metaphysical assumption, as skeptical critics of the natural rights position assume, whether we affirm the reality of one or another kind of causal interaction. And there is evidence enough pointing to self-determined behavior when human action is at issue not to dismiss this on the ground of some *a priorist* reductionism.<sup>76</sup> Similar

points can be raised against the assumption that empiricism is the hands-down winner in the competition between theories of knowledge. Clearly, the empiricist theory itself is not capable of being shown true by reference to the standards of truth and knowledge its adherents propound. Instead, a view of knowledge I sketched above makes better sense, namely, whereby what is known has a decisive impact on the standards of truth and knowledge about that kind or type of being. It is our task to see to it that we keep tracking what is known as we make our claims to knowing this or that, as well as trying to find out more about it. This again yields a pluralism, this time in the theory of knowledge – there are some general criteria that all successful knowledge claims need to satisfy, but there are also criteria that are relative to the context of the different kind and type of thing known. Thus what will be known about musical harmony will be a category of knowledge for different reasons from what will be known about the war of 1812 or the number of consecutive 7s that may occur in the calculation of pi.

This pluralism and contextualism handles very well, I propose, the problems derived from the fact of cultural diversity, without requiring us to accept cultural relativism. It makes the justifiable versus the unjustifiable diversions possible to identify, based on certain stable enough, trans-historical standards of good, right and just.<sup>77</sup> The present natural rights approach would appear to manage that very well – it may explain why the ‘human rights’ approach has been so widely invoked in international criticisms of political and legal practices through the last several decades.<sup>78</sup>

### **Arguing with Historicism**

The objections historicists make against natural rights have greater punch than those made by skeptics, who are usually hoist by their own petard.<sup>79</sup> One of them states

there is no expression in any ancient or medieval language correctly translated by our expression ‘a right’ until near the close of the middle ages: the concept lacks any means of expression in Hebrew, Greek, Latin or Arabic, classical or medieval, before about 1400, let alone in Old English, or in Japanese even as late as the mid-nineteenth century.<sup>80</sup>

This critic also construes individualism as basically wrong, referring to ‘that newly invented social institution, the individual.’<sup>81</sup>

Plainly put, the historicists contend that stable, trans-historical principles of political life cannot be identified. Both human nature and our understanding of the world change constantly; what we know is known from a given historical perspective. Human nature itself changes because we look at the world differently at different historical periods; our minds are influenced by when we use them and the resulting ‘knowledge’ is, thus, conditioned, which

does not yield stable principles of ethics, politics, economics or any other sphere of human concern.

Yet much of this is clearly wrong. The rest of it is subject to dispute on conceptual grounds.

There is evidence that the dominant language of human life in certain earlier periods of human history paid scant attention to the human self, to individuality, to the moral autonomy and political sovereignty of human beings. No doubt, Plato and even Aristotle considered human beings in their relation to other social wholes – the family, tribe, city, class, race, and so on. But what of this? Why should any such historical evidence be decisive in questions of ontology and, eventually, ethics and politics?

Conceptual development can be both gradual as well as uneven, radical, or dormant. If human beings possess the capacity to make choices, they may exercise it differently as they will, constrained by some factors but with plenty of elbow room to work in. Also, in the domain of human knowledge many false starts, misunderstandings, prejudices, and so on, are possible. To look to what in fact people believed throughout history is only one avenue of discovery as to what actually exists.

The claim that, since the dominant modes of belief had been different from some belief system being considered, the latter is flawed, simply won't settle the issue. In many sciences we find advances toward a more and more fully developed conception of some thing – the solar system, the atom, the liver, the human mind, and so on. To claim that since in the past there was little talk about a potentially infinite universe, that idea cannot be sound, would be quite out of order in astronomy or cosmology.

Similarly, it may be granted that in the past – say prior to the eleventh century – extensive or even sufficient moral concern for individual human beings as such had been negligible (though by no means absent). Most philosophers focused on the place human beings occupy in the social landscape and what this implies as to their proper behavior *vis-à-vis* some supposedly greater body. (But let us not forget that this same talk is prevalent today – for example, in Marx's phrase 'the organic whole [or body]' of humanity.<sup>82</sup>)

Furthermore, a dialectical point needs also to be made against the historicist thesis. Such a thesis will backfire because it purports to be *correct* even while many disbelieve it. Most people who have written on these matters have thought that what they say is true, whether they have been right or wrong. They have not believed that what they believe is only true for some period of time, in some phase of human history. And the historicist must implicitly propose that the thesis about the temporality of the idea of the human individual is universally valid – that is, for example, in 10,000 years it should still be accepted as true that the idea of the human individual was only a temporary myth, not something true.<sup>83</sup> But if this fails to be the dominant view, should it be dismissed for that reason alone? I doubt that historicists would be so giving.

The dominance of some position may be due to many factors, including the obvious one that those who advanced it may have found it convincing, may have benefited from advancing it, may have focused their gaze too narrowly, and so on. The real issue is whether the view can hold its own against alternative positions. The task is for historicists and all others to get into the fray and argue it all out, not keep invoking historicism itself against some position.

Finally, the historicist position is false to the facts of its own promulgation. It is, after all, individual human beings who propound ideas, who criticize them, who stand apart from the rest with their doctrines and skepticism. This testifies to the individuality of the advocate, at least – a human being who can act independently, who can think for himself or herself, and whose kind of individualistic life may therefore require certain socio-economic-political conditions for it to flourish.<sup>84</sup> The natural rights position pays very close attention to just this scenario about human life.

### **Naturalism, Some Final Reflections**

Perhaps the central thesis of this chapter should once again be stated, this time as simply as possible. It is that, because of the kind of beings they are and numerous other facts about their lives, it is more just for human beings to live in freedom than even in the slightest condition of slavery. Or, even more bluntly, free men and women live more justly as human beings, than do slaves. It is this thesis that I have been defending.

Despite the simple truth of the above claim, it is also true that the naturalist normative framework may be difficult to identify and work out. No doubt many have tried to erect it and have failed – though the mere lack of widespread acceptance of natural law/rights views is no proof of this. The main reason for much of the actual failure is not so much a matter of moral and political inadequacy but the flawed metaphysical and epistemological doctrines that have guided the enterprise of developing the naturalist position.<sup>85</sup> If we had heeded Gilbert Harman's idea, that 'We must take care not to adopt a very skeptical attitude nor become too lenient about what is to count as knowledge,'<sup>86</sup> especially in how we conceive of moral and political knowledge and what tests we expect claims to such knowledge and the underlying arguments to meet, the task of developing the naturalist position would probably have fared better.

A theory in any field of investigation is an answer to a question that human beings raise. Which theory is the best one may be determined by which of the ones proposed answers the question best, which is itself determined by what we want from an answer. In political theory we want an answer that helps us guide our organized community affairs with the least degree of inherent conflict, the most comprehensive applicability to such community life, and

the facilitation of human living while in the company of other human beings to whom one is not intimately related.

Whether the present theory meets these criteria cannot be known without a comparative analysis. What may be valuable in this undertaking is entering a contending answer with a clearly important perspective, one that places the individual in the center of political affairs.

If we do not allow a fruitless idealism to stand in the way of identifying the best theory in this sphere of inquiry, we will recognize that nature is the best guide to how we need to cope with our human personal and community lives, a matter to which each of us pays heed quite naturally, after all.<sup>87</sup>

## Notes

- 1 It is arguable that this exact problem was tackled by Socrates in his various discussions, namely, whether a firm standard of right judgment in matters of justice could be identified. See Leo Strauss, *Natural Right and History* (Chicago: University of Chicago Press, 1953). See also Tibor R. Machan, *Human Rights and Human Liberties: A Radical Reconsideration of the American Political Tradition* (Chicago: Nelson-Hall Co., Inc., 1975).
- 2 The way the alternative is stated or expressed is often one of the points in hot dispute. Interestingly, many of those who would deny that there are objective standards in any of these areas are, nevertheless, insistent on describing the dispute in ways they alone deem appropriate!
- 3 Although I will be dealing with the naturalist metaethics and metapolitics that I argue supports the classical liberal or libertarian polity of individual (negative) rights, it should be noted that there are philosophers who argue that naturalism does not support such a position.

The concept 'objective' should here be understood to mean 'capable of being demonstrated on the basis of evidence of existing (natural) beings, attributes, and so on.' It is a concept that need not be interpreted differently from how it is used in, say, instructions to a jury to be objective in their assessment of a case presented to them, that is, consider only what is evident to them – facts, valid inferences from them, and so on – and not permit their wishes, desires, or biases to undermine their judgment. Of course, what is at issue in the debate is whether such objectivity is possible to human beings. For more, see Chapter 1, notes 4 and 5.

- 4 In A. I. Melden, ed., *Human Rights* (Belmont, CA: Wadsworth Publishing Co., 1970). I discuss Macdonald at some length in my doctoral dissertation, *Human Rights: A Metaethical Inquiry* (University of Michigan Microfilms, 1972), as well as in, *Human Rights and Human Liberties*.
- 5 Strauss, *Natural Right and History*.
- 6 The one major exception is Harry V. Jaffa, who finds much in Locke that is philosophically valuable. See his *How to Think About the American Revolution* (Durham, NC: Carolina Academic Press, 1978). Others who tend Jaffa's way are Thomas Pangle and Michael Zuckert.

I should make it clear that while I treat Locke's political thinking as the precursor to the kind of classical liberal or libertarian position I defend, I do not mean to imply that Locke himself was a full-blown, uncompromised libertarian. Clearly Locke was willing to take political steps against atheists and others, for reasons we do not now need to consider. When I invoke either Locke, Aristotle or anyone else in clarifying the position I want to develop here, it is mostly so as to indicate some familiar basic similarities of

approach, thus making it simpler to understand the present position. One cannot always say everything pertinent, so these indices are very useful.

- 7 Perhaps the most general attack on natural rights theory comes from Richard Rorty, for example, in his *Objectivity, Relativism, and Truth* (Cambridge, England: Cambridge University Press, 1991), p. 31. Rorty is a pragmatist/historicist who denies any trans-historical knowledge, even in the natural sciences. That his historicist claims are themselves purported trans-historical claims about how human beings cope with their environment does not seem to phase him much, yet they would appear to involve him in a flat out contradiction. I present a case for what might be termed a minimalist foundationalism in Tibor R. Machan, 'Evidence of Necessary Existence,' *Objectivity*, Vol. 3 (Fall, 1992), pp. 31–62. See also Tibor R. Machan, *Objectivity, Recovering Determinate Reality in Philosophy, Science, and Everyday Life* (Aldershot, UK: Ashgate, 2004).
- 8 See, however, note 14 below, for a strange affinity between Strausseans and Rorty and co.
- 9 See, for example, John Gray, *Liberalism* (Minneapolis, MN: University of Minnesota Press, 1986), and *Liberalisms* (London: Routledge, 1989). See also Larry Briskman, 'Skinnerism and Pseudo-Science,' *Philosophy of the Social Sciences*, Vol. 3 (Summer, 1981), and Norman Barry, *On Classical Liberalism and Libertarianism* (New York: St Martin's Press, 1989).
- 10 John Gray has gone through several changes in his political orientation, yet he has throughout remained a Pyrrhonist in his epistemology. His most recent hero in political theory is Michael Oakeshott.

Some have observed that Gray has changed his mind on several occasions concerning the merits of liberalism and related doctrines. Yet what has remained entirely unchanged in his views is his Pyrrhonism or skepticism concerning not only morality but any kind of knowledge claim. Ever since I have known Gray, we have argued about the same issue, namely, whether human knowledge is possible at all. And, of course, when one denies that it is, one is rather unconstrained about choosing political positions, since they can now be entirely a matter of one's alternating preferences.

Incidentally, the source of skepticism in Gray is not much different from what it is in other skeptics, namely, the misguided conception of what knowledge must be, namely, timeless certainty. What many take to be the limits of knowledge really amount to no more than the fact that knowledge isn't something else, namely, becoming what one knows. To complain that we know reality only as it appears to us or in its knowable aspect is to (a) attribute to reality features that have nothing to do with reality as such, namely, that it is known or knowable by us, and (b) confuse knowing reality with somehow acquiring it *in toto* into consciousness. For more on this, see my *Individuals and Their Rights* (LaSalle, IL: Open Court Publishing Company, Inc., 1989).

- 11 John Rawls, 'The Independence of Moral Theory,' *Proceeding and Addresses of the American Philosophical Association*, Vol. XLVII (Newark, DE: American Philosophical Association, 1975), pp. 5–22.
- 12 Russell Hardin, 'The Utilitarian Logic of Liberalism,' *Ethics*, Vol. 97 (1986), pp. 73–4.
- 13 For a very informative discussion, see Stephen Cox, 'Devices of Deconstruction,' *Critical Review*, Vol. 3, (Winter, 1989), pp. 56–76. For the more constructive case supporting the foundationalist approach to moral and political theory, see some of the contributions to the special issue on this topic, 'Rethinking Foundationalism,' in *Reason Papers*, No 16 (Fall, 1991). It bears noting that all the talk about Post-modernism, as if these doctrines hadn't been thought of prior to our times, is more of a press agent publicity stunt than fidelity to fact – so called Postmodern thinking is much better described as pre-ancient (pre-Socratic, pre-Aristotelian) thinking. Or rather, more or less developed versions of these ideas surrounding these issues have been around in every age, with more or less popularity. For Postmodernism in general, see Stephen Hicks, *Explaining Postmodernism* (Tempe, AZ: Scholargy Publishers, 2004).

- 14 Some Strausseans seem to acknowledge the difficulty of establishing such foundations, yet insist on the need to look for them (at least implicitly – for example, Allan Bloom, *The Closing of the American Mind* [New York: Simon & Schuster, 1987], who eschews a thorough discussion of absolute or fundamental realities, even as he severely lambastes those who have given up on it and embrace some variety of relativism).

There has always been some question about just how genuine this Straussonian endorsement is, since Leo Strauss has claimed that for *bona fide* philosophers it is OK to deceive the ordinary folk and, also, that few so-called philosophers are *bona fide*. See, for an interesting discussion, Carl Page, 'The Truth About Lies in Plato's Republic,' *Ancient Philosophy*, Vol. 11 (1991), pp. 1–33. Perhaps it is the search alone, and the fate of those who are committed to it, never mind what one finds, that Strausseans see as significant, but it would be too dangerous to admit this to all and sundry. Some of those who have studied with Strauss have openly endorsed nihilism – for example, Harry Newman. (See, for a good summary, Paul A. Basinski and Harry Newman, 'Nihilism Challenged ... and Defended,' *Claremont Review of Books* (Fall, 1985), pp. 26–28). Newman probably articulates openly the essential features of Rorty's thinking, as well, as he does those of all epistemological skeptics.

- 15 See, Ayn Rand, *Introduction to Objectivist Epistemology*, 2nd edn (New York: New American Library, 1990).
- 16 See, for example, Frank M. Coleman, *Hobbes and America* (Toronto, Canada: University of Toronto Press, 1977). See also Edward Andrew, *Shylock's Rights* (Toronto, Canada: University of Toronto Press, 1988), for an elaborate and especially virulent denigration of the Lockean idea of individual rights. Leo Strauss and many of his students maintain that while Locke is to be credited with laying the foundations for the American polity, there is not any substantial philosophical difference between Locke and Hobbes. See for example, e.g., Walter Berns, *The First Amendment and the Future of American Democracy* (New York: Basic Books, 1976). The basic argument of the Strausseans is that since Locke's basic philosophy (metaphysics, epistemology) fails to cohere with his allegedly natural law ethics and politics, the latter is largely a rhetorical device for justifying certain special political objectives. This, incidentally, resembles closely the Marxist view, whereby not a concern for truth but one of vested interest accounts for the 'convictions' underlying the American polity. See C. B. Macpherson, *Possessive Individualism* (London: Oxford University Press, 1962). Cf., also, Andrew C. MacLaughlin, *The Foundations of American Constitutionalism* (Greenwich, CT: Fawcett Publications, 1961) and Jaffa, *How to Think About the American Revolution*.

Whatever motivations we may attribute to Locke, the crucial question is whether his basic argument holds up. And if it is possible to find a philosophical groundwork that gives the Lockean portion credibility, the Lockean theory may be in good shape. After all, every level of an edifice need not be designed and built by the same engineers.

- 17 I use these labels while aware of the controversies and fine distinctions stressed by those to whom they apply. Essentially, though, the Right supports spiritual welfarism or paternalism, urging government to act as soulcrafters (see George Will, *Statecraft as Soulcraft* [New York: Simon and Schuster, 1983]), while the Left supports economic or material welfarism or paternalism, urging the state to guard us against mismanaging our households. The dispute is probably at the metaphysical level, namely, about which is more important, our souls or our bodies. The present position sees the person as an integrated, multifaceted entity with a most fundamental need for self-directedness. See Tibor R. Machan and James E. Chesher, *The Business of Commerce, Examining an Honorable Profession* (Stanford, CA: Hoover Institution Press, 1999).
- 18 Although I discuss the views in terms of their philosophical characterization, I will cite particular theorists so that we can get a clear statement of the criticism rather than having to produce a statement that members of these schools could contend is a caricature. Those I will consider have addressed the natural rights position quite directly.



- 19 I note this because it is contested in contemporary metaphysics (most prominently by, for example, the late Willard Van Orman Quine, who advocated ontological relativism, or Richard Rorty, who simply denies that we can have *bona fide* knowledge of the nature of what exists – that is, of the foundation of knowledge). To claim, as some of these thinkers do, that all this proves is that for us reality must be consistent is to attempt something by their own thinking one cannot do, namely, gain an independent perspective of the relationship between reality and human understanding. In other words, the very enterprise in which such thinkers are involved belies their own doctrine's soundness.
- 20 Here, again, the view I am sketching is implicitly or explicitly contested by such philosophers as Richard Rorty and Paul Feyerabend. And their skepticism has direct bearing on whether the thesis I sketch below can be defended. Both seem to me, however, to be captivated by the mistaken notion that when we know *X*, we must be influencing *X* and this brings into question whether what we know is in fact *X* or *X*+our-impact-on-*X*. But knowing *X* is not influencing but grasping it, not attacking but embracing it, as it were. Part of the confusion arises from thinking that when we know *X* as it is, we somehow must have implanted into our knowing faculty the *X* itself, which of course does not happen – what is there is not *X* as it is but our knowledge of *X* as it is. Knowing *X* is not the same as being *X*!
- This should also allay worries about knowledge having always to be final, complete, closed. In this connection it is still very instructive to read J. L. Austin, 'Other Minds,' in his *Philosophical Papers* (Oxford: Clarendon Books, 1961, and Barry Straud, 'Wittgenstein and Logical Necessity,' in George Pitcher, ed., *Wittgenstein* (Garden City, NY: Anchor Books, 1969).
- 21 Tibor R. Machan, 'C. S. Peirce and Absolute Truth,' *Transactions of the C. S. Peirce Society*, Vol. 16 (Spring 1980), pp. 153–61.
- 22 This metaphysical position is not without its challengers and there is ample literature on the subject. Yet all I want to point out is that a challenge is itself something and if one denies that the above holds universally, it is an open issue what the challenge itself must mean. Aristotle still had the best defense of the law of non-contradiction as a basic fact of reality, not just of our mode of apprehending it.
- 23 Tibor R. Machan, 'Epistemology and Moral Knowledge,' *The Review of Metaphysics*, Vol. 36 (September 1982). I discuss in this paper the nature of natures – that is, what it is to be the nature of something. I carry further this discussion in *Individuals and Their Rights*.
- 24 Here the naturalism of the present position emerges most distinctively. For more, see Machan, *Human Rights and Human Liberties* and Douglas B. Rasmussen, 'Essentialism, Values and Rights,' in T. R. Machan, ed., *The Libertarian Reader* (Totowa, NJ: Rowman and Littlefield, 1982), pp. 37–52. See also Machan, *Individuals and Their Rights*.
- 25 I develop at some length the case for this definition as I try to answer a challenge by M. P. Golding, advanced in his 'Toward a Theory of Human Rights,' *The Monist*, Vol. 52 (October 1968), p. 495, in, for example, *Individuals and Their Rights*.
- 26 The argument for this conception of free will advanced by Roger W. Sperry, in his more technical paper, 'Changing Concepts of Consciousness and Free Will,' *Perspectives in Biology and Medicine*, Vol. 9 (Autumn 1976), pp. 9–19. See also Tibor R. Machan, 'Applied Ethics and Free Will, Some Consequences of Independence,' *The Journal of Applied Philosophy*, Vol. 10 (1993), pp. 59–72, and *Initiative – Human Agency and Society* (Stanford, CA: Hoover Institution Press, 2000).
- 27 The choosing in question may perhaps be characterized better by the term 'initiating (of thought).' It is done, as it were, by willing – the person's most basic act of paying heed or becoming alert or focused in life, something the person needs to sustain and maintain as an individual commitment. When this choice or initiation of the process of awareness is abnegated, even partially or temporarily – except, of course, during required rest – the commitment to living a good human life is faltering.
- 28 Machan, 'Epistemology and Moral Knowledge.'

- 29 I am here drawing on the work of Ayn Rand, 'The Objectivist Ethics,' in *The Virtue of Selfishness: A New Concept of Egoism* (New York: Signet Books, 1964). See, for more, my 'Reason, Individualism, and Capitalism: The Moral Vision of Ayn Rand,' in D. Den Uyl and D. Rasmussen, eds, *The Philosophic Thought of Ayn Rand* (Urbana, IL: University of Illinois Press, 1983). I develop these ideas more fully in Tibor R. Machan, *Classical Individualism* (London: Routledge, 1998).
- 30 Plato's conception of justice is broader than the justice that can characterize a political community. The just state for Plato is really the perfectly good human community, one in which everything goes right. For the difference between Plato's conception of justice and that which is considered here, see Hannah F. Pitkin, *Wittgenstein and Justice* (Berkeley, CA: University of California Press, 1972), pp. 303ff. Consider, also, that in Plato's Republic what is at stake is not political justice as such but the nature of the just or morally, ethically good or excellent human being. Justice, in that context, is a more encompassing concept than in the context of political theory as an effort to conceptualize the best constituents of a large community or nation state.
- 31 Some, such as Siegfried van Duffel, claim that 'The idea that people are sovereign beings does not allow us to infer that they have an obligation to respect each others' sovereignty.' 'Libertarian Natural Rights,' *Critical Review*, Vol. 16, No 4 (2004), p. 371. Few if any libertarians hold that just being sovereign suffices to obligate one to respect the sovereignty of others. Van Duffel, while quoting a passage from my own book on rights, fails to examine how I, for example, argue for that obligation. Essentially I show that the moral responsibility to think, to conduct oneself as a rational individual, demonstrates to one 'who would,' as Locke might have put it, 'but consult one's reason,' that a regime of individuals rights is to one's rational self-interest. That, in turn, obligates one to abide by that regime and respect other's sovereignty.
- 32 I develop in detail the argument for the obligatory nature of these rights for human individuals in the context of their community lives, in *Individuals and Their Rights*. Since I argue from the basis of classical egoism or individualism, it may be significant to appreciate just how one may establish the obligation to respect others' basic rights from such a moral foundation. Chapter 7 concerns just this issue. See also Tibor R. Machan, 'Reply to Critics of Individuals and Their Rights,' *Reason Papers*, No 17 (Fall 1992).
- 33 John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971), p. 104. Rawls may, of course, reject this characterization of his position but it is very difficult to see how he can make any room for moral responsibility given his view that character itself is a function of luck, and so on. See, for more on this point *vis-à-vis* Rawls, Machan, *Human Rights and Human Liberties*, p. 167–8. Consider the following: 'The assertion that a man deserves the superior character that enables him to make the effort to cultivate his abilities is ... problematic; for his character depends in large part upon fortunate family and social circumstances for which he can claim no credit.' One may wonder whether Rawls is fully aware of the deterministic implications of this claim. He may as well embrace B. F. Skinner's doctrine in *Beyond Freedom and Dignity* (New York: Bantam Books, 1971), in which the ontological foundations of ethics are explicitly denied. Yet for Rawls it is problematic, to sweep aside free will entirely, for then how could he argue, as he evidently does, that human beings ought to act in accordance with his conception of justice as fairness? If we ought to be fair, it must be true that we have the choice to be fair or not to be fair. If whether we possess the character to be fair 'depends upon fortunate family and social circumstances,' than we either will be or will not be fair and there is nothing Rawls or anyone else can do about the matter, nor can anyone blame people for failing to be fair or for failing to support institutions of fairness throughout society. Does Rawls wish to embrace the view that whether one supports, say, affirmative action or opposes it is irrelevant to one's moral virtue? It would have to be, however, if our family and social circumstances made us supporters or opponents of such policies.

- 34 Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), p. 57. Nozick has since writing this book rejected his libertarian views – see his *The Examined Life* (New York: Simon and Schuster, 1989), pp. 286–96, mainly on grounds that even if individuals require such moral space, as spelled out by means of their Lockean negative rights, they may be made to conform to certain public purposes we all need to share. ‘The libertarian position I once propounded now seems to me seriously inadequate, in part because it did not fully knit the humane considerations and joint cooperative activities it left room for more closely into its fabric’ (pp. 288–7). Nozick thought (for a while) that such considerations and activities need to be given symbolic expression via certain government projects that give it meaning as such. The libertarian who shares the concern with such common goals and meanings will stress, however, that when these are instilled in the membership of the community by force, they lose their significance and, indeed, *via* such coercion will undermine the chances of their realization. Forced belief and practice is alienating and saps the society of its lifeblood. (Nozick reaffirmed his libertarian views shortly before he died.)
- 35 Rawls, *A Theory of Justice*, pp. 101–102.
- 36 Rawls subsequently published *Political Liberalism* (New York: Columbia University Press, 1993), in which, as Stephen Holmes points out in his review (*The New Republic*, 11 October, 1993, p. 42), Rawls

unexpectedly combines this [*A Theory of Justice*’s] argument [about social determinism] with its opposite. Alongside strong claims about unequal upbringing and the redistributions it implies, we now find the observation that people are ‘responsible’ for their character and desires, whatever disadvantages their social upbringing heaped upon them, and that ‘those who surf all day off Malibu must find a way to support themselves and would not be entitled to public funds’.

I should at this point call attention to James Sterba’s efforts to demonstrate that from a classical liberal or libertarian negative rights theory one can reach conclusions that would favor the supportive welfare state. I address this position in my responses to Galston and Sterba elsewhere.

- 37 Some, such as Heather Gert, in ‘Rights and Rights Violators: A New Approach to the Nature of Rights,’ *The Journal of Philosophy*, Vol. 90 (1990), pp. 688–94, have argued that rights are superfluous since all human wrongs can be reduced to injuring or harming people. As she puts it,

To say that I ought not to punch you because it would hurt you is sufficient – there is no further need to invoke that alleged thing that is your right not to be punched or hurt. Clearly, much of what is to be taken into account is the harm caused by our actions and the significance we give to the harm. (p. 694)

Yet this is wrong – rights violations often involve depriving people of choices and some of these choices, if they had not been made, would have resulted in greater injury to the person than what resulted from the rights violation itself. Concerning some other aspects of what it amounts to violating rights, see J. Roger Lee, ‘Choice and Harms,’ in M. Bruce Johnson and T. R. Machan, eds, *Rights and Regulation* (Cambridge, MA: Ballinger, 1983), pp. 157–73. Interestingly Gert does not consider any libertarian analysis of rights – for example, those by Eric Mack, Jan Narveson, Lee, or Rasmussen and Den Uyl. This is not surprising since most of her analysis focuses on what are called positive rights, such as ‘persons in underdeveloped countries’ having ‘the right to even a minimal amount of food’ (p. 693). But then her essay ought to have been entitled ‘Positive Rights and Positive Rights Violators.’

- 38 See, for more on this, Tibor R. Machan, ‘Between Parents and Children,’ *The Journal of Social Philosophy*, Vol. 23 (1992), pp. 16–22.
- 39 For why implicit consent is a binding commitment to a principle of social life, see my *Individuals and Their Rights*, Chapter 7.

- 40 This holds even for those few who may have no means available to them to further their lives *via* the protection of their right to negative liberty – for example, the utterly incapacitated poor – since those who do have those capacities ought to strive to preserve the general, unexceptional conditions of human flourishing, meaning they ought to maintain those rights that will help them to do so as human beings. (Incidentally, those thoroughly incapacitated are not usually the ones who violate negative rights since they are by definition unable to do such strenuous things. It is, thus, moot to argue that they have the authority to engage in such conduct. It is more important to consider why others, not so incapacitated, might have that authority instead of the responsibility to provide the remedies needed.)
- 41 That the welfare state now and then does help some people is not a counter-example here. Some people fall out of airplanes and live to write best-selling books about it. Moreover, the good done *via* the welfare state is demonstrably costly to those who were taxed so as to produce it; and that much of this cost ought not to be borne by them is not an implausible thesis. Yet, it is more likely that the welfare state supports those who manage it more successfully than those in whose behalf such support is supposed to occur. See, John Gray, 'Classical Liberalism, positional goods, and the politicization of poverty,' in Adrian Ellis and Krishan Kumar, eds, *Dilemmas of Liberal Democracies* (London: Tavistock Publications, 1983). Gray notes that studies have demonstrated that

The greatest net beneficiaries from the welfare state in Britain have been the professional middle classes, whose political pull and social skills have enabled them to create and then exploit a vast range of services largely sustained by tax subsidies derived from the poorer majority. The largest net losers from British welfarism, on the other hand, have been the working poor and then victims of the artificial poverty trap created by the extremely high marginal tax rates to which they are subject (p. 180).

- 42 Ernest van den Haag, 'Against Natural Rights,' *Policy Review*, No 23 (Winter 1983), pp. 143–75. Appendix 1 of *Individuals and Their Rights* is a direct response to van den Haag's arguments.
- 43 This point, incidentally, is difficult to support philosophically without a natural law, natural rights underpinning. In other words, how do we tell, without reference to human nature, that freedom is a (non arbitrary) good thing for a human being living in a community?
- 44 Renford Bambrough, in his *Moral Skepticism and Moral Knowledge* (Atlantic Highlands, NJ: Humanities Press, 1979), disposes of the alleged conceptual connection between essentialist or objectivist moral theories and authoritarianism.

It does not follow from the true premise, '[I know that] A ought to do X' that 'Therefore, [I know that] someone ought to force A to do X.' The further premise, '[I know that] (For any A and for any X) If A ought to do X, someone ought to force A to do X,' would have to be true, as well. While there may be some cases such that if A ought to do X, when someone, say B, knows this, someone, say B, ought to force A to do X – for example, if A ought to respect the rights of others, and B is the government established to protect rights – it is certainly false that for all cases of 'A ought to do X' this is so.

- 45 Strictly, to determine whether they are intolerable would require establishing a superior competing theory; yet moral beliefs need not all rest on explicit moral theories – there is a moral reality just as a physical, chemical, biological or legal reality known to most ordinary people and to violate those beliefs should not remain unexplained.

Ethical dilemmas may appear to occur once one takes a close look at a situation that pits two or more equally sensible moral beliefs against one another. One way this might be resolved is to establish an ethical theory that succeeds in rationally ranking moral principles. A way of evading the problem is to claim that the world is simply too topsy-turvy for us to find an adequate theory to make sense of it (for example, in the realm of ethics). An explanation of all this may involve the fact that no theory pertaining to dynamic matters such as human conduct could be final in its scope, so there will always be

some areas yet to be integrated within a theory. Theories will at times need modification so as to accommodate this fact.

- 46 There is a more serious problem with the utilitarian stance, identified by Kenneth Arrow, in *Social Choice and Individual Values* (New Haven, CT: Yale University Press, 1962). The very ideas of rational choice and democracy (or liberty) combine to generate contradictory public policy. Furthermore, the idea of the greatest happiness of the greatest number is confused, based on the incommensurability of the two features to be quantified, namely, the universe of those who can be happy and happiness itself, so it would help to know just what exactly the value standard is that van den Haag is proposing. See, however, Chapter 2 in my *Private Rights and Public Illusions* (Oakland, CA: The Independent Institute; New Brunswick, NJ: Transactions Books, 1995), where I argue that no such problem faces a natural rights approach to social or public choice theory because it leaves a rationally delimited public scope wherein democracy is to function.
- 47 Gray, *Liberalism*.
- 48 Gray, *Liberalisms*, p. 258.
- 49 Ibid., p. 265, note 26.
- 50 Does this mean the individuals do not exist as individuals or are neglected as such? Presumably, for Gray's objection to go through, he would have to claim that a tribe is an individual or an organic whole, just as Karl Marx claimed that 'the human essence is the true collectivity of man' (in *Karl Marx: Selected Writings* [New York: Oxford University Press, 1977], p. 126) most likely because he regarded humanity an 'organic whole' (in *Grundrisse* [New York: Harper & Row, 1972]).
- 51 Alasdair MacIntyre, *After Virtue* (Notre Dame, IN: University of Notre Dame Press, 1981).
- 52 In *Individuals and Their Rights* I defend a conception of the human individual that withstands most of the more plausible critical charges made against individuals – for example, that it relies on an anti-social, atomic conception of human life. See also *Capitalism and Individualism, Reframing the Argument for the Free Society* (New York: St. Martin's Press, 1990). For a more fundamentally focused discussion of individuality, as it arises in metaphysics (*vis-à-vis* whether the entities populating reality are or could be individuals), see Jorge J. E. Gracia, *Individuality* (Albany, NY: State University of New York Press, 1988). In relation to the claim that within an Aristotelian tradition – including, especially, the politics that emerges from it – it is worthwhile to note that Aristotle's metaphysics may be more individualistic than is widely believed. See, in this connection, Henry Teloh, 'What Aristotle Should Have Said in Metaphysics Z,' *The Southern Journal of Philosophy*, Vol. 20 (Summer 1982), pp. 241–55. See also Emerson Buchanan, *Aristotle's Theory of Being* (Cambridge, MA: Greek, Roman, and Byzantine Monographs, 1962), p. 2. I further develop this conception of the human individual in Machan, *Classical Individualism*.
- 53 Machan, 'Epistemology and Moral Knowledge.' If radical or strict empiricism is correct, then knowledge of what ought to be done is of course impossible, since 'good' and 'ought to' are not radically (even though they could be commonsensically) empirical concepts.
- 54 For a discussion of the problems with the open question argument Moore advances against the naturalist metaethics, see Machan, *Individuals and Their Rights*, p. 94.
- 55 This development has, of course, occurred with the emergence of such views as those of Paul Feyerabend and Richard Rorty. There have always been intimations of it in the thinking of various relativist and historicist philosophers. See, Tibor R. Machan, 'Some Reflections on Richard Rorty's Philosophy,' *Metaphilosophy*, Vol. 24 (January/April 1993), pp. 123–35. See also Machan, 'Evidence of Necessary Existence' and Tibor R. Machan, *Ayn Rand* (New York: Peter Lang, 2000), Chapter 2.
- 56 The significance of this point may escape some but it should not, at least not if one is interested in consistency. At a recent conference an advocate of legal positivism was arguing how unwise it is for justices of the Supreme Court as well as legal scholars to

read the United States Constitution as if that document depended in the slightest on some notion of natural law. Professor Lino Graglia invoked David Hume's is/ought gap thesis and defended the positivist notion that all that justices ought to do is read the constitution literally, placing limits on majority rule only on very rare occasions – such as in the unlikely event that some legislature enacted a law barring women from voting. In such a case, of course, the Constitution is quite explicit: no legislature may do such a thing.

Now from a positivist position there is no justification for this heartfelt advice. Graglia may feel strongly about this matter but by the tenets of Humean moral skepticism the fact, say, that the Constitution grants women the vote does not prove that justices ought to invalidate any law that prohibits the vote. From the 'is' of what the Constitution asserts no 'ought' could follow, according to Hume, as to what anyone ought to do. (As to how best to understand Hume on this context, I would defer to those who claim that he was opposing only the extreme rationalistic efforts to deduce moral oughts, not the more common ones of drawing moral inferences from our understanding of human affairs.)

If the response were that, well, it is inconsistent to be a justice of the US Supreme Court and also refuse to uphold the provisions of that court, the answer is, so what? Why ought one be consistent? It is just some people's preference, is it not? Furthermore, neither does it hold, as many positivists maintain, that what ought to be honored in the law is what the people – that is, the majority of those who vote and their elected representatives – want. So what if the people want A (the 'is') and the justice honors not-A (the 'ought')? No objection can be made against this by legal positivists.

On the score of consistency, incidentally, if the positivists admit that at least the justices ought to be consistent in their decisions with the document they took an oath to uphold, it is then not much of a leap of logic for one to argue that they ought to be consistent with the implications of that document. For example, if the positivist accepts that the US Constitution endorses nearly universal democracy, and if democracy presupposes certain societal provisions – for example, the right to privacy, private property, political participation, freedom of speech, freedom of association, equal treatment under the law, and so on – the legal positivist would have to accept, also, that the justices ought to reject all those laws that render democracy inoperable. Are the provisions listed above good candidates for what democracy – and thus the US Constitution – requires? Well, democracy involves the uncoerced decision of a member of a community to select one of several alternatives to promote as a principle of community life. Without those provisions there is no such absence of coercion. If one has no right to privacy, private property, equal treatment under the law, and so on, then democracy is impossible – the voter lacks independence and will very possibly be threatened by any outcome of the selection process that does not favor the majority. The voter will be unable to retreat to his or her dominion to escape repercussions for voting against the majority. The voter may be treated differently from other voters if he or she is not part of the majority.

Thus, it appears, that even the most minimal normative content legal positivism accords to the process of law making and jurisprudence commits the positivist to nearly everything that natural rights theorists advocate. Most significantly, of course, the positivist has made it impossible for him or her to advocate any normative claim, including the claim that democratic decisions ought to be honored by justices. There is simply, for the positivist, nothing to be said in favor of what justices ought to do that one could not, with equal validity from the positivist framework, deny that the justices ought to do. And such a theory must simply be declared hopelessly fruitless, unworkable, void and null.

- 57 Rasmussen, 'Essentialism, Values and Rights' and Douglas Den Uyl and Douglas Rasmussen, 'Nozick on the Randian Argument,' in Jeffrey Paul, ed., *Reading Nozick* (Totowa, NJ: Rowman and Littlefield, 1981), pp. 232–69. In my *Human Rights and Human Liberties*, I put the matter as follows: 'There are no intrinsically beautiful or good or right things, only things that are good, right, or beautiful in relation to living entities for which things can be good, right, and beautiful in terms of purposes and goals' (p. 66).

- 58 This is what's so unreal about the kinds of cases that analytic philosophers use to test ethical principles – ones so ingeniously devised by, for example, Judith Jarvis Thomson. No theory of ethics – indeed, no theory of any kind outside perhaps metaphysics – should be held responsible for managing all imaginable cases.

Despite overdoing the testing of ethics by reference to such cases, some of those that are realistic should, in fact, be considered in the examination of an ethical system. When I suggest, for example, that courage might now and then conflict with prudence, I have in mind a case such as when a soldier must defend against an attack from the enemy but could easily imagine hiding instead. The act of defense would involve courage, the act of hiding would involve prudence. One needs to consider the proper hierarchy of ethical principles in order to handle such a case. That is just what would be done in the study of military ethics.

- 59 Quoted in H. L. A. Hart, 'Are There Any Natural Rights?' in Melden, ed., *Human Rights*, p. 61n. This appears to be a paraphrase of Locke's point, advanced in his *Second Treatise of Civil Government*, Book 2, Chapter 19, pp. 211–48.
- 60 This is part of the value of all the hoopla that has emerged from T. Kuhn's work in the philosophy of science. But see my 'Kuhn's Impossibility Proof and the Moral Element in Scientific Explanations,' *Theory and Decision*, Vol. 5 (December 1974), pp. 355–74, and Machan, *Objectivity*.
- 61 For a detailed discussion of compossibility, see David L. Norton, *Personal Destinies, A Philosophy of Ethical Individualism* (Princeton, NJ: Princeton University Press, 1976).
- 62 For example Mack, 'Egoism and Rights,' and 'Egoism and Rights Revisited,' *The Personalist*, Vol. 57 (Autumn 1977), pp. 282–87. See also Machan, 'Prima Facie versus Natural (Human) Rights', *Journal of Value Inquiry*, Vol. X, No 1 (1976), pp. 119–31.
- 63 Van den Haag, p. 49.
- 64 Ibid., p. 48.
- 65 Earl Conee, 'Against Moral Dilemmas,' *Philosophical Review*, Vol. XCI (January 1982), pp. 87–97.
- 66 See Machan 'Prima Facie versus Natural (Human) Rights.'
- 67 Here is a passage that illustrates Aristotle's view:

Virtue is concerned with feeling and actions; praise and blame are bestowed on voluntary ones, pardon (sometimes also pity) on involuntary ones. To define and distinguish the voluntary and the involuntary is, therefore, essential if one is enquiring into virtue – and useful for legislators too, in connection with the assigning of honours and punishment.' (*Nicomachean Ethics* III. 1, 1109b30)

- 68 Werner Jaeger, *Aristotle* (Oxford: Oxford University Press, 1934), p. 152.
- 69 David Ross, *Aristotle* (London: Methuen & Co. Ltd., 1964), p. 201.
- 70 It is worth noting that Gray makes much of two points against classical liberalism, namely, its subjective individualism and its aspiration to universalism. On the first point, Gray characterizes individualism in a strictly subjectivist way and this is clearly not necessary for classical liberalism. See, for example, my *Individuals and Their Rights, Capitalism and Individualism*, and *Classical Individualism* in which I develop what I have called classical or humanistic conception of individualism. See also Norton, *Personal Destinies*.

Concerning the non-universalizability of liberalism's principles, it is worth noting that while no doubt some implications of these principles may not be universally applicable – ought, after all, implies can, and some societal circumstances make no room for certain possibilities – the real issue is whether the basics are objective, not universal. Cultural diversity can be divided into the sensible contextually warranted and the morally and politically intolerable varieties. Without some sense of what is basically right, that distinction is impossible to make and we are left with having to accept the killing of wives in India for the sake of collecting a new dowry as simply a different cultural practice. Indeed, Gray's own effort to criticize cannot escape a certain measure of universalization.

After all, should someone in a given culture advance the thesis of universalizability, Gray would argue against such an individual. So his own criticism of the alleged cultural imperialism of classical liberalism cannot help but amount to a kind of cultural imperialism. So what we are left with is the question: which of these trans-cultural systems of standards or criteria is the sound one? We lack the option of engaging in the discussion without any concern for that issue, as Gray seems to think we may proceed.

- 71 Tibor R. Machan, *The Pseudo-Science of B. F. Skinner* (New Rochelle, NY: Arlington House, 1974) and *Initiative – Human Agency and Society*. See also Roger W. Sperry, *Science and Moral Priority* (New York: Columbia University Press, 1983).
- 72 (Princeton, NJ: Princeton University Press, 1953).
- 73 Bambrough, *Moral Skepticism and Moral Knowledge*.
- 74 John Gray has, at one point, identified himself with a rather forceful conservatism but later with the radical wing of the British Labour Party and a virulent form of anti-Western anti-individualism. See, for example, his review of Adam Seligman, *The Idea of Civil Society* (New York: The Free Press, 1992), in 'Authority's Ghost,' *The New York Times Book Review* (September 13, 1992), p. 26. See also his *Straw Dogs, Thoughts on humans and other animals* (London: Granta Books, 2002).
- 75 I explore this in greater detail in my *Individuals and Their Rights*. The main point is that our encounter with the universe clearly suggests a great variety of types and kinds of beings and while in some cases we may be mistaken in the belief that there exists a difference of type or kind while it merely appears to be so, in other cases it is not reasonable to expect the success of a reduction, say, from musical harmony to physical matter or process, from self-awareness to brain process, from literary excellence to chemical events.
- 76 I have in mind, in particular, Sperry, *Science and Moral Priority* and Timothy O'Connor, *Persons and Causes* (New York: Oxford University Press, 2002). For a good selection of essays on this topic, see Timothy O'Connor, ed., *Agents, Causes, and Events* (New York: Oxford University Press, 1995). See, also, Machan, *Initiative – Human Agency and Society*.
- 77 'Trans-historical' is not the same as 'transcendent.' What trans-historical involves is the stability of certain standards of right and wrong throughout the history of a distinctive species of agents who must, given the kind of beings they are, choose their conduct. Some fundamental choices are going to be sound for them any time, any place, although many of the derivative decisions may differ due to historical variables. Thus, while it may turn out that certain virtues, such as thoughtfulness or right reason, will never be dispensable for a good human life, other moral alternatives, *vis-à-vis* parenting, citizenship, or familial loyalty, will vary from culture to culture or even more particularly.
- 78 It may be instructive, and should be taken into consideration in the assessment of the respective views, that the natural rights theory of Locke gave impetus to the eventual emergence of such documents as the United Nations Universal Declaration of Human Rights, certainly a trans-cultural instrument of moral and political influence. While this may not be a document that fulfills its task flawlessly, it goes a good distance toward stressing the propriety of such an approach. It is doubtful, indeed, whether Gray's multiculturalism – buttressed, at one point, with a reference to Paul Feyerabend's epistemological anarchism – can make any sense of any kind of criticism, even that which he engages in, not to mention those involved in chiding the former Soviet Union, South Africa, Chile, Iraq and other cultures for inhumanities.
- 79 In the last analysis skepticism is so nihilistic that it robs the proponent of the position of any justification for saying anything at all, even critical. Why should we, from a skeptical perspective, accept any meaning of the words being spoken?
- 80 MacIntyre, *After Virtue*, p. 69. For whether the historicist position, for example, of MacIntyre, is *historically* accurate about rights in particular, see Brian Tierney, 'Origins of Natural Rights Language: Text and Contexts, 1150–1250,' *History of Political Thought*, Vol. 10 (Winter 1989), pp. 615–46, and 'Conciliarism, Corporatism, and Individualism:



the Doctrine of Individual Rights in Gerson,' *Christianesimo hella Storia*, Vol. 9 (1988), pp. 81–111.

81 Ibid., 228.

82 Marx, *Grundrisse*, p. 33. For how well developed this idea has become, often not even clearly linked with Marx, see Catherine A. Mackinnon, *Feminism Unmodified* (Cambridge, MA: Harvard University Press, 1987). See also Alan Freeman and Elizabeth Mensch, 'The Public–Private Distinction in American Law and Life,' *Buffalo Law Review*, Vol. 36 (1987), pp. 237–57. It is instructive to note that if we are to understand philosophical arguments for natural rights along Marxist lines, such that they are designed, even if inadvertently, to serve some special or vested interests, this can cut deep enough to indict Marxism as well as other views that employ it. For example, arguably one likely consequence of implementing the anti-individualist, anti-individual rights position is to strengthen the power of the state or government over against the claims of citizens. In short, this position fosters state power. One might then hold, consistent with the Marxist analysis, that these arguments against individuals have as their ulterior motive nothing other than statism, the gaining of full or totalitarian legal power over human individuals. Yet the real question is not what motivates these views but whether they are right.

83 Here the point earlier made *vis-à-vis* skepticism about universal principles holds against historicists, also. These self-reflexive arguments are not without their serious punch, using, as they do, the common logical rule of substitution to test various claims. For more on these kinds of issues, see *Reason Papers*, No 17 (Fall 1991), 'Rethinking Foundationalism.' See also Machan, 'Evidence of Necessary Existence.'

84 For an interesting history of ideas on the concept of the individual, see J. D. P. Bolton, *Glory, Jest and Riddle, A Study of the Growth of Individualism from Homer to Christianity* (New York: Barnes & Noble, 1973). But see also John O. Lyons, *The Invention of the Self* (Carbondale, IL: Southern Illinois University Press, 1978).

85 See my 'Law, Justice and Natural Rights,' *Western Ontario Law Review*, Vol. 14 (Fall 1975), pp. 119–30.

86 Gilbert Harman, *Thought* (Princeton, NJ: Princeton University Press, 1973), p. 145.

87 I wish to thank Mark Turiano for his advice on the preparation of this work, as well as James Sterba for his criticisms. I believe the discussion has benefited considerably from discussing various features of it with James Chesher, Douglas J. Den Uyl, Gregory Johnson and Douglas B. Rasmussen.

## Chapter 4

# Individualism and the Vitality of Community Life

The owner of a famous theater in Fullerton, California makes plans to sell it. Residents scold him for sacrificing the interests of the community, and some even urge the local government to ban the sale.

In the neighboring town of Orange, a resident in a historic district plans to build apartments on land he owns. Upon learning of his plan, some residents urge the local government to prohibit it, saying the community will be ruined if the owner is permitted to proceed.

In Indianapolis, influential citizens want to institute random car searches to stem drug trafficking. They claim that opposing the drug searches amounts to pitting private interests against community interests; in which case, of course, the latter should prevail. In this case, the United States Supreme Court sides with those who argue that their individual rights should be protected.<sup>1</sup>

Do the rights and interests of the individual collide – fundamentally – with the rights and interests of the community? Is there an inherent clash between individual sovereignty and political obligation?

On the face of it, that there could be such a clash seems a bizarre proposition, notwithstanding the many disputes framed in such terms that we read about everywhere. Communities, after all, are made up of individuals. Individuals form a community in the first place to promote their own survival through cooperation with others. The purpose of a concept of rights is to define the constraints within which these individuals may peacefully interact in the social context they have developed. The community is not some separate entity unto itself, subsisting somehow apart from the very individuals it comprises.

Yet many who criticize libertarianism, especially from a communitarian or socialist viewpoint, claim that the inalienable ‘negative rights’ that libertarianism defends – negative in that they prohibit others from violating one’s rights to life, liberty and pursuit of happiness – are figments of the imagination. According to such critics as Henry Shue, Stephen Holmes, and Cass Sunstein, only positive rights exist – in this case, the positive right to be protected from intrusions, a right assigned by governments. On this view, rights to life and liberty are merely entitlements to protection, and the government decides who receives these entitlements and when they receive them. A right not specifically assigned and protected is said to be a fictitious right.<sup>2</sup> Thus, the allegedly non-welfare rights defended by libertarians can be viewed as ‘welfare rights too’; thus, ‘all legal rights are, or aspire to be,

welfare rights.’<sup>3</sup> And such welfare rights imply extensive political obligations: namely, substantive services to others that governments may enforce. These critics claim that since there are no negative rights after all but only positive rights, libertarians can hardly complain when other positive rights, like ‘the right to be provided with health care,’ are added to the bushel of enforced ‘positive rights.’

The gainsayers of ‘negative rights’ might even be right – if the way to figure out the nature of rights were to play a linguistic shell game.

According to the classical liberal tradition,<sup>4</sup> a right is a social norm – a kind of justified norm – that should be recognized and respected even when it is not being protected by a government.<sup>5</sup> An innocent person should not be murdered even if nobody is preventing that person from being murdered; the norm is correct even if there is no institutional protection of that person in force as of yet, and even if that person lacks the means to protect himself during a given attack.<sup>6</sup>

In point of fact, the so-called ‘positive right’ to protection by government is *derived from* the ‘negative right’ to freely enter into a compact with those who would form the government – and, more fundamentally still, from the right to defend oneself, which would encompass the right to enlist the assistance of others toward that end.<sup>7</sup> A proper conception of rights is not arbitrary. It is derived from a sound understanding of human nature and the requirements of human survival in a social setting. Libertarians do not object to positive rights that derive from contract or compact! This is what the critics fail to appreciate. They regard government as a given, as simply there, seemingly without ethical antecedent; whereas libertarians regard government or any similar agency as instituted by free men and women so as to secure the rights we have by virtue of our very nature. The critics glide past the central questions and so misconstrue the very meaning and purpose of rights.

The nomenclature of ‘negative’ versus ‘positive’ rights muddies the waters somewhat. The right to liberty surely is ‘positive’ with respect to the individual’s freedom of action that the right implies. Of course being able to exercise that freedom does not guarantee that one will obtain specific goods, like food, necessary for survival; it merely enables one to engage in the peaceful actions that may serve to acquire food. But for human beings, freedom of action is more important than food, because that is what we need to get the food and the other life-serving goods that applying our reason enables us to acquire. The right to liberty is also certainly ‘negative’ in that it enjoins others from coercively interfering with an individual’s positive freedom of action; ‘no’ is a negative word. But the question here is whether such ‘negative’ rights as the right to life and liberty somehow conflict with the interest of the community or the individual’s serious obligations to the community. Is the notion of such a conflict even intelligible?

Prominent thinkers such as Richard Rorty, Charles Taylor, Michael Sandel and Amitai Etzioni champion the idea of communitarianism. Some go so far as to claim that all persons *belong* to communities, arguing that the

relationship of dependency between individual and community is akin to the relationship of one's limbs to one's body. The social 'body' is thought to be an ontologically prior and even superior sort of being, of which individuals are merely constituent elements, and as such possess no justified claim to sovereignty.<sup>8</sup> Some embrace his view explicitly, others implicitly as they speak of what 'we' do and think and say and how particular individuals need to accommodate what 'we' have determined.

In modern times there are few more prominent alleged conflicts than that between the individual and the community. The natural antagonism between the private realm of the individual and the public realm of the group has emerged as a central theme of modern political life. Such essay titles as 'The Challenge of Privatization in the Former East Germany: Reconciling the Conflict between Individual Rights and Social Needs'<sup>9</sup> hint at how easy it is to treat individual rights as inherently at loggerheads with the good of the community.

How did this situation come about? How did individual rights and the public interest come to be perceived as arch enemies – with the individual, all too often, cast in the role of expendable extra required to sacrifice his rights to the 'needs' of the group?

It is true that no individual has ever survived alone, utterly apart from others. Family, neighbors, tribe, village, city, country, and now even the world are interconnected and form a vital feature of the life of every individual human being. Who we are does have a lot to do with the groups of which we are members. Human beings are not born alone on desert islands and obliged to create civilization from scratch. We are born into human society and we inherit human culture. But the question is, does the benefit an individual can gain from society in and of itself confer upon 'society' (or particular other individuals claiming its mantle) a substantively limitless claim upon the individual?

In early times, especially before there was much reflective thought, let alone writing, there could only be fleeting challenges to the normal social bonds. Individuals took tribal rules and customs for granted, and probably had little opportunity or felt no great need to resist them in any persistent way. To the extent that such bonds were challenged, the challenge would have been swept aside without much controversy. The requirements of survival were too stark and pressing in the earliest days of our history for much consideration to be given to 'doing your own thing.' There had to be food, there had to be shelter, there had to be someone to placate the gods. Until humanity reached a certain complexity of civilization and attendant division of labor, it would have been pointless for a woman to revolt against having to prepare the meat – or for a man to revolt against having to catch it. The issue of survival was too stark and pressing and constant. So while individuality may well have been stifled as a matter of course in such circumstances, the stifling would not have been perceived as such, or at least it would have been tacitly accepted as reasonable and unavoidable. So in primitive social circumstances the issue of the individual versus the community could not arise with much force.

As creativity became more unleashed and the community expanded beyond family and tribe, the relationship of the individual and the community did arise. With the birth of political thought the focus was mostly on how communities should be administered – what civic virtues should be fostered – rather than on how to resolve any conflicts between individuals and the community. In ancient Chinese political thought, Lao Tzu, for example, voiced skepticism about the propriety of invoking the wisdom of the community.

But it is of course in ancient Greece that the questions arose most influentially for the West. With the life and death of Socrates, the potential clash of individual with community was starkly dramatized indeed, provoking the lengthy explorations of Plato. But this conflict is often misunderstood. It is usually regarded as one between Socrates and the mob of Athens, the individual and the community. But he did not challenge the group's supremacy. Rather, he aimed to steer it on a better course, and in fact defended the authority of the Athenian state to condemn him to death.

In Plato's dialogue *Socrates*, or at least the Platonic version of Socrates, explains to Crito why he will not take the chance to flee to save his own life: it is because he has accepted the state's general dominion over him as just, even if it acts unjustly in a specific instance. Socrates imagines that if he were to evade the sentence, the state would rightly demand to know why he would

overturn us – the laws, and the whole state, as far as in you lies? Do you imagine that a state can subsist and not be overthrown, in which the decisions of law have no power, but are set aside and trampled upon by individuals? ... Well then, since you were brought into the world and nurtured and educated by us, can you deny in the first place that you are our child and slave, as your fathers were before you? And if this is true you are not on equal terms with us; nor can you think that you have a right to do to us what we are doing to you.

The state would instruct him that 'he who has experience of the manner in which we order justice and administer the state, and still remains, has entered into an implied contract that he will do as we command him.'<sup>10</sup>

Socrates offers no counterargument – nor does Crito. The conflict here was thus between the values of Socrates and those of his critics, rather than between the rights of Socrates (the individual) and the rights of Athens (the community). The idealist metaphysics of Plato further supports the supremacy of the community. Just as in geometry it is the idea of the circle that is perfect, not any specific circle, so, for Plato, it is the universal idea or form of humanity which is transcendent, eternal, and perfect, while the shadows cast by this form – you, me, and the other guy – are perishable, imperfect, even base.

Even Aristotle's focus upon the status of the individual citizen is not so stark as his focus upon the need to administer the community properly. For the ancient Greeks it was primarily the duties or obligations of citizenship that took priority over concerns about individual rights or liberty. Individual

rights do make a vital appearance in Aristotle but not so prominently as they do in the thirteenth century and thereafter, especially in the writings of John Locke and later libertarians.<sup>11</sup> We may disagree with these early reflections, but they raise the question we too must cope with: to what extent is Socrates – or any individual – entitled to dissent from the group? And to what extent is the group entitled to subdue the individual?

And what sort of community is at issue – just any at all, so that, for example, if an individual comes into conflict with the community of the Third Reich or contemporary Iran or the former Soviet Union, such a conflict too must be resolved in favor of the community? Or are only communities of a much smaller kind at issue, such as the family, tribe, clan or neighborhood?

The question is not whether in point of fact individuals and groups have often clashed. Groups can trample individuals, and criminal individuals can set themselves against ‘society.’ As well, the individual’s chosen objectives may often be at odds with his own rightly understood interest. But the existence of such clashes among badly or mistakenly acting individuals is no proof that such clashes are inherent and necessary – no proof that the interests of the individual and those of the community are *fundamentally* at odds. The issue is whether the rightly understood and fundamental interests of one individual and those of other individuals in a society are *necessarily* in conflict. Why should they be?

Well-formed communities consist in the associations of these individuals in accordance with appropriate principles of governance. Communities are formed for the sake of the individuals the community comprises. So individual human beings, if good and rational, cannot be fundamentally opposed to a good and rational community. It is their vital support system. The answer to Rodney King’s question – Can’t we all get along? – is: yes. If we behave ourselves. Of course, persons will disagree also over the criteria of a good community, but neither does the sheer fact of disagreement show that the true fundamental interests of persons in the community are anything but consonant.

What makes for a good community depends on our nature, on that which distinguishes us from other living beings: our capacity for thought – our reason. Human beings can learn ideas and figure out how to apply these ideas to improve our lives. We govern this capacity by choice. We don’t have to be conceptual originators to do so; we can pick up ideas from books, conversation, even the habits we see people adopting for reasons which are understood only tacitly. For human beings such learning and communicating, which cannot happen without society, is central to our flourishing and even to simple survival.

Along with all the creative and practical benefits of being able to share wisdom with others in society, we also gain all the psychic benefits that flow from love and friendship. In a radically splintered society we might gain some of these values in a scattered or incidental way. But the more peaceful, complex, and stable our community is – and the more moral and just it is

– the better able we are to exercise virtue, think and plan, and enjoy the fruits of our efforts. If indeed adult human beings are creative, self-determined and morally responsible agents, communities ought to accommodate this by governing in accordance with the individual's right to life, liberty and property, which alone can secure for us the best chance to achieve the kind of life we ought to live. Anything else would be less than suitable to the life of the individual.

We need society to live. But society can also kill us. It can kill us quickly or it can kill us slowly, by stifling and banning our individuality. We aren't guaranteed hospitable communities. A community may be freighted with bad customs, bad habits, bad laws – and, yes, bad people. Often we look back upon the societies of earlier eras with disdain for their failure to cherish the requirements of human flourishing. But while primitive societies may not have known about these requirements, the same cannot be said of the rulers of later societies who could know what kinds of institutions are appropriate, but who nonetheless imposed the opposite.

So we need to monitor our communities. We need to ensure they are healthy and suitable to us. And this is a matter of individual responsibility. To abandon a corrupt tribe is something an individual does as an individual, not as a member of some other tribe. Even the family, a community that many mistakenly consider to be morally prior to the individual – meaning that one is supposed to place the interests of this community ahead of one's own – is not immune to criticism and censure. When an abused child is incapable of protesting and resisting, others, judging the situation to be intolerable, may make just claims in his behalf and even remove the child from this community.

It is important to underscore that the individual is the *sine qua non* of this analysis. The individual comes first. Society exists because individuals need society – and because individuals constitute it. What makes a community suitable to its members is its embrace of the principles individuals need to prosper in the company of others. These principles are social norms – individual rights – that are secured by both law and custom, and in terms of which many peaceful approaches to life may be actualized with impunity. Because each individual has a fundamental interest in the success of society and in being nurtured rather than molested by it, each individual also has a fundamental interest in respecting these norms.

Thus, among reasonable persons there is no necessary clash of interests, not at any rate at the most fundamental level of social interaction. When less fundamental conflicts occur among such persons – for example, over the provisions of a contract – the antagonists respect their mutual interest in sustaining society by acceding to the legitimacy of contract and the results of any arbitration. When individuals thus recognize their mutual interest in sustaining a free, rights-protecting society, conflicts between them can go only 'so far.' To cross that boundary line is to become a criminal.

If no *bona fide* conflict exists between individuals and community, the conflict in particular cases must in fact pertain to the opposing purposes of

individuals within a community. Conceptions of a proper community may also clash, certainly. Some notions of community would, if implemented, do chronic violence to individuality and individual rights. These might bar certain peaceful individuals from membership for some perverse reason. Or they might prohibit existing members – persons innocent of any crime – from engaging in peaceful but frowned-upon activities, like dancing, having gay sex, selling a property, or building a power plant. Such communities are not suitable to the life of the individual, or at any rate they are only partially or intermittently suitable. It is no surprise that the desire some may have to establish a community that victimizes certain members would clash with the desire of the victims to be left alone.

What is the greatest threat to the individual when the alleged conflict between the individual and the community gains credibility? It is the haste and ease with which some people then rush to coercively suppress practices they find objectionable. Abetted by compromised social institutions, such persons too easily abandon the principle of individual liberty and indulge the expediency of coercion. Plain criminals, too – only without the intermediary of government to obscure the nature of what they're doing – resort to violence when impatient to get something. Plain criminals, too, care little about the costs to the innocent of their invasive actions.

It is especially important to adhere to principled problem-solving in societies whose legal systems rely on precedence. If a principle is compromised once, and this compromise is affirmed as legitimate – and then affirmed again, and again – a precedent is established in accordance with which all kinds of violations of individual rights can be promoted and established. If freedom of speech has been curbed with respect to pornography, why not follow suit when it comes to cinema or talk radio? Every pushy do-gooder can see the pattern and leap to exploit it.

Rights-trampling communities are bad communities. And when folks say that human beings need to give up individuality or abandon their basic rights for the sake of the community, they are distorting the actual nature of the conflict. The actions of a gang are not consistent with the requirements of a viable community.

The community of human beings so understood, however, must not be imposed upon people – in the sense that persons must not be forced to remain in the community if they wish to leave. For this would violate their basic nature, their creative role in directing their own lives for better or worse. Human dignity requires that one be in charge of one's own life and be judged accordingly. And this is one reason why a free society, wherein we all enjoy what Robert Nozick has called our 'moral space,' is so vital.<sup>12</sup> When persons are dealt with in ways that negate their sovereignty and truncate their moral space, their humanity is thwarted; they are demeaned. At the same time, such persons demean themselves if they neglect to cultivate their lives by accepting and cultivating a good community. Yet that is an issue they must contend with themselves. It is the challenge we all face. To deprive us of that challenge



– to force us into or out of communities against our own will – is to violate principles of community life itself. That is the meaning of the political idea of ‘the consent of the governed’ and of the economic idea of ‘the exit option.’

The myriad details of the kind of community required for human beings cannot be laid out in an unalterable blueprint. The complex institutions a good community requires must be discovered, handed down peacefully from generation to generation, rekindled when lost sight of, revitalized, attended to, heeded and honed. But whatever shape such community life takes, one element must be fundamental and enduring. And that is the goal of respecting and protecting the sovereignty of the individual. Individuals must have room to make their own moral choices: about what career to pursue, what people to befriend, what recreation to embark upon, what to worship. This is what the theory of individual rights is all about.

Let us put some of this in concrete terms now. Consider the common allegation that the needs of communities in environmental matters conflict with individual rights. If wildlife preservation is at issue, involving wetlands, for example, it often seems that here clearly community interest and private interest are at odds. But why should this be so?

Actually, it turns out that a regime of private property rights affords the best chance for conserving the resources that human beings require in the long run.<sup>13</sup> The tragedy of the commons or collective ownership is the main threat to environmentally sound public policy, whereas private property rights can often secure long-term care for resources.<sup>14</sup> So it seems that respecting and protecting the individual’s right to private property, and developing measures that address environmental problems within such an infrastructure, leads to the best solutions. And this ‘best’ will be what suits both the individual and the sort of community in which individuals can flourish.

Of course it is true that an environmentalist might oppose a given development despite the long-term environmental benefits of a consistently enforced property-rights regime. He might simply have a personal preference in the matter. But why should the environmentalist’s desire to see untouched a particular square of land trump the property owner’s desire to build apartments on that land? A society that respects individual rights is not a society in which every longing of every individual is ratified and imposed on others – which would be impossible to do in any case – but one in which individuals are free to pursue their values in cooperation with others. Upholding the principle of individual rights, and upholding it uniformly, is the only way to avoid dog-eat-dog communitarianism.

Or consider pornography and prostitution, both of which are often regarded as cases in which the community’s best interest conflicts with individual rights. But is it so?

In fact, if private property rights are not strictly protected, those trading in pornography and sexual services simply go underground. The desire for such services does not disappear but is expressed and satisfied in often seedier and more intrusive ways than might be the case if it could occur freely in places

where it is accepted and looked for. The right approach is to protect private property rights and thus not to ban private trade, but to limit it to where it is wanted. Pockets of smut trade or prostitution that may develop can then be more easily prevented from invading the areas where people refrain from trading in such goods and services. Even on the Internet, in which sexual expression is often taken to an extreme, those who wish to protect themselves and their children from such matter are able to do so, using Net Nanny and other filtering services. The integrity of such pockets cannot be maintained, however, if communities are ruled not by individual rights but by majority will or dictatorship.

Let's return now to the Fullerton, California case of the proposed theater sale that some residents opposed as inconsistent with community interests. Both the residents and the owner have the same basic social requirements of survival which, as we've seen, includes respect for individual rights, one crucial form of which is property rights. To abandon a commitment to individual property rights in this case would be a very serious breach of principle and, ultimately, would thwart the public interest. With the principle abandoned, no other individuals in Fullerton could be secure in their property either – including those who would violate the property rights of the theater owner. To build nice theaters, individuals need to know they'll be able to sell them when that is to their advantage. Without this freedom, the value of what people choose to create – and the motive to create – is seriously hampered. Sure, some nice things, even colossal things, are built in tyrannical societies – for example, pyramids – but mostly at the expense of conscripted legions who receive nothing in return for their sacrifice. Only in free societies can individual rights and community values be well aligned – because only in free societies are the rights of all peaceful members respected as a matter of principle.

In the city of Orange, a resident wanted to build apartments on property of his located in a historic district. Other residents objected, preferring that the area remain unaltered. As in the case of the theater, an accommodation was certainly possible: but it would have involved spending money. If preserving the land were so valuable to 'the community' – or a certain subset of the community – why not make it to the owner's best interest to cooperate by offering him the necessary cash, instead of forcing him to sacrifice his rights? In some cases restrictive covenants can prevent such situations as well, with the original terms of sale of a property stipulating that no alteration of the architecture is permitted in subsequent sales.

The residents of the Indianapolis neighborhood demanding random searches to abate drug traffic must accept that prior restraint against innocent citizens is a serious breach of community standards for a free people. Allowing unreasonable searches isn't the way to solve the problem of drug abuse. But violating the rights of innocent people hardly exhausts the options of neighbors beleaguered by drug traffickers. Local groups could obtain voluntary consent for car searches, perhaps – with bumper stickers for the cars of those who go along with the plan, and ostracism and other pressure, short

of violation of rights, for those who don't go along. Cars without the bumper stickers would then be subject to the special attention of neighborhood watch groups. Even if this particular plan proved untenable, other voluntary plans can surely be conceived, once those concerned put their minds to it.

A community which fails to respect the rights of its members is unworthy of admiration and loyalty. On the other hand, members of a community which does consistently respect rights can be proud of the fact that they solve their problems in line with standards of civility and humanity.

The governing norms of a society should accommodate human beings as they are and as they ought to be. But for us to be as we ought to be, we must have the freedom to make the right choices, which is to say we must not be coerced for any reason, unless we behave as criminals ourselves. An environment of freedom obviously makes it possible for people to make wrong choices, whether from error or immorality. Accordingly, a community properly suited for human beings is by its nature non-utopian – it cannot and does not guarantee that all will always be morally well. But this very freedom also provides the most fertile field both for moral education and for genuine moral choice.

The thinkers of ancient Greece were keenly aware that human lives are at once private and public. They philosophized on behalf of the personal excellence and moral character of every individual, yet they also knew that such excellence and moral development required engagement with the community. Hermits are rare birds indeed, and they lead impoverished lives; their meager flourishing is enviable only in comparison with the even more limited options of those who live under tyranny.

The Greeks saw no necessary conflict between the individual and the community. Broadly speaking, they were right. It is only when we regard individual aspirations as necessarily whimsical or irrational, and community goals as necessarily a function of arbitrary collective will, that such a conflict appears unavoidable. In truth, it is avoidable. In truth, we can all get along.

## Notes

- 1 Supreme Court of the United States, *CITY OF INDIANAPOLIS, et al., petitioners, v. James EDMOND et al.* No 99–1030 (2000). But see *KELO et al., petitioners, v. CITY OF NEW LONDON, CT, et al.* No 04–108 (2005).
- 2 Stephen Holmes and Cass R. Sunstein, *The Cost of Rights: Why Liberty Depends on Taxes* (New York: W. W. Norton, 1999), p. 21. See also Cass R. Sunstein, *The Second Bill of Rights: FDR's Unfinished Revolution and Why We Need it More than Ever* (New York: Basic Books, 2004), which celebrates Franklin Delano Roosevelt's political promotion of the idea of economic rights. Of course, Sunstein is mostly reinforcing here his earlier work in support of the idea that government grants us rights, we haven't any apart from this, and thus if FDR or any other political chief sees fit to ascribe economic rights to citizens, that's really the end of the argument. See, however, Tibor R. Machan, *Individuals and Their Rights* (LaSalle, IL: Open Court Publishing Co., Inc., 1989), for a demonstration of the soundness of the Lockean negative natural rights approach and the basis for the idea

that what Sunstein and company, are proposing is a regime of involuntary servitude for those who are to be coerced to provide the economic benefits to which people supposedly have rights.

- 3 Ibid.
- 4 See Tibor R. Machan, *Classical Individualism; The Supreme Importance of each Human Being* (London: Routledge, 1998).
- 5 See Tibor R. Machan, ed., *Individual Rights Reconsidered: Are the Truths of the US Declaration Lasting?* (Stanford, CA: Hoover Institution Press, 2001), especially the essay by Tom G. Palmer, 'Saving Rights Theory from Its Friends.'
- 6 Such rights, though, are applicable for purposes of guiding the establishment of legal norms, not as personal ethical guidelines (as are such moral virtues as honesty, generosity, prudence, or moderation). For more on this, see Douglas B. Rasmussen and Douglas J. Den Uyl, *Liberty and Nature* (LaSalle, IL: Open Court, 1990). Rasmussen and Den Uyl spell out what they term a theory of meta-normativity, meaning a position as to how members of human communities ought to organize themselves, what principles their constitution ought to include.
- 7 The wording of the Declaration of Independence is instructive here: 'Governments are *instituted*... deriving their just powers from the consent of the governed' (my emphasis). For a thorough fleshing out of this idea, see Randy E. Barnett, *Restoring the Lost Constitution* (Princeton, NJ: Princeton University Press, 2004).
- 8 Richard Rorty, *Objectivity, Relativism and Truth* (Cambridge, England: Cambridge University Press, 1991), especially the chapter 'Solidarity versus Objectivity'; Charles Taylor, *Philosophy and the Human Sciences* (Cambridge: Cambridge University Press, 1985), especially the chapter, 'Atomism'; Michael Sandel, *Liberalism and the Limits Of Justice*, 2nd edn (Cambridge, UK and New York: Cambridge University Press, 1998); and Amitai Etzioni, *The Spirit of Community* (New York: Crown Publishers, 1993).
- 9 Thomas Raiser, in G. S. Alexander and G. Skapska, eds, *A Fourth Way? Privatization, Property, and the Emergence of New Market Economics* (London: Routledge, 1997).
- 10 Plato, *The Death of Socrates: Euthyphro, Apology, Crito, and Phaedo*, translated by Benjamin Jowett (New York: Fordham University Press, 1995).
- 11 Fred D. Miller, Jr, *Nature, Justice and Rights in Aristotle's Politics* (Oxford: The Clarendon Press, 1995). Compare to Alistair MacIntyre, *After Virtue* (Notre Dame, IN: University of Notre Dame Press, 1984). See also Brian Tierney, *The Idea of Natural Rights* (Atlanta, GA: Emory University Studies in Law & Religion, No 5, 1997). An elaborate philosophic defense of individual rights as based on human nature appears in John Locke, *Two Treatises of Government* (Cambridge: Cambridge University Press, 1960).
- 12 See, Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), p. 57.
- 13 The issue of private property rights has produced a great deal of consternation within the community of political philosophers and economists because some cases of property are not immediately determinate – property in water or air mass would be very clear cases in point. Even in the plain ownership of land the issue of how far up or down ownership extends can arise. Furthermore, there is always trouble about initial acquisition – how does it become established that someone owns, say, a region of territory? Would the Lockean answer that 'mixing one's labor' will serve this purpose well enough to suffice or is this too ambiguous or vague? If one puts a fence around some land mass, is that a case of 'mixing one's labor' so that the enclosed area constitutes the private property of this individual?

Libertarians are by no means sanguine about the difficulties but they do insist that there are clear enough cases of ownership – as when one finds a valuable piece of stone or catches a not yet owned wild animal or encircles a tree – so that the initial standards of ownership can be built upon and the legal procedures for dealing with more complex cases can be developed without needless worries. See, for more on this, James Sadowsky, 'Private Property Rights and Collective Ownership' in T. R. Machan, ed., *The Libertarian*

*Alternative* (Chicago, IL: Nelson-Hall Co., Inc., 1971), pp. 119–33. See also Tibor R. Machan, *Right to Private Property* (Stanford, CA: Hoover Institution Press, 2002).

There are also certain political philosophers who are now deploying the label ‘libertarian’ for a position that is essentially fundamentally unlibertarian, that is, opposed to the rule, the right to individual liberty, including the right to private property – that is, the right to act to obtain and hold valued items others must obtain permission to use. See, for example, Michael Otsuka, *Libertarianism Without Inequality* (Oxford: Oxford University Press, 2004). No one can own a label but it is dishonest and worse to attach one with a certain meaning to ideas with opposite meanings. See Tom Palmer, ‘John Locke Lite, The strange philosophy of “left libertarianism”,’ *Reason*, Vol. 36, No 8 (January 2005), pp. 56–59.

- 14 For more on this, see Tibor R. Machan, *Putting Humans First, Why We Are Nature’s Favorite* (Lanham, MD: Rowman & Littlefield, 2004). See also Tibor R. Machan, ed., *The Commons – Its Tragedies and Other Follies* (Stanford, CA: Hoover Institution Press, 2001).

## Chapter 5

# Economics and Human Values

It is a political question – a question pertaining to values. Is capitalism worthy of our support? Is it a basically just economic system, or should we support some fundamental alternative?

Many do believe we ought to support a system quite different from capitalism. The ‘ought’ of this proposition alone suggests that in exploring our topic, we are engaged in a normative inquiry. That is to say, we are concerned with the area of our lives in which we judge things to be good or bad, right or wrong.<sup>1</sup> Normative inquiries consider the standards needed to make judgments about what is the right thing to do. Political economy is, accordingly, a normative discipline.

Yet many people contend that normative judgments lack any cognitive merit – that is, that such judgments, because they supposedly do not pertain to any facts of reality, cannot be true or false but are a matter of mere preference. But if this is the case we cannot even approach our subject with any hope of seeing the truth.<sup>2</sup> Yet, the issue has to be faced even in defending a minimalist policy such as libertarianism, where what is being argued is that we all ought to respect the basic individual rights of everyone and the legal order ought to give protection to these rights.<sup>3</sup>

People clearly do think and live as if normative matters could be decided by attention to certain facts, and thus need not be left to mere subjective impressions or intuitions. This fact is not definitive, but it is suggestive. Even more suggestive is the fact that we cannot even conceive of going about our lives without resorting to value judgments. And if our value judgments lack any objective connection to reality, why are they so critical to keeping us alive and flourishing?

Moreover, even those who dispute the possibility that such judgments could be objective imply otherwise when they suggest we should not accept that value judgments can have an objective basis! Obviously, the judgment that normative judgments cannot be justified either can be objectively justified or cannot be objectively justified. If the former, the assertion that we ought not regard value judgments as at least possibly objective is self-contradictory. If the latter, by its own skeptical terms the assertion can have no grounding whatever in reality.

One can escape the morass of skepticism here by recognizing a couple of features about value judgments that enable them to be objective even if also personal and chosen. One is the fact that such judgments are conditional; they possess an ‘if–then’ character. To recognize that ingesting a certain dose

of cyanide will kill you is not a value judgment about the act of ingesting the cyanide but a plain scientific fact. But to say 'If I want to sustain my life, I should not ingest the cyanide,' is to make a value judgment. Yet it is certainly just as true! The proposition is conditional. But its conditionality is so fundamental – identifying a basic alternative, namely, between living a life and not living one – that it escapes being arbitrary.<sup>4</sup>

To conclude that 'I should not ingest the cyanide' is to presuppose an ultimate value – life – the sustenance of which is not automatic and the value of which cannot be defended by reference to other values somehow 'outside' of life. The value of life has to be taken as a given or framework within which other values are defended. This may be what worries some of those who claim that values can have no objective basis: if the objective basis of one's values has to do with whether one's life is being fostered or assaulted, but life itself cannot be further 'justified,' what can validate normative judgments?

There is no other answer than the fact that such judgments are required if one is to survive and flourish. One cannot go outside of one's own life for a justification of values, because values are all about what can promote one's life. Values emerge only with the emergence of life. It is life that entails a possibility of something being good for or bad for an entity. As Karl Popper put it, 'values enter the world with life; and if there is life without consciousness (as I think there may well be, even in animals and man, for there appears to be such a thing as dreamless sleep) then, I suggest, there will also be objective values, even without consciousness.'<sup>5</sup> Or as Ayn Rand put it: 'It is only the concept of "Life" that makes the concept of "Value" possible. It is only to living entities that things can be good or evil.'<sup>6</sup>

It's the relationships that actually exist in reality which give rise to the *conceptual* relationships. Values in fact arise in the world when life arises, just as flying arises among living species when insects and birds come into existence. To further grasp this, we might compare values to the narrower normative field of medicine: only when life exists does health begin to matter. One cannot look 'outside' an organism for the standards of health relevant to it, just as one cannot look 'outside' an organism for standards of value relevant to it. In either case, only certain courses of action will promote the organism's life. The concepts of 'value' or 'goodness' are grounded in the concept of 'life.' Moral goodness may even be fruitfully regarded – in line with the thinking of such ancient Greek philosophers as Socrates, Plato and Aristotle – as a kind of healthfulness.

Life entails alternatives. With life there is the possibility of improvement or impairment, success or failure, thriving or faltering, continuation or extinction – and on many fronts, not only with respect to the organism's biophysical condition. These fronts become more complex as the organism becomes more complex. (For human beings, the question of what courses of action truly foster one's life can be extremely complicated indeed at times.) Life, unlike inanimate matter, cannot simply change its form in any manner and go on forever, in some form or other. Once life comes into being it can

be preserved or destroyed. Life is a process the sustenance of which requires persistent effort by the organism. It is this very conditionality – and the fact that the organism itself must take actions that support its life and avoid actions that hamper or destroy its life – which makes values possible and makes them necessary.

Once we understand this fact, the questions become more specific. What are the requirements of flourishing for *this* organism as opposed to *that* organism? Our list of values for a particular organism depends on the kind of thing it is, that is, its nature. Knowing what it is to be a redwood tree enables the botanist to evaluate how a given redwood is doing; knowing what a beaver is enables the zoologist to evaluate the condition of a given beaver. At the broadest level, of course, the only specialized knowledge required to assess the vitality of an organism is the knowledge of what it means to be alive. If your plant is wilting and drying up, you may not know what the problem is, but you know something is wrong with its capacity to survive. If your four-year-old is listless and has a high fever, you may not know what the problem is, but know something is wrong with his capacity to survive. In principle, all living entities can be evaluated with respect to whether they are flourishing or deteriorating, though in many cases it may take a specialist to assess the condition in detail and determine causes.<sup>7</sup>

When it comes to human beings, one fact of our nature – our free will – adds a new dimension to values. We not only live and may or may not flourish at living, but we also, ordinarily, can choose the conduct that fosters or hinders such flourishing. It is our capacity to choose that gives rise to individual responsibility. For us, the issue of values is not only a matter of what is better and what is worse, but also whether we should (choose to) act according to certain standards. We must continually affirm our commitment to our own lives and to the values that sustaining our lives requires. By contrast, we wouldn't propose that a lion should or should not hunt, or that the deer should or should not try to escape when hunted. Such creatures have no choice about whether to act in such a way as to promote their own lives, but simply do so.

Only human beings can think and choose. Only human beings can consider not only whether to eat or run, but also what social institutions best enhance their lives rather than thwart or undermine them.<sup>8</sup>

These institutions should accommodate not only the aspects of our nature that we all share, but also those that differ from person to person. Human beings have much in common, but we are also individuals. Our individuality means that each person must make some 'ethical calls' in light of his own unique circumstances, capacities and goals, and not simply in light of universal principles applicable to all. A universal ethic might tell us that every capable person should earn his keep, but it cannot tell us that Joe should be a chiropractor rather than a dancer, or what kind of dancer, or whether he should dance full-time or part-time while also going to school. We are also members of various groups, our participation in which may require conduct geared to the purposes of that group – familial, professional, social, and so forth.



So our lives can be lived successfully or badly, and in many very different ways, though, when well lived, in mutually compatible ways. This is what has contributed, in part, to the widely held view that ethical judgments are subjective, that is, merely a matter of the individual's will, tastes, or preferences. In fact, though, the differences are due to the often unique attributes, circumstances, opportunities, and available information of each human individual. It is true that a person *can* act without sufficient regard for his own personal context, but the mere fact that he can is no proof that he must. A proper social system permits scope for all the nuances involved in making the choices individuals need to make if they are to flourish. Such a system respects and protects the freedom of all members of the society.

To summarize: the sheer fact of life – not only human life, but life everywhere around us – gives rise to the question, 'Is it good or is it bad?' with respect to the goal of surviving and flourishing. Different kinds of life will require different answers to this question. It's not just any life but life of a specific type that has to be sustained and guided if the organism is to thrive. And thus, when we are considering good and bad for, say, a banana versus a human being, we will get very different answers. But there is a common element, as well: very broadly speaking, the enhancing of the life of a specific organism is good with respect to that organism, and the destruction of it is bad.

If we accept then that values can be objective even if people may heatedly dispute them, what is the implication for economic science and the defense of capitalism? I contend that the objective normative framework we need to understand human life well is the same framework we need to understand economic science well, including conclusions regarding the free market or capitalism.

To suggest why, let me quote from Professor James Buchanan, 1986 Nobel Laureate in economic science and well known to classical liberals. In his book *The Limits of Liberty* he observes: 'Economics, the science of markets or of exchange institutions, commences with a well-defined structure or set of individual rights.'<sup>9</sup> Buchanan thus acknowledges that even to get off the ground, the *science* of economics requires the predication of a normative component, namely, a system of individual rights. For rights pertain to what *ought* to be the case, how people ought to act; not just what they do as a point of fact. The right to private property, for example, presupposes that every person ought to be left free by others to seek to hold, keep and dispose of items of value.

Accordingly, the very foundation of the free market economic system involves a normative component, contrary to what some other economists appear to believe. The set of individual rights and, more particularly, private property rights are at the foundation of the practical science of economics.<sup>10</sup>

One cannot even think of exchange or trade without the concept of the individual's rights to life, liberty or property. If one's life doesn't fall under one's own authority to govern, no part or result of one's activities (that is, labor or property) may be offered to others on mutually accepted terms. One

may not give it away. One may not lend it or sell it. One may not hold on to it for oneself, or invest it, use it, abuse it, or bequeath it. One may not capitalize on it or save it for a rainy day. Nor may one lose it. If one hasn't got anything, there is no market in goods.

The viability of establishing terms of trade rests on possession of these rights. Absent the right to liberty, all the actions associated with trade – manufacture, invention, research, marketing, labor, and so on – would have to be performed at the mercy of everyone else, without whose permission one would be morally paralyzed. Rare is the society where trade has been completely eliminated, for people want to live and will take the actions they need to try to live, even when they have no legal sanction to take those actions. But we've seen how gray and tenuous life can become when rights of trade are legally banished, as for example in the Soviet Union: *free* trade persisted only on a black market; the traders had to skulk like criminals; and if they were caught, their fate depended on a commissar's whim.

The concept of rights, including private property rights, is normative in that it designates what people *are or are not authorized to do*. Professors Rasmussen and Den Uyl call rights meta-normative,<sup>11</sup> indicating that while possessing basic rights does not serve to guide one's actions in and of itself, it does set the stage for moral action within human communities by authorizing one to resist assaults by others or to employ a government or bodyguard for that purpose. A society of individual rights at least prohibits certain behavior, to wit, the behavior no one is authorized to engage in, and it authorizes resistance to that behavior.

All of this is very important for classical liberal, libertarian institutions and the proper understanding and analysis of the marketplace. Today, markets don't always have much legitimacy in the legal sense. In most societies the right to private property is seriously compromised, indeed, grossly violated, by the legal system itself, not only by criminals. So the theorist must mentally envision the consistent market process that he thinks should transpire (or at any rate, could transpire, in the absence of intervention) in order to analyze what must be the features and consequences of such a market process.

When the analyst of markets then goes on to propose that markets ought to be established and that trade ought be protected among free citizens, to be persuasive he must provide a normative justification – that is, he must argue that this is a good thing, which ought to be pursued. He cannot stop with his explication of what happens in markets in point of fact. He cannot simply try to smuggle in some standard of 'optimality' or the like while trying to sidestep moral questions. For without such a moral justification, it can be argued without much resistance that markets are a bad thing and that students of markets are no different from students of, say, criminal activities or diseases. Indeed, that is the opinion of many among Western intellectuals: that market activities are but expressions of greed, the immoral pursuit of wealth. And their unwarranted but often inadequately countered assertions have resulted in destructive public policy.

If it is not morally good to institute markets, there are all sorts of alternatives we might be morally required to embrace. The market is not an automatic system, like the weather or the rotation of the planets. It is, instead, a system established and maintained by choice – maybe a long series of philosophical, moral and political choices. This is so even though once markets exist, much that happens within them – for example, the emergence of various institutions such as money, rented and leased property, labor negotiations, and so on – happens not because some leaders decide that it should but because ordinary people act on their own initiative and insight, inadvertently producing various orderly processes as one consequence of their individual actions. The possibility of centrally unplanned, ‘spontaneous’ orders which *as a whole* are not chosen but which do result from many *individual choices* is a theme of many classical liberals, most notably F. A. Hayek.

In any case, the emergence of markets is not the inevitable consequence of impersonal historical forces. Indeed, markets are very difficult to establish and then protect from those who regard them morally odious, such as Marxists, fascists, democratic socialists, theocrats, anti-globalists, protectionists or anyone who cares little about whether he lives or dies. Legal institutions require human initiative to be sustained. At least some people in society, therefore – and the more the better – must guard against the corruption or destruction of these institutions. And for that it’s necessary to show the worthiness of doing so.

I have argued that individual rights are an abstract or conceptual way of designating a sphere of authority for human individuals (as distinct from fenced-off territories, which are concrete). They are a sanction of personal sovereignty.<sup>12</sup>

In the feudal era, people who lived in a country were regarded as the *subjects* of the king. In the liberal era, however, they are regarded as sovereign citizens, with government as an institution serving delegated purposes that has no power to intrude on matters of life having nothing to do with criminal activity. Of course this is the ideal case; the liberal era is not so liberal now and hasn’t ever been fully liberal. But sovereignty survives as a principle that is still often asserted against unwarranted governmental intrusions.

‘Sovereignty’ means independence or self-government, that is, ruling oneself rather than being ruled by others. It is only the concept of individual rights – which itself rests on the facts of individual responsibility and standards of right and wrong – that can justify such sovereignty and clarify the boundary lines of the sphere within which each individual is the sole master. Others who want to enter that area must ask for permission. If they have not obtained permission, not only are they doing something wrong, but those whose rights are being encroached upon are entitled to resist them.

That is why one has the moral and political authority to hire a bodyguard or a government – to protect one’s rights. One is justified in warding off thieves, thugs, rapists, or murderers, and also in using the needed force to resist them.

One's life is for oneself to govern, not subject to the governance of others without one's consent.

But why is this true? That goes back to the issue of what sort of a being one is. I have espoused the naturalist doctrine that our nature as thinking, choosing beings requires that such spheres of individual action be honored if we are to survive and flourish as humans. By contrast, some argue for the legitimacy of rights not on the basis of human nature but simply as the result of social agreement. Professor Buchanan has in mind by 'a structure of well-defined rights' a set of rights agreed to or contracted into, an agreement that serves all of our interests if we are alike enough. But because such rights are not justified by reference to human nature and the implications of our nature, the contractual rationale for adhering to them is brittle.<sup>13</sup> If there is no ethical imperative requiring people to adhere to their promises, then no morally binding reason exists for them to live by the terms to which they have agreed. Furthermore, the advantages to be gained from such an agreement are specified only subjectively, so they can be changed at the whim of the agents. If one can hoodwink others and get away with it, there is nothing objectionable about doing so beyond the displeasure of others. The assumption of social contract theory is that most of us are not smart enough or devious enough to do that, so we will probably abide by the social contract.

The natural rights position, in contrast, holds that, quite apart from any agreement, those embarking on human community life have the right to their life, liberty and property – although agreements do come into the picture at some point, namely, when consent is given to be governed. For only a regime of rights can secure for everyone the personal sphere of jurisdiction within which choices about one's life can effectively and meaningfully be made. Basic rights themselves are thus not a matter of agreement. We discover them as needed social principles. They are an objective feature of the human social world.

When we study human beings we notice certain basic, defining facts about their nature. We notice their creativity, individuality, moral agency. We notice that some fail, some succeed, and many are somewhere in between as they proceed to guide their lives. Now we ask: 'what do all these facts tell us about the way we ought to live?' Well, they tell us clearly enough, to paraphrase John Locke, 'if we but think about it,' that everyone ought to be free and protected in his or her freedom.

Unfortunately, of course, not everybody thinks about this. John Locke and later normative classical liberal theorists have recognized that *reason has to be consulted*.<sup>14</sup> Its findings – including how we ought to act – aren't handed to us on a silver platter. This is a most basic responsibility of each human individual: to attend to the world and discover how best to live! However much help each individual receives from those who have thought about these matters already, even to grasp their meaning one must think for oneself.

Although Locke had a somewhat problematic theory of human free will, his political thinking presupposes that ordinary human adults are free to attend to the issue of how they ought to live and interact with others. Since some will,

however, fail to do this and thus fail to act properly, governments are highly advisable so as to secure for everyone the basic rights of individual human beings. Those who are immoral in a way that intrudes upon the sovereignty of others pose a threat to the rest.<sup>15</sup>

Accordingly, if we but think about it, we will learn that we need some place where we are in charge as individuals; a sphere in which we can distinguish ourselves as the individual human beings that we are, despite our complex social entanglements. Without such a sphere, we are going to observe what economists refer to as *dumping*, although in a broader sense than they typically mean it.

In environmental economics, ‘dumping’ means transferring to others burdens that one incurs oneself, usually without anyone noticing – for example, when one drives down a road and people vulnerable to respiratory ailments are assaulted by the pollutants one’s car emits. This dumping is possible when there are no clearly defined private property rights that require one to ask another person for his permission before making use of that person’s domain. If one could do that, perhaps he would say, ‘Yes, for \$5000 a year.’ Environmental degradation would contract severely if this were the legal norm or even merely accepted as the basic standard of environmental property law to which a community aspires.<sup>16</sup>

Some environmental cases are difficult. We have not developed a realm of property rights in the air mass. On the other hand, we are not even trying. Legislators and constituents, especially lobby groups, are only rarely even considering that option, because the principle of the right to private property is not prominently embraced. Even those who support private property tend to say, ‘Well, it will emerge through evolution,’ or ‘It is a matter of social contract,’ or ‘There is no objective normative case to be made for such rights outside of their possible convenience, if that is how people feel or prefer things.’ This is a mistake. In human affairs sound ideas need to be well grounded and actively promulgated – it isn’t enough to wait for them to evolve. After all, bad ideas are also contending for acceptance.

The kind of dumping that is referred to in environmental discussions can be construed more broadly to subsume any forcible severing of the link between one’s actions and the consequences, good or bad, of those actions. This is the kind of dumping that the welfare state facilitates: the widespread sharing of both individual burdens and individual achievements not because one chooses to do so, but because lawmakers require it.<sup>17</sup>

Such dumping narrows the scope of self-responsibility. It weakens incentives both to take care to avoid destruction and to go the extra mile to achieve something. Aristotle noted the effect of dumping on personal incentives some 2500 years ago:

That all persons call the same thing mine in the sense in which each does so may be a fine thing, but it is impracticable; or if the words are taken in the other sense, such a unity in no way conduces to harmony. And there is another objection to

the proposal. For that which is common to the greatest number has the least care bestowed upon it. Every one thinks chiefly of his own, hardly at all of the common interest; and only when he is himself concerned as an individual. For besides other considerations, everybody is more inclined to neglect the duty which he expects another to fulfill; as in families many attendants are often less useful than a few.<sup>18</sup>

It was also noted by Thucydides when he observed that,

[T]hey devote a very small fraction of the time to the consideration of any public object, most of it to the prosecution of their own objects. Meanwhile, each fancies that no harm will come to his neglect, that it is the business of somebody else to look after this or that for him; and so, by the same notion being entertained by all separately, the common cause imperceptibly decays.<sup>19</sup>

Professor Garrett Hardin, the UC Santa Barbara environmental biologist, calls what's happening here *the tragedy of the commons*.<sup>20</sup> Hardin was referring to commonly exploited land, such as an over-grazed pasture, but the principle applies as well to any communally shared burdens and achievements, such as compelled under socialism or the welfare state. What is produced in such a case is a *moral* tragedy of the commons.

The facts of our nature as moral agents<sup>21</sup> indicate that a realm of individual rights, including private property rights, is indispensable to a form of community fitting for human life – a genuinely *human form* of community life. There are other forms of community life, evident, for example, in how bees or ants or wolves or antelopes live together. But fully developed human beings require that a sphere of private property rights be conscientiously and consistently protected.

We have considered some of the facts that justify the *system* of private property rights. But to determine who actually owns what is a distinct problem. Once one grasps the soundness of the general case for the system, one is still left with the problem of how we know, especially in cases of conflict, who ought to have what. This requires a good understanding of how private property may be justly acquired and the sort of process by which its ascription is to proceed within human communities where the problem of who owns what arises.

In John Locke's famous labor theory of property acquisition, mixing one's labor with something is supposed to be the way to tell who owns what. Such mixing, of course, includes buying a thing in the market, with honestly obtained income. It's a very broad concept. It's sophisticated. But is it sound?

I don't think it's sound enough. But here I can only hint at the kind of improvement the Lockean theory needs.

Professor James Sadowsky made a very good attempt at clearly spelling out the principle of property assignment.<sup>22</sup> His view is also implicit in the more general position on the nature of virtue spelled out by Ayn Rand. In this view the primary moral virtue is rationality – the use of human reason in a

consistent and sustained fashion. And the goal is human success as per one's nature, including one's individuality. This position implies Sadowsky's (as well as Israel Kirzner's) entrepreneurial view of property acquisition, which is that something becomes one's private property after one assesses it as valuable and, accordingly, places borders around it in more or less complex ways for purposes of current or future use.

When someone has made a prudent judgment and acted on it in the wild or the marketplace, and has thus (at least purportedly) insightfully engaged with that part of reality that can have value, this person then appropriates the thing in question. Within established communities such acquisition generally arises through voluntary exchange. The appropriate kinds of exchange include even exchange that ultimately proves mistaken. The choice of a transactor to treat something as valuable is a determining factor of exchange, not any assumption of infallibility. (Exchange perpetrated by fraud, however, is not merely a 'mistaken' exchange from the perspective of the victim but a result of the violation of his rights; the kind of mistake fraud encourages could not have occurred if the defrauded person had received honest information.) Whether one buys stock in IBM or a toilet seat, it's the judgment that leads to private ownership, the judgment that this item will matter, that it has value for people. We know that an item belongs to a person when that person has made the judgment and done what is necessary to act on that judgment in a manner consistent with the rights of all parties.

The institution of private property rights – which is the fundamental basis of market transactions – thus depends on the ethically significant (if not always successful) act of judging what is best to do. This fact also provides the link between free markets and individual human responsibility. Without the concrete stuff private property rights can secure for us, there would be no determinate sphere of personal jurisdiction. Only within such jurisdiction is there a means to establish what falls within a person's realm of responsibility and what falls outside it. The ability to assign moral responsibility enables us to avoid the moral tragedy of the commons.

Yet, the particular or detailed elements and implications of the private property system – including how complex valued items are to be defined and how novel versions are to be integrated into the system – cannot be spelled out before we see how problems arising in relation to private property ownership and trade develop and are dealt with through negotiation and, finally, through the courts. Due process is what ensures, as much as possible, that the developing system is just and practical. Criticisms of Locke are justified mainly because he didn't spell out a procedure for maintaining a system or property rights reasonably intact and uncorrupted. However, others in the classical liberal, libertarian tradition have made up for this.<sup>23</sup>

It is the normative base of a system of private property rights that grounds the 'well-defined structure or set of individual rights' with which, according to James Buchanan, economics commences. It is here that normativity infuses the market – even if, in the course of economic analysis, the issue of

how property rights are justified, how they ought to be ascribed in particular and complex cases, and how they can be sustained against assault may be set aside or taken for granted. The issue can't be set aside when it comes time to justify the system, however. Explication of market process is not enough. Morality and human nature have to be considered.

Some classical liberal economists and political theorists seem to be at odds with each other when they speak about property rights. Many economists, for example, advance what they refer to as the economic theory of property rights. When they use the phrase 'property rights' in this sense, what is being said from the point of view of political theory is not that you are buying and selling property rights. In order to commence buying or selling, you are assumed to have the right to private property. You can't buy and sell anything prior to having property rights. Rather, property rights in the economic sense pertains to *having legal title* to things, the legally protected power to decide about the disposition of something.

What needs to be stressed is that in my own discussion, 'property rights' is not used to mean legally protected powers *per se*. That's because, apart from considering the technical subject of how the market functions through the existence of such legally protected powers, we do need a justification of the broader set of individual rights that Professor James Buchanan says is at the foundation of the theoretical and practical science of economics, including the natural right of every individual to own property. It is this natural right, and antecedent to any legal protections that may be instituted, which I have sought to defend.<sup>24</sup>

## Notes

- 1 Some normative matters pertain to the well being of plants and animals, the quality of human conduct and institutions, and the aesthetic attributes of objects. Other normative questions, though, bear on our choices – ethical and political ones, for instance.
- 2 I defend the cognitive nature of normative, especially moral, judgments in Tibor R. Machan, *Objectivity: Recovering Determinate Reality in Philosophy, Science, and Everyday Life* (London: Ashgate, 2004). See also Machan, *Individuals and Their Rights* (Chicago, IL: Open Court Publishing Co., Inc., 1989).
- 3 A free society is defended by thinkers with widely different orientations but all are united in supporting a legal order that stresses individual sovereignty, personal self-rule and social voluntarism. In the present instance the defense comes from a neo-Aristotelian philosophical position. For more, see Machan, *Classical Individualism* (London: Routledge, 1998).
- 4 For more on this, see Tibor R. Machan, 'Rand and Choice,' *The Journal of Ayn Rand Studies*, Vol. 7, No 2 (Spring 2006).
- 5 Karl Popper, *Unending Quest* (Glasgow: Fontana/Collins, 1974), p. 194.
- 6 Ayn Rand, *The Virtue of Selfishness: A New Concept of Egoism* (New York: Signet Books, 1964), pp. 15–16. Here Rand argues for a form of egoism best characterized as eudaemonist, wherein we ought to choose to do what will enhance our own good as individual rational animals. See also David L. Norton, *Personal Destinies: A Philosophy of Ethical Individualism* (Princeton, NJ: Princeton University Press, 1976).



- 7 For an analysis of how much of recent philosophy undermines these ideas, by virtue of innumerable false twists and turns that would take volumes to straighten out, see Stephen R. C. Hicks, *Explaining Postmodernism* (Tempe, AZ: Scholargy Publishing, 2004).
- 8 For a detailed examination of the issue of free will and defense of agency causation, its ontological underpinnings, see Tibor R. Machan, *Initiative – Human Agency and Society* (Stanford, CA: Hoover Institution Press, 2000), and Edward Pols, *The Acts of Our Being: A Reflection on Agency and Responsibility* (Amherst: University of Massachusetts Press, 1982).
- 9 James Buchanan, *The Limits of Liberty* (Indianapolis, IN: Liberty Press, 1985). See <http://www.econlib.org/library/Buchanan/buchCv7c2.html>. (7.2.6)
- 10 Although often deemed a social science, economics is in fact a practical science, more akin to engineering than to astronomy, given that it lays out the principles by which prosperity is best achieved in a social context. See, Tibor R. Machan, *Capitalism and Individualism: Reframing the Argument for the Free Society* (New York: St. Martin's Press, 1990). See also Amartya Sen, *Rationality and Freedom* (Cambridge, MA: Belkap Press, 2002).
- 11 Douglas J. Den Uyl and Douglas B. Rasmussen, *Liberty and Nature: An Aristotelian Defense of Liberal Order* (LaSalle, IL: Open Court, 1991).
- 12 Clubs, corporations, teams and other voluntary groups in a free and just society gain their sovereignty as legally recognized organizations from the sovereign choices of members. For the application of this idea to business corporations, see Robert Hessen, *In Defense of the Corporation* (Stanford, CA: Hoover Institution Press, 1979).
- 13 Tibor R. Machan, 'Why Agreement is not Enough,' *Philosophia*, Vol. 28, Nos 1–2 (2000).
- 14 What this means is debatable, but the wording Locke uses suggests that whether one makes use of one's reasoning capacity is in one's own power. Elsewhere in his writings Locke discusses free will extensively, although it is not clear that he is able to reconcile its existence with his own scientism.
- 15 There are libertarians who claim to be anarchists and to reject government as a morally acceptable institution. But they substitute something that is only nominally different, namely, defense or justice-insurance agencies. For a full discussion, see Tibor R. Machan, 'Anarchism and Minarchism, A Rapprochement,' *Journal des Economists et des Etudes Humaines*, Vol. 14, No 4 (December 2002), pp. 569–88. For more, see Roderick Long and Tibor R. Machan, eds, *Anarchism/Minarchism* (Burlington, VT: Ashgate, forthcoming).
- 16 I develop this further in Machan, *Putting Humans First* (Lanham, MD: Rowman & Littlefield, 2004).
- 17 For a general discussion, see Tibor R. Machan, 'Justice and the Welfare State,' in T. R. Machan, ed., *The Libertarian Alternative* (Chicago, IL: Nelson-Hall, 1974).
- 18 Aristotle, *Politics*, 1262a 30–37 in Werner Jaeger, *Aristotle* (Oxford: Oxford University Press, 1934), p. 152.
- 19 Thucydides, *The History of the Peloponnesian War*, bk I, sec. 141, trans. Rex Warner (London: Penguin Books, 1954), p. 120.
- 20 Garrett Hardin, 'The Tragedy of the Commons,' *Science*, Vol. 162 (December 13, 1968), pp. 1243–8.
- 21 The fact that we aren't always full moral agents – for example, infants, invalids, and all of us while asleep – does not call into question the general truth about us being such. Definitions are always 'for the most part,' as Aristotle noted, and one function of adjectives is to alert us to borderline cases, exceptions and such which are, nonetheless, properly classified under them. For more on this, see, Machan, *Individuals and Their Rights and Putting Humans First*.
- 22 James Sadowsky, 'Private Property Rights and Collective Ownership' in T. R. Machan, ed., *The Libertarian Alternative* (Chicago, IL: Nelson-Hall Co., Inc., 1971), pp. 119–33.
- 23 See, for example, F. A. Hayek, *Law, Legislation, and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy* (London, UK: Routledge and Kegan Paul, 1982).

- 24 For over a century Marxists and others have claimed that scientific economics, so called, is in fact a kind of ideology, a not very well disguised means for the promotion of certain arbitrary class interests which are by no means universally valid. Neo-classical economists have fought against this vigorously – consider Milton Friedman’s book *Essays in Positive Economics* (Chicago, IL: University of Chicago Press, 1953), wherein he states and proceeds to argue that ‘Positive economics is in principle independent of any particular ethical position or normative judgment’ (p. 4) – but in vain, for the reasons advanced herein.

Friedman and others seem to me to shy away from any normative component in economics because they embrace the notion – made prominent by David Hume in the eighteenth century but then reinforced by twentieth-century logical positivists like A. J. Ayer (via his very popular *Language, Truth, and Logic* [New York: Dover, 1936]) – that judgments as to what is good or bad, right and wrong are simply incapable of being shown true or false. This view itself rested on the widely championed epistemology of empiricism, in terms of which only facts that could be apprehended via the senses had credible status.

The Marxist charge, of course, is telling only against those who reject the factual nature of normative judgments. Since positivist economics necessarily embodies certain values – for example, that of prosperity and, *via* the exchange system, private property rights – denying this will appear to be disingenuous.

If, however, value judgments can be shown to be true, then whatever is infused with them, including economics, could well be given (or denied) objective support instead of simply resting on arbitrary human interest. Moreover, economics could well be the instrumental science or technology of human prosperity, just as medicine is the instrumental science or technology of health, which is a human value. Prosperity, as health, could, in turn, be shown to be an entirely justified objective for us to pursue, perhaps even as a priority when compared to other alternatives such as order, acculturation, health, environmental fitness (especially if the latter presuppose it for their flourishing).

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## Chapter 6

# Finding the Rational Man

Reason is not a simple tool for simplifying, nor is rational thought an intellectual monoculture. And this ... is not a tragedy. The world does not relapse into helpless confusion just because things have more than one aspect and can be correctly described in more than one way. On the contrary, overlapping pictures taken from different angles provide the right way to get a reasonably unified notion of an object ...

Mary Midgley, *The Ethical Primate* (1994)

The first and the most direct use of rationality, it can be argued, must be normative: we want to think and act wisely and judiciously, rather than stupidly or impulsively. If the understanding of rationality is firmly tied to the systematic use of reason, the normative use of rationality is easily placed at the center of the stage.

Amartya Sen, *Rationality and Freedom* (2002)

How has the concept of rationality been used, and abused, by many economists?

What the economists have done in the name of reason has left us with the very widespread and well-entrenched idea that reason is useful only for purposes of determining the most effective means to achieve various ends. As far as ends or goals are concerned – what are the good or right things to do – these should supposedly be relegated to such *non-rational* elements of our nature as desires, whims, instincts, drives, preferences, and cultural pressure. By conjoining these two beliefs – instrumental rationality and value-subjectivism – we get the curious and paradoxical result that all persons act rationally, all the time; it also follows that no one ever does anything wrong.

Professor Gary Becker, University of Chicago Professor of Economics and Sociology, won the 1992 Nobel Prize in economics for ‘having extended the domain of economic theory to aspects of human behavior which had previously been dealt with – if at all – by other social science disciplines such as sociology, demography and criminology.’ Becker is one of the earliest and perhaps most prolific among those economists who believe that what motivates human beings in the marketplace, namely, utility – that is, the desire to make a good (economic) deal – is exactly what motivates them everywhere else – when they make love, play with their children, go to church, or develop theories of social science. He is the most unabashedly imperialistic of the neoclassical school of economic analysis in whose view human rationality

consists of acting effectively to satisfy one's desires or fulfill one's preferences. Only Gordon Tullock, of the George Mason University, co-author with James Buchanan of the classic *The Calculus of Consent*,<sup>1</sup> comes close. (A book edited by Gerard Radnitzky and Peter Bernholz, *Economic Imperialism, The Economic Method Applied Outside the Field of Economics*,<sup>2</sup> collects the writings of many supporters of this way of thinking.)

In recent years the Nobel committee has rewarded a good deal of the work resting on the economic approach championed by Professor Becker. In 1986 they gave the prize to Professor James Buchanan, who was credited for his pioneering work in applying economic (or 'public choice') theory to an understanding of the political process. Public choice theory holds, in essence, that we can best understand the conduct of politicians and bureaucrats if we regard their behavior as utility-maximizing. As Buchanan characterized the approach, 'Politicians and bureaucrats are seen as ordinary persons, and 'politics' is viewed as a set of arrangements, a game if you will, in which many players with quite disparate objectives interact so as to generate a set of outcomes that may not be either internally consistent or efficient.'<sup>3</sup> In some details Buchanan's views differ from those of the Chicago School, although it is not possible to briefly distinguish their views of the nature of rationality. (The crux of the difference is that Buchanan seems to locate individual rational action, following Hobbes, at the point of the inception of political society, not at each point of human decision making.)

A few years ago it was the late George Stigler who received the award for his similarly oriented work in studying government regulation. And earlier, in 1976, Milton Friedman, the head of 'the Chicago School,' was rewarded for his work along more general lines that many credit for laying some of the foundations for subsequent economic imperialism. All these scholars not only endorse a version of economic imperialism but are also champions of a largely *laissez-faire* economic order, one that is firmly linked with libertarianism. Their ideas, if found problematic, naturally call into question in the minds of most critics the libertarian policy itself.

Some of the most prominent participants in the discussion appear to understand by the concept of 'rational' nothing more than 'logically consistent.' For example, Amartya Sen, in explaining how the economists see it, tells us: 'Rationality, as a concept, would seem to belong to the relationship between choices and preferences, and a typical question will take the form: "Given your preference, was it rational for you to choose the actions you have chosen?"'<sup>4</sup> So, the term 'rational' is taken by most of these economists to describe the behavior in which one pursues a given objective in the most efficient way – that is, in the shortest possible time, with the least amount of disagreeableness involved.<sup>5</sup>

This is not the only way economists construe or misconstrue rationality. They make another claim that is difficult if not impossible to defend. For example, Ludwig von Mises, former leader of the Austrian school of economics, claimed that, 'Human action is necessarily always rational ... '<sup>6</sup>

As Richard McKenzie explains, ‘Austrian “rationality” can be captured in the very general notion that people either know, or will learn within tolerable limits, what is best for them and will seek to improve their position in life, with no mention of what it is that is pursued.’<sup>7</sup>

Stigler apparently also thought that the economic way of understanding human behavior – to wit, that everyone acts rationally or maximizes utilities, all the time – is accurate: ‘Man is eternally a utility-maximizer – in his home, in his office (be it public or private), in his church, in his scientific work – in short, everywhere.’<sup>8</sup> Gary Becker put it somewhat less directly when he said: ‘The combined assumptions of maximizing behavior, market equilibrium, and stable preferences, *used relentlessly and unflinchingly*, form the heart of the economic approach as I see it.’<sup>9</sup> And in his 1975 Nobel acceptance speech, Milton Friedman put it as follows: ‘Every individual serves his own private interest ... The great Saints of history have served their “private interest” just as the most money-grubbing miser has served his interest. The *private interest* is whatever it is that drives an individual.’<sup>10</sup> We are all doing what we do to achieve the subjective values that we hold: the great Saints are acting as they do to attain eternal salvation, the money-grubbing misers to achieve wealth. Which is pretty close to saying that we are all acting rationally (provided we do not slough off in our pursuits – although if our values were to change, that, too, might be the rational thing to do).

Is there a connection between the two positions on rationality? If one holds that (a) rationality is entirely instrumental, and holds, too, that (b) the ends of action are entirely subjective (that is, incapable of being evaluated objectively and designated as either rational or irrational), then everyone who pursues any goal at all is necessarily ‘rational.’ This is because anyone whose actions might be judged irrational could claim, plausibly, that his goals are such that the way he is acting constitutes the rational pursuit of those goals.

We have already seen that many economists see rationality in purely instrumental terms – they believe that only *means in the pursuit of ends* can be judged as rational (except insofar as we judge some person who uses such means in such terms). But do economists also think that the merits of goals or ends of action are subjective? Certainly the Austrian school has many prominent adherents who do.

Ludwig von Mises claimed, for example, that ‘When applied to the ultimate ends of action, the terms rational and irrational are inappropriate and meaningless. The ultimate end of action is always the satisfaction of some desires of the acting man ... No man is qualified to declare what would make another man happier or less discontented.’<sup>11</sup> Don Ballente characterized the Austrian approach as being ‘most distinct from mainstream economics in its thorough emphasis on the individual decision maker as the focus of scientific analysis. Yet with the values and motives of individuals being entirely subjective it is impossible for an analyst to pass judgment on the optimality of the individual’s chosen actions.’<sup>12</sup>

Neoclassical economists also tend to embrace value-subjectivism. As Richard McKenzie explains, for these economists, ‘No agreement is presumed with reference to subjective evaluations of “goods” because there is no basis for establishing what constitutes agreement. (What is “satisfaction derived from apples”?)’<sup>13</sup> And Milton Friedman himself suggests this subjectivist take on values when he states that

The liberal conceives of men as imperfect beings. He regards the problem of social organization to be as much a negative problem of preventing ‘bad’ people from doing harm as of enabling ‘good’ people to do good; and, of course, ‘bad’ and ‘good’ people may be the same people, depending on who is judging them.<sup>14</sup>

I wish to argue, then, as follows: if the subjectivity of values – that is, of ends sought or goals pursued – is embraced by both the Chicago and the Austrian schools – the two schools most supportive of the free market and thus of the libertarian political economy – and both also view rationality as purely instrumental, it would follow that both must regard all human action as ‘rational’ or utility-maximizing, exactly as von Mises and Stigler state. Why? Because there is no way to deny that an action is rational if goals can always be imputed, so as to render the means currently being undertaken as intelligible and efficient with respect to achieving the implicit goal.

Say that I set out to get to New York City. Am I being rational in how I do this? That is, do I employ the most economic means within the shortest time? I do as follows: I drive my car and I take numerous detours, stop frequently, backtrack now and then, linger and bide my time. A friend notices this and claims that I am being somewhat irrational, as my means are inefficient with respect to my end. But I respond: I want to get to New York City just this way, slowly, biding my time, backtracking. So I am, in fact, being perfectly rational – I am doing what I want to do, what I prefer. If there is no way to assess whether getting to New York City rapidly is for me itself a rationally superior goal to, say, getting there slowly, then *any way of getting there will be rational*, even if I crawl there, and even if my purpose in getting to New York is to say goodbye to someone on his deathbed who could die at any moment. Clearly this cannot be right. In point of fact, however, what constitutes instrumental rationality actually cannot be determined without the prior determination of the comparative superior rationality of the objective being sought.

Economic imperialists believe that they are telling us something quite simple and true, namely, per Buchanan, that all persons in society ‘are seen as ordinary persons.’ And, as they understand it, ordinary persons are driven to advance their own lot – understood as whatever they prefer – on every front. Everyone is, to put it even more plainly, selfish. Greed is no sin but a fact of life, a natural drive. For the economists, however, such terms are misleading, since when pressed they will insist that they ‘do not assume that people in all parts of their lives are motivated by selfish considerations, but also by

“honesty,” “justice,” “love,” and “friendship.” And, as Geoffrey Brennan and James Buchanan elaborate the point, ‘the *homo economicus* model in no sense rules out the possibility that each individual may be motivated by certain ethical or moral concerns, as long as we can take it that such ethical conduct on the part of anyone cannot be presumed to benefit everyone else.’<sup>15</sup> It does rule out, however, that anyone’s motives could be open to criticism, might be wrong. As Becker himself made clear, ‘the heart of the economic approach [is] to include hatred, love, obligation, etc.’<sup>16</sup>

Implied in this position is an assumption that rational moral *choice* or *initiative* is absent from human life, as it is from the lives of dogs or giraffes. Everything is set. (Stigler once argued just this, holding that the world is exactly as it has to be – nothing is wrong or right with it, it merely is.)<sup>17</sup> Furthermore, when reference is made to ethics or morality, what is meant is some form of conduct that benefits other persons than the agent. Thus the economist tends to accept the neo-Kantian characterization of morality, to wit, that no action is morally significant – praiseworthy – if it achieves a purpose of the acting agent. They do not take ethics to be a framework of principles whereby one initiates conduct for good or ill that can be identified objectively as such, independently of the current feelings, desires, preferences of the agent who is acting. Ethics or morality for these economists means, instead, doing whatever benefits other persons, period; that is, altruism. But since such altruistic conduct is incomprehensible from the motivational (scientistic) viewpoint, morality does not really make sense as anything but the private, albeit perhaps unconventional, interests that some people happen to have (for example, the great Saints).

While these thinkers support free markets – on grounds, I believe, of their common sense realization that it has been the most productive in human history – it is crucial to realize that their support is not decisive and not what the free market requires, even strategically, in our time. Scientism might have been in great fashion at some times in the past but not so now, given all the understandable concern for guiding visions and values.<sup>18</sup> It is, thus, insufficient to argue for a political economic system by assuming – and that is all these economists do – that human beings are utility maximizers (even when they benefit others) and that the system of free production and exchange is most hospitable to how they must behave. That is because many criticisms of the free market rest on a far more detailed and complex conception of human behavior, one that includes reference to the basic capacity of human beings to initiate and make choices about what they will do. Furthermore, these criticisms assume that some standard of proper conduct is identifiable and should be followed, regardless of who is thus benefited.<sup>19</sup>

Despite their Nobel Prizes, the reputation of the free market as a just system has not gained a great deal from economic championing of this system from a ‘scientific’ point of view. What lukewarm popular support there is now for capitalism in mainstream intellectual circles – for example, by Jeffrey Sacks at Columbia and Janos Kornai at Harvard University – comes from the collapse



of socialism in Eastern Europe and elsewhere, and even that level of support is waning by now. The economic advocates of free trade and the unregulated marketplace have had something to do with that collapse, of course, but they have also prompted a pretty strong backlash from critics – for example, George Soros, Paul Krugman, Joseph Stiglitz, and others – especially so far as extending the principles of the free, capitalist market throughout the globe (à la globalization) is concerned.

Of course, one problem about this attempt to support globalization is that there is something of a ruse afoot when it occurs. Suppose someone defined the game of golf in terms of riding in carts, wearing funny pants and large shirts, and occasionally using the various clubs to beat one's dog. Would this be fair? Chances are, someone who gave such a definition of the game would probably be on a campaign to disparage it, not to explain its true nature. So consider how the critics of globalization – legion after September 11 – deal with that far more important contemporary phenomenon – which, by the way, isn't all that contemporary (since in certain periods of the modern era globalization was in full advance).

These critics point to the fact that globalization is sometimes related to child labor; it can involve various strains of insidious nationalism, such as trying to whip a country's economy into shape by coercion; and it can involve some regional collusion (as with the European Union). Indeed, when so characterized – or, should we say, caricatured-globalization looks like a positive evil, instead of a promising method to promote economic prosperity and political liberty fostered by sensible political economists (beginning with, among others, Adam Smith himself).

Why would some folks hate globalization as it is properly understood and conceived? Why would they be so eager to distort its nature and paint it in a bad light? We could ask the same thing about those who would distort the nature of golf or marriage or education. Enemies of golf might think that too much money is spent on the sport, at the expense of their own favorite pastime. Enemies of marriage might wish to discredit it because they have failed at it royally and now wish to make some other kind of union respectable. Critics of education might want to have others believe that all there is to it is indoctrination in dogmas that the old want the young to accept uncritically because, well, they don't much like to learn and find intellectual effort unpleasant. So what might be some reasons for disliking globalization so that it is then mischaracterized to make it seem a menace to be destroyed?

For one, the removal of international trade barriers, the central theme of globalization, unleashes competition, which is the nemesis of entrenched industries and labor groups. It is like the American 'dream team' that was sent to the Barcelona Olympics: unbeatable for a time, but eventually other countries started to catch up, and the dream team could not continue to win without doing hard work to stay on top.

Industry, including labor, often would like nothing better than to achieve prominence in the market and then stay there effortlessly. There is much of

this everywhere – including academic life, where many people wish to coast without keeping up, without doing anything past the point where they get tenure. When young Turks turn up, as it were, and challenge the old guard, this is not often received with welcome. In principle, academics are supposed to keep going and invite challenge and criticism from their colleagues, but there is corruption, as elsewhere, and it often issues in barriers to entry or refusing tenure to a challenging young teacher or scholar and so on.

This is one of several reasons why globalization is resisted – the motive is known as protecting one's vested interest, and members of many industries evidence it aplenty. Another one is the widespread belief that if markets are opened up and international commerce encouraged, this will eliminate or diminish national and cultural distinctiveness. There is something to this, though not much.<sup>20</sup> It does not take genius to see that the marketplace unites people on some levels but by no means on all; one can tell this from going to any mall and seeing the enormous diversity of shoppers and merchants. The majority accept the common medium of exchange and the ethics of commerce that should guide everyone, without any threat whatsoever to personal, cultural, or religious identity, nor, again, to our ubiquitous basic humanity. (Recall the remark from Steve Martin's novella, with which this book begins.)

Of course, there are some groups the practices of which conflict with the principles of free trade. If your tribe likes to enslave people, this will certainly be threatened by globalization, since slaves experience the harshest barriers to free trade of all. If the dominant male citizens in some countries treat women badly and wish to bar them from economic power, this, too, is going to be threatened by freedom of trade.

Perhaps one of the main sources of the objection to globalization is the widespread belief that living a good life is itself something of an affront! People should suffer here on earth, not enjoy their lives, and globalization promises many folks just the opposite – namely, prosperous living.

Under the guise of globalization, of course, some dirty practices are also possible, and some mistake this for the consequences of a real thing. For example, taking your firm abroad because there in the host country you can dump your soot into the atmosphere with impunity may appear to be consistent with freedom of trade, but it isn't. This should be a crime, because people are being assaulted, and freedom of trade cannot tolerate assault among trading partners. Globalization, in fact, should encourage the enactment of laws that protect life and property from assault, including pollution.

In fact, however, outside the discipline of economics, most academicians are hostile to capitalism, not simply globalization. They treat the greed that economists praise with disdain – one need only recall the 'hero' of Oliver Stone's movie, *Wall Street*, who espoused the doctrine that 'greed is good' and was roundly seen as a villain for this. One need only consider how the popular press has embraced the largely phony claim that the 1980s, guided by the free-market rhetoric of Ronald Reagan – who many of these economic

imperialists advised – was a ‘decade of greed.’ Intellectual trends don’t necessarily comport with every manifestation of popular culture, but anti-capitalist sentiment in academia is certainly simpatico with that of such movies and press reports.

It is my thesis that it is wrong to extend the approach economists take to understanding human behavior to every area of human life.<sup>21</sup> People do not simply calculate costs and benefits in terms of a certain set of preferences or goals. Indeed, they probably ought to do so more regularly than they actually do. I also argue that a rational approach to ethics would give support to such a recommendation – but not to the view that we already and necessarily engage in such cost–benefit analysis everywhere in our lives. We would all be better off if people did practice prudence more consistently as they embark upon their economic tasks. But they do not do so automatically. As the late Allan Bloom put it in his essay ‘Commerce and “Culture,”’ ‘It is not true, as the moderns appear on the surface to say, that men in civil society are always motivated by utility, by self-interest ...’<sup>22</sup> As Stephen Breyer put it, in his review of Thomas Philipson’s and Richard Posner’s *Private Choices and Public Health*,<sup>23</sup> a book critical from an economic approach of government spending on AIDS research: ‘Economics can wisely inform our efforts to attain our goals; but ultimately, if we prefer John Donne to Adam Smith, economists cannot prove us wrong.’<sup>24</sup>

Should we prefer reading literature to reading economics, if we cannot do both at the same time? The economists cannot help us with such choices, namely, those that we are most troubled by – what ends we should pursue. All we can get is some measure of wisdom about how to pursue the ends we already have. And, to add to the difficulty, there really is no ‘we’ here – no consensus – about those ends.

Now if the case for establishing and protecting the right to individual liberty, including in the marketplace, depends on such economic analysis, then so much the worse for freedom. Economics can, at most, suggest why free markets are useful for purposes of enabling people to strive for prosperity or well-being. But it cannot demonstrate that prosperity is something we ought to foster and place ahead of, say, equality, order, or revolutionary progress.

But can anything prove that we are right or wrong about our preferences?<sup>25</sup> Economic analysis can *contribute* to such a quest, by showing us the limits of the possible. Economics can confirm you can’t get blood out of a turnip, as it were. It can tell us not to strangle geese that lay golden eggs. And this is the beginning of the story of the virtue of prudence.

One reason the market approach to understanding human conduct does make sense up to a point is that *within markets* – that is to say, when they go to market, when they enter into commercial relations – people do tend to focus on making a good deal with respect to previously determined desires and preferences. They do not deliberate about whether to get affordable – within-their-budget – food once they are *in* the grocery store but only *before* they go there; nor whether to hire a stockbroker after they have begun investigating

who might be the best for them to hire; nor whether to take a plane trip after they have called their travel agent. Such decisions are made outside of the market and explain why markets are entered in the first place. Of course, even outside the marketplace, we have economic concerns. It is prudent to pay heed to our economic well-being even while embarking on such non-economic matters as going to church or getting married to one's beloved.

Once a person has chosen to obtain some good or service through the market process, he or she is likely to realize that there are probably several options available and search out the one that will secure the desired good or service at the lowest possible cost and effort. Such instrumental rationality is clearly important and without it there would be a great deal of waste in human life. Adjusting one's available means to the goals one wants to attain is indeed rational. But to understand why, we require more than what the economist gives us: namely, the view that human beings are automatically rational. For this view simply does not make sense of even the widespread *economic* irrationality we witness in the world, not, at least, without reducing the economic approach to vacuity.

Because rationality in economics is so often treated as purely instrumental, when human decision making includes considerations that seem unrelated to economics, many prominent economists argue that a proper scientific approach to those matters means bringing them within the rubric of economics. As Becker makes clear, economists do attempt to account for seemingly varied human motivation – for example, honesty, justice, love, friendship, and so on. But these accounts state that some people just have a preference for these such that when they abandon the quest for efficiency in some economic endeavor – for example, by giving up a good job in favor of letting a less-experienced good friend get it – they do this only because their skein of given preferences makes this necessary. Or if someone refuses to treat an employee unjustly in the course of seeking some economic objective, it is only because within his or her preference scale, treating employees justly occupies a prominent position. In the end, then, all decisions are economic decisions, after all; per Friedman, 'every individual serves his own private interest.' The data of these private interests are just brute givens that cannot be analyzed except insofar as they exist and are ranked with respect to other preferences.

This kind of reasoning was explored by Wittgenstein some decades ago. Bouwsma gives the following account of it:

The hedonist says: 'Men desire nothing but pleasure.' ... Obviously this is no empirical proposition. The hedonist does not find this out by going about asking people what they want. He has no statistics about this. And yet he knows very well that people want all sorts of things. So it isn't at all like: Everybody wants a motorcar. If someone wants a motorcar, then he wants pleasure, and if he wants to smoke or to write a letter, then he wants pleasure. Pleasure is another word for whatever anyone wants. In other words it's a tautology. Everyone prefers the preferable. So pleasure is the desirable, the preferable.

But there is, of course, the illusion of having discovered something. How does that happen? Perhaps in some such way as this. Freud asked – in his own language: What is the essence of the dream? Then he inspected and noticed that a certain dream was a wish fulfillment dream. And another, and another. This was it. A man is hungry and dreams of feasting, is thirsty and he dreams of passing water. Some dreams are like this. This comes like a flash, a great light – an *aperçu* ... . Concerning pleasure there is no doubt. Pleasure is desired and there is no question of ‘Why?’ or ‘For what?’ about it. When it is desired, the case is clear. And now the temptation is to say that when you desire an automobile, what you desire is automobile-pleasure, eating-pleasure, writing-pleasure, etc. The generalization, which was mistaken at the outset, compels this manner of speaking.... Pleasures are not all of the same kind. There are higher and lower. This is the mistake of the generalization breaking out into curious distinctions, or it proceeds to develop the absurdities of the calculus. We desire nothing but pleasure, but there are qualities of pleasure. Poetry-pleasure is better than pushpin pleasure.’<sup>26</sup>

To the charge of vacuousness Becker responds that the conclusions of the economic analysis ‘would not be attacked so much if they were in fact vacuous.’<sup>27</sup> A better explanation than Becker’s is that since such vacuity is put in service of capitalism, as well as some rather disturbing notions (for example, that crime or suicide or divorce is always ‘rational’), and since the prominent economists offer no other support for this ‘odious system,’ most people find the approach not only fruitless but objectionable. They object not so much to a vacuous thesis as to the supposed dirty work done by it.

The economist’s use of the concept of ‘self-interest’ is vacuous, yes, but the common-sense meaning of the term tends to be ‘ruthless, callous, unthinking pursuit of one’s own advantages in life.’ Since this idea clashes with the most widely supported ethics, altruism, a system that treats self-interest in any version as respectable will be ‘attacked so much’ for that reason. It is not the alleged substance of what in fact is a vacuous notion but the ordinary suspicion of ‘self-interest’ that generates the criticism.

Becker does not appear to appreciate just how serious the opposition to capitalism is, regardless of how it is supported. But because the critic can plausibly argue that the economist is embarking on scientism and economic imperialism at the expense of common sense, he can more easily dismiss not only the economist’s method but also his preference for the free market. Preferences are just givens, after all; they’re data. And even if the critic of capitalism may be knocking down a straw man, the ‘value-free’ economist is supplying a lot of the straw.

Sen notes that in the economic or instrumental conception of rationality, paradoxes arise ‘in a situation where the outcome depends on other people’s actions in addition to one’s own.’ More important for our purposes, he also notes that morality ‘would seem to require a judgment among preferences whereas rationality would not.’<sup>28</sup> This suggests that if the view of rationality embraced by the economist is left intact, there will be a gap between morality and rationality. Must we accept this? The puzzle arises because in the case

of human beings the fundamental and distinctive capacity of using reason to flourish in life has been identified as central to the moral life. Plato, Aristotle, Spinoza, Kant, and others have, in their various ways, argued that to be moral, to live ethically, is to make conscientious use of one's reasoning capacity. If the economist's view is right, it would seem that being rational not only has little to do with but can often conflict with being ethical.

In and out of the marketplace, virtues other than prudence – in the narrow sense of looking out for one's economic well-being – may be equally important to practice or even take precedence. Courage, honesty, justice, generosity, and so forth at times outweigh prudence (in the sense of the choice to prosper). By denying our freedom to make a rational choice as to which of the numerous virtues we need to practice, economic imperialism is not only false to the facts but also demeans us. It suggests that we are *unable* to pay attention to anything other than the satisfaction of certain built-in or given desires or preferences. This creates the illusion that we carry on only as we must, *driven* by our preferences, regardless of the situation or what is at stake. No wonder, then, that some economists have argued that it's economic analysis which can make the best sense of the behavior of laboratory mice!<sup>29</sup>

No doubt, nearly all aspects of human living involve economic considerations – some thought of cost and benefit as determined in the marketplace. But there are values one cannot reduce to such factors – friendship, love, truth, beauty, and, indeed, goodness. There is, then, the economic aspect of, say, the purchase of a Rembrandt. But the experience and understanding of the beauty of the work cannot be reduced to this. The same painting could be worth \$5 at a garage sale (sponsored by some poor guy who doesn't realize what he found in his attic) and \$5 million in an auction by Sotheby's. But if the same person were the buyer in both transactions, his aesthetic appreciation and eagerness to have the painting could be identical.

The Beckerian approach manages to subsume so much of human activity precisely because it is so open – indeed, vacuous. Every decision a person makes has to do with cost and benefit. But what will count as such for that person is purely subjective and could, in fact, change from moment to moment. Thus if a criminal prefers to steal Volkswagens instead of Rolls Royces, that is explained by reference to that criminal's preferences. But if another makes the opposite choice, that too is so explained – both wanting to maximize their values, satisfy their preferences. But this is not of much help in understanding thieves and how their kind of life comports with how human beings ought to live.

In the extreme case, if an economist can't 'reconstruct' the consideration at all in economic terms as he understands economics, he may go so far as to claim it does not exist. At the Hoover Institution, where I was a fellow in the mid-1970s, Aaron Director, a very prominent economist at the University of Chicago, argued that the concept 'true' has no meaning in economics; only 'useful' does. Truth seemed to be a pretty large concern to set aside as irrelevant or unintelligible. But whether that claim is itself true was not a polite question to ask, as I found out.

Despite the welcome support of free-trade measures in most commercial realms that the economist's thinking has generated among these famous economists, to defend and revitalize individual freedom requires more. A proper approach would concede that while economics can shed light on many aspects of human living, other disciplines must also be enlisted, lest we suffer an incomplete and thus misleading understanding of ourselves.<sup>30</sup>

What is rationality? Lest we fail at the outset in our exploration of the difference between the economic and ethical ideas of rationality, we need to defend, briefly, a way of going about answering the question.

All beginnings seem to pose the problem of needing support beyond their own framework or assumptions. But, as Aristotle and some others have argued, some starting points are indeed axiomatic or primary – one cannot dig any deeper and their truth is both inescapable and a support for other truths. Some matters, like the law of identity, really cannot be questioned or doubted with any hope of being understood, despite what some current schools of philosophy – for example, Richard Rorty's form of radical pragmatism – suggest.<sup>31</sup>

Why do we think that such ineluctable grounds of inquiry might be found? Because, to start with, we are here asking these questions and doing so by relying on (or suspecting that we do already rely on) some such grounds in many of our activities. Our mutual presence at the inquiry, our mutual interest in the problem at hand, our mutual ability to focus on the issue at hand, all affirm that our search is mutually grounded over time (indeed over several generations, considering the history of this inquiry). Denying this would make the search we are conducting unintelligible. Without some common ground, those of us who inquire about these matters would not be able to embark upon it at all. As Rand argues:

A man's protestations of loyalty to reason are meaningless as such: 'reason' is not an axiomatic, but a complex, derivative concept – and, particularly since Kant, the philosophical technique of concept stealing, of attempting to negate reason by means of reason, has become a general bromide, a gimmick worn transparently thin. Do you want to assess the rationality of a person, a theory or a philosophical system? Do not inquire about his or its stand on the validity of reason. Look for the stand on axiomatic concepts. It will tell the whole story.<sup>32</sup>

There is indeed an axiomatic common ground that underlies what we do, inasmuch as even to deny that we are discussing the issue in mutually intelligible terms would be to affirm that such terms are indeed at work in the discussion. Once these grounds are uncovered, confusion and conflict in usage are more likely to cease, or at least be clarified and ameliorated. Of course no one is justified in expecting final guarantees, as we can go astray in innumerable ways often not anticipated.

'Rational' is a term with diverse and sometimes incompatible usage in both common and philosophical discourse. The term is used to characterize what we say and do, but, given the different meanings people attach to it, people

will disagree about whether a given course of conduct is rational. Some tend to mean by 'rational' that, for example, one is 'in possession of his or her (uniquely human) conscious faculties.' Actions that are rational are then supposed to involve competent, unimpeded, undiluted use of these faculties. In this rendition of 'rational,' both means and ends of action can be subject to evaluation as either rational or irrational. As Sen put it,

The first and the most direct use of rationality, it can be argued, must be normative: we want to think and act wisely and judiciously, rather than stupidly or impulsively. If the understanding of rationality is firmly tied to the systematic use of reason, the normative use of rationality is easily placed at the center of the stage.<sup>33</sup>

(Some matters, of course, would not be subject to such evaluation, namely, anything not capable of being placed under one's conscious control.)

Others employ the word 'rational' to characterize some action that leads efficiently to satisfactory results, to just what was desired. This, as we have seen, is often designated as the 'instrumental' conception of rationality – what counts as rendering some behavior rational is that the most effective (even technically up-to-date) means are employed to get from some starting point to some desired objective. The meaning here is the one that I have associated with the economists and that we saw endorsed by von Mises and attributed to most economists by Sen. It is to act consistently, being (formally) logical, internally consistent in one's course of conduct.

Others hold that 'rational' means whatever is widely accepted – conventionally agreed to – in the relevant community as the way to proceed. Or it is argued that this is the most one can expect to mean by the term, given the difficulties of defending more robust senses of it. On this view rational conduct or, less strictly, reasonable conduct, is that which conforms to the commonly adhered-to standards. (In the law the 'reasonable man' standard is sometimes taken to mean this.)

In certain contexts the conceptions described above will conflict. To take 'rational' as meaning both 'self-consistent' and 'widely accepted in the relevant community' is perhaps plausible, yet assumes that the relevant community prizes consistency. Charles S. Peirce verged on assuming this when he proposed his conception of truth as that which an *ideal* community's membership would accept. Richard Rorty seems to travel much further into the realm of parochial intersubjectivity when he construes objective knowledge to be no more than what an actual community agrees to. The intersubjectivist sense of 'rational' we find in the early pragmatists also clashes with 'rational' as characterizing 'action flowing from competent use of one's conscious faculties,' since members of the relevant group might not use their faculties competently.

Any inquiry or action presupposes the axiom of existence, that there is a definite something that exists.<sup>34</sup> So we must grant that our inquiry about the nature of rationality rests on the existence of some common framework



arising from this axiom. But at this level the standard is extremely broad and will not help with such special areas of inquiry as economics and ethics.<sup>35</sup> What we are after in inquiring whether human goals and institutions are rational is a narrower common standard. That is why the decision theorists' or economists' rendition of 'rational' is of little use here. But could we use the other, intersubjectivist sense just discussed?

A common standard of rationality implies a framework for evaluating judgments and actions in every area of human endeavor, from the sciences to the arts and humanities to everyday personal life. It presupposes a shared capacity to identify the standard as indispensable, binding, and universal with respect to the context of the inquiry at hand. In judgments as such, independently of the specific subject matter (but not of any subject matter), the context would be seeking knowledge or learning what exists or ought to be done, or why. Given the purpose of gaining knowledge, there would be a common standard by which judgments or conclusions can be evaluated (at least concerning a minimum degree of success, so that, for example, willful contradictions are ruled out from the start). 'Rational' would thus mean abiding by such a standard.

Clearly, inquiry into the meaning of 'rational' produces at least two (but maybe more) mutually exclusive answers. Why should we select one over the other? Can we give an answer to this question without encountering vicious circularity?

If a proposed answer to the meaning of being 'rational' implies that it is impossible to make ourselves clear about what exactly the answer is, then the answer should be rejected. At this fundamental level of inquiry, accepting the criterion of internal consistency is necessary, for inquiries as such make no sense without it. Seeking solutions itself presupposes that the standard is fully applicable. Some conceptions of rationality do allow contradictory procedures in the same context to be rational. For example, when 'widespread acceptability in the relevant community' is used as a substitute for 'rational,' too many matters are left ambiguous to enable us to avoid avoidable conflict.

We cannot consistently and reliably make use of either the economic or the conventionalist idea of rationality. Both fail to provide us with any common ground. The economist and the conventionalist can take us closer to settling on common means or methods, but most often what concerns us are goals – for example, in guiding our own lives or in public policies that are being recommended to an entire nation.

We turn to the conception of 'rationality' as 'abiding by common fundamental standards for judging choices or decisions in some specific context.' When someone correctly asserts that "'X is right" is the rational evaluation,' he must mean that "'X is right" is established by reference to common standards of establishing truth in a given context.' We can already see that within the context of human conduct, one common standard is going to be human nature. We generally want to know what course of action will promote individual human well-being given the nature of the agent.

But we need to consider whether this result begs the question. If one believes that the method for establishing the proper meaning of 'rational' is itself employed because it is considered rational, then one will think the result empty (or, as I like to say when criticizing the economists, 'vacuous'). This is especially relevant in ethics, because human nature includes as a central feature the capacity for rationality. Although the concept of 'rational' here has a different sense from 'rational' as applied to the characterization of specific conduct, the two are not separable. That human beings are by nature rational means that one of their central, defining aspects is their capacity to think conceptually, to form ideas, theories, identify principles, consider long range plans, and so forth. And it is this very capacity that enables us to assess whether some course of conduct is rational, that is, conforms to principles that are based on relevant facts of reality including human nature itself.

We must now consider the concept 'choice,' a central component of rationality and human nature. The strong relationship between rationality and choice has been recognized by many philosophers, beginning with Aristotle (who identified as the central virtue of human life right reason and linked moral virtues to choice quite unambiguously), through Spinoza, Kant, Wittgenstein, Rand and Sen, among others. The relationship is worked out in detail by Boyle et al.<sup>36</sup>

When economists speak of choice, they usually mean a selection that is revealed through actual behavior, that is, the action or behavior of someone who is exposed to an existing range of alternatives from which some or one may be selected. The sense of the term in its strong relationship to rationality, however, concerns *initiating* action – as when we speak of freedom of choice or free will. On the decision theorists' or economists' idea of rationality, so long as a given long- or short-range goal is efficiently achieved, the selection that is made from the available alternative is rational *ipso facto*. On the conception of rationality developed above, however, the choice of a goal or end, too, could be either rational or not.

Given that a choice can involve both selection from among alternatives and the initiation of some (possible) course of conduct, which sense of the term is appropriate for our purpose? Since we are speaking of rational choice, we are concerned with both possible uses, as well as with uses that indicate both aspects of choice within one particular phenomenon. Thus, if someone chooses to learn to play an instrument, he would both initiate some available course of conduct and select from alternative kinds of conduct (for example, learning to play an instrument, learning skiing, taking a vacation).

Only where the possibility of initiating – that is, being the fundamental or first cause of – one's conduct exists can the possibility of non-instrumental rational choice arise.<sup>37</sup> This explains in part why it does not make sense to speak of a dog making a rational choice, although dogs *can and do make many selections*. (The prevalent economic conception of rationality would not rule out considering a dog's selection of one dog food over another a rational choice! Nor the behavior of computers. If internal consistency of

behavioral pattern is the proof of rationality, these are the kinds of conclusions that flow.)

Even when a choice is made in the sense that a person makes a selection from among alternatives, initiation is involved. The judgment that forms the plan of action, as it were – or the intention – that culminates in the overt behavior, had to be initiated by the agent. To be sure, such initiative is often nearly automatic. For example, when a concert pianist performs, the behavior is guided by a rather grand plan the details of which are not individually intended. Instead, once the pianist embarks upon the performance, the rest largely follows; his instruction to himself is to call upon reserves of learning. Yet, even here a difference exists between someone who focuses intensely and someone who is merely drifting along. Certainly this would be evident enough when one pianist is drunk while the other is sober. But it is just as true when one pianist is lax in concentration, merely ‘phoning in’ the performance, while the other concentrates intently. So even when many automatic forms of skill and knowledge are involved in acting to attain a certain goal, focus often needs to be initiated and then sustained by choice.

Human action is inexplicable without a recognition of free will. The exact mechanism of the process cannot be considered here, although I would cite the work of Roger Sperry, who accounts for free will in terms of the human brain’s composition as a self-monitoring organ that makes self-governance or self-determination possible.<sup>38</sup> Keeping all this in mind, we can propose as a definition of the concept ‘choice’: either the initiation of some course of conduct, or the selection from among alternatives, or both. Rational conduct, in turn, would mean initiation of a course of conduct, or selection from alternatives, or both, in accordance with a common standard appropriate to the context, the broadest of which is human life, that is, the human life of the individual agent whose conduct we are assessing. Accordingly, when we speak of rational action in the context of ethics, we are referring to what someone ought to do given the best information he can obtain about human nature and himself and given the alternatives confronting him.

It should be noted that when speaking of invoking principles in ethics, at issue is a process of emergence and reciprocal reinforcement. The most important ethical step for a person comes before any principles could be known to the agent. It comes when the agent initiates and sustains a thinking process that sets into motion an inquiry or search for understanding and knowledge. One must already be thinking to become aware of the truth and relevance of the principles of living (among other things). So the most fundamental principle of living is acted upon not from conviction or belief, but as a matter of one’s (rational) will.

Fortunately, a child does not need to articulate why thinking clearly about things is beneficial to attain the benefits of doing so. (One hopes he receives appropriate guidance from adults whose lead he is inclined to follow until he is in a position to think about such principles explicitly.) It is the will to live that is the ignition of the rational process, which, in turn, brings to awareness

more of what one requires for living and flourishing, including ethical principles or virtues. One will not become aware and apply these if one fails to think, or thinks only in a haphazard or narrowly focused way. A person, to be ethically good, will require the policy of rational thought to carry himself forward in an integrated fashion.

Whereas in economics the sort of rationality that is usually referred to concerns only select virtues, in particular, the virtue of prudence – whereby one, in essence, does not waste one's life on irrelevancies – this virtue is insufficient to guide someone to living and flourishing. It can, in fact, misguide one if the practice of other virtues is lacking. One can become, for example, a superbly 'rational' profiteer and be guilty of parental malpractice. Rationality in ethics has a far broader scope than rationality in any specific area of human conduct, be it commerce, art, science, politics, parenting, education, and so on. Although there is the likelihood that someone who is narrowly rational will eventually be irrational even within his or her narrow domain, it is at least possible to excel in such a domain, while seriously neglecting others by failing to focus properly when attending to them.

If, however, one has a balanced or integrated character, and sustains a consistent practice of all virtues, then one may well act exactly as the economist assumes we all act when addressing our commercial concerns. Thus, the economist's assumption that we act rationally is probably not far from the truth, especially when we embark on market behavior – both in the sense in which the economist means 'rational' (deploying appropriate means to achieve given ends) as well as in the sense in which 'rational' is best understood by ethics (choosing ends appropriate to the life-as-a-whole of the agent).

Now that the story is told in full, we can see that what the economist actually means (if only implicitly) by 'rational' is that *if we go to market, then we will most likely seek to make a good deal*. It is false, however, to assume that wherever we are, whatever we do, we are seeking good deals, since we may very well have other rational objectives that relegate making a good deal much lower in the totem pole of values than is ordinarily the case when we go to market. If, for example, one is embarking on identifying and acting upon what is true in economics or ethics or politics, that usually would rank as more important than making a good deal in the narrow sense – so that one would not, for example, sell out one's convictions in order to receive a higher salary, betray a friend to get a better job, and so forth. The economist *qua* instrumentalist cannot make judgments about such ends, or even fully explain why the market is conducive to such moral judgment-making.

At the same time, a rational person, one who is ethical through and through, will indeed often act rationally in the sense meant by the economist. An ethical individual does not squander his wealth and does seek to enrich himself to the degree that this is conducive with how he ought to live as a human individual. And this could, often, involve very sensible, conscientious attention to making a good deal in the market.

How would the instrumentalist reply to our concerns and distinctions? Milton Friedman feels obliged to put the words 'good' and 'bad' in quotation marks when it seems he cannot avoid referring to the kind of conduct and assessments that people normally regard as morally good or morally bad. A follower of Friedman might argue that a person who values his or her character has a different preference function from the one who values, say, a higher salary. Is that not all there is to the matter, rather than some kind of objectively demonstrable superiority we are justified in ascribing to the former person over the latter?

Given the way mainstream economics approaches the phenomenon of human behavior, this will be true just because someone does, in fact, act to maintain his or her integrity. Doing so will mean, for the economic imperialist, simply that the agent places personal integrity very high on his or her preference scale. 'Preference scale' means 'just what people select – first, second, third, and so forth – from among available alternatives as the act.'

Yet does this tell us anything? We already see what the person does. What we need to know is why he does what he does. Asking for an explanation means asking for some set of factors that help to understand why this action rather than some other was taken. As we saw from Wittgenstein's remarks, it is an illusion to believe that invoking preference talk supplies what is wanted here. 'Demonstrated preference' will always be demonstrated in every action. Yet one person will refuse to betray a friend in order to climb the corporate ladder because he has integrity and values friendship – even as another person in the same situation exhibits the exact same 'demonstrated preference' only because he fears blowback.

What is our more-informative way of viewing the situation? While it is dangerous to impute objective values to human beings without knowing about whom in particular one is speaking, and sufficient details about that person's situation, some principles apply across the board. This is indeed what ethical theories aim at: namely, to identify *general* virtues or principles of action that ought to guide us as we live our lives.

The rational egoist holds, for example, that in a world governed by the laws of identity and non-contradiction, maintaining an integrated character is of superior value to (nearly) anyone than obtaining a higher salary, if one is obliged to make a choice between these two alternatives. Indeed, it is nearly impossible to consider, without inherent confusion, how it could be better for a person to earn more money if doing so requires the person to sacrifice honesty, courage, self-respect, dedication to justice, or generosity of spirit. These attributes are part and parcel of the guiding system of human action; without them, the higher salary may end up serving hardly any purpose in someone's life. In other words, a disintegrated individual isn't even likely to gain rational advantage from increasing his wealth, because the use of that wealth to his best advantage is itself based on being someone with integrity.<sup>39</sup> Obviously, the manifestations of the contradiction may vary greatly, depending on the scale of the betrayal, whether one repents, how good one is

at suppressing inconvenient thoughts about one's own conduct, and so forth. But one cannot scuttle or undermine the most basic moral requirements of leading a good human life without experiencing destructive consequences.<sup>40</sup>

If the pursuit of wealth is to be morally defended, it is exactly this wider, moral view of human rationality which one must accept.<sup>41</sup> When critics of capitalism and free market economics reject the *homo economicus* approach to human behavior, they hope to undermine much more. They believe, I think, that discrediting the narrowly economic approach will discredit a rational egoist approach to life as a whole, including the political principles that make it possible for citizens to exercise freely the virtues of a rational egoist in the company of others. The economist's futile attempt to defend his value-free approach to understanding human behavior plays into the hands of capitalism's and thus libertarianism's critics. Only if one first appreciates the soundness of the broader ethics of rational egoism can the more narrowly focused idea of economic rationality be defended. Because then we can see that even if the free market accommodates irrational conduct in the moral sense (that is, with respect to moral ends), the freedom of that market is nonetheless morally justified because only a *free* market can accommodate freely chosen rational and thus moral conduct in the broader sense.

For the benefit of those who see value in much of neoclassical and Austrian economics – and rightly – let me repeat that from the standpoint of the rational egoist, it is morally appropriate to act prudently in the course of market transactions. I have not been arguing against attending to means but only against attending to means as if ends could not be attended to at all! There is, of course, no guarantee that we will always act prudently and morally. Yet, because ethics is a matter of individual responsibility, even if one embarks on economic activity in an unbalanced, irrational fashion – so that one neglects other personal and social responsibilities or virtues – there is nothing that any third party is authorized to do about this, apart from attempting persuasion, ostracism, boycott and such, unless the irrational actor acts criminally, in violation of individual rights.

Contrary to much that is taught in business ethics courses across the world, attempting to interfere with unethical, irrational market conduct that involves no fraud or theft in fact removes ethics from the realm of economic life. Such 'market failures' are not remediable by means of regulation and interference. So-called remedies are, in fact, nothing less than ways to delete morality from the marketplace. Or more precisely, the kind of setting in which moral choices can be made.

The free society and free market – that is to say, libertarian politics and law – offer no guarantee of ethics and, thus, of rational conduct by its participants. But such a system is most hospitable to rationality, both in economics and in ethics, by imposing what Nozick called 'side constraints,' by means, for example, of the instrument of the law of property. By this means the irrationality that does occur both in economics and in the broader realm of ethics is likely to have the greatest impact on those who perpetrate it and

those who freely associate with the perpetrators. At the same time, moral conduct is given the greatest possible encouragement and scope. No other system offers this kind of promise for a largely prosperous and ethical human community.<sup>42</sup>

## Notes

- 1 (Ann Arbor, MI: University of Michigan Press, 1962).
- 2 (New York: Paragon House, 1987).
- 3 James Buchanan, 'Why Governments "Got Out of Hand",' *New York Times*, October 26, 1986.
- 4 Amartya K. Sen, 'Choice, orderings and morality,' in Stephan Korner, *Practical Reason* (New Haven, CT: Yale University Press, 1974), p. 55.
- 5 One important reason is that economists (*qua* social scientists) tend, in the main, to adhere to scientism and positivism, both schools holding that the only legitimate understanding of human behavior comes from the general view that every event, including human behavior, is caused by some prior event with no choice about the ends in which the behavior results. Those ends are given by tastes and preferences and reason has no role in assessing and guiding them. Reason cannot judge of ends that are for all intents and purposes fixed. Reason can only judge of means. See George J. Stigler and Gary S. Becker, 'De Gustibus Non Est Disputandum,' *American Economic Review*, Vol. 67(2), 1977, pp. 76–90. For a dissenting view of this understanding of human behavior, see Roger W. Sperry, *Science and Moral Priority* (New York: Columbia University Press, 1983) and Edward Pols, *Acts of Our Being* (Amherst, MA: University of Massachusetts Press, 1982) and a host of, for example, neo-Aristotelian philosophers.
- 6 Ludwig von Mises, *Human Action* (New Haven, CT: Yale University Press, 1952), p. 19.
- 7 Richard McKenzie, *The Limits of Economic Science* (Boston, MA: Kluwer-Nijhoff Publishing, 1983), p. 8.
- 8 George Stigler, Lecture II, Tanner Lectures, Harvard University, April 1980. Quoted in McKenzie, p. 6.
- 9 Gary Becker, *The Economic Approach to Human Behavior* (Chicago, IL: University of Chicago Press, 1976), p. 8 (my emphasis.)
- 10 Milton Friedman, 'The Line We Dare Not Cross,' *Encounter*, November, 1976, p. 11.
- 11 Mises, *Human Action*.
- 12 Don Ballente, 'Subjective Value Theory and Government Intervention in the Labor Market,' *Austrian Economics Newsletter*, Spring–Summer 1989, pp. 1–2. As should be obvious, the *mainstream* economics being referred to is not that embraced by the Chicago School, including Friedman, Stigler or Becker, but by contemporary welfare macroeconomists such as Paul Samuelson, James Tobin or John Kenneth Galbraith.
- 13 McKenzie, p. 44; see also Stigler and Becker's classic paper, 'De Gustibus Non Est Disputandum' ('There is no disputing of tastes'). Some much harsher versions of the kind of fatalism that we find implicit in (but at times made explicit by) some economists' works is available in Edward O. Wilson's *Sociobiology* (Cambridge, MA: Harvard University Press, 1975) and Richard Dawson's *The Selfish Gene* (Oxford, England: Oxford University Press, 1976).
- 14 Milton Friedman, *Capitalism and Freedom* (Chicago, IL: University of Chicago Press, 1962), p. 12.
- 15 Geoffrey Brennan and James Buchanan, 'The Normative Purpose of Economic "Science",' *International Review of Law and Economics* (Winter 1981), p. 158.
- 16 Personal correspondence, March 15, 1993. Invoking selfishness to explain human conduct is very likely the result of the persistent scientism within economics, the need

to provide some causal factors that *explain* what people do. Some economists will go to any length to argue that even the most benevolent acts are, in fact, selfishly motivated. Once I drove through an intersection and when I saw in my rear mirror that several others were trying to make it through, I speeded up and later reflected on whether I did this from selfish motives. No, I was trying to be helpful to others with minimal regard for my own advantage (which, in any case, wasn't in need of attention just then). True, generosity is cultivated in part to foster a decent community for oneself, but on particular occasions this is not the thinking that lies behind acting kindly and considerately. (For more, see Tibor R. Machan, *Generosity; Virtue in Civil Society* [Washington, D.C.: Cato Institute, 1998].)

- 17 See George J. Stigler, 'Law or Economics?,' *Journal of Law & Economics*, Vol. 35 (2) (1992), pp. 455–68. See also 'Do Economists Matter?' in Stigler, *The Economists As Preacher And Other Essays* (Chicago, IL: University of Chicago Press, 1982), pp. 57–67, where he holds that what economists do hardly matters inasmuch as the self-interested motives of economic agents will drive all of them. This implies, incidentally, that all economists spawn their theories as a matter of their own utility maximization efforts.
- 18 See, John C. Moorehouse, 'The Mechanistic Foundations of Economic Analysis,' *Reason Papers*, No 4 (1978).
- 19 Perhaps the most magisterial effort to make this point was made recently, by Amartya Sen, himself the recipient of the Nobel Prize in economic science but also a formidable moral and political economist, in his *Rationality and Freedom* (Cambridge, MA: Harvard University Press, 2002).
- 20 See, Tyler Cowen, *Creative Destruction* (Princeton, NJ: Princeton University Press, 2002).
- 21 Arguably they take it because they believe it does in fact support liberty and prosperity. Yet by fostering an amoral conception of human social affairs – whereby no one can meaningfully claim that anyone is underpaid, anything is overpriced, any demand is perverse, and so on, other than as a personal opinion – this approach actually undermines the case for liberty and prosperity.
- 22 Allan Bloom, *Giants and Dwarfs* (New York: Simon & Schuster, 1990), p. 288.
- 23 (Cambridge, MA: Harvard University Press, 1993).
- 24 *New York Times Book Review*, March 6, 1994, p. 24.
- 25 Some political theorists have made note of the fact that certain defenders of the free society are not wedded to the *homo economicus* approach. For example, Bob Brecher writes:

Perhaps the point may be best made by Tibor Machan, a writer who, while greatly sympathetic to liberal individualism, is unusually critical of the 'subjectivist, undefined, arbitrary, "do whatever you desire" idea of human values'. Unlike Flew, Machan is clear that 'persons often demand what is, in fact, very bad – even for themselves' and that 'something can be worthwhile to someone objectively, even if that person fails to recognize this'. His own incorporation of these apparently uncomfortable and illiberal observations into a scheme palatable to capitalism and individualism may not be convincing, but his observations nevertheless serve to clarify two important things. First, they show the power of the moral ontology of individualism. Second, they illustrate the need for those who oppose liberal individualism to propose an alternative, rather than to attempt what is anyway the hopeless task of debating 'real' or 'genuine' wants with liberal opponents.

Some liberal opponents are so misguided as sincerely to suppose that their liberalism is neutral with respect to questions of the nature of human beings. Others, being of a moral libertarian frame of mind, nevertheless fail to understand that their purportedly anti-ontological or anti-metaphysical view – that these are non-questions – itself constitute just another such view, however untheorized. Here, again, is Machan:

The human essence, then, is the true individuality of every person. The bourgeois individual is the first occurrence in human history when men and women are not first of all members of a tribe or a clan or even a family, but are recognized for what is most essentially human,



namely, self-responsibility. Bourgeois men and women belong by nature to no one; they are sovereigns, they are capable of using this sovereignty for good or for ill and they require a political community that pays relentless, sustained attention to this fact.

Flew, unlike Machan, supposes that the sovereignty of such individuals consists in the autonomy of their wants, which is why he allows himself to think that Galbraith's worry is about wants being socially produced, rather than about their serving as a moral or political bedrock. He is muddled by having to insist on the autonomy of individuals' wants at the same time as recognizing, as anyone must, that wants are socially created.

Flew is wrong about the autonomy of wants; and his notion of the individual, while properly liberal in being based on supposedly autonomous wants, is therefore necessarily incoherent. How this notion of the individual, which Machan rightly rejects, has come to constitute liberal 'common sense', and how it might be resisted, are the concerns of the rest of this book. First, however, a positive aspect of that common sense needs to be discussed, lest its power be underestimated ... (Bob Brecher, *Getting What you Want? A Critique of Liberal Morality* [Routledge, 1998], pp. 19–20).

- 26 O. K. Bouwsma (J. L. Craft and Ronald E. Hustwit, eds), *Wittgenstein, Conversations 1949–1951* (Indianapolis, IN: Hackett Publishing Co., 1986), pp. 58–60. The same point, essentially, was made later in Nathaniel Branden, *The Psychology of Self-Esteem* (Garden City, NY: Bantam Books, 1971).
- 27 Becker, personal correspondence.
- 28 Sen, op. cit., 'Choice, orderings and morality.'
- 29 Oddly, whenever corporate managers, say those of Enron, are accused of wrongdoing, it is rare to find anyone defending them as economic theory would dictate: 'They simply had no choice but to pursue profit as they deemed feasible.'
- 30 I address this topic more fully in Tibor R. Machan, *Capitalism and Individualism: Reframing the Argument for the Free Society* (New York: St. Martin's Press, 1990).
- 31 I have argued this in my papers 'Evidence of Necessary Existence,' *Objectivity*, Vol. 1 (Fall, 1992), pp. 31–62, and 'Some Reflections on Richard Rorty's Philosophy,' *Metaphilosophy*, Vol. 24 (January/April 1993), pp. 123–35. The first work became the basis of Chapter 2 of Tibor R. Machan, *Ayn Rand* (New York: Peter Lang, 2001), the second Chapter 1 of Tibor R. Machan, *Objectivity: Recovering Determinate Reality in Philosophy, Science, and Everyday Life* (London: Ashgate, 2004).
- 32 Ayn Rand, *Introduction to Objectivist Epistemology*, 2nd edn (New York: New American Library, 1990), p. 61.
- 33 Sen, *Rationality and Freedom*, p. 42.
- 34 Consider just this: any question about whether existence does in fact exist, whether there is something or other, whether reality is real – however this is put by whoever raises the skeptical inquiry – is itself something that exists, thus confirming the very fact that is being questioned.
- 35 For a detailed treatment of the axiom of existence, aiming to clarify and develop Ayn Rand's account, see Machan, 'Evidence for Necessary Existence.'
- 36 See, Joseph Boyle, G. Grise and O. Tollefson, *Free Choice* (Notre Dame, IN: University of Notre Dame Press, 1976). See also the essay by Anthony Bertocci, 'Personality, Free Will and Moral Obligation,' in William F. Enteman, ed., *The Problem of Free Will* (New York: Charles Scribner & Son, 1967). Finally, see also Midgley, *The Ethical Primate*.
- 37 For a discussion of this see Edward Pols, 'Rational Action and the Complexity of Causality,' *Journal of Theoretical and Philosophical Psychology*, Vol. 22, No 1 (Spring 2002).
- 38 See Sperry, *Science and Moral Priority*. See also Tibor R. Machan, *The Pseudo-Science of B. F. Skinner* (New Rochelle, NY: Arlington House, 1974), and *Initiative – Human Agency and Society* (Stanford, CA: Hoover Institution Press, 2000). A detailed philosophical exploration of human beings as causes of their own actions may be found in Timothy O'Connor, *Persons and Causes, The Metaphysics of Free Will* (New York: Oxford University Press, 2000).

- 39 Or, as the Bible has it, 'For what shall it profit a man, if he shall gain the whole world, and lose his own soul?' Mark 8:36
- 40 For a development of the rational egoist ethical position, see Tibor R. Machan, *Classical Individualism* (London: Routledge, 1998) and David L. Norton, *Personal Destinies: A Philosophy of Ethical Individualism* (Princeton, NJ: Princeton University Press, 1976).
- 41 For such an effort, see Tibor R. Machan and James E. Chesher, *The Business of Commerce: Examining an Honorable Profession* (Stanford, CA: Hoover Institution Press, 1999).
- 42 A version of this chapter, since considerably reworked, was presented at the 1994 Institute for Objectivist Studies Summer Seminar at Oberlin College, Ohio.

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## Chapter 7

# A Positive Libertarian View of Government

Success makes you a target. As libertarians make headway in getting their ideas aired and published, both liberals and conservatives have been taking potshots at the libertarian conception of government.<sup>1</sup>

Conservatives Bill Kristol and David Frumm have been especially eager to denigrate a libertarian idea of a government with properly circumscribed powers and scope. They complain that such a view is insufficiently ‘inspiring’ – that citizens cannot rally around a conception of society in which government plays a strictly restricted role. They wonder how such a society would fare in the face of foreign enemies and how it could function as a world power. Governments must generate enough devotion, reverence and respect to garner the support needed to govern, they argue. They believe that a minimalist government, set forth as ‘a necessary evil’ at best, cannot earn this reverence and thus has no chance of survival, let alone flourishing.

But these critics lack a clear understanding, let alone full appreciation, of the libertarian view of government. In fact, libertarianism does have a positive, upbeat and frankly demanding view of government.

The function of a proper government is to secure certain individual rights, among them the rights to life, liberty and the pursuit of happiness; it is to safeguard these rights that governments are ‘instituted among men, deriving their just powers from the consent of the governed.’ That is the libertarian view of government. It is also the view of the American Founders, and there can be no more venerable or inspiring heritage.<sup>2</sup>

The just powers of government are whatever powers are needed to secure the rights in question without their violation in the process.

Libertarians would do well to invoke the Declaration of Independence as their rallying cry against paternalistic conservatives who have no idea what they wish to conserve in the American political tradition. It is libertarians who want to preserve the Declaration’s positive vision of government as the great, honorable, and properly understood guardian of our rights. The moral virtues of such a government are vigilance, valor, honor, and integrity. If politicians actually possessed these moral virtues in our time, would that not be inspiring? Would it not earn the respect of the people at large – perhaps even of Mr Kristol and Mr Frumm? Certainly the chances are greater that such a government could earn legitimate respect than could a government which meddles constantly in all of our affairs, with all the attendant mishaps that

provoke so much contempt from the public, and all the corruption that comes with having embarked upon unjustified public policies. What many people hate about government is not its virtues but its vices. These vices arise from its lack of integrity, its failure to fulfill and stick to its appropriate duties.

So-called 'libertarian anarchists' insist that even such limited government amounts to a kind of tyranny. They reason that because even a limited government functions by law as the only agency of rights protection and adjudication within a given jurisdictional region, it amounts to a coercive monopoly. But a government that keeps to its role as rights protector within a given jurisdiction region is no more a coercive monopoly than is a department store that must be exited so as to reach its competitors. Within its own territory, the department store is a 'monopoly,' just like millions of other businesses. But since they do not prohibit either departure or the nearby presence of a competing store, they are not a *coercive* monopoly.<sup>3</sup>

Governments operate within particular spheres – 'countries' – whose owners have consented at least implicitly to be governed by these institutions. Just across the border, another country with another government is free to exist as well; so long as emigration is possible, no coercive monopoly is involved. It is all akin to gated communities which one may leave at will, and the benefits of which one may enjoy so long as one pays one's way, although one would not, of course, be justified in demanding that one's home there be serviced by the owners of another gated community.

So, then, does the libertarian provide us with an inspiring vision of a legal system?

One should note, first of all, that it is reductionist to charge political thought with the mandate of forging a vision for all of society. Society is a huge and diverse group of individuals intertwined in innumerable complicated ways. These various individuals have diverse purposes; in their innumerable interactions they are united, optimally, by a common sense of civility, of respect for the rights of everyone. It is imperialistic to attempt to generalize the goals of one individual or group to others apart from the very general purposes of seeking to live a fulfilled, happy, honorable life in peaceful coexistence with others. That it acts to secure the right of its citizenry to do just this is part of what makes government an honorable institution, when clearly understood and uncorrupted.<sup>4</sup>

It seems to me that even libertarians who reject the very idea of government can support the limited conception of it that I have outlined. After all, every libertarian is committed to some sort of institutional defense of individual rights, whether in the form of a 'competing government,' a defense agency, a justice agency or some other rights-protecting 'firm.' For most of us, this limited conception means some version of government as an institution dedicated to conscientiously guarding individual rights.

How could anyone seriously believe that a government that resists becoming coercive and that carries out its job in accordance with due process – the requirements of justice – cannot inspire the citizenry of the society

in which it operates? Only those who mistakenly expect government to be something it should never become – a parental authority – could chastise advocates of limited government for failing to endorse a regime that functions more as nanny than protector of individual rights. The kinds of respect and honor governments ought to expect from their citizens are probably akin to the respect and honor that referees or umpires would expect from everyone concerned with how a game is guided by its rule-keepers. What matters is honesty, integrity, professionalism, and dedication to outstanding service. Beyond this governments do not deserve to be cherished and receive, especially, subservience, which is what we may suspect Mistrs Kristol and Frumm are really hoping for.

## Notes

- 1 Among libertarians there are those who consider themselves anarchists. Actually, this is misleading because these same libertarians also defend a legal system that provides, as they see it, all the justified functions and services of governments, only they are not monopolies. This, too, is somewhat confusing because while such legal systems are said to be ‘competing’ with others, they are also said to be entirely capable of dealing with crime and the problem of ‘the court of last resort,’ as well as the requisite military resistance to invasion or aggression against those who subscribe to the system (citizens).  
For why this is really just a more rarified version of government limited to the use of retaliatory and punitive force – excluding all systematic coercive, initiated force – see, Tibor R. Machan, ‘Anarchism and Minarchism, A Rapprochement,’ *Journal des Economists et des Etudes Humaines*, Vol. 14, No 4 (December 2002), pp. 569–88.
- 2 That the Founders did advance the rudiments of a libertarian legal order is not fully appreciated, given how their revolutionary political achievements were by no means complete, having, for example, left slavery, confiscatory taxation, and other statist measures in place. See Tibor R. Machan, ed., *Individual Rights Reconsidered: Are the truths of the US Declaration of Independence lasting?* (Stanford, CA: Hoover Institution Press, 2001), especially the essay by Ronald Hamowy.
- 3 For the elaboration of the nature of a constitution of such a legal order, see Randy, E. Barnett, *Restoring the lost constitution: The presumption of liberty* (Princeton, NJ: Princeton University Press, 2004).
- 4 Some have proposed what might be called ‘the cricket test’ – or, depending on which country is in question, ‘the baseball’ or ‘the soccer’ test – whereby a loyal citizen would need to also root for that country’s sports teams in international competitions. Absent such rooting, citizens are then deemed to be disloyal. Yet this is a mistake, since in matters of culture many citizens take sides on the basis of familiarity, tradition, fraternity. The real test is wherein lie the expectations of being treated justly as citizens, that is, persons with interest in proper legal adjudication.

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## Chapter 8

# Liberalism and Atomistic Individualism

### Criticism of Atomistic Individualism

#### *A Fatal Flaw in Individualism?*

Classical Liberalism has its Achilles' heel. It is its radical individualist foundations. If, as critics assume, absent the individualism, we cannot sustain the case for classical liberalism, it is doubtful that this social-political stance can withstand skepticism.

Radical individualism holds that human individuals are, first and foremost, unique, particular beings with just one concern, namely, to advance their own goals. This is why critics have said that such individuals are atomistic and asocial. Classical liberalism had often appeared to embrace this because of the new science of classical mechanics. It was a view that Hobbes admired so much that he went to visit Galileo in Italy to learn it from him. For Hobbes human beings, too, are versions of matter-in-motion, only more complicated in their configuration.

#### *Flaws of So-called Hobbesian Individualism*

Whether or not anyone actually held this Hobbesian, arid individualist view, what's crucial for us to know is what some of the liabilities the critics have ascribed to it are.

Atomism, of course, does not square with the individual histories of most human beings. They are born into families where they remain significantly dependent on other persons prior to any possible calculation of their own advantages. The idea that standards of good and bad are no more than tastes and preferences is offensive to the common-sense idea that there are some things that are good and some that are bad and that these are not all a matter of taste or preference, attraction or aversion. Furthermore, the assumption of subjective value, that is closely linked with this sort of individualism, left no standard by which human conduct could be subjected to criticism. All criticism is left groundless if the only thing that matters is whether people prefer or do not prefer something. Even bad logic becomes immune to criticism.

In ethics and politics, the atomistic individualism goes against the grain. Many economists, for example, would say that for them the freedom of a



classical liberal society is something they prefer. There is not much else to be said, since they take all values to be subjective.

But what if some of us, perhaps unwisely, do not prefer it? What if after we express preference for these norms, we were to renege – what could be wrong with that? What of the supposed corrosive influence of all this, influence that is said to undermine community bonds, loyalty, honesty, decency, and the rest, especially in the realm of commerce which in the modern age is all pervasive? To say that this would imply that we prefer the state of nature, with its risks and horrors, may be true, but what of it? Is there anything objectively, morally wrong with such a preference? Those who champion such individualism, and the critics who pick on them as representatives of the classical liberal ethos, deny that from this perspective any moral fault could be assigned to such persons.

Already in John Locke intimations of a different kind of individualism are evident. What is this individualism and why does it have more than a fighting chance of being right? What, moreover, is wrong with the critics' case against individualism?

### *Individualism Under Assault*

Individualism has a bad reputation, 'willingly sacrificing all other human values so as to cultivate ... a particular group of virtues – notably independence, courage and honesty.'<sup>1</sup> By association, so does classical liberalism and its political economic system of capitalism. This gives collectivist political systems and economies a clear moral advantage. As Susan Mendus puts it, the 'liberal commitment to independence – to achieving things on one's own ... is [factually] false ... [and] morally impoverished.'<sup>2</sup>

The targeted version of individualism is embraced, more or less intact, by neoclassical and Austrian economists. Its basic premise is that all human behavior is motivated by a narrow, subjective self-interest or utility maximization. Having shown this individualism to be untenable, the system closely associated with it, namely, limited government that stresses the basic negative rights of individuals is also taken to be discredited.

But the charges against individualism are open to serious criticism. For example, individualism need by no means embrace atomism, anti-social attitudes and policies, hedonism or moral subjectivism. Nor need limited government or a constitution of natural rights rest on the arguably fabricated version of individualism that the critics usually target.

Often the criticism of individualism, and its broader philosophy of classical liberalism, is reminiscent more of political propaganda than of scholarly exchange. Marx, for example, refers to it as an 'insipid illusion.' Alasdair MacIntyre regards liberalism itself as vile, nasty, and very harmful.

[T]he Marxists' understanding of liberalism as ideological, as a deceiving and self-deceiving mask for certain social interests, remains compelling ... Liberalism in the name of freedom imposes a certain kind of unacknowledged domination,

and one which in the long run tends to dissolve traditional human ties and to impoverish social and cultural relationships. Liberalism, while imposing through state power regimes that declare everyone free to pursue whatever they take to be their own good, deprives most people of the possibility of understanding their lives as a quest for the discovery and achievement of the good, especially by the way in which it attempts to discredit those traditional forms of human community within which this project has to be embodied.<sup>3</sup>

MacIntyre has argued that individualism is an invention and individual rights are artifacts with no enduring, substantive moral significance.<sup>4</sup> Marx and MacIntyre, furthermore, consign individualism and liberalism to the status of ideologies serving some specific historical purpose – in the case of Marx, the purpose of facilitating social productivity.

MacIntyre and others have argued that individualism rests on no more than arbitrary preferences that happen to have been expressed in a given epoch of Western history. Marx put the point succinctly: ‘It is only in the eighteenth century, in “civil society”, that the different forms of social union confront the individual as a mere means to his private ends, as an external necessity.’<sup>5</sup>

So prior to the eighteenth century, presumably, the individual as a choosing entity, seen as having the right to choose his social relationships on the principle of the consent of the governed, did not exist.

John N. Gray, however, delivers the most virulent frontal attacks on individualism:

[I]ndividualist cultures devour their own moral capital and slide into debt-ridden stagnation as individualism corrodes family life and long-term planning and investment. So, then, what ails the poor nations of the globe is individualism, plain and simple. Exactly how this is done is not made clear but one may gather that individualism is the sort of social philosophy that demoralizes us, robs us of our sense of community and destroys our generosity, charity and fellow feeling.<sup>6</sup>

In less harsh but equally damaging terms, Richard Rorty maintains that individualism is an ideology that in our era has come to be accepted, even though it is a mistake. As Rorty suggests of his own pragmatist-communitarian alternative, it

takes away two sorts of metaphysical comfort to which our intellectual tradition has become accustomed. One is the thought that membership in our biological species carries with it certain ‘rights,’ a notion which does not seem to make sense unless the biological similarities entail the possession of something non-biological, something which links our species to a nonhuman reality and thus gives the species moral dignity.<sup>7</sup>

Rorty’s point is that principles of social organization are a function of what a given community has chosen, collectively, to embrace, and therefore rights, specifically those of the individual human being, are unfounded. They lack

cognitive significance. So when it is claimed that a person has such rights and none should violate them, there is no basis for that claim. All such claims tell us is that the view is one that some groups of people have embraced, while other groups have decided to accept some other view. So Rorty can say, in one of his many more popular writings, that '[We] cannot say that democratic institutions reflect a moral reality and that tyrannical regimes do not reflect one, that tyrannies get something wrong that democratic societies get right.'<sup>8</sup>

Given these harsh or drastic conclusions about the doctrine, let us get a clear idea of what individualism amounts to. Then we will look at the views of some particular critics of individualism. Finally, two types of individualism, atomistic and classical, will be distinguished and it will be shown that at least the classical version is superior to collectivist alternatives.

### *Essentials of Individualism*

Mary Midgley makes the point that 'our own culture, in particular, has grossly exaggerated the degree of independence that individuals have, their separateness from other organisms, and also their degree of inner harmony.'<sup>9</sup> She continues:

But these exaggerations do not affect the more modest facts that underlie them. Whenever people have to take decisions, the language of agency has to be used, and the reasons why it had to be invented constantly become obvious. The language of impersonal process, by contrast, can scarcely be used at all for many important aspects of human behavior and, when it is used there, it often serves only for fatalistic evasions.<sup>10</sup>

What are the modest facts that underlie an exaggerated individualism? One is a certain indispensable level of separateness of every person. A human being is an individual in part insofar as he experiences a measure of separateness – for example, that his death does not require the death of another human being. A human being dies by himself. Insofar as that involves the extinction of his identity in some important respect, he is an individual with a separate identity.

Another component is an element of self-directedness. Self-determination or free will is a part of individualism insofar as an individual is someone whose initiative – choices, decisions and actions – is instrumental in determining who he is and will become. Individualism regards everyone as something of a self-made person, even if only in a minimal respect, culminating in no more than acquiescence. Individuals have a determining, decisive influence on their own lives. The idea is that how a human being develops is not reducible to the influence of other people, of history, or even of their parents. They put forth the initiative or effort that will produce significant aspects of their lives: knowledge, character, conviction, skill, and other personal attributes.

To put it a bit differently, every human being is capable of engaging and, within different individual conceptions, more or less responsible to engage in creative reasoning: in figuring things out, learning about the world, and understanding it to some minimal but essential extent. Cognition, at least at the conceptual, idea-forming level, has to be generated by the person – it cannot be imposed. A person is not a container into which ideas are funneled or poured, or something that responds to various stimuli passively. There is an element of self-generated understanding, however minimal, on the part of the individual according to the individualist social philosophical tradition.

Individualism also upholds moral autonomy for human beings, in the sense that it identifies the individual as the source of morally relevant choice. The point is not, as Steven Lukes argues, that individualism involves a subjective autonomy that ‘will eventuate in ethical individualism, the doctrine that the final authority of ethical behavior, values, and principles is the individual alone.’<sup>11</sup> What individualism requires is that the initiative to do what is right, or wrong, must come from persons and cannot be wholly explained by reference to external or causally structural forces, such as cultural or genetic ones. It is not others, nor the individual’s DNA or environment that is held responsible for what the individual does. Thus, it is an essential point of individualism that it is the agent who makes the moral choice, whose input is the most vital one for whether he takes the morally right or wrong action. Indeed, all *bona fide* moral blaming and praising is implicitly individualistic.

Individualism pertains to what people are like and how they ought to be. In political matters, it propounds the sovereignty of each adult human being. It holds that ultimately the individual members of a polity are sovereign, not the polity itself – not its leaders, not its representatives, but its citizens. They are not subject to some other sovereign whose natural position or superiority – or divine selection – has come to entitle him or her to exercise power over them.

The political individualism with which this notion of sovereignty is associated is very much a part of American and, by now, the modern Western political tradition. Indeed, those of us who come to the United States from outside, from the very beginnings of our stirrings as Americaphiles, have associated America with this individualism precisely for that reason.

Finally, the notion of liberalism, which is also associated very much with the American political tradition, is related to individualism. This is a fairly sophisticated idea – although for many, virtually common sense – that individual negative rights to life, liberty, and property, are to be ascribed to every human being by his nature.

So, these six conditions, drawn from different branches of philosophy but comprising a reasonably cohesive doctrine, pretty much characterize individualism. A seventh might also have been mentioned – the metaphysical form of individualism which maintains that every being in an essential respect is a particular being. According to this, there are no general or concrete universal beings – no such thing as society or even family, let alone humanity

or ethnic group or tribe, no such thing as the team or America, or blacks or whites, or women or men as such. Instead, there are a great many particular beings, although they can be of various specific kinds. But their actuality is individual.

### *The Platonist Criticism*

If Plato's dialogues actually spell out a philosophical viewpoint – and that has been disputed – then we are forced to the conclusion that Plato favors the reality of concrete universals over concrete particulars or individual beings. Particular beings, you and I as manifest in this actual, visible world, are in some sense inferior, imperfect versions of the perfect concrete universal that is our type, just as a perfect circle, as defined in geometry, is superior to any actual circular being.

Thus it is human nature – the *form* of humanity – that has the elevated or noble status. Actual persons, who imperfectly participate in this form, are always inferior, and lamentably so. It is, accordingly, no accident that Western civilization has always had some disdain toward the body, whether it be in connection with work, sex, business, or material possessions. Such is the legacy of Plato.

It is anti-individualistic in that the individual is always an inferior part of reality. The truly elevated part of reality is the universal, the ideal. The criticism of individualism derived from this Platonic outlook is embodied in a comprehensive, philosophical view. In response, we would have to deal with at least some aspects of that point of view, to which we will return later.

### *Aristotle as Anti-Individualist*

Aristotle is invoked as a more moderate anti-individualist. The whole does not have to be all of humanity as is implicit in a certain reading of Plato, but may be the family, polis, community, or some other limited group.

Because Aristotle identifies human beings as essentially social, it follows from his view that no individual can flourish apart from the realization of this communitarian good. There are many echoes of this view in our own time, what with the reemergence of communitarianism in the writings of Alasdair MacIntyre, Richard Rorty, Robert Bellah, and Amitai Etzioni.<sup>12</sup> There are certain elements in Aristotle's position, however, that stress individualism since he gives a prominent place to self-directedness, something that does not square fully with an exclusively communitarian conception of human flourishing.

### *Christianity vis-à-vis Individualism*

The idea that each human being is a distinct, unique child of God and that the saving of each individual's everlasting soul is the task of the ethical life suggests crucial elements of individualism in Christianity. But there are also

anti-individualist directions in Christian theology. St Augustine said that 'every part of the community belongs to the whole.' There also appear to be certain ways in Christianity in which the individual may be sacrificed at least for the purposes of the whole. When Jesus said, 'Compel them to come in' and was taken by some, such as the more zealous missionaries, to suggest coercing people to become part of the faithful, this was anti-individualistic because it implies the rejection of personal choice and responsibility.

Debate continues about whether Christianity is more supportive or less supportive of individualism – the theologians Michael Novak and Robert Sirico stress the individualist element in the American debate, while the Catholic Bishops tend to stress the collectivist element, whereby compelling people to help the poor, thus denying their free choice in the matter of practicing the virtues of charity and generosity, seems to be favored.

### *The Marxian Critics*

Charles Taylor and C. B. Macpherson seem to follow Marx in their criticism of individualism. Both espouse a holistic view, to the effect that humanity is, as Marx said explicitly, an 'organic whole' on a historical march toward self-development or emancipation, when all will have reached their full, unalienated species-being.<sup>13</sup> Others who draw on this Marxian tradition mix it with Aristotle and communitarian ideas. Among the leaders of this group is Amitai Etzioni, a sociologist at George Washington University and editor of *The Responsive Community*. That journal has published essays criticizing libertarianism that the author associates intimately with radical, atomistic individualism. Taylor and Macpherson also maintain that individualism is necessarily tied to an atomistic view of the self, holding that human beings are quite self-sufficient, apart from society.<sup>14</sup>

These critics are clearly focusing on what Mary Midgley called an exaggeration of individualism. Its *homo economicus* version posits that everyone is a utility maximizer and social relations among human beings are entirely optional, neither biologically necessary nor morally required. It is taken in this approach that the human individual is in principle, essentially, an isolated self, akin to Robinson Crusoe on an island who just appears out of nothing but manages to survive and flourish. If another individual of this type shows up, say Friday, the two then face the option of engaging in mutual transaction, each having their personal, private, subjective preferences set, with no role played by ethics, their biological, psychological or social nature in this process.

The critics, including communitarians and neo-Marxists, have found this version of individualism quite false to the facts, sociologically, psychologically or ethically flawed. Because sometimes this model of human nature and human behavior is taken out of the realm of technical economics and used to make sense of political economy, when criticism is leveled at this type of individualism, it appears that individualism *per se* is felled by the blows that are delivered; but this move is quite hasty.

*Feminist Critique of Individualism*

Some radical feminists, especially Catherine MacKinnon, attack individualism, often from a kind of neo-Marxian perspective that has been transformed to embody feminist components. It is supposed to be classes, not the individual members of the classes, who matter politically and ethically.

For example, MacKinnon recommends, instead of talk about a woman's right to abortion, that the discussion be cast in the collectivist parlance of group power. Here, again, the group is looked upon as the greater reality than the individual. This line of reasoning follows one advanced two centuries ago by August Comte, the French father of sociology:

Everything we have belongs then to Humanity ... Positivism never admits anything but duties, of all to all. For its social point of view cannot tolerate the notion of *right*, constantly based on individualism. We are born loaded with obligations of every kind, to our predecessors, to our successors, to our contemporaries. Later they only grow or accumulate before we can return any service. On what human foundation then could rest the idea of right, which in reason should imply some previous efficiency? Whatever may be our efforts, the longest life well employed will never enable us to pay back but an imperceptible part of what we have received. And yet it would only be after a complete return that we should be justly authorized to require reciprocity for the new services. All human rights then are as absurd as they are immoral. This ['to live for others'], the definitive formula of human morality, gives a direct sanction exclusively to our instincts of benevolence, the common source of happiness and duty. [Man must serve] Humanity, whose we are entirely.<sup>15</sup>

This notion, it will be easily seen, harks back all the way to Platonism – the idea that humanity is a reality which stands over and above every individual or even every subgroup of humanity.

*Radical Pragmatism*

The idea that there is something on which our belief systems can rest, which can hold it firm, which gives it stability and reliability, is rejected by at least the more radical versions of pragmatism. That much all pragmatists have in common, including Charles Peirce, John Dewey, Willard Van Orman Quine, and Richard Rorty, just to mention the major ones.

Out of this position, Rorty advances the belief that when people do have some understanding, this rests on what is agreed to by members of different communities. In his famous essay 'Solidarity or Objectivity?' Rorty rejects the possibility of objective knowledge – the sort a person imagines he might get after hard work, research, and the clearing away of prejudices and preconceptions. It is a myth that people can know the world as it exists, unconditioned by the thinking that they do in coming to know it. They are able to keep a stable, apparently independent worldview intact only because

their community supports them in this. They have their various communities, they belong to them, and in terms of what these communities give them, they formulate an understanding of the world.

Rorty goes so far as to indict much of our history of ideas, claiming that 'The tradition of Western culture which centers around the notion of the search for Truth, a tradition which runs from the Greek philosophers through the Enlightenment, is the clearest example of the attempt to find a sense in one's existence by turning away from solidarity to objectivity.'<sup>16</sup> This objectivity, if attainable, would make some elements of individuality possible: a person could, at least now and then, take an independent view of reality and thus perhaps criticize even his own community.

Rorty insists, however, that no such objectivity is possible because, as he puts it in another place, 'we should have to climb out of our own minds' in order to attain such a stance. Indeed, he thinks, following Ludwig Wittgenstein, that any question that suggests that we need to do this is meaningless, 'should not be asked.'<sup>17</sup>

There is no role for the individual, with his independent consciousness, to ascertain or to stand apart and criticize the community's viewpoint. Rorty fashionably invokes Wittgenstein in support of this epistemological thesis by way of the latter's well known 'private language argument.' It maintains that a certain type of empiricism is false, one according to which every individual gains sensory impressions of the world on which he then, individually, builds an understanding of reality by organizing, naming, and drawing inferences from these sense impressions.

Wittgenstein held that no individual could ever create a language since such a language could never admit of being corrected. If I create my own language, every name I apply is like a christening: necessarily right because it is an act of will, not a publicly correctable discovery. If I created a language all on my own there would be no way anyone could correct what I am saying and doing; no one could hold me responsible for making a mistake.

Wittgenstein, no simple thinker to interpret, is taken to have argued that the only way that language can be understood as a medium within which errors and corrections can be made is if we look upon it as a social creation. Neither the subjective certainty of Descartes' individual mind, nor that of the empiricists' subjective sensory impressions, can provide us with intelligible knowledge. Thus the argument is supposed to oppose individualism. Another statement of this view which Rorty advances was proposed nearly two centuries ago by August Comte:

The man who dares to think himself independent of others, either in feelings, thoughts, or actions, cannot even put the blasphemous conception into words without immediate self-contradiction, since the very language he uses is not his own. The profoundest thinker cannot by himself form the simplest language; it requires the co-operation of a community for several generations.<sup>18</sup>



So Rorty supplements his pragmatist view of anti-foundationalism with Wittgenstein's private language argument, thereby disposing of the notion that any individual could ever take a cognitively independent stand from his community. In effect this means that true dissidents do not exist, there are only warring groups.

### **Some Answers to Critics**

Was Plato's criticism a telling one? Not really. First, it is arguable that the realm of perfect ideas is a philosophical myth. It is not supposed to be some objective reality, one wherein actual ideals subsist as concrete universals, superior to individuals here in visible worlds. Rather, arguably, what Plato may have had in mind is that we should always have a set of standards to which we refer the actual, and in terms of which the actual world might be improved. This reading of Plato does not exactly endorse individualism, but it certainly softens the blow against it.

As to Aristotle, it would be best to focus on Aristotle's ethics as opposed to the frequent interpretation of his politics. Arguably, every individual has to be a member of a community but it is not necessary for the individual to be a member of one kind of community or to select one community over all others, or to flourish within one community rather than another. As Zeller puts it,

Plato had demanded the abolition of all private possession and the suppression of all individual interests, because it is only in the Idea or Universal that he acknowledges any title to true reality. Aristotle refuses to follow him here. To him the Individual is the primary reality, and has the first claim to recognition. In his metaphysics individual things are regarded, not as the mere shadows of the idea, but as independent realities; universal conceptions not as independent substances but as the expression for the common peculiarity of a number of individuals. Similarly in his moral philosophy he transfers the ultimate end of human action and social institutions from the State to the individual, and looks for its attainment in his free self-development. The highest aim of the State consists in the happiness of its citizens. The good of the whole rests upon the good of the citizens who compose it. In like manner must the action by which it is to be attained proceed from the individual of his own free will. It is only from within through culture and education, and not by compulsory institutions, that the unity of the State can be secured. In politics as in metaphysics the central point with Plato is the Universal, with Aristotle the Individual. The former demands that the whole should realise its ends without regard to the interests of individuals; the latter that it should be reared upon the satisfaction of all individual interests that have a true title to be regarded.<sup>19</sup>

Zeller seems to me to make a convincing case, as do others who show Aristotle to be, as Miller puts it, a 'moderate individualist,' to contrast him with those, like Hobbes, who propose an extreme or radical nominalist version.<sup>20</sup>

As to the Christian criticism of individualism, it depends largely on how we are to appreciate the theological criticism of a philosophical position. Taking Christianity as a fairly straightforward doctrine, where it joins hands with philosophy, there appears to be no major conflict between certain crucial aspects of individualism and Christianity. Augustinian Christianity sees the individual as a moral agent with free will and the responsibility to live a virtuous life. Thomism draws on Aristotle and thus affirms the role of the individual ethical agent, since Aquinas takes seriously the place of the individual's moral choice or initiative, as did Aristotle. As such, there appears to be no major opposition between the main thrust of Western Christianity and individualism, especially if we add to this the distinctive Christian doctrine of every individual person's status as a child of God and as having the responsibility to achieve everlasting salvation by his own chosen deeds.

Because of its other-worldliness, it is troubling how Christianity would answer the question, 'Who is the I?' Is it possible to answer this in a way that is accessible to non-believers and non-Christians? And there is the related provision of the Bible already mentioned, namely, that the non-Christian might need to be forcibly brought to the faith. 'Compel them to come in' can be rendered in such a way as to lead to policies that would rob the individual agent of his autonomy in making the decision to aspire to the kingdom of God.<sup>21</sup> Similar problems can be found in other religious faiths, of course.

As far as the Marxian view is concerned, although it is now somewhat out of favor, as we will see in Chapter 16, many still embrace it. It even receives some support from scientists, such as the late Lewis Thomas and many ecologists who endorse the conception of humanity or the earth as an organic whole.<sup>22</sup> Marxism shares one clear-cut problem with all anti-individualist positions, namely, that it is contradicted by certain very evident facts on the part of every human being, including, especially, someone like Marx – an undeniably creative intellectual.

Intellectuals – and in our capacity as willing, intending, thinking beings, all of us – are nearly always engaged in original acts. We are not the kind of beings who can be entirely submerged as mere passive particles in some revolutionary progression of history. There is always the role individuals play in understanding human history, recasting and criticizing it, not to mention putting its lessons into practice.

Marx is an especially renowned example of a critical human individual who has a personal, self-determined impact on events. That is one reason the late Sidney Hook could not square the role of the individual in history with hardline Marxism. Marx by implication excludes himself, as a potent member of the historical drama, from his understanding of human affairs. This is a powerful argument against the Marxian conception of humanity as a collective entity: in being unable to accommodate people like Marx himself, it reveals a self-referential inconsistency in the system.

As to communitarianism, a telling critical point, as *The Economist* noted a while ago, is that it 'caricatures outrageously' the substance of Western

liberalism, 'calling it a doctrine of economic atomism that pays no heed to man's social nature.' This, as the editors noted, 'is simply false.'<sup>23</sup>

Second, the communitarians have no way to decide to which community we owe our loyalties. Is it my fellow ex-Hungarians, members of the professional community in which I work, my neighbors, fellow tennis players, fathers, drivers of BMWs, travelers, fans of the blues or of Fred Astaire's dancing, libertarians, divorced men, or what? How is the communitarian to group us so that we can be understood fully, as who we are, by reference to *that* group? Etzioni's communitarianism offers no clue given that all his claims about the community rely on some obscure 'we' whose wants, choices, will or desires are to be satisfied. This is altogether too vague and systematically so.

Is anything better to be said for Rorty's version? Rorty talks about solidarity replacing objectivity, but with which group do we proclaim this solidarity? Wittgenstein does not help here either. He argued against radical empiricism, the notion that any single mind, faced with nothing but groupings of bits of sensory impressions – sense data – could come to know the world, to attain propositional or conceptual knowledge. There is nothing in Wittgenstein to deny a human being the independent ability to perceive some parts of the world. The private language argument does not tell against perceptual – only sense data based – knowledge.<sup>24</sup> And as we would anticipate, it is from simple ordinary experience and reflection that human beings begin to know. They perceive the world and are not simply told about it. So, even after they have mingled this knowledge with what they learn from others – including elaborate conceptual knowledge built on complex chains of concepts – they must take care, individually, to remain properly anchored, to keep their bearings.

Furthermore, the idea that knowledge begins with community runs aground when we consider just how this could happen. Communities have no brain – only their members do. So even if after centuries of human history the bulk of what any of us knows does come by way of what others teach us, it could not have been like that from the start. Nor is it always like that now – there are plenty of cases in which children stand their ground against their teachers, citizens against their leaders, those who try to indoctrinate or brainwash them and whose efforts often enough need to be and do get thwarted by individual resistance. But for Rorty and other communitarians, the heroic stance of the dissident is impossible – they are either deluded in thinking they are lone rebels or actually amount to lunatics.

### **Individualism: Atomistic or Classical?**

There are forms of individualism (not of the type that much of the classical liberal tradition inherited) which can withstand the critics' assault.

The type of individualism being sketched here stresses the humanity of each individual. This humanistic, or classical, individualism recognizes that there is in nature a distinct class of beings we call human. This is to contrast

such an individualism with one – assuming there ever was one the critics focus upon that was actually proposed – that claims the individual is a bare particular, that what are called natures are constructs invented by our minds.

So on the one hand we must acknowledge the inadequacy of atomistic individualism but on the other hand we can firm up the foundation for individualism *per se*. This can be achieved by noting that in a study of human nature – that is, by a careful examination of what it is to be a human being – we arrive at the conclusion that one of the crucial factors about being a human being is individuality.

In response to this, instead of saying, with Hobbes, that there is no human essence, we can say in opposition to both Marx and Hobbes that the human essence is the true individuality of man. That human beings are also essentially social does not render its individualistic nature void. But their social nature must always be understood alongside their individuality. Accordingly, for example, while human beings require community affiliation, they need to consent to it as adults, not have it imposed upon them. That is the great insight of classical liberalism and the rejection of this, the failure of collectivism.

## **The Case for A Classical Individualism**

### *Platonism Rejected*

One of the major objections to the idea of an objective or real nature of something has to do with Platonism. It was Plato's form of naturalism that had been most widely developed, embraced and utilized in, for example, natural law theory. Even in the tradition of natural rights there is often an allusion to a Platonist conception of the nature of something; but there is a very serious problem with this view of 'the nature of something.'

We need first to remember that, for Plato, the nature of anything is a timeless, unchanging, perfect form in another, timeless dimension of reality. We do have some plausible examples of this: when we study geometry we can, perhaps usefully enough, think of the perfect circle as being in a timeless, perfect, unchanging realm however we might actually understand the precise status of being of the figures geometers define. Euclidean geometry is a formal field, so at least there is a plausible case here.

We were left with two extremes: the radically skeptical idea that issues in nominalism and radical individualism, and the Platonic alternative of an unattainable, hopelessly utopian and ideal conception of human nature. Both lead to skepticism in the end.

### *Rethinking Essentialism*

We should rethink essentialism or naturalism, not abandon it. When we talk about the essence or nature of something we are most sensibly talking

about what that thing is, given the best, most reasonable way to classify our experiences. The classification that we thus make – on the basis of evidence we have gathered and which is limited to the context of our present knowledge – is stable enough, given that the world cannot just up and change without rhyme or reason. Even such a changeable being as we are, can be classified in terms of certain basic capacities that can be stable enough to guide us in our political and even perhaps in our personal lives. It can be just as stable as we can expect the world to be, just from our knowledge of history and from our common sense.

In other words, we need an approach to understanding the nature of things that both gives us stability as well as makes room for gradual change. The world itself, as we know it from common sense, demands just that. We can learn it from history, from science, from everything that we are aware of: nature is stable as well as changing!

### *The Stability of Human Nature*

When we study *homo sapiens* over the 100,000 years they have been on this earth, we see that human beings do, indeed, have a stable nature as thinking animals – biological entities that have the distinctive facility to think and depend upon exercising this facility in order to make their way through and do well in life. Moreover this thinking capacity of human beings does not just happen to go into motion. It is one feature of conceptual consciousness that individuals must initiate – they must themselves start this process, otherwise they perish, unless they enlist the thinking of others, who have started it, as a substitute.

It is by their own particular initiative – circumscribed by their family backgrounds, traditions, habits, customs, environment, opportunities, climate, and so forth – that human individuals must confront the task of living their lives. So they face the task of implementing or establishing their individuality every moment of their lives. But it also quickly points to the social nature of human life – the very fact that they are thinking animals points to the fact that flourishing in their lives is utterly interwoven with their fellow human beings.

### **Individualism Humanized**

Now how does all this help us out of some of the problems and paradoxes that critics of individualism tend to focus upon? For one, since we have now a viable, sound, or feasible conception of human nature – not timeless, yet having the stability to be expected of a view about the nature of things – we can identify some general principles we could count on to guide our lives. These principles are going to be general enough to apply over time to succeeding generations even if they will not be guaranteed to hold for eternity as earlier naturalists had hoped.

Of course, as Aristotle already recognized, the precise application of the general principles that rest on our knowledge of human nature may not be exactly identical in different situations, at different times. Being honest in the twentieth century probably requires applying the principles to telephones, call waiting, fax machines, and computers. Two hundred years ago people did not have the responsibility to be honest in just this way. So honesty, although it may well be a very general human virtue that we all ought to practice, will also have its very individual, regional, temporal, and culturally related manifestations. And so, too, with other virtues such as courage, prudence, or justice.

There can be very many general human traits of character that make for human excellence that we ought to practice. That these must be applied in particular circumstances does not imply at all that they have to be subjective, mere preferences or choices that we invent at a given moment. These could well be human virtues, so that, for example, trans-historically we could consider a person 400 years ago and if we discover that he is a liar we could say that he did something objectively, morally wrong.

A good example of misguided criticism of individualism may be found in Charles Taylor's previously mentioned essay 'Atomism.'<sup>25</sup> Here Taylor claims that ascribing basic negative rights to individuals necessarily presupposes atomism, the view that human beings are self-sufficient apart from society. He links this view to Hobbes and Locke. He tells us that

Theories which assert the primacy of rights are those which take as the fundamental, or at least a fundamental, principle of their political theory the ascription of certain rights to individuals which deny the same status to a principle of belonging or obligation, that is a principle which states our obligation as men to belong to or sustain society, or a society of a certain type, or to obey authority or an authority of a certain type.<sup>26</sup>

To start with, contrary to Taylor's claim, even Locke identifies pre-political moral responsibilities, when he tells us

The state of Nature has a law of Nature to govern it, which obliges every one, and reason, which is that law, teaches all mankind who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty or possessions ...<sup>27</sup>

Locke clearly, unambiguously refers to 'a law of Nature' – which in this context means a system of ethics – that governs the state of nature, and 'obliges everyone.' Locke does not claim there is only one law of nature or moral principle. But he does say that such a law obliges us all, so Taylor is wrong to think that Locke begins his understanding of politics with individual rights. In the state of nature there are obligations or, to put it another way, moral responsibilities or virtue one ought to live by. Of those, Locke calls attention to the obligation that 'no one ought to harm another in his life, health, liberty

or possessions.’ This obligation Locke treats as indeed enforceable. But it is too weak for those like Taylor who want us to be society’s possessions. The East German socialists precisely implemented this belonging when they regarded everyone who tried to leave them as embarking on a kind of kidnapping of part of the collective self.

Locke’s obligation<sup>28</sup> means that we ought to abstain from killing, assaulting, kidnapping, robbing, and otherwise interfering with other people’s choices, the failure of observing which would justify forcible defensive response. But other laws of nature – for example, ‘everyone is bound to preserve himself’ – may not be enforceable. Furthermore, ‘when his own preservation comes not in competition, [he] ought as much as he can preserve the rest of mankind.’ But this is not enforceable. It is a moral, freely chosen, obligation of charity toward others.

Locke also makes clear, using a quotation from ‘the judicious Hooker’ that human beings are by nature social: ‘[W]e are naturally induced to seek communion and fellowship with others.’<sup>29</sup>

Taylor laments that our choices are not always mature enough to guide us toward self-fulfillment and self-development so the obligation must be an enforceable one. But a moderate individualist would say, first, that assisting with the initial stages of self-development is the task of parents, not the state of strangers who have come to govern society; second, that ordinarily each of us, except for the very unfortunate, will be able to set himself or herself to the task of self-development, gaining help when in need of it from society, not the state; and, third, that self-development must amount to something highly individualized, so others will usually be unprepared to assist in it very much except in a voluntary, invited capacity. This fulfills every bit the necessarily social component of human nature with no need to extend it to coercive impositions that arise from seeing each of us as belonging to society.

It is important to note that Taylor equates ‘a principle of ... obligation’ with ‘a principle of belonging.’ The two are very easy to differentiate. A person may have the obligation to be generous or kind or helpful without belonging to those who would benefit from this. Only slaves belong and do service, not from their sense of morality or ethics but from the requirement to comply with the demands of those to whom they belong. Men and women who possess both free will and moral responsibilities do the right thing, including fulfilling their obligations, because they choose to do so. Taylor completely ignores this distinction between an enforceable and an ethical obligation. Because of this he never has to deal with whether the social nature of human beings is something they need to fulfill as a matter of their moral responsibilities or something they can be made to fulfill at the command of others.

Taylor also claims, along with MacIntyre, that prior to Hobbes and Locke there was no reference to rights, which is flatly contradicted by other scholars.<sup>30</sup>

Furthermore, there is the occasional serious ambiguity in Taylor’s use of the concept of obligation. Are we to understand by that term a course of

conduct that is mandatory and enforceable or one that is a matter of moral requirement? If it is morally required, a person needs to be free from the coercive interventions of others so as to fulfill the obligation. If it is mandatory, others may impose it upon the individual by force. But then no credit is due to the person who obeys and thus ostensibly fulfills the obligation. A mark of a virtuous person is to recognize that his nature requires, among other things, extensive social engagement which is a part of his self-development, and fulfillment of his nature. What it does not require is that such engagement be unconditional. Taylor does allow that there are 'certain theories of belonging ... which hold that our obligation to obey, or to belong to a particular society, may in certain circumstances be inoperative.' But he discounts this exception and says that 'in theories of belonging it is clear that men *qua* men have an obligation to belong to and sustain society.'<sup>31</sup> Taylor makes too little of what is, after all, a rather important qualification on so-called theories of belonging. For if a person has the authority to withdraw from a perverse society, he will have the authority, also, to determine what criteria to use for this purpose. This is not an epistemological *carte blanche*, of course, but a serious moral responsibility to find out what kind of society is suitable to human flourishing.

Critics of individualism might consider that competing accounts of our nature need to be considered not only on the basis of how wildly certain elements of our nature might be exaggerated, but also on how exaggerating aspects of our nature in one way may be far more harmful than in another. Thus while it is true that individualism can be propounded in an arid fashion, this has been far less harmful than the similarly exaggerated collectivist accounts. Consider, as just one example, the Russian author Tatyana Tolstaya's observation, in an essay written for *The New Republic* magazine shortly after the fall of the Soviet Union, of the nature of one grandly horrid example of collectivist social organization:

According to [collectivists] 'the people' is a living organism, not a 'mere mechanical conglomeration of disparate individuals.' This, of course, is the old, inevitable trick of totalitarian thinking: 'the people' is posited as unified and whole in its multiplicity. It is a sphere, a swarm, an anthill, a beehive, a body. And a body should strive for perfection; everything in it should be smooth, sleek, and harmonious. Every organ should have its place and its function: the heart and brain are more important than the nails and the hair, and so on. If your eye tempts you, then tear it out and throw it away; cut off sickly members, curb those limbs that will not obey, and fortify your spirit with abstinence and prayer.<sup>32</sup>

Tolstaya's choice of terms may suggest to some that this is an overstatement of the collectivist position. But is it, really? Marx himself refers to human society as 'an organic body.'<sup>33</sup> We have already seen that 'belong' is Taylor's preferred term. And St Augustine states that '... every part of the community belongs to the whole ...'<sup>34</sup> What else does this suggest but that human beings



are component parts of some larger body and are, thus, ultimately not self-directed? Indeed, it means that some people – a majority, politburo, central committee, or dictator – will have that power, not that the whole body will exercise it in some kind of cohesive, integrated fashion.

With the smaller collectives, such as communes or convents, especially where voluntarily entered into, the probability of disharmony and instability will not be so great, precisely because such groups can very well reflect the main attributes of the individuals who comprise them. Even if such groups are established and maintained coercively, their configurations may well suit the individual purposes of their membership, making stability more likely. But that is less and less likely as the collective becomes larger.

The individualist idea can, of course, also be made to serve unsavory purposes, but never so readily and with such cataclysmic results as those of collectivism, small or large. Most importantly, however, individualism can be rendered in terms that are closer to the truth of the human situation, both actual human capacities and realizable human ideals.

It is quite true that individuals ought to form social ties, that they ought often to be loyal to their groups, that it is best for them to choose to be generous, compassionate and kind toward others. It is also true that mere individual initiative will not lead to full human flourishing, which is the thrust of Aristotle's observation that human beings are by nature social-political animals. Even thinking cannot get much beyond mere familiarity with, as it were, the surface of the world, unless it is enhanced by the kind of education that only many generations' combined individual effort can produce. Just as the argument for individualism shows that the individual is indispensable, it also demonstrates that the company of other individuals is essential to the flourishing of human life.

But it does not follow from any of this that individuals ought to be coerced, by others, to comply with the tenets of any given social arrangement. All that can be demanded of anyone is that he accept the protection, for everyone, of his moral space or personal moral jurisdiction – that is, the respect of our basic rights that make it possible for us to act on our own initiative. It is the hallmark of individualism that even what is dead right for someone to do must be a matter of choice. Without that, the very dignity of the human being – the capacity for a person to earn moral credit for doing what is right – is destroyed.

Alas, though this may be true, it is also the case that without sustained philosophical support, such common-sense ideas are quickly overwhelmed, first by doubt and then by sophistry. In that spirit, suffice it to note that there is now a serious change of direction, at least in biology, concerning the adequacy of the mechanistic, scientistic model for understanding behavior, not just human but animal as well. In neurophysiology and psychophysics conclusions have been reached that give solid support to the idea that human brains are exactly the sort that enable human beings to function as causal, governing agents.<sup>35</sup> Furthermore, it is evident that although there is a great

deal of value in approaching much of the world along lines recommended by the methods of modern natural science, that method has been extrapolated too hastily to areas of inquiry where it fails to apply. The enthusiasm with social science and engineering, both spheres where individualism fares badly except in economics, seems now to have abated. What may well be the missing element is the type of moderate or classical individualism that has been defended in the present discussion. Surely this is suggested by the current tendency to abolish individual responsibility and to embrace the idea that we are all basically helpless in the face of our troubles.

In any case, the individualist stance is not by any means so out of line as some of its critics suggest; it could indeed be the exact opposite story, at the end of the day.<sup>36</sup>

## Notes

- 1 Mary Midgley, *The Ethical Primate* (London, England: Routledge, 1994), p. 123.
- 2 Susan Mendus, 'Liberal Man,' in G. M. K. Hunt, ed., *Philosophy and Politics* (London: Cambridge University Press, 1991), p. 47.
- 3 Alasdair MacIntyre, 'Nietzsche or Aristotle?' in Giovanna Borradori, *The American Philosopher* (Chicago, IL: University of Chicago Press, 1994), p. 143.
- 4 Alasdair MacIntyre, *After Virtue* (Notre Dame, IN: University of Notre Dame Press, 1981).
- 5 Karl Marx, *Grundrisse*, (New York: Harper Torchbooks, 1971), p. 17.
- 6 John Gray, 'From Post-Modernism to Civil Society,' *Social Philosophy and Policy*, Vol. 10 (1993), p. 44.
- 7 Richard Rorty, *Objectivity, Relativism, and Truth* (London: Cambridge University Press, 1991), p. 31.
- 8 Richard Rorty, 'The Seer of Prague,' *The New Republic*, July 1, 1991, p. 37.
- 9 Midgley, *The Ethical Primate*, p. 103.
- 10 Ibid.
- 11 Steven Lukes, *Individualism* (London: Oxford University Press, 1973), p. 101.
- 12 Amitai Etzioni, *The Spirit of Community* (New York: Crown Publishing Co., 1993), Robert Bellah et al., *Habits of the Heart* (New York: Harper & Row Publishers, 1985).
- 13 Marx, *Grundrisse*, p. 39.
- 14 Charles Taylor, *Philosophy and the Human Sciences* (Cambridge, England: Cambridge University Press, 1985), pp. 187–210.
- 15 Auguste Comte, *The Catechism of Positive Religion* (Clifton, NJ: Augustus M. Kelley Publ., 1973), pp. 212–30.
- 16 Rorty, *Objectivity, Relativism, and Truth*, p. 21.
- 17 Ibid., p. 7.
- 18 Auguste Comte, *A General View of Positivism* (New York: Robert Spellers & Son, 1957), p. 246.
- 19 Eduard Zeller, *Aristotle and the Earlier Peripatetics*, trans. B. F. C. Costelloe and J. H. Muirhead (London: Oxford University Press, 1897), ii, pp. 224–6 (quoted in Fred D. Miller, Jr, *Nature, Justice and Rights in Aristotle's Politics* [Oxford, England: The Clarendon Press, 1995], pp. 200–201). For an individualist understanding of Aristotle's metaphysics, see Emerson Buchanan, *Aristotle's Theory of Being* (Cambridge, MA: Greek, Roman, and Byzantine Monographs, 1962).

- 20 See, for more on the measure of individualism and the natural rights of individuals in Aristotle's philosophy, Miller, Jr, *ibid.*
- 21 For more on this, see J. D. P. Bolton, *Glory, Jest and Riddle, A Study of the Growth of Individualism from Homer to Christianity* (New York: Barnes and Noble, 1973). See also Paul Zweig, *The Heresy of Self-love: A Study of Subversive Individualism* (Princeton, NJ: Princeton University Press, 1980).
- 22 Lewis Thomas, *Lives of a Cell* (New York: Viking, 1971).
- 23 *The Economist*, March 18, 1995.
- 24 David Kelley, *The Evidence of the Senses* (Baton Rouge, LA: Louisiana State University Press, 1986). Ironically, Kelley did his doctoral dissertation, on which this book is based, under the chairmanship of Richard Rorty at Princeton University. For an extensive discussion of Richard Rorty's anti-objectivism, see Tibor R. Machan, *Objectivity: Recovering Determinate Reality, in Philosophy, Science, and Everyday Life* (London: Ashgate, 2004).
- 25 Taylor, *Philosophy and the Human Sciences*.
- 26 *Ibid.*, p. 188. For my fuller discussion of Taylor's position, see Tibor R. Machan, *Generosity: Virtue in Civil Society* (Washington, DC: Cato Institute, 1998).
- 27 John Locke, *Concerning Civil Government, Second Essay: An Essay Concerning the True Original Extent and End of Civil Government* (1690), Chapter II, 'Of the State of Nature.'
- 28 The term 'obligation' is a bit misleading since it suggests an enforceable moral – that is, a properly grounded legal – principle, yet outside of civil society no edict is yet enforceable other than self-defense.
- 29 *Ibid.*
- 30 See, for example, Tierney, 'Origins of Natural Rights Language: Text and Contexts, 1150–1250,' 'Conciliarism, Corporatism, and Individualism: The Doctrine of Individual Rights in Gerson,' *Christianesimo hella Storia* 9 (1988), 81–111; and Cary J. Nederman, 'Property and Protest: Political Theory and Subjective Rights in Fourteenth-Century England,' *The Review of Politics*, Vol. 58 (Spring 1996), pp. 323–44. See also Fred D. Miller, Jr.
- 31 Taylor, p. 188, note 1.
- 32 Tatyana Tolstaya, 'The Grand Inquisitor,' *The New Republic*, June 29, 1992, p. 33.
- 33 Marx, *Grundrisse*, p. 33.
- 34 St Augustine, quoted in Thomas Beauchamp, ed., *Ethical Issues in Death and Dying* (Englewood-Cliffs, NJ: Prentice-Hall, 1984), p. 103.
- 35 See the work of Roger W. Sperry, for example, his *Science and Moral Priority* (New York: Columbia University Press, 1983), as well as Midgley, *The Ethical Primate*. See also Edward Pols, *Acts of Our Being* (Boston: University of Massachusetts Press, 1982) and *Mind Regained* (Ithaca, NY: Cornell University Press, 1998).
- 36 A substantial portion of the material in this chapter is drawn from Chapter 14 of my *Classical Individualism* (London: Routledge, 1998).

# LIBERTARIANISM *PER SE*

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## Chapter 9

# Anarchists and Minarchists: Allies After All?

My purpose in this chapter is to discuss a controversy that has split a goodly portion of the libertarian political movement for quite a while. Since the very birth of the American political tradition, there have been those who have found fault with its idea of even limited government, claiming, in essence, that government in any form is morally suspect if not out and out criminal. I believe Lysander Spooner's criticism of the US Constitution,<sup>1</sup> not for any particular provision it includes but because it assumes that the consent of those of one generation can bind those in subsequent ones. It has continued more recently with the leadership of Murray N. Rothbard and is kept alive by a host of libertarian thinkers, including Walter Block, Eric Mack, John Hasnas, Aeon Skoble, Jan Narveson, John Sanders, and quite a few others. Other libertarians, such as John Hospers, Ayn Rand, Douglas B. Rasmussen, Douglas J. Den Uyl, Roger Pilon, Tom Palmer and I, have held the view that limited government is compatible with the full respect and protection of unalienable negative individual rights.

In this chapter I shall argue, in part, that the dispute is not as significant as many of the parties maintain and that, in any case, both factions of libertarians actually reject anarchism as that is understood in the classical anarchist tradition, namely, as the denial of any moral justification for law and legal enforcement. That tradition has been largely pacifist and hostile to any systematic law enforcement and agencies that would carry it out. So-called anarchist libertarians are very different from the usual Marxist or socialist breed of anarchists, as well. 'Anarchocapitalists' defend arrangements in society that serve the sole purpose of protecting individual rights, calling these 'defense agencies,' 'protection agencies,' or 'justice services'; they would not assent to the socialist-anarchist view that in a true anarchist society the 'surpluses' generated by capital would devolve to the laborers, private property would wither away along with the state, and so on.

Robert Nozick, who was identified as belonging with the minarchist faction in this dispute, opened his famous book on political philosophy, *Anarchy, State, and Utopia*, with a discussion of whether a libertarian society must necessarily be anarchist, as Murray N. Rothbard and others have claimed. Nozick concluded that even with full respect for everyone's individual rights, a society that attempted anarchism would 'back into' a minimal state.

Nozick argued that this backing away from a ‘society without a state’<sup>2</sup> into minimalism occurs even if innocent persons afflicted by private efforts to defend individual rights – or to punish culprits for violating them – are compensated for their worries about negative side effects. He claimed there would still be persistent concern about such side effects among those not directly affected. ‘Even under the strongest compensation proposal which compensates victims for their fear, some people (the nonvictims) will not be compensated for *their* fear. Therefore there is a legitimate public interest in eliminating these border-crossing acts [that is violations of the rights of some in the process of acting to punish rights violations], especially because their commission raises everyone’s fear of its happening to them.’<sup>3</sup> Nozick concludes that in the resulting system, which I call a minarchist society, one legal order alone would prevail within a given geographical area. There would be a single administration of this legal order.

Nozick thus contradicts the claims of Rothbard and other libertarians that in a fully free society, one that respects and protects individual rights of the sort that Nozick (and Locke, and Rand, and Rothbard) regards as basic, competing legal orders and administrators could operate within the same geographical realm. He contradicts the claim that law could become an *enterprise* just like any other provision of services people might want.

When living in communities, dangers from others exist and it is *ethically* imperative to address these dangers. Government, rightly understood, is the institution that specializes in proper protection of individual rights. Thus it would be ethical to establish government instead of leaving the task of rights-protection to individuals and businesses that lack the training or mandated mission to protect rights properly, that is, via due process and without violating rights in the process of this protection. Indeed, this institution, government, is unique in human communities because protecting individual rights is not like other tasks (for example, producing and selling bread) in that its genesis is not peaceful interaction but the initiation of force and the required response. Thus politics *cannot* be reduced, without remainder, to commerce (which is *per se* peaceful), contrary to what individualist anarchists maintain.

I believe that both the individualist anarchists and the so-called minarchists – those who support a properly limited government – are right on key issues and also that their differences are only apparent.<sup>4</sup> In one respect, no competing legal orders would exist in a fully free society, while in another respect, competition among different legal orders (but all abiding by certain ultimate principles and procedures) would be the natural libertarian situation.

What is the anarchist–libertarian case for adjudication and law enforcement? And what is the minarchist case for the libertarian society’s approach to law? How opposed are they to each other, really? I will argue that the two positions only appear to be different because of certain preconceptions about what a legal order must entail.

The fact that Nozick's treatment of this issue received such close attention from political philosophers and theorists – as well as economists and public policy scholars – suggests that there is more at stake here than merely settling an internecine squabble. With good reason. The dominant principles of Western liberal democracies are of two distinct types. One stresses individual sovereignty. The other stresses more or less extensive collectivism or communitarianism. According to the latter position, all able persons naturally owe provisions for those less able who are in dire straits, that is, the poor, helpless, injured. These provisions are to be obtained via taxation or universal service, both of which are, to use Nozick's words, 'on par with forced labor' and therefore rights-violating.

Whether either system can be stable, orderly, consistent and just in the policies it precipitates has been the subject of much debate.

One motivation for incorporating a substantial welfare provision into a fundamentally liberal order is the belief that without it, no reason can be found for supporting the traditional configuration of countries as political entities. In other words, only if all citizens have enforceable positive duties toward one another may a government be justified at all. If no such duties are involved in maintaining justice, perhaps the need for government could not be established. So, in a sense, one promise (or threat?) of consistent classical liberalism or libertarianism is that it would require the abolition of government altogether – including the very idea of a country. But not all libertarians consider this a sound inference from their agreement that all individuals have unalienable rights to life, liberty and property.

The libertarian view is that none may violate these and other properly derived individual rights. If one needs to protect these rights, one may do so oneself or hire others. As with all services, provisions may be offered by various parties and none may acquire a protected, legal monopoly. So the protection of basic rights may be provided to different individuals by different firms specializing in such provisions, and no exclusion of competing providers can be justified on libertarian grounds. This right of competitive provision supports the anarchist-libertarian idea of legal adjudication and enforcement.

The response from the minarchist side is often that such a system would in principle be chaotic and could more easily fail to provide decisive results than a minarchist system. Dissatisfied parties could always seek yet another trial court, employ yet another police department, switch to yet another appellate court, and so forth, so there would be no 'court of last resort' to issue a genuinely *final* or *decisive* judgment. The right of competition would entail a right to opt out of legal contexts that do not suit one *qua* consumer of law-and-order. Such a situation would render the legal system non-functional in a variety of cases where those involved wish to press on with their claims, or simply go home without abiding by the judgment.

Minarchists also argue that a legal system is essentially different from other kinds of provisions because



- (a) it involves the use of force against those who haven't authorized this use (alleged criminals);
- (b) there is a need for law prior to market transactions, so law itself is in a different category (politics versus economics), and
- (c) one should not be a judge in one's own case (*vis-à-vis* self-defense in complex cases).

It is my contention that, contrary to appearances, the two camps of libertarians aren't actually opponents but rather emphasize different issues, ones through which a common ground (and a common system of justice) may emerge.

Government is a legal service institution (the actions or policies of which are backed by allegedly justified physical force and its threat). Since it is just the definition of government that's in dispute in this discussion, for now I will give only this rough characterization rather than a formal definition.

Anarcho-libertarians reject the government on the view that its very nature entails fundamental injustices (such as taxation or exclusivity of legal jurisdiction).<sup>5</sup> Legal services consist of enforcing laws, and laws are supposed to uphold justice. If, as libertarians contend, political justice consists primarily of respecting individual rights, then proper legal services involve adjudicating disputes about rights violations, overseeing the conviction of criminals, and providing for some of the police protection and military defense of people who live within the relevant jurisdictions, all in the effort to protect these rights.

Rights are the objective criteria by which just adjudication is to be conducted. Respecting rights fulfills the requirement of a civilized legal system whereby the rule of law rather than the will of human beings (as rulers) is followed. But anarcho-libertarians believe it is impossible for the government to achieve justice without also violating justice.

If the provision of legal services is to be just, they say, government must enjoy the full consent of the governed, not just the majority of those being served by it. (That consent may be explicit or, some have argued, implicit – based not only on overt but tacit agreement implied by one's actions.) But can even a properly limited government exist with the full consent of the governed? Some argue it has never done so and, indeed, cannot, for it is necessarily coercive, involving as it does the forcible monopolization of the legal services it provides.<sup>6</sup> To achieve justice, it is held, legal services must be provided in ways government cannot provide them, namely, absent any kind of initiated coercion.

Those who understand government to be unjustly coercive by its very nature can relate to Max Weber's definition:

A state is defined by the specific means peculiar to it, the use of physical force. The state is a human community that successfully claims the monopoly of the legitimate use of physical force within a given territory. Politics, then, means striving to share power or striving to influence the distribution of power, either among states or among groups within a state.<sup>7</sup>

Notice that Weber talks here of the state as a human community, in the fashion of Hegel, Marx, Green and Bosanquet, rather than in the fashion of classical liberals such as Locke, Mill or Spencer. But many make use of this conception of the state to characterize government as an organization that monopolizes the use of force within some geographic area and raises its revenue through coercive taxation.<sup>8</sup> Tyler Cowen gives a slightly different definition of government or state, saying it is characterized by ‘finance through taxation, claim of sovereignty, ultimate decision-making authority, and prohibitions on competitive entry.’<sup>9</sup> And John Hasnas tells us that ‘What appears to be essential for an organization to be considered a state is that it monopolizes the basic policing, rule-making, and adjudicative functions in an identifiable area and funds these functions through taxation.’<sup>10</sup>

Our own concern here is not the nature of the state insofar as it is closely linked to the collectivist ideas of Hegel or Marx – the state as a holistic, organic community of human beings – but the nature of *government*, which is the institution established to provide legal services *for* human communities. As the American Declaration of Independence puts it, such ‘governments are instituted among men, deriving their justice powers from the consent of the governed.’ Here government is not a state, that is, not a human community of a certain type, but an institution *within* such a community. The libertarian controversy concerns whether governments are necessarily in violation of basic individual rights, or can exist and function without necessarily doing violence to those rights.

Of course, political theorists debate the proper scope of legal services or governments more generally than libertarians do. Some would include the provision of a wide set of goods and services apart from the protection of individual rights. Indeed, some deny that such rights exist at all, and believe government should proactively mandate production of goods and services for various segments of the citizenry. Indeed, some argue that government comes before any rights – government being the grantor of rights, not the protector of them.<sup>11</sup> Here we are considering only the more specific controversy among those who share the classical liberal tradition that regards the protection of individual rights as the sole – or at most, the paramount – service that a properly conceived government or legal order provides: the controversy about whether, within a given region, only one or several providers of legal services might practically exist.<sup>12</sup>

As the Declaration of Independence put it, it is ‘to secure these rights’ that governments are instituted among men. But must there be some kind of insidious, rights-violating monopoly afoot were governments to proceed to carry out this task? Or might government be a monopoly of the benign sort that we find in the provisions of all goods and services? If the term ‘monopoly’ is construed with sufficient narrowness, even a barber shop enjoys a monopoly (over the barbering done at its exact location); as does any grocery store, amusement park, apartment complex or a gated housing community (and the various services provided or ‘bundled’ within). Could government be a monopoly that just happens to have emerged without anyone forcibly imposing it?<sup>13</sup>

To obtain the services even of a competing barber shop, one needs to take the trouble to go to a location other than the one where the original shop is located. So it is with all other competing providers other than those that deliver their service or product, such as some pizzerias or plumbers. Is government merely a larger monopoly of this kind? Or is its monopoly necessarily held coercively, by the violation of the rights of others who would also want to offer its services?

I have argued that governments may serve communities without any degree of coercion and without being a monopoly.<sup>14</sup> Jack Sanders claims I use the concept ‘government’ idiosyncratically, since it proposes that one can have such an institution without any measure of initiatory coercion.<sup>15</sup> Yet he argues that history shows that no government has ever existed that did not engage in extensive coercive activities.

One response<sup>16</sup> is that the concept of ‘government,’ not unlike that of ‘marriage,’ is rarely – perhaps never – instantiated fully or flawlessly. These are normative concepts and while it is important to learn whether instantiating them is realistically *possible*, it is not always decisive that they are rarely instantiated. So the *history* of governmental conduct is not decisively indicative of the *nature and morality* of government, any more than the history of actual marriage demonstrates whether marriages can exist *as they ought to*, whether as usually conceived they could be a proper arrangement between couples.

In classical liberal political theory as encapsulated in the Declaration of Independence, the concept ‘government’ is used in a way that suggests that it is compatible with respect for individual rights. John Locke, for example, not only deemed government compatible with such respect but believed it was needed to provide effective protection of such rights.<sup>17</sup> More recently, Ayn Rand and her students have argued that government *can* exist without taxation, a practice that Murray Rothbard and others see as inherently anti-libertarian. If indeed it is possible for government to subsist without taxation (and possible to show that it can), the fact that historically governments have always relied on taxation is not definitive. Just as the fact that no society has every been *fully* capitalist does not prove that a consistently free market is somehow inherently unworkable.

One matter that anarcho-libertarians rarely discuss, noted by David Kelley,<sup>18</sup> is the fact that such market institutions as corporations, partnerships, private businesses – and even plain one-shot trades – presuppose a background of law-enforcement, including protection of property rights and the integrity of contracts. Such enforcement must thus be fundamentally different from the provisions of other goods and services. J. Roger Lee has also raised this issue, charging that anarcho-libertarians commit a philosophical *category mistake* as they attempt to reduce all politics to economics. This may be symptomatic of some economic approaches to understanding human (social) life.

A rebuttal might assert, of course, that ‘politics’ is a category which is unjustly coercive by nature and thus inherently incompatible with justice; that

all along, the belief that we require politics has rested on a misunderstanding: the notion that the use of initiated force is sometimes proper in human community life. Anarcho-libertarians see ample evidence for this belief among statists and tend to think that minarchist libertarians simply have not gone far enough in shedding this very bad habit of associating community life with coercion.

But the anarcho-capitalists get this wrong. Politics in a libertarian polity concerns, in part, *the need for using force against unwilling persons* who have, however, implicitly *asked for it* by way of their criminal conduct. It is not that a proper politics rests on the idea that *initiated* force – that is, coercion – is sometimes justified; it rests rather on the need to cope with (defend and retaliate against, and adjudicate disputes involving) such initiated force in special, appropriate ways (suggested by the concept of *due process* in criminal law-enforcement). Politics addresses the problem of dealing with involuntary or coerced human interactions – crimes, wars, and other forms of rights violation or violence.

To this it may be replied that even today there are arbitration agencies that provide legal services, so it must be possible to do so. Yet key here is that all such agencies are still subject to legal scrutiny by governments. Their customers may file complaints against them. They may be sued in regular courts.

The attempt to reduce all politics to commercial enterprises raises other concerns. Limiting the providers of rights protection and adjudication to the tasks aiming at this goal will be impossible without any rule of law at all beyond their own chosen procedures and laws. After all, why should an ordinary business enterprise decline to expand its activities, perhaps to providing social security services, unemployment compensation, wildlife preservation, or terrorist assassination? The enterprise might do such things on ideological grounds even if no profit is involved, provided its other services garner a large enough profit. Is a mafia to be tolerated as long as it offers ‘protection’?

As far as I understand, the possibility of overstepping libertarian bounds and the need to prevent the same, pretty much puts these anarcho-libertarians in the camp of those who do, in fact, defend some form of government, albeit one that’s supposedly free of the flaws of governments defended by socialists and welfare statists. It is a form of government rejected by those anarchists who want no laws at all to govern societies and who believe that communities will flourish through cooperation not overseen by any laws, only by personal moral vigilance.

Perhaps the most controversial question among those who want legal services provided solely for the protection of individual rights is whether governments need by nature be a *coercive* monopoly, in the sense of specifically banning competition – as is, say, the United States Postal Service’s first class division – rather than a benign monopoly, like that of a privately owned apartment house or an air carrier (once airborne). In order for the USPS to retain all first-class mail service, a legal authority must prohibit

anyone from offering an equivalent service, and they must have the power to enforce this prohibition. Such an enforced monopoly is coercive.

But a monopoly or near-monopoly is not coercive if it exists by virtue of overwhelming customer support – for example, Microsoft’s dominance in the software industry.<sup>19</sup> A privately owned apartment house is a *de facto* monopoly in the same way in which any particular ownership constitutes such a monopoly, especially to someone else who wants that item in particular but cannot have it, since it is now owned by another. Prospective homeowners find themselves in this position when the seller closes a deal on the ‘perfect’ house with another buyer. Owners of a good may set terms of use for others, by, say, evicting renters who fail to abide by terms of a lease. A passenger air carrier becomes a *de facto* benign monopoly between ports of embarkation and disembarkation. While flying United Airlines from LA to NYC, one has no access to competitors *en route* over Kansas.<sup>20</sup>

In short, some provision of services, given the nature of the service, may only appear to be coercively monopolistic. However, since customers are aware of this and prior to entering the exchange can easily seek out competitors who are free to enter the market, the apparently coercive monopoly is not in fact such even when the service being obtained is one provided for a long period of time. My suggestion is that becoming a citizen of a country may amount to (provisionally) consenting to such long-term provisions of rights protection from a given government.

The service anarcho-capitalists envision being provided by non-coercive legal service agencies – as well as by governments that would protect individual rights only by operating within the terms of such rights – appears to resemble services provided by coercive monopolies. Citizenship is a long-term condition. One of its great benefits is, indeed, that it offers substantial predictability and objectivity – that is, the rule of law. But can there be *bona fide* competition among governments such that despite retaining some characteristics resembling those of coercive monopolies, they are in fact non-coercive? Governments of this apparently monopolistic type would be more like air carriers in transit rather than a postal monopoly.

Anarchist critics argue that no such apparent monopoly is necessary. They insist that one could simultaneously gain defense services from competing agents – shop for them on the model of shopping for home-delivered pizzas or plumbing services. The idea is that one could gain criminal legal services, as well as others of course, from one legal agent but then decide that one no longer wished that agent to be the provider and proceed to subscribe to another legal agency or enterprise within the same territory. In short, one could change one’s citizenship as easily as one changes which pizzeria delivers one’s pizza.

Put the question another way: could there be legal service provisions without countries? Could legal services be delivered to citizens without their having to move, or could they even be divided such that one agency offers police service, another prisons, another adjudication? Or is this impossible

for the same reasons that it is impossible during a flight from Los Angeles to New York to enjoy the benefits of both competent service and of switching mid-flight to another carrier? Perhaps even the separation of distinct parts cannot work, just as it would not work for a patient in a hospital to get a bed from one agency, blood tests from another and nursing from yet another, without some common provider that coordinates it all.

Many minarchists dispute the notion that governments *must* be coercive (in the sense of being rights-violating, as opposed to using force while protecting rights), even though a proper government would naturally govern within a homogeneous region, like a country. They admit that throughout history, governments with jurisdiction over homogeneous regions have been more or less coercive. But they contend that this is neither unavoidable nor necessary. Just as marriages could be free of major flaws, although few in fact are, so too could governments be free of major flaws, including coercive policies like taxation or conscription or even banning secession.

Even in the Weberian conception of government, government is only a monopoly *per se*, not a *coercive* monopoly. When Weber says of government that it ‘successfully claims the monopoly of the legitimate use of physical force within a given territory,’ his characterization does not in itself imply that such a successful claim must itself issue a legal or coercively maintained monopoly.

The controversy between anarchists and minarchists over government institutions or ‘services’ takes place in a certain ethical context. We all assume that human beings *ought to* defend themselves against criminals and foreign aggressors. This is a view not shared by old-fashioned anarchists, those who reject all law-enforcement; but it seems uncontroversial among those libertarians debating the nature of limited government or legal services.

But if the division of labor is a sound principle, not everyone ought to do his own defending – it is quite complicated to do so, especially considering the appropriate due-process constraints of a free and civilized society. We ought, instead, to employ specialists. Government is a specialist in securing justice and the rule of law. But government is logically or conceptually a pre-market institution. It is required *for* the maintenance, elaboration and protection of the individual, including private property and rights.

Anarchists claim that it would be a violation of individual rights to have governments that aren’t competing *within a given geographical region*, akin to how different pizza delivery providers compete in the same neighborhood.<sup>21</sup> It is true that just as one can move from one apartment house to another, one gated community to another, and one airline service provider to another (once a flight is completed), so one should be able to move from a legal jurisdiction to another. But one could not have certain crucial legal services – particularly those involving the criminal law – provided in the manner of pizza deliveries. The type of service being provided involves a long-term commitment to having one’s rights protected and innumerable activities conducted within the framework of such protection, something that requires ongoing mutual access to courts, police services, and so on.

Of course, libertarian anarchists contend that if the competition among governments does not occur within the same geographical area, one is being unjustly compelled to take one's legal 'business' elsewhere, a violation of basic rights. They also seem to suggest that under their proposed scenario of competing governments there is no sustained risk of accused or convicted criminals switching jurisdictions midway through legal proceedings! Presumably, it would not pay, in the long run, for courts in adjacent or even remote jurisdictions to go against the judgments of competing courts. By theoretical fiat, then, in the anarchist world of the future all mafias and PLOs would disappear. All criminals would either be law-abiding criminals, or else helpless to set up and patronize their own 'defense agencies.'

This analysis rests, I believe, on the (economic?) assumption of the universally agreed-to utility of common standards in market services. Indeed, in free markets, providers do often converge on the standards they deploy for their customers – so that after the initial conflict between, for example, different VCR services, the market eventually settled for one over the other. VHS won out over Beta, and now DVD is winning out over VCR.

Justice, however, is not a utilitarian objective but a rights-based objective, aiming at settling disputes in individual cases, not over the long run. Even if in time the various courts would see the utility of adhering to common standards, at any given time they may well choose not to do so (just as in a DVD world we continue to use VHS and even Beta). And this would be an obstacle to justice that is supposed to be swift and efficient *for individual citizens*.

Justice and property rights are not utilitarian objectives and not marketable ones. The functioning of enterprises *presuppose* property rights. In order to invest, trade, hire, fire, contract and do all those things enterprises are likely to do, those who embark upon an enterprise must have their right to private property and freedom of trade/contract *clearly (enough) defined* and *well (enough) protected* so as to carry on with their tasks. And the definition and protection of private property and related rights within a complex society requires objective law and its impartial enforcement. While the realm of politics may not be capable of yielding fully objective results, even in the judiciary of a free society, nor produce fully impartial enforcement of the law, it is explicitly committed to serving the individual good of all citizens *qua* rights-bearing citizens (the 'public good'), not various private interests whose special pleading tends to prevent such objectivity and impartiality.<sup>22</sup>

There is a threat of an infinite regress if law itself is understood as just one more form of enterprise. Your neighborhood has a barbershop, auto factory, farm, insurance agency, and brokerage firm; next on the block is your adjudicating firm. Whereas with the others there can be several on the same block, almost literally, with the adjudicating agency, especially *vis-à-vis crimes*, several different ones serving the community would pose problems, if we assume a context in which they are all independent and do not have to answer to a government with oversight power. Suppose one agency is hired by the barbershop, another by the factory and a third by the insurance agent.

And suppose some of these come into serious legal disagreements among themselves, involving basic rights violations, not mere contractual disputes. How is the adjudication to ensue? Will the plaintiff be able to secure the presence of the defendant in the same courtroom? Not if the defendant refuses to deal with the same adjudicating agency as the plaintiff.

More importantly, suppose there is a dispute between the adjudicating agency and some *other* adjudicating agency.

A Swiss-cheese conception of governments operating within the same territory – all possessing ‘ultimate’ authority to conclude disputed arbitrations – seems inherently unworkable (and has worked only sporadically through history – for example, in ancient Iceland). It is almost inevitable that if such ‘competition’ is attempted, it will, in some significant cases, generate irresolvable legal conflicts – not merely irresolvable in practical fact but in principle. For if two ‘competing’ legal authorities themselves dispute the outcome of a case, which one may trump the other? Who will adjudicate between the adjudicators? By theoretical stipulation they are not, after all, operating within yet another governmental framework, answerable to an uber-government or ‘true’ government that is authorized to resolve disputes between defense agencies by reference to a common legal framework.

The fact that such ‘irreconcilable differences’ could not be resolved even with the force of law – given the fact that both parties enjoy the same full right to exercise the force of law, as deployed according to their own separate standards – thus defeats the very purpose of law, namely, a means of just, individual-rights-respecting, systematic resolution of conflicts between parties who cannot or will not work out the conflict on their own. That is why we value the law and, however bitter and disappointed we may be, accede to legal outcomes even when a court does not rule in our favor. We sense, at least implicitly, what society must be like if courts did not have the power to definitively resolve passionately disputed cases in which both parties believe they are in the right.

Anarchists like Bruce Benson, author of *The Enterprise of Law*,<sup>23</sup> have answers to these questions, resorting mainly to interagency contractual agreements, as inspired by the model of international law.

In the international arena we have no binding court of last resort, yet often the World Court and similar bodies function quite successfully as adjudicators of disputes between parties with different citizenship and, indeed, between different countries. Why so? Because there are various motivations that impel the parties to come to a resolution, usually involving business disputes. Yet this does not always occur, and it is especially problematic where criminal law is concerned.

Different countries hold different standards of justice and reciprocity is often resisted. When Yugoslavia’s past-president Slobodan Milosevic was indicted by an international court, compliance was not initially forthcoming because Yugoslavia did not then recognize the authority of the court, at least not within its own jurisdiction. When the presence of ex-Chilean dictator



Augusto Pinochet was sought in the Spanish courts, he had to be captured in England where he went for medical treatment. Chile did not cooperate with the Spanish authorities. And when Bertrand Russell and Jean-Paul Sartre established the international court in which the United States of America was indicted and, if I recall correctly, convicted of war crimes in Vietnam, the US government refused to respond.<sup>24</sup> And these are only the more visible cases. Thousands of others where international cooperation in criminal adjudication is absent understandably go unnoticed. Those, I think, may be deemed failures of the enterprise of law or at least the model of law as a sort of competitive enterprise.

On the other hand, one can embrace the enterprise model with some modifications; the point is that systems of adjudication need to be broadly integrated to be functional. To the extent that a Benson-type model works, it is because it resembles a true government; to the extent that it does not, it is because it does not sufficiently resemble a true government. If we consider, say, the United States, Canada, Mexico, New Zealand, Australia, Japan and all other countries as fora of dispute-adjudication, the possibility of changing one's residence or citizenship affords one something akin to benefiting from competition. Even within countries with a substantial federalist political organization there is the opportunity for benefiting from competition. New York, New Jersey, Pennsylvania, and so on – states of the United States – all compete for 'customers' of their adjudication services. Certainly we see such competition functioning vis-à-vis taxation, which in this context could be viewed as court fees. They vary. And parties to potential disputes will shop around to find the most efficient process at the lowest cost.

In this scenario, however, the fora wherein adjudication can proceed are large habitations, with thousands or millions of potential disputants signed up within the same homogeneous system. They are usually committed fairly long term and may leave only if they have a clean record and no adjudication pending that involves them. Moreover, within the system, various layers of authority operate, so that the appeal process is integrated and there is in principle a court of last resort – an ultimate arbiter.

In this sense, an adjudication service resembles some other enterprises in which one signs up for the long haul. Insurance services are like this, as are apartment rentals, car leasing and even marriages. Midway through the duration of the long-term contract, the option to exit does not exist or exists only at great cost. And this is because the very idea underlying these kinds of relationships between customers and service providers or trading partners, is that reliable, ongoing and predictable arrangements are of benefit to all of the parties.

Even within the same jurisdiction, many kinds of competition could be accepted, as long as there were a governmental structure that could resolve disputes among the competing 'governments.' There would be one actual government and any number of sub- or demi-governments – security guard firms, arbitration courts and the like. But if the State of New York found that a

particular arbitration agency was chronically meting out injustice in violation of explicit arbitration contracts, the New York government could be justified in investigating the arbitration agency, ordering changes, and/or shutting down the arbitration agency. And the arbitration agency would not be free to say, 'Hey, butt out, New York State and/or federal government! You're just another defense agency on the block here; you play adjudication your way and we'll play it our way.' Rather, the private court would be obliged to submit to the judgment of the government.

Thus it seems that both the traditional conception of a homogeneous country and free and open competition could be secured, satisfying – one can always hope – the demands of both minarchists and 'anarchists' among libertarians. 'Anarchists' would have to concede the necessity of a robust ultimate arbiter in matters of legal enforcement; minarchists would have to concede that many forms of defense-service competition could coexist within a single regime if that regime (government) provides a means of that ultimate arbitration. It has always been my view that there is some misunderstanding about this matter among supporters of the free society. They need not be divided on it. So long as the commitment to respecting individual rights is unwavering, a resolution between the anarchists and minarchists, along the lines sketched above, is possible. This is so even though in some cases the parties carrying on the dispute seem almost to have a vested interest in not having it resolved amicably, of continuing to charge the other side with breaching fundamental principles of individual rights. That seems a sad mistake to me and distracts from the far more significant task of making the case for libertarianism in the face of innumerable *bona fide* statist challenges.

## Notes

- 1 Lysander Spooner, *No Treason: A Constitution of No Authority* (Boston, MA: L. Spooner, 1867).
- 2 For the most recent publication of Murray N. Rothbard's libertarian-anarchist essay, 'Society Without a State,' see Aeon Skoble and T. R. Machan, eds, *Political Philosophy, Essential Selections* (Upper Saddle River, NJ: Prentice-Hall, 1999), pp. 488–99. It also appears in J. R. Pennock and J. W. Chapman (eds), *Anarchism Nomos XIX* (New York: New York University Press, 1978), pp. 191–207, and in T. R. Machan, *The Libertarian Reader* (Totowa, NJ: Rowman and Littlefield, 1982), pp. 53–63. Originally published in *The Libertarian Forum*, January 1975, pp. 3–7.
- 3 Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), p. 67.
- 4 I indicated my stance on this issue in 'Ethics vs. Coercion: Morality or Just Values?' in Llewellyn H. Rockwell, Jr et al., eds, *Man, Economy and Liberty* (Auburn, AL: Ludwig von Mises Institute, 1988).
- 5 Rothbard discusses the issue in *The Ethics of Liberty* (Atlantic-Highlands, NJ: Humanities Press, 1982), pp. 162–3. For his definition, see p. 171, where he says,

The State may therefore be defined as that organization which possesses either or both (in actual fact, almost always both) of the following characteristics: (a) it acquires its revenue by physical coercion (taxation); and (b) it achieves a compulsory monopoly of force and of ultimate decision-making power over a given territorial area.

- 6 Arguably though, not everyone's consent may be needed. Suppose I hire a bodyguard who consents to become my defender against all aggressors. Some person then attacks me and my bodyguard defends me from this attack, a course of conduct that may become violent toward the aggressor. Now, does it matter that the aggressor did not consent to my bodyguard's defending me? No. The aggressor in effect gives consent by taking an action that has as its natural, rationally-to-be-expected result, my defending myself either personally or through an agent. So, *does it matter that a government that acts purely defensively isn't consented to by, say, criminals or foreign aggressors?* This would be a government that does not coercively collect taxes, so consent would only be relevant to its getting hired and being paid voluntarily by those whom it defends. Payment could be in the form of premiums, as with insurance; or per-service, as with some attorney or dentist fees; or bundled with prices for various goods and services, as with payments for newspapers that also provide magazines on Sundays.
- 7 Max Weber, *Economy and Society: An Outline of Interpretive Sociology* (Berkeley: University of California Press, 1978), p. 56.
- 8 See, for example, Murray N. Rothbard, *For a New Liberty*, pp. 49–50 (1973); John Hospers, 'What Libertarianism is,' in *Liberty for the 21st Century*, p. 14 (Tibor R. Machan and Douglas B. Rasmussen, eds, 1995); David Boaz, *Libertarianism*, p. 187 (1997); Robert Paul Wolff, *In Defense of Anarchism*, p. 1 (1970); Ludwig von Mises, *Liberalism in the Classical Tradition*, p. 35 (1985).
- 9 Tyler Cowen, 'Law as a Public Good,' 8 *Econ. & Phil.* 249, 250 (1992).
- 10 John Hasnas, 'Some Reflections on the Minimal State' (unpublished manuscript).
- 11 Stephen Holmes and Cass Sunstein, *The Cost of Rights: Why Liberty Depends on Taxes* (New York: W. W. Norton, 2000).
- 12 For a succinct account, see Aeon Skoble, 'The Anarchism Controversy,' in Machan and Rasmussen, eds, *Liberty for the 21st Century*, pp. 77–109.
- 13 This is the kind of monopoly that Robert Nozick envisions as the dominant legal authority. See Nozick, *Anarchy, State, and Utopia*, p. 109.
- 14 See, Tibor R. Machan, 'Dissolving the Problem of Public Goods: Financing Government Without Coercive Measures,' in Machan, ed., *The Libertarian Reader*. I have also advanced some points in support of this position in Tibor R. Machan, *Individuals and Their Rights* (La Salle, IL: Open Court Publishing Co., Inc., 1989), Chapter 7 ('Individualism and Political Authority').
- 15 Jack Sanders, 'The State of Statelessness,' in Jack Sanders and Jan Narveson, eds, *For and Against the State* (Lanham, MD: Rowman and Littlefield, 1996), p. 286.
- 16 See Machan, *Individuals and Their Rights*, Chapter 7.
- 17 For a discussion of Locke and anarchism, see Stuart D. Warner, 'Anarchical Snares: A Reading of Locke's Second Treatise,' *Reason Papers*, No 14 (Spring 1989), pp. 1–24.
- 18 David Kelley, 'The Necessity of Government,' *The Freeman* 24 (April 1974).
- 19 Max Weber's definition of 'the State' does not specify coercive or non-coercive monopoly as characteristic of states or governments. Even Hasnas claims of the state only that it 'monopolizes the basic policing, rule-making, and adjudicative functions in an identifiable area.' This is ambiguous: the crucial issue is *how* a government comes to monopolize these functions: coercively, or by the consent of those to whom they are provided. Only when he adds taxation to the definition of the state or government does the coercive nature of such an institution become evident. But that is begging the question, just as Rothbard did when he made taxation a defining element of government.
- 20 It is instructive to note that dealing with travel providers is often frustrating in nearly identical ways to dealing with government agencies. Once one is on board or has signed up, changing carriers is very cumbersome and, given one's plans, nearly impossible and financially prohibitive. Those providing the service seem to be well aware of this, given how they tend to conduct themselves toward their customers. Not in all cases, of course. One can disembark from a London cab and find another easily enough, although it may be tougher when one is going to some remote region of the city (let alone some village in New Mexico).

- 21 There are some cases of quasi-Swiss-cheese type countries that might be pointed to as quite peaceful and operational, such as Baarle-Nassau/Baarle-Hertog. History has left us here with a territory composed of two municipal jurisdictions. The shape of this realm is unique: it belongs in part to Holland and in part to Belgium. The people are reported to be 'quite comfortable with the situation, even though it raises so many complicated and difficult problems that even the most brilliant jurists are puzzled.' For more on this see <http://wings.buffalo.edu/philosophy/faculty/smith/baarle.htm>. Arguably this shows their viability, although not superior efficiency, for purposes of administering a system of just criminal law. But in practice the residents can choose which taxes they must pay only by moving (in some cases, they will move the front door of their home or shop in order to take advantage of the more favorable tax code).
- 22 For why the goal of objectivity and impartiality is thought to be impossible to achieve, see James M. Buchanan and Gordon Tullock, *The Calculus of Consent, Logical Foundations of Constitutional Democracy* (Ann Arbor: University of Michigan Press, 1962), the work that advanced the theory of public choice, according to which public servants are just as utility-maximizing as market agents.

I dispute that this is a necessary feature of public service in any type of political order. It is, of course, *typical* behavior of public servants in what economists call a 'rent seeking' society welfare state. However, in a free, libertarian government such public or civil servants may well carry out their oath of office to defend the constitution because the constitution does not sanction special interest legislation and regulation. For more on this, see Tibor R. Machan, *Private Rights and Public Illusions* (New Brunswick, NJ: Transaction Books, 1995).
- 23 Bruce Benson, *The Enterprise of Law: Justice without the State* (San Francisco, CA: Pacific Research Institute for Public Policy, 1990).
- 24 More recently the administration of US President George W. Bush refused to accede to the authority of a World Criminal Court.

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## Chapter 10

# Robert Nozick and the Libertarian Alternative

Like its more extreme brother, socialism, welfare statism has been tried and been found wanting.

Throughout much of the twentieth century an often-expressed and prominent political ideal haunting America and the rest of the West was hardly distinguishable from that of the former Soviet Russia or Communist China. The welfare state too, after all, aims at establishing, by means of government action, a conception of social welfare. It is distinguished from state socialism and communism only by its *means* for achieving its purpose and by the degree to which the alleged ideal is enforced. Thinkers like Rawls, Sen, Nussbaum, Dworkin, Sandel and so on all seem to favor a substantially egalitarian welfare regime because, in their view, things are unfair otherwise. They aren't concerned for the poor, *per se*, but about lack of equality, income gaps and the like. Certain concessions are made to the usefulness of retaining some human liberty, political democracy, and due process of law.<sup>1</sup>

But the quasi-egalitarian welfare state can no longer be advanced with complete self-confidence as a just system. Those who dream of building it have had to confront a troublesome reality: none of the citizens and groups who were to be satisfied with its policies is in fact satisfied. The welfare state is now seen to be but a somewhat more civilized version of Thomas Hobbes's state of nature – a war of all against all. In the wake of this development, the intellectual climate has shifted. One major development was the publication, in the early 1970s, of Robert Nozick's book, *Anarchy, State, and Utopia*,<sup>2</sup> which defends the social order of *laissez-faire* capitalism.

Nozick argues that justice, properly conceived, is best secured within the framework of the minimal state. He begins by assuming that all individuals have certain natural rights as identified in the tradition of John Locke's natural rights theory. Nozick does not defend this claim but argues that a social order developed with scrupulous respect for such rights best maintains justice. His argument takes the form of a transcendental deduction, postulating those principles which make sense of our moral intuitions respecting how human beings should live among each other. Having demonstrated that respecting individual rights will satisfy these moral intuitions, Nozick has shown, at least, that the principles are sufficient for a just system.

Nozick's recognition of the lack of moral foundations for his political position leaves it open to skepticism from critics like Samuel Scheffler,

Thomas Scanlon, and Thomas Nagel, who find fault with libertarianism on the grounds that Nozick's argument lacks moral foundations. My aim in this chapter is to reply to criticism of the Nozickian system. I will not, however, be defending Nozick's *argument* for that system.

Although the significance of his work has generated considerable interest in libertarianism, those inspired by Nozick to consider it have not gone beyond his own work, and appear to think that the shortcomings of that work represent shortcomings of libertarianism *per se*. But the theory of justice underlying the libertarian viewpoint may indeed have good support already.<sup>3</sup> At any rate, all interested parties should look beyond Nozick in their efforts to understand and perhaps develop a just political system. American citizens in general, and in particular those involved in politics and law, would also benefit from a reexamination of what is, after all, a powerful tradition in American politics.

The case for the free society offered by Robert Nozick relies on the possibility of identifying at least some very basic moral and political principles. Nozick is not a skeptic. Nor did John Locke consider his defense of the minimal state – a constitutionally limited republican form of government – as essentially pragmatic or utilitarian. He believed, with Nozick, that the form of society he advocated is proper for human beings; that is, it accords with human nature and that people *should* establish a society with a minimal state as the means of legal order, not that human beings would automatically do so. The idea of natural rights is, then, a normative one, meant to draw a distinction between rights that *happen* to be upheld by legal powers (sometimes referred to as positive rights) and rights that legal powers *ought* to uphold (natural rights).

In Nozick's view, the legal system of a free society would work to protect individuals against aggression from both domestic and foreign sources. But to determine what constitutes the sphere violations of which would represent aggression,<sup>4</sup> the system of natural rights is incorporated within a constitution administered with the consent of the governed (in whatever manner this can be achieved). At the heart of this system of natural rights is the right to property: the natural right of each individual to seek and obtain, as well as trade and bequeath, valued items found in nature and the market. The evolving legal structure based on this system would be a reflection of the detailed implications of these natural rights for the concrete affairs of men and women in the community.

It is evident from the above sketch that the society Nozick defends is similar to, though hardly identical with, the system practiced in the United States; his position stresses precisely those aspects of this system which are gradually being abandoned both in law and in the minds of those who forge America's institutions. Thus, it is no surprise that following the publication of Nozick's book many essays appeared which were highly critical of his position. Though I will not be considering many well-known Marxist critics,<sup>5</sup> some of these offering recent criticism no doubt echo ideas Marx and other prominent figures have popularized.<sup>6</sup> Many other critics make use of another

and more recent anti-libertarian approach, that of John Rawls in his *A Theory of Justice*.<sup>7</sup>

Rawls argued that justice must be understood by reference to a hypothetical contract entered into 'behind the veil of ignorance' by individuals who know nothing of their individual attributes, capacities, prospects, and aspirations – but who nonetheless wish to devise a system of principles that accords with moral intuitions that (somehow) persist in this state of ignorance. Such a contract would omit considerations of what individuals want and have reason to expect and would focus only on some workable scheme consistent with conventional and widely held notions of right and wrong. It is not entirely clear whether the two principles that Rawls derives from this scheme – the principle of equal liberty and the difference principle – would have to be enforced by government, although in view of the paramount need for redistribution of benefits (and disadvantages) in his proposed system, it would be virtually impossible to exclude extensive governmental coercion from the system.<sup>8</sup>

Those who criticize Nozick from Rawlsian premises tend to stress precisely this alleged need for government to equalize benefits and hardships. But a free society limits the role of government to keeping the peace, and it encourages individual initiative without coercively interfering with personal and voluntary collective action; such a society thus neglects the second Rawlsian principle which allows social or economic inequality only if it benefits the least-advantaged social class. Rawls ignores the role of personal initiative in achieving desirable ends, treating such achievement as the result of nothing more than accidentally distributed natural assets (upbringing, fortune, genetic endowment or the like), and therefore as morally arbitrary. Rawlsians thus believe that the free society perpetrates an injustice by permitting individuals who do not deserve it to achieve disproportionate levels of well-being.

Another criticism issues from both neo-Marxists and neo-conservatives, who often chide the free society for failing to give official encouragement to the moral or spiritual dimensions of life.<sup>9</sup> On the libertarian view, the government of a free society would be engaging in unauthorized conduct if it tried to promote virtue in any way beyond what is entailed by acting to preserve and protect the individual rights of all. But such critics charge that peacekeeping and the resulting encouragement of private initiative is insufficient to maintain a decent social order.

It is true enough that neither John Locke nor Robert Nozick has developed a sufficiently robust moral theory to answer some of these challenges. Locke merely mentioned that all of us must abide by the law of nature, independently of positive or civil law. He not only did not develop fully enough an ethical position but in places explicitly endorsed a hedonistic view of values.<sup>10</sup> Nozick, for his part, arrives at the basic political principles of individual rights in a round-about manner rather than on the basis of clear-cut and articulated moral principles. He assumes these principles of rights and squares them with our moral intuitions, from which he concludes that his assumptions are sound. But



moral intuitions can be used to support conflicting basic political principles – for example, those of both Nozick and Rawls.<sup>11</sup> So while certain intuitions may be ultimately sound, as philosophical investigators we cannot simply leave it at that but must learn what if any objective bases exist for them.

In any case, Locke and Nozick are not the only supporters of the free society. In our times, numerous works offer multifarious economic, sociological, historical, and philosophical support for the libertarian alternative. Not all scholars who have contributed to the discussion are equally prominent, of course. The critics are not simply attacking Nozick or Locke but the system of libertarianism itself. If they are to do a creditable job, they must confront these other efforts. Apparently taking Thomas Kuhn's thesis about the hegemony of received paradigms<sup>12</sup> as if it were prescriptive, the critics often argue only with those who have achieved prominence.

The central complaint about Nozick's position is that our moral intuitions warrant more coercive statism than his analysis permits.<sup>13</sup> This argument is well aimed at Nozick, who seeks to draw support for his rights theory from our intuitions. Consider, for example, his view that,

Taxation of earnings from labor is on a par with forced labor. Some persons find this claim obviously true: taking the earnings of  $n$  hours labor is like taking  $n$  hours for another's purpose. Others find the claim absurd. But even these, if they object to forced labor, would oppose forcing unemployed hippies to work for the benefit of the needy.<sup>14</sup>

To this line of argumentation, which relies on what people tend to believe about various forms of conduct regardless of whether they have good grounds for their beliefs, Thomas Scanlon replies that

even if the notions of forcing and voluntariness sometimes incorporate notions of rights, as Nozick's analysis of voluntariness suggests, they certainly do not always do so. Where they do not, it seems unlikely that we can settle the question of the moral acceptability of a form of treatment by appeal to intuitions about forcing and voluntariness. If these notions do incorporate moral principles, then such appeals to intuition are going to be suspect when these principles are themselves in dispute ...<sup>15</sup>

Another attack stresses the failure of Nozick's position as contrasted with the one he attacks. Nozick believes that any system of society that proposes to strive for collective end-states – for example, a particular distribution of wealth, or a specific quality of life – will encounter inherent contradictions in its policies, and will also violate even the degree of freedom that most egalitarians are willing to consider indispensable. This last is true because, given even that minimal level of freedom, citizens can begin to upset any achieved end-state with the amount of freedom they are allowed, such that to reestablish the desired end-state would require continually renewed, extensive force.

Thomas Nagel suggests that this scenario does not really present a problem:

It only seems a problem to Nozick, and a further violation of liberty, because he erroneously interprets the notion of a patterned principle as specifying a distribution of absolute entitlements (like those he believes in) to the wealth or property distributed. But absolute entitlement to property is not what would be allocated to people under a partially egalitarian distribution. Possession would confer the kind of qualified entitlement that exists in a system under which taxes and other conditions are arranged to preserve certain features of the distribution, while permitting choice, use, and exchange of property compatible with it. What someone holds under such a system will not be *his property* in the unqualified sense of Nozick's system of entitlement.<sup>16</sup>

Yet another criticism of Nozick – this one directed against his minimal statism – argues that the delegation of authority as directed by a system of rights would not exhibit the smoothness Nozick assumes. Robert Paul Wolff criticizes the simple rights transfer approach:

By analogy, in a simple rights-transfer, as when I hire a lawyer to close a real estate sale for me, there is a minute slippage or blockage in the rights transfer, due to the fact that my agent is also an independent human being. Because he is a person as well as an agent, there is a small but nonzero probability that he will exceed his authority, or get his instructions confused, or interpret a situation in a manner that I would not approve. There is also a nonzero probability that I will be unaware of the breakdown or agency, or will be unable to rectify it. Because Nozick focuses his attention on simple rights-transfers, where the probability of slippage falls below the minimal threshold of moral awareness, he fails to see that as the protective association grows, as the rights collected are transferred and retransferred, as my relationship to my so-called agent grows ever more attenuated, I will become less and less able to see my own will, my own moral agency, in the actions of the association's owners and employees.<sup>17</sup>

Finally, another line of criticism concentrates upon Nozick's methodology in *Anarchy, State, and Utopia*, asserting that he fails to pay sufficient heed to basic philosophical spadework. As Samuel Scheffler put it:

Contemporary philosophers who choose to work within the natural rights tradition need to explicate their use of natural rights terminology. Given the metaphysical associations of the tradition, such philosophers must explain what they *mean* by assigning rights to people. They must, further, say something about the source of these rights, and they must deal with a variety of epistemic questions. How do we know what rights people have? What sorts of evidence justify us in believing that people do have certain rights but do not have certain others?<sup>18</sup>

Others find Nozick's method of 'argument from best explanation' unsuited to his subject matter.<sup>19</sup> Yet some consider him nothing more than an apologist

for the kind of society that favors a given segment of the population (the rich) at the expense of others.<sup>20</sup>

Sundry tangential points in Nozick's work have also come under criticism, and I shall presently address one such.<sup>21</sup> First, however, let us consider each of the criticisms just recounted. In view of Nozick's silence on these critical points it seems appropriate to address the critics for another reason. After all, there is more than argumentative gamesmanship at stake here. Quite apart from the goings-on in academic circles, the political systems of the West – insofar as they approximate the system Nozick advocates – are under severe challenge, not only from totalitarians but also from those, like Solzhenitsyn,<sup>22</sup> who claim that Western liberalism lacks moral backbone, and from radical Islamic theologians and terrorists who hold that the West, especially the United States of America, is in cahoots with the devil because it fails to control against materialism and other vices.

I have contributed elsewhere to the philosophical case for the free society<sup>23</sup> in part by arguing<sup>24</sup> that the failure of John Locke has now been remedied in the work of David L. Norton,<sup>25</sup> among others. Norton's individualist ethical system supplies the Lockean idea of natural law (the moral system that exists independently of any legal code) with solid content. Of course this has some bearing on Nozick's argument, since he, too, relies on Locke's natural rights.

For Scanlon, it is not enough that we abhor various forms of coercion. But with Norton's full-blown ethical individualism at hand, distaste for coercion is not the only clue to its impropriety. The very underpinnings of ethical conduct, the freedom of choice to act, is undermined by it. (I have developed this point in various portions of this work, Chapters 2 and 7, in particular.) It is worth, however, spending some time on a particular aspect of this line of argument for libertarianism.

Many who champion human liberty make it clear enough that although ethics matters to every person's life, it isn't necessary to agree on it to defend the free society. They explain that without freedom of choice, when one behaves properly it has no moral significance. Only good conduct that is freely chosen is ethically or morally significant. So only a free society accords with our moral nature – anything else undermines it. Without the sort of liberty defended in free societies, the ethical life, however one might spell it out, must suffer.

There is, however, a feature of certain moral systems that will be significant in whether one considers violating individual liberty very tempting. Plainly put, if an ethical system amounts mainly to working for others – such as utilitarianism or altruism – it is more likely that for people to follow it they need the fear of repercussions, of sanctions. This means that encouraging people to be ethical will require coercion. Those who support vice squads hold this view.

Others, however, believe that when you act immorally, unethically, in the last analysis it comes back to haunt you. This might be called the boomerang effect endorsed in the tradition of Socratic–Aristotelian ethics: wrongdoing

is self-destructive, whether immediately or in time – it will cost you at least what you might have gained by being good.

Other ethical positions, however, don't have this element about them. Doing the wrong thing is often seen as precisely self-promoting; others are likely to lose out. And so there is this temptation to break with the notion that 'ought' implies 'can,' meaning if you ought to do something, you must be free. Instead, the idea is that people must be forced to do the right thing; otherwise, they have no reason for doing it.

Of course, whether Socratic–Aristotelian ethics is right in holding that all wrongful conduct ultimately punishes the perpetrator, that virtue brings reward and vice causes loss, is widely debated. In this ethical tradition, called 'eudemonism,' extended famously by Ayn Rand, the idea is quite reasonable. Ethics concerns a set of principles by which one's life can flourish and thrive. So, if one does not act ethically, if one fails to be guided by moral virtues, one will pay dearly – one will be less happy, less fulfilled, less excellent as the human individual one is. So for those within this tradition of moral philosophy there is little risk in championing a fully free society. The bad guys will get their due even if no one punishes them for being bad, here or in an afterlife.

This is not so with utilitarianism, altruism, Kantianism and many religious moralities. The good guys are supposed to be good, just because, and won't be of their own accord, unless they fear the results. For Kantians it is because doing good is just how a rational individual must act – do not by any stretch of the imagination look for any rewards for it. Kant despised the idea that morality is supposed to have pay-offs. For utilitarians, the sheer value of maximum satisfaction, among those capable of being satisfied, is supposed to suffice to motivate good conduct on everyone's part, even if the individual were to be left dissatisfied. And, of course, for the altruist doing the right thing is just something innately good and it would be indecent to expect any personal benefits from it. As the philosopher W. G. Maclagan, wrote, "Altruism" [is] assuming a duty to relieve the distress and promote the happiness of our fellows .... Altruism is to ... maintain quite simply that a man may and should discount altogether his own pleasure or happiness as such when he is deciding what course of action to pursue.'

Perhaps it is persuasive enough to stress that no moral credit accrues, nor any moral blame, to someone who is being coerced. As a lover of individual liberty this is probably all that one can stress, without endorsing a specific moral system (which champions of the free society tend not to wish to do lest they chase off a lot of fellow travelers). But a good dosage of eudemonism will certainly help to convince folks that it is safe enough to have everyone be free, given that when they embark on any sort of personal or social malpractice, they will lose out even if no one lays in on them for it.

We can now return to discussing further the naturalistic conception of ethics and of rights. Worries about the reliability of moral intuitions need no longer trouble us especially in light of a systematic theory showing which moral principles are prior, which subsidiary, and so forth. There is such a theory,

and indeed, there has been a good deal written about it for some decades. But academic philosophers have not examined it thoroughly enough to consider it worthy of confrontation.<sup>26</sup>

According to eudemonist individualist ethics, the flourishing of the individual human being as such is the highest goal at which each person ought to aim, and certain basic principles of conduct – notably the ethical virtues suggested by Aristotle and elaborated by others more recently – will serve as broad guidelines in this effort. It remains, of course, for the individual to make sure how they guide him or her in his or her particular circumstances. Here is where so many are tempted by relativism and subjectivism but needlessly. The objective application of universal basic principles in any practical science, including ethics, varies a great deal, while the principles remain the same. The idea is that when applied to the issue of the constitution of a human community as such – not a club or association or corporation or university but a human community – these basic moral principles imply the primacy of individual rights to liberty. That is because without such liberty, the moral life is severely impeded.

The Lockean natural rights are just those basic socio-political principles which, when established as a feature of a constitution, enable all members of a society to aspire to individual excellence without the fundamental threat of irresolvable conflict.

Of course, to make out the full case for this position does indeed require what Scheffler claims any natural rights theory requires, namely extensive philosophical analysis. Nozick may have thought the work already being done when he published was not well enough developed to make mention of them – or perhaps he had not yet become familiar enough with them to invoke them with confidence.<sup>27</sup> Nevertheless, Scanlon's objections are answerable.

Philosophers have argued that we can identify certain first principles that enable us to avoid resting an argument on an infinite regress.<sup>28</sup> It has also been shown that reductionism about the nature of existence is unjustified, so that room exists for such domains as the mental, the moral, and the political.<sup>29</sup> The compatibility of essentialism with individualism has also been demonstrated, so as to secure both objectivity and diversity in the normative theory that supports the free society.<sup>30</sup> The possibility of knowing moral truth has also been discussed in direct relationship to libertarian political theory. So Scheffler's criticism against Nozick is unjustified when wielded against natural rights libertarians. Nozick himself did not advance the kind of theory in which the philosophical underpinnings of his political assumptions required extensive discussion but other libertarians certainly did.

Nagel thinks Nozick should not worry about wholesale coercion. Since no one 'really' owns what he or she possesses, interfering with use, exchange, and the like cannot be regarded as coercive.<sup>31</sup> Replying to Nagel's attack on Nozick, however, requires a less extensive theoretical project than a close look at our contemporary world where the absence of protection of private property rights is a notorious cause of poverty and underdevelopment.

The issue of whether there could be anything like *absolute* entitlement is a red herring. The operative term here is entitlement. Being entitled to something *must* involve certain specifications as to what should be respected and will be protected in doing with that to which one is entitled, and what others may or may not do with that in the light of this. Nozick only stresses that in a system where various end-states *must* be maintained (that is, as a mandated feature of a social system), no such specification can be made, so that arbitrariness enters at all levels.

A condo owner might be entitled to the full use of her backyard as a vegetable garden, but not as a tennis court. So she has no 'absolute' or limitless entitlement to the backyard. But if she is entitled to use it as a vegetable garden and shortly after she plants her garden the state determines that its various end-states might be more efficiently pursued by prohibiting the garden, the entitlement is empty. Exactly this is what is going on with the current abuse of eminent domain laws, for example, when a firm like Costco in the USA is able to induce city officials to condemn private property so as to lease it to the large firm that offers more taxes to the city!

That Nagel fails to see the force of Nozick's criticism is his fault alone, for no one needs enlist a notion of absolute entitlement to show that coercive enforcement of various end-states is incompatible with *any* kind of entitlement, even the right to free speech. In the history of constitutional law the alleged entitlement to say and publish whatever one wishes (within the reasonable or at least clear-cut limits of certain laws against libel, obscenity, or incitement to riot) is really nonexistent. Businesses may not speak or publish by way of the electromagnetic spectrum if the government believes their doing so will upset some prescribed pattern or end-state (for example, by increasing smoking; hence ads promoting smoking are banned).<sup>32</sup> That is to say, even the entitlement conferred by the First Amendment is often treated as merely a *privilege*, revocable in exactly the fashion predicted by Nozick as characteristic of the welfare state and defended by Nagel and co.

Wolff's criticism of the simple rights-transfer approach seems on target if Nozick's approach is taken literally. But need one suppose that he conceives of actual cases of rights-transfer in the literal geometrical fashion his language suggests? All the physical sciences make allowances for errors in measurement, despite the fact that their calculations begin with idealized cases. So even if we left Nozick's approach intact, the elaborate rights-transfers in real life can withstand the tendency toward error, given institutions providing appropriate review and conflict resolution, for example, a court system.

But even if Wolff's criticism stands against Nozick, does it stand against the free society *per se*? Not really, especially in light of Wolff's demonstration that we can make ourselves aware of the problem of rights-transfer, and take it into consideration as we exercise our moral judgments and undertake risks. If there is a sound argument for undertaking these risks, then despite the chance of error, one might wish to undertake them. Indeed, it is because of

the great probability of threats and acts in violation of a person's rights in the state of nature that one authorizes specialists to act on one's behalf, precisely for the purpose of reducing that probability. Nozick admittedly fails to demonstrate that one *should* take this relatively lower risk. He merely argues that, motivated by fear, people *would* take it. But other defenders of the free society show that the establishment of genuinely limited, non-coercive but purely defensive (and retaliatory) government with the function of protecting and preserving rights is objectively valuable, despite obvious risks.<sup>33</sup> Wolff's anarchistic objections, then, aren't enough to show that Nozick's system is unjustified even though they do point to certain weaknesses in Nozick's own argument for that system.<sup>34</sup>

Let me very briefly outline an argument in support of the objective value of a government which has as its functions the protection and preservation of individual rights. Even libertarians, those labeling themselves 'anarchists,' reject the *terms* of it but not its substance; since, they fully support defense agencies, justice agencies and the like, all of which are based on laws that aim to protect individual rights.<sup>35</sup>

Human beings are moral agents. They can flourish only when they make provisions for exercising moral choice. To do so, they must protect themselves by using science and technology to exercise control over inanimate nature and morally dumb nature (that is, creatures other than human beings). But in dealing with other human beings, who are capable by their own choice of either enhancing or obstructing one's efforts to live successfully, everyone must resort to different approaches from what they do to control non-human nature.

To treat others as if they were not moral agents is to fly in the face of reality.<sup>36</sup> To ignore the fact that they nevertheless can be obstacles in one's own life is to do likewise. The appropriate approach institutes a system for dealing with those who choose to engage in such obstruction. (By 'appropriate' I mean 'warranted by reference to the nature of human existence.') It should be kept in mind here that reference to human nature is meant to be taken quite literally, which implies that it is possible to know what every human being – other than crucially incapacitated ones for whom special provisions are made in the law – essentially is.

This is a crucial point in light of the widespread nominalism and radical (Rortyite) pragmatism that permeates contemporary intellectual life, whereby designating something as, for example, 'a human being,' is regarded as merely a convenient, expedient, or arbitrary decision with no possibility of objective support.<sup>37</sup> In other words, dealing with other human beings requires that we act with justice, and dealing with their obstruction of one's humanity – violations of individual rights – requires that we abide by due process. Thus, while a rock may be crushed if it blocks one's way, or a fly may be squashed if it is a nuisance, a person very likely to be guilty of theft, even of rape or murder, may not be killed, or indeed punished at all, absent a conviction by a court of competent jurisdiction.<sup>38</sup>

Government is an instrument for the administration of justice. As such, it is objectively valuable to each human being who lives amongst other human beings and for whom the administration of justice can become relevant.

Nozick's approach is very different from the one taken above. The former approach to political philosophy is Aristotelian in that it takes account of the proper ends of human life and evaluates whether proposed institutions enhance the achievement of such proper ends. Nozick seems to have wanted to follow more modern lines of argumentation, and he did succeed in showing that by methods very similar to those of Rawls, he could develop a political theory with very different consequences. Nozick uses the method of a detective whose aim is to explain the past. But the function of political theory is to guide our actions in the public affairs of the future.<sup>39</sup>

Some, following the Canadian Marxist C. B. Macpherson, try to show that Nozick is simply an apologist for bourgeois interests.<sup>40</sup> The charge is misconceived, swallowing as it does whole the notion that thinkers of a certain economic background are constrained to think along certain lines. Such a bourgeois theorist as Nozick supposedly cannot help but argue for capitalism – which, if true, makes it hard to understand why there are so many bourgeois socialists about.

The one interesting feature of this attack is that certain ways of understanding the free society tend to encourage it. When some economists with a free market orientation maintain that everyone acts with the sole motive of maximizing his or her private satisfaction (or of maximizing his or her utilities), the idea can turn upon the economists themselves, who can then be charged with merely wishing to secure their own satisfaction, even as they engage in economic analysis. As opposed to seeking truth – generally regarded as a possible and proper goal of scholarship – the economist insists we are all slaves of our elemental desire to be satisfied and fulfilled by means of acquiring material things, or whatever it happens to be that makes us feel pleased. Truth itself is merely incidental to this; some may be fulfilled by it, but others may be fulfilled by untruth. As the late Aaron Director of the University of Chicago's economics school once said, 'What's important is utility, not truth.' And for economists, 'utility' amounts to desire-satisfaction, regardless of what the desire may be. To assess or evaluate a desire is presumably pointless; as Stigler and Becker stipulate in a very famous essay: one cannot question desires.<sup>41</sup>

Because Nozick invokes, at least in part, the economic model of human action in his analysis of the development of a just social order, this kind of self-referential point can be legitimately scored against him.<sup>42</sup> But in the end, the debit has little to do with the substance of Nozick's theory. One must realize, as noted already, that Rawls starts by assuming a modicum of self-interest on the part of those who enter into a contract behind a veil of ignorance. Marx, too, assumed that, as directed by their economic conditions, members of different social classes would seek their own best advantage. Those who wish to argue with this general method of invoking the idea of



self-serving motivation in analyses of social and political affairs, could do far better by taking on such philosophers as Thomas Hobbes, Adam Smith, and Karl Marx, than by zeroing in on those who make only a partial use of the idea.

A similar issue emerges in a comment by Thomas C. Grey:

Radical libertarianism depends heavily on the rejection of the concept of human needs as distinguished from wants and preferences. See, for example, D. Friedman, *The Machinery of Freedom* 65 (1973). ('The word "need" should be eliminated from the vocabulary of political discourse,' *ibid.*) The notion that needs are simply wants which the speaker approves of and the related notion that wants are insatiable and infinitely variable together entail the rejection of any conception of a finite and discernible human nature as the basis for ethical argument. Yet if this conception is rejected, what is the non-utilitarian ethical basis for the rights which libertarians assert? Are not the protection of life, liberty and property against aggression important because of some essential human need for security against such intrusions?<sup>43</sup>

This is a formidable challenge but it ill applies to Nozick, or even to Friedman. After all, there is a difference between making talk of needs a part of political discourse and invoking some idea of needs in the preliminary analysis from which one might arrive at various political conclusions. In fairness to Grey, there certainly are some libertarian-oriented thinkers who would excise the concept of need from all discourse and substitute the concept of preference throughout.<sup>44</sup> Be that as it may, it is uncertain that the substitute Grey offers secures an ethical base for political discourse. Grey approvingly quotes Oliver Wendell Holmes:

Sir Henry Maine has made it fashionable to connect the archaic notion of property with prescription. But the connection is further back than the first recorded history. It is in the nature of man's mind. A thing which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it. The law can ask no better Justification than the deepest instincts of man.<sup>45</sup>

But does this view accomplish what Grey wants? A normative or ethical justification of property rights must involve some well established theory as to what human beings *should* do. But Holmes is talking about what human beings *will or must* do, by force of instinct or habit, not by force of choice and moral conviction.

Apart from the inadequacy of Grey's alternative, does the libertarian alternative require reference to needs as Grey suggests? Not if a theory of ethical conduct and a theory of rights can be developed in support of the system. As indicated above, a theory of ethical conduct does exist that gives

support to the natural rights theory that underlies the libertarian social/political system.

Given an understanding of the nature of man, one can show that the flourishing of human beings requires that individuals take certain kinds of actions on their own initiative to exercise their distinctive capacities, that they do so *by choice*. Given these capacities, we can learn what enables an individual human being to flourish, what it would be for any person to be a morally good human being – namely, the sustained exercise of these distinctive capacities, most fundamentally the capacity to reason. And since to exercise these distinctive capacities in a social setting requires that others abstain from acting aggressively toward one, it is naturally right that a society be governed by those principles that rule out such aggression.

Needs do come to play an important role in this theory. Because each person's life will be enhanced by taking certain actions, the requirements for those actions are *needed* by the actor. In this sense there will be requirements persons must satisfy both privately and publicly. Privately, for example, individuals will need to take the actions that enable them to flourish. Obstacles to this effort can come from three sources: their own unwillingness or inability, the limitations of the natural environment, and the limitations imposed on them by others.

Part of the natural environment to be taken into account is the moral autonomy of others. Thus personal ambitions must be satisfied without abridgement of the like peaceful ambitious conduct of others. The limitations others can impose on a person are the only ones that may be overcome by way of concerted forcible social action, and it is this group of limitations that the libertarian social/political system seeks to specify by reference to the theory of natural rights.

To demand of others that they eliminate the obstacles posed by nature – such as attacks by a virus or tornado – would be unjust. It would make them slaves to one's own purposes, compelling them to neglect theirs in the process. It is impossible for others to eliminate the obstacle of personal choice, of the lack of will to flourish. One cannot substitute another person's moral character for one's own; moral autonomy cannot be transferred like a property deed. Nor should anyone, given what his own human flourishing requires, want to demand such serfdom from others. To demand of others that they abstain from coercively limiting one's actions in one's own behalf is to demand that they abide by the conditions of mutually beneficial opportunities for self-advancement which they themselves also require as autonomous agents.

So Grey is unwarranted in claiming that the libertarian system neglects a theory of human needs that can inform our understanding of political life. The libertarian system can rest on a theory of ethics appropriate to human nature<sup>46</sup> and a theory of rights based on such ethics. This approach is non-utilitarian, just as Grey realizes it must be to avoid arbitrary state action. Specifically, the greatest happiness or good of the greatest number of human beings is not the

goal of political organization within this theory. Nevertheless, the libertarian natural rights argument does note the beneficial consequences promoted by the libertarian system. This theory of the human good notes that by acting on certain principles it is more likely for human beings to succeed in their lives. In the political domain, these principles are the natural rights which require protection and preservation by a government confined by the dictates of this specific purpose.

Governments should not seek to achieve certain end-states such as equality, productivity, or the flourishing of science or the arts. But they should maintain certain conditions which will enable citizens, if they choose, to pursue various goals properly suited to them as human beings and as the individuals they are.

I should mention at least some additional points that are pertinent to thinking about the free society. One such point is related to the work of Professor Ronald Dworkin,<sup>47</sup> which is said by its author to be in the liberal tradition of legal and political thought, and yet aims to strike a blow at the central ideal of classical liberalism. Although he sounds as if he were advocating Lockean individual natural rights, Dworkin advocates the priority of procedural rights.<sup>48</sup> But he accepts the state as given, in no need of legitimization or justification, and consigns individual rights to the minor function of guarding against too much or arbitrary interference with citizens that has the purpose of achieving collective goals. Dworkin ridicules the libertarian conception of the right to liberty by citing the widely accepted powers of contemporary governments to curtail human liberty. He simply ignores the problem this raises with respect to slavery, a practice also once widely accepted, yet one we would hardly think could be sanctioned from Dworkin's position.

Dworkin's book of essays on rights theory, published in the late 1970s, is primarily concerned with technical legal philosophy. He does consider broader political issues, but simply evades all the difficult problems with and obvious objections to his position. What is interesting about him is that he has managed to publish a work on individual rights whose practical implications (for example, in matters of constitutional law) are almost diametrically opposed to those ordinarily associated with the tradition of individual human rights. He has also advanced a more comprehensive case for his egalitarian position in his book *Sovereign Virtue*.<sup>49</sup> Here he deploys an approach remarkably similar to that of Amartya Sen and Martha Nussbaum, except that instead of concluding in favor of libertarianism, he concludes in favor of a robust welfare state. The source of the difference is straightforward: Dworkin, as Sen and Nussbaum, is not much concerned with the social preconditions of morally virtuous conduct, namely, freedom from others' coercion.

In Chapter 20 I will address an argument by James P. Sterba, concerning welfare rights, that was recast against Nozick by Adrian Bardon, recently.<sup>50</sup> I wish to discuss it briefly here because Bardon brings up an issue that's central concerning the nature of basic rights, rights that would become the substance of a constitutional government. He argues that he has successfully 'cast doubt

on that approach to rights' that holds that 'there are negative rights that cannot be outweighed.'<sup>51</sup> Bardon's way of saying this already shows how wide of the mark he is concerning the nature of rights. Rights aren't like other good things – ice skating versus, say, volley ball, dinner at home versus at a restaurant, a vacation in Hawaii versus one in Italy – to be weighed and measured and compared. It's a category mistake to think they are.

Consider a woman's right to be free of rape. Is this a right that might even conceivably be outweighed? No. It is a principle, a firm limit, which identifies the fact that women are free to do as they please with their own body (whether they deserve this or not) – they are sovereign authorities concerning how to live their sex lives, to whom they will give their consent to engage in sex, and so on. In contrast, Bardon's conception of rights raises the possibility that someone might weigh the woman's right to be free to govern her own sex life against, say, a desperate male's right to gain sexual satisfaction by using her against her will.

Of course, Bardon is concerned with property rights but he forgets that these, too, are rights to action, not rights to objects. As Ayn Rand makes clear,

the right to property is a right to action, like all the others: it is not the right *to an object*, but *to the action* and the consequences of producing or earning that object. It is not a guarantee that a man *will earn any* property, but only a guarantee that he will own it if he earns it. It is the right to gain, to keep, to use and to dispose of material values.<sup>52</sup>

Rand also makes clear that earning isn't the sole means by which ownership can be established – we have a right to our hair or lungs without having earned these because to act to gain and to keep them, as it were, is part of the process of growing up and becoming ourselves. (Life itself is a process of self-generated *action* so that even the right to life is a right to a wide range of actions.)

Put another way, the right to private property is a right to acquire and to hold – which are both *actions* – various items no one has previously acquired and held or items which others have acquired and are holding are willing, freely, to part with (another action). So, in fact, private property rights are akin to rights to act freely – as when one acts to engage in consensual sex or work or recreation. In the case of property rights, one acts to engage in, as it were, consensual acquisition or holding of some items. (Notice, no one may impose ownership on another against his or her consent because of this right to freedom of actions such as acquisition and holding.)

Thus, property rights identify someone's sphere or range of freedom of action *vis-à-vis* items in the world, not unlike how the right to freedom of speech spells out spheres of freedom of action *vis-à-vis* verbal or written expression of ideas. Indeed, these latter presuppose the right to private property, for speeches need to be given some *place* to which one has a right or has gained permission from those who do, and writing takes places on materials (paper, blackboards, sand, computers, and so on).

Now it is true that others could well need the items someone has come to own by exercising the right to acquisition and holding, but since that exercise may not be interfered with, and interference with it would place others in the position of robbing the agent of his or her sovereignty, consent needs to be obtained in order to obtain even such desperately needed items. A need cannot be weighed against a right, any more than a wish can be weighed against a right. There can be no weighing involved – not between rights, nor between rights and needs – although a rights holder could weigh whether to hang on to what he or she owns, contribute it to the person in dire need or to some cause or project, or otherwise dispose of it in light of his or her weighing of the importance of these alternative possibilities. The weighing is not of different rights or different people's rights but of the importance of the goals to which one may contribute what one has the right to freely acquire.

Here is what would happen if the weighing were about rights. *Someone would have to do the weighing.* By what right would such a person weigh other people's rights? Would that person's right to weigh also be open to being weighed? By whom? The whole process would amount to a conceptual and public policy mess.

In fact, the role – or conceptual point – of basic individual rights is to remove from public policy, based on constitutional laws that rest on rights, the element of arbitrariness by basing decisions on self-consistent, compossible principles instead. The very conceptual point of rights within the sphere of social, political and legal policy is lost if they are subject to being weighed since they are supposed to be the rock bottom of decision-making – if I have a right to do X, this is the end of the story.

There is no such thing as 'weighing rights' – the idea is what philosophers call a category mistake, akin to talk about weighing, say, time or concepts. Indeed, to even consider weighing rights is to suggest that the importance of human beings, *vis-à-vis* their place in the citizenry, may be weighed against each other within the realm of politics, something that was abandoned once the idea of inherent status was jettisoned, finally, so no one could justly claim to be more important than someone else as far as the law of the land is concerned.

There are many other criticisms of the free society which could be considered. Marxists have done their hardest to discredit the system. Schweickart has argued that under capitalism it is unjustified to associate material benefits with desert because, after all, ownership confers much undeserved benefit on capitalists.<sup>53</sup> But he takes on only the economists who have tried to link productivity to benefits without much concern for the issues of moral philosophy. There are far better ways of establishing the link between virtue and success in a free society, such as by reference to a broader idea of what human success involves in addition to gaining economic benefits.<sup>54</sup> What the economist has to say is essential, just not the whole story.

Those who fault the free society for lacking a moral vision seem to want some promise of a utopia, something comparable to the Christian heaven or the communist earthly paradise; but of course, this is unavailable. A more

sensible moral vision does emerge from reflecting on the free society, and Robert Nozick chose well to close his book with it.

The minimal state treats us as inviolate individuals, who may not be used in certain ways by others as means or tools or instruments or resources; it treats us as persons having individual rights with the dignity this constitutes. Treating us with respect by respecting our rights, it allows us, individually or with whom we choose, to choose our life and to realize our ends and our conception of ourselves, insofar as we can, aided by the voluntary cooperation of other individuals possessing the same dignity. How *dare* any state or group of individuals do more or less.<sup>55</sup>

## Notes

- 1 Not all contemporary political thinkers fit this bill. Some feminists, such as Susan Moller Okin, *Justice, Gender, and the Family* (New York: Basic Books, 1989), are egalitarian in other respects than the mainly economic. Okin addresses the libertarianism of Nozick in her book but is completely misguided about, for example, the labor theory of value, something Nozick himself embraces only tentatively and something that does not constitute a central element of my own defense of the right to private property. Okin confuses the productive and property-creating Lockean activity of 'mixing one's labor with nature' and the 'labor' of women as they carry to term a newborn. For the conception of private property rights, one that completely eschews the idea of 'mixing one's labor,' that figures in my own defense of the fully free, unregulated, unregimented society, see Tibor R. Machan, *The Right to Private Property* (Stanford, CA: Hoover Institution Press, 2002). This work develops the theory along lines sketched by Ayn Rand, James Sadowsky, and Israel Kirzner. See, most pertinently, James Sadowsky, 'Private Property Rights and Collective Ownership' in T. R. Machan, ed., *The Libertarian Alternative* (Chicago, IL: Nelson-Hall Co., Inc., 1971), pp. 119–33.

There is an even more fundamental defense of private property rights found in Samuel C. Wheeler III, 'Natural Property Rights as Body Rights,' in Tibor R. Machan, ed., *The Main Debate* (New York: Random House, 1987), pp. 272–89. Curiously, although in print since the publication of this work, by a prominent house, Wheeler's argument hasn't attracted the attention of critics of libertarianism such as Okin and Olsaretti. That may be because Wheeler's case does not rest on any notion of desert or the mixing of labor with nature. Critics of private property rights have, of course, always had trouble with private assets such as one's limbs, eyes, kidneys, beauty, health, and so forth, none of which need be deserved but all of which are nonetheless clearly one's own. If these, or their use, give rise to further assets, they too seem clearly to be no one else's but the person who has them. Indeed, a feature of the libertarian approach taken here is that the onus of proof should not be on those who possess valuable stuff, including one's own talents and other assets, but on others who propose to lay claim to them. (See, for more, Tibor R. Machan, 'Liberty vs. Coercion: the Burden of Proof,' *The Freeman*, January 1974, pp. 35–38.) The point is that although one may not deserve what one has, that by no means justifies others' confiscating it from one unless some prior obligation exists, which is what is generally wanting in the critics' case.

Okin stresses that she objects to Nozick's refusal to treat women and men differently for political purposes, and on this score she would find me guilty as well. However, this is clearly because Okin chooses to politicize all social problems, which is precisely what the form of libertarianism being discussed here opposes. Such a totalistic political theory, found, for example, in the works of most Marxists, fails to acknowledge that many, many

social problems are such as not to involve the kinds of violation of individual rights that constitute coercion. It is only where coercion is present that political solutions are appropriate, although, admittedly, some feminists, Okin included, stretch the meaning of 'coercion' so far as to justify innumerable paternalist public policy measures.

- 2 Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974).
- 3 Outside academia Ayn Rand has made the most comprehensive contribution to this effort. See Ayn Rand, *Capitalism: The Unknown Ideal* (New York: New American Library, 1967). For several valuable discussions by academicians, see Machan, ed., *Libertarian Alternative*. See also Eric Mack, 'Egoism and Rights,' *The Personalist* Vol. 54 (1973), pp. 5–33. In Tibor R. Machan, *Human Rights and Human Liberties* (Chicago, IL: Nelson-Hall, 1975), written during 1970–74 and so without the benefit of Nozick's work, I offer a synthesis of various strains of argumentation in support of a free society.
- 4 See F. A. Hayek, *The Constitution Of Liberty* (Chicago, IL: University of Chicago Press, 1960).
- 5 See, for example, M. Harrington, 'The Misconception of Society,' *Commonweal*, Nov. 7, 1975, at pp. 534–6; David Schweickart, 'Capitalism, Contribution and Sacrifice,' *Philosophical Forum* Vol. 7, (1976) pp. 260–76. The standard attack on libertarianism from Marxist circles is best represented by C. B. Macpherson, *The Political Theory Of Possessive Individualism* (Oxford, England: Clarendon Press, 1962). For more discussion of Marxism, see Tibor R. Machan, *Marxism: A Bourgeois Assessment* (Lanham, MD: Hamilton Books, 2005).
- 6 See, for example, Lawrence A. Scaff, 'How Not to Do Political Theory: Nozick's Apology for the Minimal State,' *Arizona Law Review*, Vol. 19 (1977) pp. 193–219.
- 7 John Rawls, *A Theory Of Justice* (Cambridge, MA: Harvard University Press, 1971); Nozick's book had its genesis in a paper, included in *Anarchy, State, and Utopia* as Chapter 7, published as 'Distributive Justice,' *Philosophy & Public Affairs*, Vol. 3, 1973–4.
- 8 See Ernest van den Haag, *Liberty: Negative or Positive*, *I Harvard Journal of Law and Public Policy*, Vol. 63 (1978), pp. 70–71.
- 9 See Daniel Bell, *The Cultural Contradictions Of Capitalism* (New York: Basic Books, 1976); Michael Harrington, *The Twilight Of Capitalism* (New York: Simon and Schuster, 1976); Irving Kristol, *Two Cheers for Capitalism* (New York: Basic Books, 1978).
- 10 John Locke, *II An Essay Concerning Human Understanding* 2 (Oxford, England: The Clarendon Press, 1706).
- 11 See note 11 in Chapter 3 for more.
- 12 Thomas S. Kuhn, *The Structure of Scientific Revolutions* (Chicago, IL: University of Chicago Pres, 2nd edn, 1970).
- 13 See, for example, Samuel Scheffler, 'Natural Rights, Equality, and the Minimal State,' *Canadian Journal of Philosophy*, Vol. 6 (1976), pp. 59–76.
- 14 Nozick, *Anarchy, State, and Utopia*, p. 169.
- 15 Thomas Scanlon, 'Nozick on Rights, Liberty, and Property,' *Philosophy & Public Affairs*, Vol. 6 (1976), p. 14. That is to say, Scanlon isn't accepting Nozick's dispensation with a defense of individual rights other than by way of the 'argument to the best explanation.' He wants to see an argument that establishes that we do have the rights Nozick only assumes we have. Unfortunately, Scanlon, as many others, is guilty of the scholarly sin of stargazing – as if no one but a star such as Nozick has produced arguments worthy of consideration, thus missing the arguments advanced for individual rights by others (Eric Mack, Roger Pilon, Jeffrey Paul, myself and others).
- 16 Thomas Nagel, *Libertarianism Without Foundations*, Vol. 85 (1975), *Yale Law Journal*, p. 147.
- 17 Robert Paul Wolff, 'Robert Nozick's Derivation of the Minimal State,' *Arizona Law Review*, Vol. 19 (1977), pp. 23–24. This entire issue of *Arizona Law Review* was devoted to articles critical of Nozick's book.
- 18 Scheffler, p. 62.

- 19 For example, Scaff, pp. 193–211.
- 20 Ibid. This is not precisely what Scaff tells us but by calling Nozick's work an apology and by invoking a sort of Marxian meta-analysis of Nozick's methodology he does suggest that Nozick was really speaking for some particular ideological interest group rather than attempting to establish the truth about human political life. While Scaff does not provide a Marxian critique of Nozick, others have provided such a critique of classical liberal thinkers. See Macpherson, *Political Theory Of Possessive Individualism*.
- 21 See Thomas Grey, 'Property and Need: The Welfare State and Theories of Distributive Justice,' *Stanford Law Review*, Vol. 28 (1976), pp. 877–902.
- 22 See Alexander Solzhenitsyn, *Two Addresses* (1976); 'A World Split Apart,' *Imprimis*, Vol. 7 (1978), pp. 1–6 (Harvard Commencement Address, 1978).
- 23 Machan, 'Law, Justice and Natural Rights,' *Western Ontario Law Review*; Tibor R. Machan, 'Human Dignity and the Law,' *DePaul Law Review*, Vol. 26 (1977), pp. 807–32 and *Objectivity: Recovering Determinate Reality in Philosophy, Science, and Everyday Life* (UK: Ashgate, 2004), especially Chapter 7, 'Richard Posner's Pragmatic Jurisprudence.'
- 24 Machan, 'Natural Rights and Morality.'
- 25 David L. Norton, *Personal Destinies: A Philosophy Of Ethical Individualism* (Princeton, NJ: Princeton University Press, 1976).
- 26 I have in mind the philosophy Ayn Rand developed, Objectivism. For a succinct presentation, see Tibor R. Machan, *Ayn Rand* (New York: Peter Lang, 2001), and for a more detailed one, see Leonard Peikoff, *Objectivism. The Philosophy of Ayn Rand* (New York: Dutton, 1991). Rand, however, is a novelist who turned to philosophy in part to explore the possibilities for ideal types in the romantic novel. While her own works have not appeared in scholarly periodicals, her views have come to the attention of philosophers. See, for example, Luther John Binkley, *Conflict of Ideas* (New York: Van Nostrand, 1969); Doug Den Uyl and Doug Rasmussen, eds, *The Philosophical Thought of Ayn Rand* (Chicago: University of Illinois Press, 1983) and, especially, the *Journal of Ayn Rand Studies*.
- 27 Nozick himself explained to me in the Spring of 1976, while I visited his home (in Brighton, MA, I believe it was), that he wanted to show that views very different from those of Rawls could be derived using an essentially similar philosophical method. Thus his book might be regarded as a sophisticated rhetorical move which enables him to go on to develop his arguments further.
- 28 See Douglas B. Rasmussen, 'Aristotle and the Defense of the Law of Contradiction,' *The Personalist*, Vol. 54 (1973), pp. 149–62.
- 29 As a sample of such work within the Aristotelian tradition of non-reductionism naturalism see, Tibor R. Machan, *The Pseudo-Science of B. F. Skinner* (New Rochelle, NY: Arlington House, 1974), Roger W. Sperry, *Science and Moral Priority* (New York: Columbia University Press, 1983), and Hillary Putnam, *Word and Life* (Cambridge, MA: Harvard University Press, 1994).
- 30 Norton, *Personal Destinies*, pp. 25–27.
- 31 In a subsequent work, Thomas Nagel and Liam Murphy, *The Myth of Ownership* (New York: Oxford University Press, 2003), try to justify this view, without success. Ownership is no myth – it is in evidence throughout the globe, as is its violation – theft, robbery, embezzlement and such, based on laws that are themselves based on the principles, more or less faithfully, of private property rights. It is, of course, a moral relationship such that it signifies that those who own X are justified to use and dispose of it without others' interference. It derives from their ownership, first and foremost, of their lives and the priority of their taking care to thrive in this life with the aid of whatever is available to them from nature that none other has acquired and, subsequently, via commerce. See Tibor R. Machan, *The Right to Private Property* (Stanford, CA: Hoover Institution Press, 2002) and 'A Defence of Property Rights and Capitalism,' in Brenda Almond, ed., *Introducing Applied Ethics* (Oxford, England: Blackwell, 1995). A neo-Lockean defense



of the right to private property comes from James Sadowsky, 'Private Property and Collective Ownership,' in Machan, ed., *The Libertarian Alternative*.

32 I have in mind the ban on cigarette advertising in the broadcast media.

33 See, Tibor R. Machan, 'Anarchism and Minarchism, A Rapprochement,' *Journal des Economists et des Etudes Humaines*, Vol. 14, No 4 (December 2002), pp. 569–88. For why funding government does not require coercive measure, any more than, say, funding health care or education does, see Tibor R. Machan, 'No Taxation, With or Without Representation,' in Robert McGee, ed., *Taxation and Public Finance in Transition and Developing Economies* (forthcoming).

34 If we keep in mind, however, that Nozick's objective was to show that an argument akin to one deployed by Rawls in favor of massive wealth redistribution gives ample support for prohibiting such wealth redistribution – that is, for a limited government libertarian polity – this turns out not to be a failing on Nozick's part but a misunderstanding of what can be expected from his book.

35 See, for example, Murray N. Rothbard, *Power and Market: Government and the Economy* 2nd edn (Kansas City, KS: Sheed Andrews and McMeel, 1977), especially Chapter 1, 'Defense Services on the Free Market.'

36 The reality at issue is that persons are moral agents and ends in themselves, not available for others' use without their agreeing to that use. This is not a self-evident reality, yet a reality nonetheless.

37 For a defense of this 'essentialist' approach to what the nature of something is, see Ayn Rand, *Introduction To Objectivist Epistemology* (New York: New American Library, expanded 2nd edn, 1990). See also Tibor R. Machan, *Individuals and Their Rights* (Chicago, IL: Open Court Publishing Co., Inc., 1989). See also, Machan, *Objectivity* (a work that addresses several skeptics about objectivity, including regarding whether the natures of things can be known objectively). It is rather odd that those advancing these arguments expect others to have confidence in their findings about how human beings relate to the world cognitively, while denying that prospect to all others on grounds that no such arguments can be advanced at all!

38 Consider the following from Harry V. Jaffa, *Equality And Liberty* (New York: Oxford University Press, 1965):

[T]he doctrine in the Declaration of Independence of the self-evidence of the difference between man and other species, and its absolute moral significance, is *the* premise of the laws of nature and of nature's God. This premise, it is true, has been gravely questioned by scientific developments since the eighteenth century. However much the course of science may, as it must, raise theoretical doubts concerning this and every other premise of human thought, it remains the necessary moral and political premise of everything we call human and decent (p. 16).

For a discussion of why, despite numerous claims to the contrary, there is no reason to suppose that the course of science *has* called into question, at least thus far, the moral and political premise of the free society, see Roger W. Sperry, 'Mind, Brain and Humanistic Values,' in John R. Platt, ed., *New Views Of The Nature Of Man* (Chicago, IL: University of Chicago Press, 1965); Theodosius Dobzhansky, *The Biological Basis Of Human Freedom* (New York: Columbia University Press, 1956); Machan, *The Pseudo-Science and Initiative – Human Agency and Society* (Stanford, CA: Hoover Institution Press, 2000). Essentially, in spite of the mere fact that entities do not remain firm in the fashion of timeless, perfect Platonic forms, it doesn't follow that they are all in a Heraclitian flux. For many centuries – approximately 100 – the human species has been as we now know it, with only minor changes in height and other inessential human attributes. This is no different from how biology, botany, physiology and other life sciences offer up quite stable principles that guide serviceable practices. Politics, in a sense, is one of these life sciences pertaining to the way human communities ought to be organized (the difference between, of course, the 'ought' element).

- 39 For a critical discussion of Nozick's methodology from the broader philosophical perspective of the present author, see, for example, Tibor R. Machan, 'Nozick's Geometrical Libertarianism,' *Occasional Review*, Vol. 6 (1977), pp. 167–87.
- 40 See, Scaff, 'How not to do Political Theory,' p. 5.
- 41 Director made the remark to a group of scholars at the Hoover Institution at Stanford University about 1976, when I was a national fellow there. The prominent *homo economicus* view is laid out in detail by George Stigler and Gary Becker, 'De Gustibus Non Est Disputandum,' *American Economic Review*, Vol. 67 (1977), pp. 76–90. See also Milton Friedman, 'The Line We Dare Not Cross,' *Encounter*, Nov. 1976, at p. 11: '[E]very individual serves his own private interest ... The great Saints of history have served their "private interest" just as the most money-grubbing miser has served his interest. The *private interest* is whatever it is that drives an individual.' See, for an extensive discussion of analyzing the infrastructure of human community life along *homo economicus* lines, Richard A. Posner, *Economic Analysis of Law* (Boston, MA: Little, Brown, 1992). For a discussion of the problems facing such arguments in support of a free market, see Machan, 'Some Normative Considerations of Deregulation,' *Journal of Social, Political and Economic Studies*, Vol. 1 (1979), pp. 363–77, and 17.
- 42 When addressed specifically to Nozick's argument, Scaff's criticism is on target. Some of Nozick's language makes it appear that he adheres to the *homo economicus* conception of human beings. But Nozick was attempting to enter a discussion begun by others in the philosophical community, for example, Rawls, who had already employed this language. After all, the individuals behind 'the veil of ignorance' are uniformly self-interested in just the (ambiguous) sense in which the *homo economicus* model conceives of them.
- 43 Grey, 'Property and Need,' p. 898.
- 44 Posner, *Economic Analysis of Law*.
- 45 Oliver Wendell Holmes, 'The Path of Law,' *Harvard Law Review*, Vol. 10 (1897); p. 477.
- 46 The form of ethical egoism (or individualism) that provides sound support for a theory of natural rights (within the Lockean tradition but without its problems) is identified as classical egoism, stressing its Aristotelian naturalist foundations. See Tibor R. Machan, 'Recent Work in Ethical Egoism,' *American Philosophical Quarterly*, Vol. 16 (1979), pp. 1–15 and 18.
- 47 Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1977).
- 48 Ibid.: 'The constructive portions emphasize an idea that is also part of the liberal tradition, but that has no place in either legal positivism or utilitarianism. This is the old line of individual human rights ...' (p. vii).
- 49 Ronald Dworkin, *Sovereign Virtue* (Cambridge, MA: Harvard University Press, 2002).
- 50 Adrian Bardon, 'From Nozick to Welfare Rights,' *Critical Review*, Vol. 14 (2000), pp. 481–501.
- 51 Ibid., p. 496.
- 52 Ayn Rand, *Capitalism: the Unknown Ideal*, p. 322.
- 53 Schweickart, 'Capitalism, Contribution and Sacrifice.' For a very extensive critique of this line of argumentation, associated by the author with Robert Nozick and a few other libertarians, see Serena Olsaretti, *Liberty, Desert and the Market* (Cambridge: Cambridge University Press, 2004). It is worth noting that books critical of libertarianism tend, mainly, to discuss Nozick's case and are usually published by very prominent university presses – Oxford, Princeton, Chicago, Harvard and so on. In this connection it is worth noting that when W. W. Norton published a book titled 'The Passion for Equality,' I proposed to them a book to be titled 'The Passion for Liberty.' Norton's editors didn't even wish to look at the plan for the book but turned it down cold. (It was subsequently published by Rowman & Littlefield.) I am not privy to the motivation for the recurrent phenomenon of prominent presses publishing repeated critiques of libertarianism. But the evaluation process of such projects may leave something to be desired – mainstream scholars are consulted, most of whom are critical of libertarianism, and they turn down

proposals, while they favor those that are critical. As a case in point, Blackwell publishing company once considered my manuscript, 'Individuals and Their Rights,' and while one reader liked it, Professor Alan Ryan reportedly sent in a one line rejection: 'Do we really need yet another defense of the God given right to private property?' (I was made aware of this some time later by a friendly reader for Blackwell.)

- 54 See, for example, Rand, *Capitalism: The Unknown Ideal*, Chapter I; and Sadowsky, 'Private Property.'
- 55 Nozick, *Anarchy, State, and Utopia*, pp. 333–4.

## Chapter 11

# Will Technology Make Us Free?

Why do many cyber-enthusiasts believe that elements of the e-economy – namely, the kind of trade and other activities associated with the Internet – will fundamentally aid the cause of individual liberty?<sup>1</sup> Can encryption, for example, set us free (or hide us) from the tyrannical reach of governments? Or is such confidence ultimately the result of a misguided and scientific faith in technological tools at the expense of vigilance about how they are employed?<sup>2</sup>

At least since the scientific revolutions of the sixteenth century we have tended to expect an awful lot from scientific and technological progress – often too much.

The inclination actually goes back to the optimistic rationalism of the Greek philosophers. In ancient Greece it was the philosopher Democritus, as well as his very scantily recorded predecessor Leukippus, who proposed that the world is made up of one thing, namely, atoms. Democritus also held to the empiricist doctrine that perception amounts to recording copies of the tiny atoms and thus gaining understanding of the real world. Once the laws of atoms were identified, all else could be understood and explained. We may call this the first scientific temptation. It is a view that is very tempting to adopt because it appears to conform to the requirements of science, which include analyzing everything into its smallest components and learning why it all behaves as it does by reference to how these smallest components behave.<sup>3</sup>

I am, of course, begging an important question by calling this view a temptation, implying thereby that it is mistaken, even blameworthy, albeit often yielded to by philosophers and other thinkers. Perhaps it is right to try to get to the simplest of all entities and thus produce the simplest of all explanations! Perhaps greater complexities would then be easy to grasp. But such an approach is a kind of shortcut that avoids the difficulties of a more pluralistic conception of the world, one in which different principles may govern different kinds of beings. To determine this, we cannot start with theory that presupposes a monistic view of causation in the world. We must look at the world and observe how different kinds of entities actually behave.

While the ultimate roots of scientism and materialism may be found in the ancient world, two early modern thinkers figure most prominently as promoters of this view, namely, Thomas Hobbes and Francis Bacon (an early employer of Hobbes). Bacon's reductionism, inductivism and scientism – and the vision he laid out in *The New Atlantis* of a technological utopia ruled by experts ('The end of our foundation is the knowledge of causes, and

secret motions of things; and the enlarging of the bounds of human empire, to the effecting of all things possible') – are arguably the true ancestors of Marxist 'scientific' socialism as well as of later technocratic visions. (Bacon was rather hostile to real science; for example, he did not welcome the news that the Earth revolves around the sun.)

Although Bacon is not considered in academic circles an important philosopher in our time, his influence on both Hobbes and general thought is very important. For example, consider the seventeenth-century statist and founder of econometrics Sir William Petty – whose descendent the 2nd Earl of Shelburne created the 'Bowood Circle' (Richard Price, Joseph Priestley, Jeremy Bentham, and James Mill). Petty tried, in various different ways, to make politics a science after the manner of mathematics. The Bowood Circle cannot be simply summed up as 'statist,' but there was a strong rationalist element in their work – and both the rationalism and the statism can be traced back to Petty. Even the collectivist side of John Stuart Mill is rooted in this tradition (that is, more than the influence of Harriet Taylor was at work here).<sup>4</sup>

The major promise of the Hobbesian philosophy is that henceforth we will be able to control the causes that impel human beings to behave as they do and thus develop what Skinner would call a technology of human behavior. Thomas Hobbes advanced the modern version of the view of Democritus when, inspired by the scientific work of Galileo, he proposed that there is nothing in the world but matter-in-motion, and that all the distinctions, differences and varieties we seem to perceive in reality are just nominal – exist 'in name' only. Now that we know that all human behavior is based on the same principles as the behavior of the most fundamental materials of the universe, matter-in-motion (for Bacon the 'secret motions of things' and for contemporary physicists' strings), we presumably should be able to organize society 'correctly' and almost if not quite as easily as we get the eight ball into the corner pocket.

Here, too, the temptation to reduce everything to just one kind of thing – to learn the laws of that one kind of thing and assume one has arrived at an explanation of all other kinds of things – had not been resisted. The hope was that just as with the inanimate portions of nature, wherein understanding leads to the ability to control, so it would be with human nature. We would understand what we are and then apply this understanding, just as social engineers envision it, successfully and benevolently manipulating human affairs.

As I have argued elsewhere, real science (including technological development) is based on human creativity.<sup>5</sup> This understanding does not mesh with the mathematical determinism of some visions of modern technology – that is, certain forms of technocratic politics and general society. Such mathematical determinism – also known as reductive materialism – indiscriminately applies the principles of classical physics or mechanics to all realms of inquiry, especially the realm of social and political life. It is the view sometimes dubbed the grandfather of classical liberalism and

one that is evident in the works of such disparate contemporary thinkers as B. F. Skinner, Karl Marx and James Buchanan.<sup>6</sup> In his books *Beyond Freedom and Dignity* (1971) and *Science and Human Behavior* (1968), psychologist Skinner claimed to have identified a technology of human behavior by confining himself to elements of human life that are observable, eliminating all references to mental or internal entities such as feelings, mind, purposes, intentions, memories or thinking. Of the last, Skinner said it is best understood as 'the probability of verbal behavior,' making it, thus, quantifiable and subject to scientific study.<sup>7</sup>

Many thinkers, eager to find some intellectual framework that would offer a sure-fire solution to the troubles facing human communities, regarded these efforts with hope. Indeed, it is arguable that the Hobbesian approach (reinforced by Hume's empiricism and logical positivism, as well as the emerging idea that there must be an unbridgeable gulf between facts and values) spawned the later flourishing of the social sciences. Following the diminished intellectual and especially philosophical reputation of the moral and religious views of human life, the mantle of (specifically physical) science became a must for any discipline to gain respectability.

The scientific perspective was even enlisted to rationalize a classical liberalism that, you would think, rests most comfortably on a view of the human being as a free agent.<sup>8</sup> While Hobbes combined his reductive materialism and radical individualism with what to him seemed a highly efficient absolute monarchy, those who followed in his steps got wind of a version of public choice theory and realized that instead of trusting some monarch, it is the marketplace that should be entrusted with working most naturally and efficiently.<sup>9</sup> In Newtonian space, what moves most efficiently is whatever encounters the least resistance or friction. From this, it is not a very long leap to the idea that human behavior should not be burdened with regulations, regimentation, interference and whatever else could stand in its way blocking or impeding self-improvement.

More recently, scientism has supported high expectations from the development of the computer. As John Searle put it,

these strong feelings may come from the conviction of many people that computers provide the basis of a new sort of civilization – a new way of giving meaning to our lives, a new way of understanding ourselves. The computer seems to provide, at least, a way of explaining ourselves that is in accord with the scientific worldview and, perhaps most important, the computational theory of the mind expresses a certain technological will to power.<sup>10</sup>

But he added, 'I believe that the philosophical importance of computers, as is typical with any new technology, is grossly exaggerated. The computer is a useful tool, nothing more nor less.'<sup>11</sup>

Despite the apparently seamless move from the mechanistic conception of the universe to a deterministic conception of human life, upon close

inspection the plausibility of this viewpoint crumbles.<sup>12</sup> Consider, for example, that human beings often err in conceiving of the way things are. Indeed, that is just what those who embrace the mechanistic idea claim about those who disagree. Yet, it is very difficult, if not impossible, to make sense of this phenomenon of making a mistake, let alone of thinking badly, within the mechanistic, deterministic framework. Other living things do not make such mistakes. The very idea of truth versus falsehood makes little sense unless there is freedom to err. The ability to choose between right and wrong presupposes that one is not being compelled by antecedent forces to do what one is doing – that one can in fact choose freely between alternatives, and might have chosen otherwise.

In addition to this elementary problem, the deterministic view of human life cannot explain the sources of all the diversity in how human beings live and what they believe – including human beings who come from similar backgrounds and encounter similar influences. It is fairly simple to understand such diversity and variety in the framework of a view that regards human beings as having free will. Their freedom makes all the variety possible: in art, culture, politics, philosophy, religion, cuisine and the rest. But if human beings are hard-wired, it is hard to understand why they would ever act with willful irrationality or self-destructiveness, as human beings sometimes do.<sup>13</sup>

Nor can the uses and abuses of human technology itself be understood by the mechanistic viewpoint inspired by that technology. As we know, at least by the evidence of the twentieth century, human beings are far from having solved their political problems via the materialist or physicalist approach, whether in its Hobbesian, Marxist or positivist incarnations. Looking to any (hard) scientific and technological advance as the primary means of securing social institutions, including liberty itself, is a mistake. At the heart of this conclusion is the simple fact that all tools human beings develop, intellectual or otherwise, may be used for good or ill. That is as true of the Internet and encryption as it is true of gunpowder.

One prominent classical liberal presented a case a while back for the potential of the liberating power of encryption,<sup>14</sup> claiming that once this technique has been perfected, the state will lose most of its power. A skeptic from the audience noted,<sup>15</sup> however, that not only is the state busily at work breaking all the encryption codes but that it also, as a last resort, could sabotage such evasion of its powers by simply shutting off the electricity. This is not to say that a lock on your door won't prevent many attempts at home invasion, but that no home dweller is immune to a really determined cohort of intruders.

In addition to the unreliability of technical devices for purposes of securing our liberty, depending on them to achieve that end can undermine the personal resolve needed to protect individual rights. Furthermore, the belief that technology can deal with the threat of tyranny can lead to what we might call a soulless approach to politics. In other words, devices are treated as the means for doing what requires human thought and passion and commitment

to values. When people trust in gadgets as the exclusive means by which their individual liberty is secured, their focus on vigilance and other civic virtues is likely to wane. Science and technology will solve the problem, so why bother with self-improvement?

All in all, what is needed is the fullest possible acknowledgement of the insight that the price of liberty is indeed eternal vigilance. Although the emerging technological tools and devices can all be used to facilitate such vigilance, without the personal commitment of the citizenry, those tools will be insufficient. Since such commitment is a matter of individual choice or initiative, it is unreasonable to expect any guarantee of advance.<sup>16</sup>

None of this is to deny that very positive results may emerge from the invention of the Internet and other tools produced via science and technology. But these must not be confused with the kind of measures needed to secure and maintain the infrastructure of a free society, measures that can only come from the sustained efforts of human beings.<sup>17</sup>

The unpredictable human factor is what most crucially determines whether a technology will be used for good or ill. We can say that the defense of liberty does gain some advantage from new technologies – as does the state in its efforts to find new ways to control us. But the ability to offer a positive alternative to scientism and to other rationalizations of statism is far more pivotal. To win a war of ideas, you above all need ideas, and the will to defend them.

So, actually it is freedom that will promote technology, not so much the other way around. That's because having the right to liberty respected and protected promotes human creativity and its fruits.

## Notes

- 1 Examples of this belief abound. See, for example, *Internet Computing Online*, a magazine that features articles making this case. See Ian Clarke, Scott G. Miller, Theodore W. Hong, Oscar Sandberg and Brandon Wiley, 'Protecting Free Expression Online with Freemart,' January/February, 2002. See also Yacine Atif, 'Building Trust in E-Commerce,' January/February, 2002. For more along these lines, see the materials posted at <http://www2.epic.org/reports/crypto1999.html>.
- 2 For a discussion of whether the Internet is a gadget or tool, see [http://www.j-bradford-delong.net/OpEd/virtual/technet/An\\_E-economy.html](http://www.j-bradford-delong.net/OpEd/virtual/technet/An_E-economy.html).
- 3 Science, in turn, brings the unambiguous fruits of technology, thus embodying a promise that's difficult to resist.
- 4 I thank an anonymous reader at Ashgate for some of the points included in the early passages of this chapter.
- 5 Tibor R. Machan, *The Pseudo-Science of B. F. Skinner* (New Rochelle, NY: Arlington House Publishing Co., 1974), and *Initiative: Human Agency and Society* (Stanford, CA: Hoover Institution Press, 2000). For a somewhat ambivalent contemporary argument in support of a view closer to Thomas Hobbes and Francis Bacon, see Philip Ball, *Critical Mass: How One Thing Leads to Another* (New York: Farrar, Straus and Giroux, 2004).
- 6 Many more could be included among those who propose that a reductionist program can be fully successful. Among economists, for example, there are Gordon Tullock and the late Nobel Laureate, George Stigler. See, Gerard Radnitzky and Peter Bernholz, eds,



*Economic imperialism: The Economic Approach Applied Outside the Field of Economics* (New York: Paragon House Publishers, 1987).

- 7 It is a question begging, of course, to designate the methods of one of the sciences – or even of a group of them, often referred to as the hard sciences – as the scientific method. Different sciences may well require different methods and some disciplines that the former view may dismiss as unscientific may then also qualify as sciences, albeit with methods of study quite unlike those of, say, physics.
- 8 It is vital to realize that there were other approaches by which classical liberalism had been defended; for example, the normative or moral tradition of natural law and the Christian tradition of individualism. For more on these, see Tibor R. Machan, *Human Rights and Human Liberties, A Radical Reconsideration of the American Political Tradition* (Chicago, IL: Nelson-Hall Co., Inc., 1975), and J. D. P. Bolton, *Glory Jest and Riddle, A Study of the Growth of Individualism from Homer to Christianity* (New York: Barnes & Noble, 1973). It is mainly because of the new prestige of the natural sciences after the fourteenth century that the positivist version of classical liberalism gained more impact. This is not all that different from what happened among the critics of classical liberalism, such as socialists. As against the humanistic socialism of Charles Fourier, it is Karl Marx's scientific socialism, so-called, that emerged as the most prominent.
- 9 Often, following Hayek, the case against all-powerful government is made on grounds of the lack of sufficient knowledge needed to coordinate human (and, of course, economic) activity from above. It is, in fact, impossible to gain the requisite type of knowledge, namely, the local information of individuals who know their own needs and circumstances better than anybody else. For a good summary of the issues, see F. A. Hayek, *The Fatal Conceit* (Chicago, IL: University of Chicago Press, 1991).
- 10 John R. Searle, *The Mystery of Consciousness* (New York: NYREV, Inc., 1997).
- 11 Ibid.
- 12 Two recent books develop this theme in detail: John Searle, *Rationality in Action* (Boston, MA: MIT Press, 2001) and Stephen Toulmin, *Return to Reason* (Cambridge, MA: Harvard University Press, 2001).
- 13 This is especially problematic, by the way, for environmentalists who blame or praise us for how we treat the environment even as they deny basic differences between human and other animal life, all the while wishing to remain purely scientific as well.
- 14 David Friedman has advanced this position in no uncertain terms, for example, at a symposium at the Cato Institute. Many others who champion classical liberal, libertarian politics have a similarly hopeful outlook regarding the potential for securing liberty by these and related means. See, for example, *Laissez-Faire City Times*, an Internet publication many of the writers and editors of which see the Internet along these lines.
- 15 This incisive skeptic was the author.
- 16 See Tibor R. Machan, *Initiative – Human Agency and Society* (Stanford, CA: Hoover Institution Press, 2000).
- 17 A more elaborate discussion of this topic may be found in Toulmin, *Return to Reason*. See also Tom Sorell, *Scientism: Philosophy and the Infatuation With Science* (London, UK: Routledge Ltd., 1991). For some of the serious obstacles to Internet-based advances toward liberty, see Yaman Akdeniz, Clive Walker, and David S. Wall, eds, *The Internet, Law and Society* (London, UK: Longman, 2001). A very fruitful if somewhat ambiguous discussion of some of these matters can be found in Ball, *Critical Mass*.

## Chapter 12

# How Critical is Critical Legal Studies?

For Barney had never questioned the nature of his right to the swimming and the fishing, the boats and the blue summers, which he had described so confidently to the stranger. His ignorance of human misery had been consigned to him with as much loving care as an inheritance . . .

Peter Matthiessen, *Partisans*<sup>1</sup>

In 1987 and 1988, controversy abounded over the failure of two law professors to obtain tenure at Harvard Law School.

The professors, Clare Dalton and David Trubek, were exponents of the legal philosophy known as Critical Legal Studies (CLS). It is generally believed that the denial of tenure had to do with the teaching and scholarly practices they engaged in, as shaped by that legal philosophy. In Spring of 1988, Harvard president Derek Bok decided against tenure for a third professor of the school, whose fate had been in limbo during the affair.

The fracas over Critical Legal Theory at Harvard goes back to the 1970s, when its adherents, aka ‘Crits,’ tried to dismantle the basic legal training of the law school. By 1990 or so, Bok and his allies would largely defang the insurgency, but the Crits continue to maintain a strong if minority presence at the school, as they do at institutions across the academic landscape.<sup>2</sup>

If one judged by the complaints of certain of the school’s members – for example, Professor Robert W. Gordon in his essay, ‘Law and Ideology,’<sup>3</sup> – one might get the impression that Crits are ostracized at the important schools and gain entry only in some of the less prominent institutions of legal learning, if anywhere. In fact, Crits tend to protest too much – quite a few are very well situated indeed, much better situated than the natural law advocates in jurisprudence, not to mention those who actually defend the object of the Crits’ hostility, capitalism. CLS is well represented in law schools at Cardozo, Georgetown, Miami, Rutgers, Stanford, SUNY Buffalo, UCLA, Yale, and – yes, most of all – Harvard! Major figures in the movement have included, at least until recently, Duncan Kennedy, at Harvard; Mark V. Tushnet, at Georgetown; Mark Kelman and Robert W. Gordon, at Stanford; and Richard Michael Fischl, at the University of Miami.

Evidently the CLS scholars harbor quite ambitious expectations for the impact of their thinking on legal education in the USA. So when a few of their brood fails to gain tenure at Harvard University – a place where many professors in many fields do not receive tenure either, even after having been

‘given the privilege’ of teaching and working there for the initial years of their career – CLS leaders see this as unjust and ideologically motivated.

Yet exponents of competing radicalisms – for example, members of the radical political school of thought that favors pure capitalism, libertarianism – for the most part have yet to reach even the lower-level plateau from which they can grouse about not yet having gotten tenure at Harvard; and this is true regardless of publication and teaching record. In academe, it is not enough to produce good work. A kind of aristocracy exists (an aristocracy of prestige, not of talent), so that the *status quo* is more entrenched in academia than elsewhere in our society. When it comes to radicalism, this *status quo* is much more Marxist than *laissez-faire* capitalist.

What do the aggrieved scholars who inhabit the field of ‘Critical Legal Studies’ believe? And is there any substance to the charges of unfair treatment?

What they believe is that American political-legal institutions are hopelessly unjust, hopelessly biased in favor of people who have no justification for being so privileged. They object not merely to the corruption of institutions that may at root be sound, but to basic elements of American law as such, including the institution of voluntary contract and the protection of the right to private property. In and of themselves, such institutions constitute fundamental injustices in the system, say the Crits.

The Critical Legal Studies school of legal education and scholarship is a direct challenge to individualist social and political thought. Crits argue that the supposedly impartial institutions of bourgeois individualist law are anything but. Quite the contrary, they say: individualist law is itself an ideology, a framework of administering law and public policy that is biased in favor of certain special interests, namely, the propertied classes.

The Crits often take as their foil the view that such legal institutions are *neutral* – mere neutral efficiency begetters, at least when operating optimally. But the dichotomy between ‘neutral’ and ‘biased’ ignores the possibility of a view of law that, while hardly ‘neutral’ toward the principles of justice it embodies, advocates that they be applied in an objective and universal fashion – to protect the fundamental rights of all, equally. That is a substantive ethical understanding of the legal system that need not presuppose that all agents invoking the law must lack self-interest, or even be guided solely by enlightened self-interest, or never err. (There is certainly a lot of unprincipled maneuvering to *violate* the rule of law within the law’s own framework, for instance.) But accepting as they do the neo-Marxist, Postmodernist notion that objectivity and truth are not even possible – that perceptions of reality must always be mediated by alleged class or racial or other collective interests – the Crits would hardly be persuaded by a view of property-rights-protecting law as valid even if fallible.

CLS scholars are of course not monolithic in their thinking, but they do share a basic approach. While some focus on the content of the law or propose reforms to it, in general the school is not so much concerned with

advocating changes in the US Constitution or the various Criminal Codes as with stressing certain methodological issues surrounding the teaching of law – especially at the more ‘elite’ institutions such as Stanford, Harvard, UC Berkeley, and Yale laws schools (although their methodological concerns still have a definite, if only implicitly acknowledged, bearing on constitutional and legal issues).

CLS promotes a very suspicious – ‘critical’ – attitude toward the legal system governing the society the laws of which the professors are supposed to teach. Indeed, it is appropriate to say that the Crits *challenge* law rather than *teach* it. But that is not too surprising, given their wide-ranging rejection of even the possibility of objectivity; to hold such an assumption *ipso facto* exempts oneself from any obligation to survey a field objectively.

CLS scholars embrace several ideas that are not entirely distinctive to them – for example, that there is really no specialty such as *legal* reasoning: reasoning in the law is pretty much the same as in any other field, fraught with the same pitfalls, subject to the same biases, tacit assumptions, and so on. Crits also tend to make the point, shared by many others who reject legal positivism, that the law is part of the culture and cannot be treated as some autonomous institution. Judges are better off if they do not expect that the law can be understood apart from an understanding of the larger society in which it operates.

At first blush one might think that CLS is a stepchild of the legal realist movement. And there is indeed a conceptual link between CLS and legal realism insofar as Crits stress the instrumental function of law, its role as a vehicle for advancing certain (possibly hidden) causes. More important, however, is the CLS’s alliance with the Frankfurt School of critical theorists, a neo-Marxist offshoot that emphasizes the need for the constant (Marxism-informed) re-examination of society’s institutions and of the conditions required for such constant scrutiny.

According to the Crits, the legal system is contaminated by (largely bourgeois) assumptions that spawn injustice. Most fundamentally – in the very structure of the politically propagated rights that undergird them – the laws manifest class interest; for no good reason they tend to favor property owners and employers over those without property and employees. And even where these principles of law do not intrinsically favor the powerful interests, if they are not properly scrutinized during the educational process – especially at law schools where the prominent jurists of tomorrow are being trained – the result will be persistent uneasiness about whether any connection between justice and law obtains in our society. Crits admit that extant law undergoes change – for example, they note that tenants and employees now have more rights than in the past. Yet they are nonetheless appalled by ‘how legal training produces its mind numbing paralysis – how even left-liberal students trained by left-liberal teachers end up drained of energy and hope for social change.’<sup>4</sup>

CLS scholars sometimes also endorse what Rutgers political science professor, Benjamin Barber, has called ‘strong democracy.’ That is, they want the democracy that they admit obtains at the political levels of our society to become woven into other aspects of culture as well: economics, science, education, and so on. Here, again, Critical Legal Studies is not original – Professor Paul Feyerabend, a philosopher of science at UC Berkeley, has argued pretty much this view in his *Science in a Free Society*.<sup>5</sup>

But CLS brings some of these ‘radical’ ideas to bear not just on the law but also on legal education *per se*. CLS professors teach not only constitutional law or jurisprudence but also tax law and property law, and use the classroom podiums to criticize what they take to be the unexamined underpinnings. They play the part of Socrates, of impartial gadflies asking the tough questions of the citizens of that unselfconscious polis that is the United States of America.

When one inspects the standards CLS professors invoke in their critical activities, however, one soon notices that their Socratic skepticism is quite lopsided, and hardly cuts equally harshly at all the presuppositions of our legal system. They certainly don’t take much of a scalpel to their own implicit assumption that they are entitled to carry out their sweeping criticisms in a context in which such unabated criticism amounts to a breach of contract, a failure to do what they have been hired to do: namely, teach the profession of law. But no very incisive analysis is required to unveil the agenda of Critical Legal Studies. Its practitioners champion socialism and debunk capitalism, every chance they get.

In his *Tikkun* article, Robert W. Gordon goes to bat for Crits victimized by unjust discrimination at the hands of bourgeois law faculty. Among the villains are the most conservative and liberal colleagues of the Crits. Claiming, essentially, that CLS is merely a method of challenging all the tacit assumptions underlying ‘legal discourses [that] are saturated with categories and images that for the most part rationalize and justify in myriad subtle ways the existing social order as natural, necessary, and just,’ Gordon chides those who are fearful of Crits.

First, Gordon attempts to distinguish Crits from Marxists who regard the law to be ‘an infernal machine for the projects of the ruling class, albeit one full of tricks and devices that can sometimes be turned back upon its makers.’ Second, he argues that the law needs the scrutiny of the Critical Legal school in light of the enormous impact on it by those schools of law and economics (for example, Professor Guido Calabrese and Judge Richard Posner) which argue that a value-free economic analysis supplies a valid picture of how our legal system works. Gordon thinks Crits are able to show the underlying hidden assumptions of this bourgeois legal theory, and that it yields vacuous explanations and aims to rationalize the existing legal order. Third, Gordon baldly asserts that ‘people with identified left-wing associations have always had trouble finding and holding on to jobs,’ contending that Crits, like so many others on the left, are unjustly treated in academe, especially at law schools.

The *New York Times*, in its report on the Harvard Law School controversy, quoted some poignant passages from 'Some Realism About Critical Legal Studies,' an important essay by Crit law professor Richard Michael Fischl published in *The University of Miami Law Review*.<sup>6</sup> Fischl offers numerous good illustrations of the Critical Legal Studies approach. Professor Gordon's more journalistic piece seems to draw heavily on this article for its own examples.

During his course on labor law, Professor Fischl asks his students questions that he believes unearth the assumptions underlying much of American law, especially as it relates to private property and business. In one especially illustrative passage, Fischl recounts his approach to teaching the laws governing the relationship between employer and employee:

Near the beginning of my course on labor law, I engage my students in the following dialogue: Picture an employee who works for a company that produces widgets. One working day, this employee builds four widgets and, at the end of that day, tenders to her boss an amount in cash equal to the cost of the necessary materials and their procurement, the reasonable rental value of her workplace and tools, and the approximate cost of other managerial expenses. She then leaves the shop and takes the widgets with her, planning to sell them and keep the profits.

After this, Professor Fischl asks his students what will happen. He reports that some say the employer will sue the employee on grounds that the employee has committed theft. He goes on with his account as follows:

I then ask why the *employer* is not guilty of the same misconduct when he pays the employee a reasonable 'rent' for her labor, keeps the widgets for himself, and sells them for his own profit. There is more stirring and murmuring, until someone finally says, 'Because the widgets belong to the employer – the law says that they're his property.' Why should that be, I ask. After all there is nothing 'necessary' about permitting the employer to 'rent' the worker and keep the widgets; why not structure the relationship the other way around? When someone objects that, if we did that, 'then we wouldn't have capitalism,' I reply that that's exactly my point.<sup>7</sup>

So, per this, the law's protection of the employer's property is entirely arbitrary – there is nothing 'necessary' (that is, justified or right) about it. Gordon refers to the same employer–employee issue and also insists that, contrary to what other teachers seem to convey, the relationship is not a 'natural' one. He then also lays out the allegedly hidden ideological assumptions of the law – unveiling how it is merely a means of rationalizing injustices.

It does not seem to be relevant for either of these champions of a supposedly *critical* approach to law that the initial agreement between employee and employer might well have been made with the clear and mutual understanding that the employee would be paid a salary or wage for his skills and effort and that the employer's ownership of the produced widgets is acknowledged

and indeed fully agreed to in advance by the employee. Would admitting this mutual knowledge and mutual agreement be crediting employees as a class with too much awareness of their circumstances – too much ability to choose how they interact with employers? Is it possible that the Crits rest their challenges on unspoken assumptions of their own, for example, about the impotence and ineptness of employees?

The truth is that the very arrangements that Fischl and Gordon claim capitalist-generated law treats as ‘necessary,’ are, in fact, quite optional – and are openly taught as such in many law courses. Both Fischl and Gordon could have described the situation of work under capitalism such that the worker is not seen as a victim nor the owner as a robber baron – nor the law as some arbitrary instrument in the hands of the latter. They could have explained that the market is a place where workers are indeed sovereigns (as opposed to being wards of a state that allegedly ‘protects’ – that is, ‘regiments’ – them by setting terms of trade for them). They could have reminded their students that in the market, workers often *choose* not to become entrepreneurs but to remain employees, so as to be free of certain kinds of responsibilities; whereas owners – as novelists, movie stars or industrialists – often enough earn their wealth.

Fischl and Gordon could have admitted to their students that the law in our supposedly employee-trampling society happens to make possible many different kinds of agreements that can also be honored. Some people rent a building, perform work there, collect earnings for this work and pay rent to the owner. Others buy a building and go into business for themselves. Others form cooperatives. Yet others form communes and leave it at shaking hands. As Robert Nozick has ably observed, capitalism is the one system under which innumerable ‘experiments in utopias’ are possible – a system much more open than that predicated as ideal by the socio-economic theories underlying Critical Legal Studies.

Fischl and Gordon could have reminded their students that one can draw up many very different agreements with companies that want work done for them. One, of course, involves employment for a wage or salary. Another involves signing on as an independent contractor. Some persons freelance, dealing with several ‘employers.’ As for the property issue, it’s a red herring: most of American law does not stress property relations so much as the integrity of various agreements or contracts (which implicitly acknowledge rightfully owned property, of course, and the right of the owner to contractually dispose of it as he sees fit). Contract is what is central, and contract law shows perhaps the most respect to all parties involved – certainly more than whatever legal apparatus is available in socialist economies, where the state dictates terms and all parties must simply follow orders (a fact that somehow eludes the critical faculties of CLS faculty).

Ironically, many of the institutional hurdles in the path of these various market arrangements arise not from the law as a guardian of capitalist processes but from the various tax codes and regulations – for example,

National Labor Relations Board rulings – that prevent people from becoming independent contractors, partly because labor unions do not welcome this phenomenon. But, in line with their own barely hidden assumptions, the Crits don't count the beneficiaries and officiators of the government's regulatory empire as members of an oppressing class.

A conscientious, fair accounting of the law and its social context would have had to at least acknowledge such alternative interpretations. That would have been the genuinely critical, open attitude. But the Crits give no sign of attempting to acquaint students or readers with the idea that capitalism treats workers as full human beings, just as capable of undertaking prudent strategies in the market as are the owners of capital who need them (and who risk suffering great losses) to make this capital marketable. So to make it appear that the laws in our quasi-capitalist system impose an arbitrary, coercive, unjust organization of production that favors some special class of persons – employers – the 'scholars' of Critical Legal Studies must load their examples. The implication is that some other system – socialism is the 'natural' candidate – would do much better.

It seems that Critical Legal Studying requires not only the excavation of 'hidden' assumptions, but the burying of facts.

How, one might ask, is the Critical critique of capitalism different from the Marxist critique of capitalism from which it is laboriously distinguished? Well, it isn't, much, except that Marx argued that these 'infernal arrangements' could not be ameliorated until a total revolution succeeded in abolishing capitalist institutions and ushering in socialism, while the Crits seem to think that it would be nice to hasten the process by inventive pedagogy. They resemble the champions of Critical Race Studies, who offer a rationale for wholesale lawlessness in the name of protesting the allegedly thoroughgoing racism of Western European institutions of law and government.

Critical Legal Studies, then, contrary to its repeated denials, seems more ideologically than critically motivated. Perhaps there are exceptions; two prominent cases do not tell the whole story. Yet it must be noted that neither Fischl nor Gordon have any genuinely critical attitude to report in their supposedly authentic descriptions of the CLS view of legal relations under our mixed system.

The point here is not the particular facts of the nature of the labor market, that is, whether, as Professor Fischl observes, the 'distribution [of wealth and economic power] is a *choice* – not a "natural" or "necessary" phenomenon.' Whether that is so is worthy of fair debate. Fischl seems to regard the 'choice' about social arrangements as largely a top-down kind of choice. Perhaps, instead, the distribution of wealth or economic power follows the lines of historical choices made by people, with some exceptions that unfortunately cannot be remedied without abandoning the system altogether. But you would never know there could be reasonable argument about these matters from perusing the accounts of Fischl and Gordon.



Despite their boast of being – unlike their targets – beyond ideology – the Crits veer very close to orthodox Marxism in their view that roiling beneath the surfaces of the various systems of ideas in society – law, religion, politics, philosophy – there must be some kind of insidious hidden agenda orchestrated by the economic powers that be. Those who have perceived this truth, in turn, are duty-bound to carry out the revolution whenever they get the chance. Throughout academe, sociologists, economists, and philosophers inspired by Marxism or neo-Marxism have behaved accordingly, including the Crits. The bourgeois bogeyman may be thus effectively dispatched, but not without also making a casualty of academic objectivity.

Yet – Crits and their more orthodox Marxist brethren might ask – aren't neo-classical economists and their law and economics brethren in law schools doing exactly what the Crits do? To be sure, even if the law and economics gang could be found guilty of some of the same offenses the Crits commit, that only proves that those offenses are not confined to the Crits. It does not vindicate the Crits. But let us look at the law and economics school briefly and see if their sins are indeed comparable.

The law and economics school of jurisprudence roughly holds that the law – especially case law – is largely an expression of economic rationality – or, at any rate, that law would make the best sense if it could be directed toward that objective. For example, law and economics scholars regard many of the decisions reached in case law – dealing with anything from the sentencing of trespassers to the assessment of tort damages – as expressive of a kind of utilitarian calculation, implicitly aiming for a Pareto-optimal resolution. Some of the economics and law-school organizations, such as Dean Henry Manne's center at George Mason University School of Law, hold seminars for judges and invite noted economists – for example, Herold Demsetz, Armen Alchian – to explain the economic interpretation of law. And a few of the leaders of this school – such as Richard Posner – are now sitting judges.

In contrast to the Crits, though, these scholars do advance a substantive – not wily 'critical' – thesis. They do not claim to be promoting a neutral scrutiny of our legal system, to be merely hunting for hidden assumptions, with no theses of their own to advance. Quite the contrary. They spell out a very clear, usually jurisprudential doctrine, and engage in extensive debate as to whether it is correct (for example, in Posner's book, *The Economics of Justice*<sup>8</sup>). And they do not lack detractors – many of them from the philosophical community, publishing their critiques in such journals as *Philosophy and Public Affairs*.

Most law and economics scholars actually believe that their approach is value-free – as do many psychologists and historians who by no means have any kind of ideological agenda (even if one might agree with the Marxists that a normative message is still inadvertently conveyed *via* this so-called value-free education). Yet that is a different matter, since there is nothing conspiratorial about the economists' approach. In fact, it would be reasonable to take the teachings as merely a broad conditional proposition: if you want

a country to prosper economically, then follow such-and-such approaches to legal reasoning, adjudication, plea bargaining, public policy, taxation, international trade, and so on. If you don't want the country to progress economically, or if you feel that other values are a more pivotal consideration, the economic approach to law will have serious limitations.

No one would wish to argue that there should be no room in our law schools to explore and debate the kinds of issues proponents of Critical Legal Studies are concerned with. No professor should be denied promotion for introducing skepticism into his or her courses or scholarship; but when such skepticism is allowed to overthrow legitimate legal training altogether, the question becomes very different.

And the apparently typical cases of Critical Legal Studies pedagogy do raise doubts about whether CLS is a *bona fide* critical perspective. It seems much more like a means of advancing a political agenda. Professor Fischl paints a selectively callous portrait of the market and suggests some supposedly benign, compassionate, egalitarian alternative. Professor Gordon does no better.

Even if their point about open criticism and self-reflection could be taken at face value – which, as we have seen, they can't be – the Crits miss the point of an education in the law. There is, after all, a time and a place for everything. The practice of throwing every class in law school open to unbounded and critical debate may be properly revolutionary, but it is not a conscientious fulfilling of the task at hand. The bulk of the courses even in the 'elite' schools are largely training grounds for assisting people in their legal affairs in this society, not for either trying to change the world into some (allegedly) ideal version or guarding students against the possibility of resting some of their practical preparations on misguided premises. Worthy as these goals may be, they cannot displace the professional training that is the main purpose of the curriculum. There is ample opportunity in most (and especially the better) liberal arts universities and colleges, attended by students prior to entering the best law schools, to confront the big questions about the philosophical, moral and political assumptions underlying the law in our society as well as alternative societies.

Most law school courses are on the order of professional training sessions. Prospective lawyers go to law school just as others attend conservatories, schools of industrial design, architecture, pharmacology, business or engineering. They want to learn a trade, a craft, a profession; if they are to succeed, their professors must convey to them the nuts and bolts of that trade, not perennially question whether the nuts and bolts even exist, or should exist. In engineering schools one does not use a course on structural design to explore the metaphysical question of whether any objects really exist in reality or whether a principle of design today will also apply tomorrow. A marriage and family therapy masters program does not include extensive speculation about the value of family life, merely explorations about how to keep families functioning. When medical colleges do not give equal time to the African witch doctor's 'methods,' are they mistreating their students? One

can argue that if they spent time on such materials they could and even should be sued for malpractice! The law is a no less important field to the health of a society and its members.

As for the law schools themselves, most have particular courses – usually under the heading of ‘Jurisprudence’ – in which the topics the Crits revere could be covered. But to allow these topics to swamp the syllabi of courses on contract law, agency law, labor law, criminal law, would be counterproductive *at that time and in those courses*.

It is a curious thing for skeptics to try to infiltrate such schools and, when rebuffed, protest that they have been treated unjustly. After all, even Socrates would not be welcome in the kitchen, challenging recipes when dinner is about due; or at a building construction site, grilling the foreman about whether the laws of physics really hold. No, he would be well advised to conduct his inquiries in a setting where the central objective is in fact to consider the broad philosophical issues that bear on human life and the ways and means of organizing a community.

But none of my own observations should be taken to mean that competent law professors, who in fact do prepare their students to handle expertly the American legal system – for example, for some possible client – should be penalized for advancing radical ideas in their various publications, provided they also keep up the scholarship that will make them good professors. There is room even for considerable advocacy on the part of professors without having to give up *bona fide* scholarship and instruction, even when the line between the two is not simple to establish.

Well, all this may strike one as simple common sense. Why then do the Crits urge what could reasonably be construed as disruptiveness?

Probably because their agenda is revolutionary not only in the pedagogical but in the political sense of that term. Here again they betray a distrust for the people the teaching of whom they have chosen to take up as a career. And they cannibalize and distort the basic ideas of the very ‘ideology’ they deride, namely, the classical-liberal notion that from a wide-ranging critical discussion will flow the best understanding of a subject matter. This, after all, is a central tenet of the conceptions of education of John Locke and John Stuart Mill, an understanding of the value of discourse that was developed in conjunction with the championing of social and political individualism.

If we are really in favor of open and various discourse, we should also keep in mind a possibility even more radical than what Crits talk about, namely, complete privatization of education. One reason for the dismay with not just American legal education but American education as such is that in this society we have a somewhat complex combination of publicly funded but largely democratically administered education. That is true from the elementary school level all the way to post-graduate studies. Even our ‘elite’ private universities are very powerfully wedded to the state – hip-deep in grants from various government agencies and departments.

In such a climate it is not a surprise that all education will tend to reflect contemporary political orthodoxy. And to the extent that the political arena is beset with confusion, lack of direction, mediocrity, so too will much of formal education. (In Europe, where the state is even more directly involved in education, there is, however, not such a strong democratic impact on the field. The momentum from the past, with its tradition of exclusive, aristocratic education, has managed to persist in many – but not all – education institutions even in the midst of the gradual trend toward political democracy.)

With all their affected skepticism of regnant orthodoxy, one has to wonder why the Crits haven't questioned the advisability of the virtually total politicization of education. If there is anything that would achieve the goals to which Crits give lip service – namely, diversity and ongoing rethinking of institutions – it's a totally privatized educational system.

But, alas, that kind of laissez-faire free-for-all wouldn't mesh with the Marxist program.

Judging by the reports of two of their own prominent defenders, the Crits have two counts against them. One is that they are merely parading themselves as uncommitted and fair critics – whereas in fact they are pursuing an agenda of academic sabotage. Second, whether or not their rhetoric of criticism is authentic, it betrays a misunderstanding of the very nature of law school education.

For these two reasons the suspicions many law schools have about the Crits seem to be warranted. Individual cases are legitimately scrutinized with such concerns in mind.

So what then should law schools and universities do when scholars use classrooms as political platforms? Scholars can have firm viewpoints, even skeptical ones. The issue at the various law schools must be whether the purpose of legal education is enhanced. Are professors teaching what they have been hired to teach – or are they working to steer their students in what they take to be the more important but actually irrelevant subject for study? If the latter, then promoting the teacher, even if in some ways a brilliant thinker and scholar in the areas that interest him or her, would not be a responsible course. Academic freedom does not include the right to change at will the curriculum of a law school to that of political philosophy or revolutionary ideology.

If this is what Clare Dalton and David Trubek were guilty of at Harvard, former president Bok was right to deny them tenure.

## Notes

1 Peter Matthiessen, *Partisans* (New York: Viking Press, 1955).

- 2 See Bruck Brower, 'The Law School and the Law: A "Benthamite" dean lets a hundred legal flowers bloom,' *Harvard Magazine*, January–February 2000; reprinted at <http://www.Harvard-magazine.com/issues/jf00/law.html>.
- 3 Robert W. Gordon, 'Law and Ideology', *Tikkun*, Vol. 14 (1988), pp. 15–16.
- 4 Ibid., p. 16.
- 5 Paul Feyerabend, *Science in a Free Society* (London: New Left Books, 1978).
- 6 *University of Miami Law Review*, Vol. 41 (1987), pp. 505–11. Professor Fischl authored a follow-up of sorts, 'The Question That Killed Critical Legal Studies,' *Law & Social Inquiry*, Vol. 17 (1992), pp. 779–83
- 7 Fischl, p. 527.
- 8 Richard Posner, *The Economics of Justice* (Cambridge, MA: Harvard University Press, 1981).

## Chapter 13

# Should You Apologize?

### **Moral Concepts, Groups and Facts**

Are there some facts that are presupposed in apologizing and forgiving? What are they? Could we apologize and forgive without them?

The way I plan to go about discussing these questions needs to be addressed briefly before I begin. I take it that when an idea, theory, or principle gains its meaningfulness from others on which it rests, conceptually, then if those other ideas are false or confused, those that rest on them are called into question. It is, of course, possible that some other source of support could be found for the original ideas. But the burden of showing that such ideas exist and are meaningful and true lies with those who wish to defend the idea, theory, or principle in question. If, for example, the concept of ‘intention’ rests on the idea of mental action and it turns out that no mental action exists, then for the time being ‘intention’ has to be given up as a sound idea, at least until its foundations are reconstituted.

The questions on which I will focus arise in connection with certain social-political-legal problems, such as the rectification of past oppression by some against other citizens of a country as well as apologies offered for the commission of such past oppression. Even if most of these citizens are deceased, as are the perpetrators of the oppression against them, it is sometimes argued that a country as such owes an apology for the oppression, as well as that the descendants of the oppressed might and sometimes ought to forgive the country for the oppression their ancestors suffered. Sometimes these issues are linked to consideration of reparation or compensation, from members of the group that oppressed to members of the group that was oppressed.<sup>1</sup>

Anyone who regards the idea of collective guilt or culpability objectionable, and I count myself among these, needs to have an account available of these sorts of matters that is substantially individualist.<sup>2</sup> For example, in Western liberal legal systems the sins of the parents do not serve to condemn the children; the vices of some members of an ethnic group do not transfer to others. If some Jews were complicit in killing Jesus, other Jews aren’t deemed guilty, not in virtue of also being Jews, not unless the tenets of the religion dictated the original killing and current worshipers fully embrace those tenets. Even then, they would not be guilty of the killing itself, only of sanctioning the killing. Also, children do not inherit the debts of parents unless they are also willing members of a corporation or firm that has incurred and is still obligated to pay the debts.<sup>3</sup>

Some take this very seriously and have been faulted for being unable to make clear sense of any references to the intentions, actions and responsibilities of groups. For example, the view that Christians inflicted upon thousands of people the torments of the Inquisition, that Germans are responsible for the murder of millions of Jews, and that France or Britain or Iraq perpetrated some kind of military action against some other country – all these would appear to be problematic from the standpoint of those who deny group culpability and guilt.

For this reason it will be of some use here to consider what facts if any underlie such concepts as ‘guilt,’ ‘apology’ and ‘forgiveness.’ First, for these concepts to be meaningfully deployed, they require some matters of fact of which we can be aware and from which these concepts are formed. Otherwise assertions about whether one owes others an apology and whether one may be forgiven for what one is apologizing for could not be shown to be true (or distinguished from denials). ‘I apologize for having insulted you,’ and ‘I forgive you for having insulted me’ could not be true, meaningful assertions without certain facts being the case, such as being responsible for the insult.

In short, something about human beings must make it possible to think and speak of making decisions, choosing courses of conduct, failing to act properly in order to speak truly of someone having the obligation – or duty or responsibility – to do something, including, apologizing for some conduct. Similarly, there are preconditions for it being the case that someone can or should forgive someone else. Apology, forgiveness and the like have, thus, certain ontological preconditions; and if these are unfulfilled, the application of such concepts turns out to be groundless (because they lack the requisite conceptual base<sup>4</sup>).

The situation is analogous to there having to be atoms for there to be molecules; if no atoms exist, then no molecules can exist either, not, at least, as they are now understood. Or for Jesus Christ to have existed, there must be a Christian God and have been a Virgin Mary and if not, there could not have been a Jesus Christ (not in the relevant, Christian sense). Of course, it is not impossible, in the sense of being self-contradictory, for molecules to exist without atoms, nor for Jesus Christ without the Virgin Mary, only that is quite irrelevant.<sup>5</sup>

In relation to apologizing and forgiving (among other morally pregnant activities), if no one can choose to do something wrong or right, then to apologize to or forgive someone for having chosen to do what is wrong in the ordinary sense in which we mean these terms can make no sense. One might refashion the concept in some way, such that ‘to apologize’ would be consistent with unavoidably having done something untoward – say, by having the concept mean ‘to lament’ – but that would no longer be the apology we know and associate with people doing wrong things and regretting and wishing to be forgiven for having done them.<sup>6</sup>

Let me illustrate just how preconditions, along the lines I am suggesting, are required in another domain, namely, in connection with ascribing criminal

responsibility to persons. To wit, H. L. A. Hart tells us, in connection with culpable negligence, that

[N]o satisfactory account of what it is which makes 'conduct' voluntary or involuntary, capable of covering both acts and omissions can be given in [the] terminology of 'states of mind' or 'mental attitude.' What is required (as a minimum) is the notion of a general ability or capacity to control bodily movements, which is usually present but may be absent or impaired. ... It is important to pause and note that if anything is 'blameworthy,' it is not the 'state of mind' but the agent's failure to inform himself of the facts and so getting into this 'state of mind.'<sup>7</sup>

The idea here is that one must have the capacity to bring about conduct that produces culpability. So it would have to be up to the individual to bring such conduct about, something one could do or refrain from doing of one's own initiative. In traditional terms, culpable conduct presupposes free will. If one had no freedom of choice to do or not to do what turns out to be wrongful actions, it would make no sense to claim that one should or ought not to have done them.<sup>8</sup>

It is, however, only individual human beings with minds that are capable of forming or omitting to form conscious intentions guided by conceptual understanding that fit this condition. That is to say, human beings make judgments as to the desirability of certain complex actions, such as taking someone else's belongings, for which they are then responsible. The human mind, with its capacity to form general ideas – that are not a perception of some state of affairs that pre-exists in nature – uses the capacity to become volitionally aware by forming such ideas, based on perceptual evidence and on inferences. One can choose to think – to form complex conceptual propositions – or choose not to do so. This is clear enough from the fact that some persons do and others fail to become aware of how they ought to act and when they do not, their ignorance is no excuse. They could have become so aware.

For example, persons who fail to appreciate that an individual's color, race, national origin or gender is no grounds for attributing to that individual either favorable or unfavorable moral characteristics are morally responsible for what they come to believe as a result. That, indeed, is the source of culpable, blameworthy racism or similar prejudice, namely, a judgment that precedes evidence or proceeds hastily or carelessly.

Without such a capacity to either attend to the facts or fail to do so, no responsibility could be ascribed for holding prejudicial views such as those held by racists, sexists or bigots. So in, for example, a Skinnerian world, for contrast, the facts about human nature would be such as to render any moral responsibility – including the basis for an apology or for forgiveness – unfounded since in such a world this capacity for freedom of choice that brings moral responsibility into existence would be no more well grounded than, say, would be the casting of spells or the invocation of spirits in a naturalistic world.<sup>9</sup>



Some might dispute this on the grounds that certain determinists do retain the use of concepts such as ‘responsibility’ or ‘punishment.’ But they do not mean by these concepts what is meant as we use them in our day-to-day moral and legal discourse. So such transmogrifications do not suffice to refute my point – they amount to wishing to eat one’s conceptual cake and have it too. Since for Skinner and other determinists (for example, Daniel Dennett whose compatibilism is but a will-o’-the-wisp<sup>10</sup>) – be they hard or soft ones – our behavior is prompted by the interaction of the environment and the organism with no choice or initiative available to the agent – nor any standard of right and wrong the agent might then choose or fail to choose to act on – concepts presupposing the possibility of choice have no basis.

So, while it is true enough that many champions of deterministic accounts of human behavior assure us that their view makes ample room for ethics, morality, personal responsibility, blame, praise, apology, forgiveness, punishment and atonement, among other institutions and phenomena, their reasons seem to be that (a) they know how well these ideas are interwoven with human affairs and so without them their theory would lack realism and (b) they alleged that all these concepts mean something other than what they are normally taken to mean. Thus by ‘punish’ they do not mean ‘meting out untoward treatment in response to an avoidable wrongdoing’ – as the normal criminal law and ordinary ethical thinking would have it – but something along the lines of ‘act so as to prevent future performance of this kind.’ Skinner himself was forthright about all this when he rejected, instead of merely recasting, the sense of such concepts as ‘freedom,’ ‘dignity,’ ‘regret’ and ‘choice’ in his various works.<sup>11</sup>

Second, not only is it the case that without certain ontological propositions being true there would be no way to ground conceptually a claim to having moral obligations and, correspondingly, if those are not met, having the moral responsibility to apologize.<sup>12</sup> The very idea of moral misconduct – although not bad, undesired, unhealthy or even revolting *behavior* – would be impossible, provided we mean by ‘moral misconduct’ actions that one has undertaken of one’s own initiative and for which one is, therefore, responsible (one might not have taken those actions but chosen to take them).<sup>13</sup> Culpable malpractice, too, in the law, would have to be given up as a correct account of how some people act.

The moral dimension of human life assumes personal responsibility to make the right choice from among various alternative courses of conduct – or, in other words, free agency or will – on the part of human beings who aren’t crucially incapacitated.

### *Morality Without Facts*

Let me give a quick example. Peter Singer is a very prominent defender of animal liberation and substantial sacrifice in behalf of the world’s poor. He embraces a utilitarian approach to substantive ethics. Yet he is also an

advocate of noncognitive metaethics. Popular sentiment or private intuition is what he produces to ground his beliefs that animals must be included in a utilitarian calculus and that most Westerners ought to give up a great deal of their wealth to help others around the world.<sup>14</sup>

Not surprisingly, Singer does not really take his own advice seriously, either as far as his own conduct is concerned nor as far as what he believes others ought to do.<sup>15</sup> And why should he approach matters otherwise? He has no basis on which to claim that his utilitarianism is or even could be morally binding on us. Public opinions as well as intuitions vary a great deal, from person to person, culture to culture, and era to era. Hindus firmly believe that cows are sacred while Christians believe that human life is sacred. In the eighteenth century the public flogging of children was intuitively held to be a fine thing; today, it is held to be barbaric.

### *What Makes Apologies Work?*

As with moral responsibility – which, if it is real, often can issue in the justified ascription of blame and praise for deeds done by persons – so it is with apologies. Both presuppose some facts about human beings that are in serious dispute. To put it plainly, those who apologize must have certain attributes in terms of which their offering a *bona fide* – or even disingenuous – apology makes sense. Meaningfully demanding an apology from, as well as granting forgiveness to, someone similarly presupposes certain facts about human beings without which the moral point of view would be a bogus one.<sup>16</sup>

For example, to apologize is both to accept responsibility for a wrong done that the agent could have refrained from doing and to seek forgiveness from those who have been wronged by what was done. This is why it is problematic to accept an apology issued in behalf of persons who have not actually accepted responsibility or sought forgiveness, as when a spouse apologizes for a mate or a parent for a child. If an agent hasn't acknowledged wrongdoing and does not seek to be forgiven for this, no one else can do this for the agent. All that such 'apologies' can amount to is a profession of dismay or lament.

Nor is saying 'I am sorry' sufficient for an apology because it could mean merely that one is dismayed or laments what has happened without taking any responsibility for it. Very often when one hears of someone's mishap or loss, one says, 'Oh, I am very sorry.' This could express merely that one feels badly about what happened without suggesting contrition for it. Of course, sometimes 'I am sorry' is used as an apology; but it need not be so meant or taken.<sup>17</sup>

Those, however, who apologize implicitly admit to possessing free will – or what I have been calling initiative throughout this discussion.<sup>18</sup> Free will, initiative or agency implies that it is we who normally cause our conduct and might not have caused the conduct that is (deemed to be) wrong or right. If we

lack this capacity, so that instead what we ‘do’ is an unwelcome happening – akin to an earthquake, tornado or bug bite – apologizing and wanting forgiveness make no reasonable sense.

It would not make sense to expect an apology from inanimate matter, plants or non-human animals. If a dog bites or a rock falls on someone, the idea that an apology is now due – other than from some possible human agent who contributed to such a result – is nonsense (other than in Disney movies or fairy tales, both of which enjoy poetic license). These all behave as they naturally must, although it is arguable that some animals possess a measure of free choice and even moral sense (something I will not discuss here). However we best put their situation, the crucial point is that none of the above possesses, as a central feature of their nature, the capacity for moral responsibility. Why? Because none can be the cause of its own significant actions, nor apprehend or grasp how it *ought to act*.<sup>19</sup>

### *Moral Objectivism*

Another assumption of apology and forgiveness – as well as all morally pregnant concepts – is metaethical cognitivism or objectivism. That is to say, that what is right and wrong must be knowable. What we ought to do is a fact about how we relate to the world properly, not merely a matter of some people’s wishes, desires, hopes and the like. Judgments concerning how one ought to and ought not to act must be something that can be established as true or false.<sup>20</sup> If this is not so, apologies and other moral notions would be arbitrary, *ad hoc*, and groundless in the sense in which people speak about them. If I can apologize without being responsible for the wrongness of what I have done, this is certainly something different from what we ordinarily mean by an apology. Such perverse uses of the concept of ‘apology’ would render the sincerity of an apology or forgiveness, for example, impossible, just as the ‘truth’ of a dream or fantasy is impossible to tell.

Some very crucial institutions in most societies presuppose that human beings can know what is right and this is knowledge (of certain kinds of facts) about human life. In short, if human life is truly value free – that is, if concepts of right and wrong, good and evil, guilt and innocence, worth and unworthiness, blame and praiseworthiness and many other concepts with ethical presuppositions are wholly inapplicable in human life, just as many in the social sciences used to assume – this would make apologizing something entirely odd, unrelated to our common moral universe.<sup>21</sup> And in the case of apologizing for injustice or other misconduct toward others, the denial of the capacity of human beings for free agency would be a cruel hoax, as well. It would underscore the view of those who perpetrated and continue to defend the unjust actions and institutions involved that in fact, realistically speaking, no injustice had – indeed could have – been done, so that nothing needs to be apologized for and no forgiveness needs to be sought.

*Assuming Individualism*

Finally, a version of moral individualism is also presupposed by moral concepts such as ‘apology’ and ‘forgiveness.’ It is supposed to be human individuals, not groups, who do what is morally wrong and for which they could and sometimes should apologize, otherwise the offer of an apology by someone – an individual – would be disingenuous. It is human individuals who possess the capacities of mind – resting on their individual brains and faculties – by which they can produce beliefs and actions for which they may need to apologize and which might be forgiven by other individuals.<sup>22</sup>

There are serious philosophical and related schools of thought that attempt to deny this because they share Karl Marx’s belief that ‘The human essence is the true collectivity of man.’<sup>23</sup> This then leads to treating human affairs not as the product of individual choices or initiative but of class tendencies. It is, by Marx’s lights, humanity that actually acts – goes through development processes independently of the subjective features of human consciousness.<sup>24</sup> (I refer here to Marx instead of more recent proponents of such a view because of his prominence and influence and because a good deal of contemporary discussion of collective responsibility and guilt is derivative of his sort of class or collective analysis.) But we may appreciate one of the central problems with that idea, namely, that all such beliefs and arguments are themselves what individual human beings develop, hold, and advance, and in connection with which they criticize one another, claiming that those who disagree are individually wrong for doing so. That may be seen as the most elementary form of individualism implicit in human intellectual discourse.<sup>25</sup>

Arguably, some may wish to have it both ways, admitting some measure of individual responsibility for conduct yet also holding responsible – that is, blame or praise – human collectives (as when a corporation or even a country is the focus). ‘Germany caused the Second World War,’ or ‘The Jews killed Christ’ or ‘Muslims are the terrorists’ would be examples of such attributions. According to the present approach, however, these kinds of claims are at best short cuts, loose talk, and cannot be literally true.

It may also be claimed that people who speak for groups, such as governments or corporations, can apologize and seek forgiveness even if those who perpetrated the moral evils at issue are no longer alive. This is an interesting idea, especially in the wake of British Prime Minister Tony Blair’s apology for Britain’s conduct during the Irish famine, the US government’s compensation of Japanese Americans for their unjust internment during World War II, and several Swiss corporations’ payment of large sums to relatives of Holocaust victims.

Exactly how to render all these sensible is not an easy task but one account that squares with moral individualism focuses on the fact that in each of these cases the transfer of legitimacy – of governments and corporations – involved, in part, a willing assumption of responsibility for the organization’s past actions. If I join the KKK, I, in a serious sense, become supportive of

its past deeds, and once they are acknowledged to have been vile, I need to apologize for having been supportive of them. And to clear the name of the organization, its leaders would need to place it on record as having regretted the organization's past deeds. In a crucial sense, then, we are still concerned with how individuals see themselves and their actions and their willingness or lack thereof to accept responsibility where that is warranted. That the language is often somewhat hazy testifies to the fact that these matters are difficult to sort out, especially for purposes of issuing simple, straightforward statements to the public at large.

## Conclusion

I would suggest that the several presuppositions I mention above – free will, moral objectivity and moral individualism – render apologies, forgiveness and similar aspects of our moral lives well grounded. Putting it a bit differently, that human initiative exists, that moral knowledge is objective and that individualism is a sound social theory all point to the conclusion that when, in the ordinary sense of these terms, human beings apologize and when they forgive one another's wrong deeds, this is something that fits properly within their lives and is not some illusion, myth or ruse – or something in need of being recast into language that no longer means what we ordinarily take it to mean.

What may be most controversial about the above approach is that moral individualism strongly suggests that apologizing to those one could not have wronged is probably mostly – though perhaps prudently – ceremonial. At worst it may be a case of capitulating to collectivist prejudices and thereby perpetuating some of the conditions that led to the injustices that required an apology in the first place. Accordingly, the conclusion here reached is that collective as well as retrospective apologizing is ill founded.<sup>26</sup>

## Notes

- 1 Other issues may also be involved, such as assigning guilt to all members of a group for the deeds of some of its members. Can current managers of a corporation be faulted for the deeds of past members, as is suggested by apologies offered by current managers of some Swiss banks for the deeds of past managers? Can current members of ethnic groups share the blame for the deeds of past members? Could they owe an apology to those who descend from the victims? Several volumes deal with these and related matters, including Larry May, *The Morality of Groups* (Notre Dame, IN: University of Notre Dame Press, 1987), Peter A. French, ed., *Individual and Collective Responsibility* (Rochester, VT: Schenkman Books, 1997), Larry May and Stacey Hoffman, eds, *Collective Responsibility: five decades of debate in theoretical and applied ethics* (Lanham, MD: Rowman & Littlefield, 1991), Sandra L. Bloom, *Bearing Witness: Violence and Collective Responsibility* (Binghamton, NY: Haworth Press, Incorporated, 1998).

- 2 Some communitarians, such as Michael Sandel, dispute the very existence of individuals as being ontologically prior. See Sandel, *Liberalism and the Limits of Justice* (Cambridge: Cambridge University Press, 1982). Their thesis is that a self is inherently collective or communal so that everyone is a bundle of persons, the one whom we ordinarily think of as the individual plus various more or less intimate others. But see, in response to his idea that selfhood is ontologically flexible, John Haldane, 'Individuals and the Theory of Justice,' *Ratio* XXVII 2 (December 1985), pp. 189–96. See also Tibor R. Machan, *Individuals and Their Rights* (LaSalle, IL: Open Court Publishing Company, Inc., 1989) and *Classical Individualism* (London, UK: Routledge, 1998).
- The central idea of individualism isn't atomism but that there is one, unitary self who is the source of significant action, an individual will, as it were.
- 3 Accordingly, comparing demands for contemporary white persons' reparations to contemporary black persons' for slavery and segregation from whites with reparations to Jews from certain German corporations, such as banks operating in Switzerland, is a category mistake.
- 4 For bachelors to exist, there must be adult male human beings. If there aren't, then no bachelors can be, not in the sense in which the concept is now deployed. The concept of bachelorhood presupposes the valid concept of adult male human being.
- 5 It is true that there might be – that is, it is logically possible for there to be – molecules without atoms and Jesus Christ without a Virgin Mary, whatever that is supposed to state. However, I am not interested in logically (that is, formally) necessary truths here, although some do speak of 'the logic' of a concept. I am concerned that the conceptual base of certain ideas be identified and not forgotten as those ideas are deployed.
- 6 Such refashioning of language was a prominent feature of B. F. Skinner's *Beyond Freedom and Dignity* (New York: Viking, 1971).
- 7 H. L. A. Hart, *Punishment and Responsibility* (New York: Oxford University Press, 1968), pp. 142–43.
- 8 For more on this, see Tibor R. Machan, *Initiative – Human Agency and Society* (Stanford, CA: Hoover Institution Press, 2000). In this work I explain why Frankfurt type refutations of alternative possibilities are not telling. They are, essentially, contrived and gain their thin plausibility from highly exceptional language uses.
- 9 Skinner, *Beyond Freedom and Dignity*. Cf., Tibor R. Machan, *The Pseudo-Science of B. F. Skinner* (New Rochelle, NY: Arlington House Publishers, 1974).
- 10 Daniel Dennett, *Elbow Room: The Varieties of Free Will Worth Wanting* (Cambridge, MA: MIT Press, 1984).
- 11 For how Skinner recasts these and related concepts, see Skinner, *Beyond Freedom and Dignity*, *Science and Human Behavior* (New York: The Free Press, 1965), 'Behaviorism at Fifty,' in T. W. Warin (ed.), *Behaviorism and Phenomenology* (Chicago, IL: University of Chicago Press, 1964) and 'Answers for my Critics' in Harvey Wheeler (ed.), *Beyond the Punitive Society* (San Francisco, CA: W. H. Freeman and Co., 1973).
- 12 My remarks here rest on the conviction, not argued for here, that concepts are formed by reference to facts of reality. In short, I am invoking a realistic understanding of concept formation. See, for more on this, Edward Pols, *Radical Realism* (Ithaca, NY: Cornell University Press, 1998). See, also, Ayn Rand, *Introduction to Objectivist Epistemology*, exp. 2nd edn (New York: NAL Books, 1990).
- 13 There are those who argue that moral responsibility is possible without it being the case that the agent could have done otherwise. I address this compatibilist view in *Initiative*. Briefly, compatibilism robs morality of its central feature, namely, that the agents of morally significant conduct had the capacity to avoid doing what is wrong or to do what is right. If compatibilism is true, then only good behavior is possible, not morally right conduct that depends on choice.
- 14 See Peter Singer et al., *Animal Liberation*, 2nd edn (New York: The New York Review of Books Collection, 1990) and *Practice Ethics* (London, UK: Cambridge University Press, 1993).

- 15 See Peter Berkowitz, 'Other People's Mothers,' *The New Republic*, January 10, 2000. Berkowitz makes note of the fact that despite Singer's proclamation that the very old ought to be allowed to die and the resources to keep them alive ought to go to help those who suffer poverty and deprivation, Singer himself has spent extensive resources on helping his own elderly mother.
  - 16 As Nagel puts it, 'The concern with what one is doing to whom as opposed to what happens, is an important primary source of ethics that is poorly understood.' Thomas Nagel, 'Equality,' in Thomas Nagel, *Moral Questions* (Cambridge: Cambridge University Press, 1979), p. 115. I take it Nagel here is reminding us of Kant's famous dictum, "'Ought" implies "can".'
- It has been suggested by one critic that the view that moral responsibility is predicated on some sort of free will is a minority position and that there are many different senses of this idea that can be made to fit within determinist or compatibilist theories. As I note above, this may well be due to not wanting to depart from reality too obviously as one advances one's philosophical views and because the concepts of 'responsibility' have been radically recast. Another reason is that determinist – even soft determinist and compatibilist – views are widely deemed to be consistent with what the philosophers take to be the requirements of science, so despite their willingness to make room for the ethical life, they are also beholden to the scientific account of human life. Not willing to do what Kant did, namely, to divide reality into the noumenal and phenomenal regions, they simply concoct a so-called compatibilist position. As noted, Skinner was more forthright and simply tossed the moral realm altogether, thereby preserving consistency albeit at the expense of ordinary realism. If this sounds somewhat judgmental or moralistic, in suggesting as it does that some people perform dubious theoretical moves so as to satisfy incompatible goals, well, that is merely one way of understanding the point. But why would that be so outlandish? When scientists tried to reconcile the findings of astronomy with a given cosmology, they were accused of constructing bogus epicycles. Even if one may have problems with discerning motives, the fact should suffice that this was a dubious move. Other such efforts are no less culpably carried out.
- 17 Arguably, one source of concern about former president Bill Clinton's response to being accused of wrongdoing with Monica Lewinsky is that he would usually only say, 'I am sorry for what happened.' It is very possible that this was done at the advice of legal counsel so as not to legally implicate Mr Clinton. Saying, 'I apologize for what I did' would very possibly have run the serious risk of implicitly admitting guilt, which, given his problems with Paula Jones, could have been quite costly. 'I am sorry for what happened' leaves open whether I am responsible.
  - 18 Machan, *Initiative*, and Tibor R. Machan, 'Applied Ethics and Free Will,' *Journal of Applied Philosophy*, Vol. 10 (1993), pp. 59–72.
  - 19 For a discussion of this issue, see Tibor R. Machan, *Putting Humans First, Why We Are Nature's Favorite* (Lanham, MD: Rowman & Littlefield, 2004).
  - 20 I develop the case for this claim in some detail in Tibor R. Machan, *Objectivity – Recovering Determinate Reality in Philosophy, Science, and Everyday Life* (London, UK: Ashgate Ltd, 2004).
  - 21 Machan, *Initiative*. This was the gist of A. J. Ayer's logical positivist view of morality in *Language, Truth, and Logic* (New York: Dover, 1936).
  - 22 For more on this, see Machan, *Classical Individualism*. For a view that embraces a form of collective guilt and debt, see Randall Robinson, *The Debt, What America Owes to Blacks* (New York: Dutton, 1999). Matters can get complicated but the general idea I would propose is that any liability be dealt with similarly to how tort law deals with it. Individuals, or their voluntary associations such as corporations and the like must be found liable. That is the approach that was taken *vis-à-vis* Swiss bank and German corporate debts to survivors of the Holocaust and their offspring, as well as to Japanese Americans who were interned in the USA. It is problematic, also, just how abrogation of US Government Treaties with Native Americans – that is, Native American tribes – can

be adjudicated once all the parties to the treaty have died. For this, a fully developed sound theory of tribal and political identity over time may be required.

- 23 Karl Marx, *Selected Writings* (New York: Harper & Row, 1970), p. 126. Others, not necessarily completely in agreement with Marx, uphold a similar view. See, for example, Charles Taylor, *Philosophy and the Human Sciences* (Cambridge: Cambridge University Press, 1985), where in several chapters he writes of people *belonging to* society or some other group.
- 24 Marx, *Selected Writings*, p. 417.
- 25 For more, see Tibor R. Machan, 'Individualism and Discourse Ethics,' in *Classical Individualism*. For a very detailed discussion of ethical individualism, see David L. Norton, *Personal Destinies, A Philosophy of Ethical Individualism* (Princeton, NJ: Princeton University Press, 1976).

To appreciate the individualist point, the following may be of some help here:

Language often obscures truth. More than is ordinarily realized, our eyes are blinded to the facts of international relations by tricks of the tongue. When one uses the simple monosyllable 'France', one thinks of France as a unit, an entity. When to avoid awkward repetition we use a personal pronoun in referring to a country – when for example we say 'France sent her troops to conquer Tunis' – we impute not only unity but personality to the country. The very words conceal the facts and make international relations a glamorous drama in which personalized nations are the actors, and all too easily we forget the flesh-and-blood men and women who are the true actors. How different it would be if we had no such word as 'France,' and had to say instead – thirty-eight million men, women and children of very diversified interests and beliefs, inhabiting 218,000 square miles of territory! Then we should more accurately describe the Tunis expedition in some such way as this: 'A few of these thirty-eight million persons sent thirty thousand others to conquer Tunis.' This way of putting the fact immediately suggests a question, or rather a series of questions. Who are the 'few'? Why did they send the thirty thousand to Tunis? And why did these obey? ... Empire-building is done not by 'nations' but by men. The problem before us is to discover the men, the active, interested minorities in each nation, who are directly interested in imperialism, and then to analyze the reasons why the majorities pay the expenses and fight the wars necessitated by imperialist expansion.

Parker Thomas Moon, *Imperialism and World Politics* (New York: The Macmillan Company, 1930), p. 58.

- 26 The exception may be that derivatively – that is, when one speaks for others who have appointed one as their representative or spokesperson – such apologies could have merit. For a discussion of why it is wrong to seek rectification of all past wrongs from someone or another now, see Christopher W. Morris, 'Existential Limits to the Rectification of Past Wrongs,' *American Philosophical Quarterly*, Vol. 12, No 2 (April 1984), pp. 175–82.



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## Chapter 14

# Between Parent and Child

Are we forgetting about the kids?

Critics sometimes say that libertarians don't pay enough attention to social issues as compared to political issues, nor to certain gray areas in the political arena, for example, the morality and legality of abortion or assisted suicide and, especially, the legal status of children.<sup>1</sup>

Now it is true that most libertarian theorists have thus far been preoccupied with fundamentals, but understandably so. The very idea of a fully free society is anathema to most other political philosophers. Even if most contemporary political philosophers would also take issue with full-fledged socialism or communism, their statism inclines them to be less dismissive of such ideological systems – which are, after all, only extreme variants of their own views.

Some libertarians have addressed the ticklish questions of abortion. But they have also argued that abortion *per se* is not a concern of libertarian justice – that what is of concern is the point at which someone becomes a rights-bearing human being. Should this turn out to occur immediately after conception, so be it, and this is the point at which rights ought to be enforced; but if this occurs later, then so be it also.<sup>2</sup>

I will not revisit those topics here. I note them to distinguish them from others even more remote from politics: topics in social philosophy such as the proper view of gambling, drinking, adventure, commercial speculation and so forth; and the topics of applied ethics (business, medicine, science, athletics, and so on). Libertarians do have something to say about these, though not necessarily *qua* libertarians. Yet, as the following discussion illustrates, there are affinities between libertarian politics and libertarian treatments of such a topic as the proper, ethical relationship between parents and children.

We take it for granted that there are moral dimensions to the parent–child relationship. Such concepts as parental authority, child abuse, and the duty to obey suggest as much. We also distinguish between the legal and the moral dimensions. For example, we refer to the legally enforceable duty of child support or to children's rights that may be protected by law, as opposed to a parent's moral responsibility to teach values or the child's responsibility to help around the house.

How do these moral components of the parent–child relationship arise? So what if children are begotten by parents? How could this obligate parents to do anything in particular? And what if the child refuses to obey his parents? What is wrong with that aside from a kind of recklessness inviting inconvenient parental repercussions?

Certainly much of the law across the civilized world affirms the obligations of parents and children. But the sheer fact that these obligations are widely upheld isn't enough to explain and validate the morality of the relationship. When children challenge a parent, or a parent contemplates how to deal with his children, such questions need to be answered independently of the law. And much of family life is carried on behind closed doors in any case, so that mere legal guidelines cannot suffice to steer people in the right direction. A family life that proceeded by continuously consulting the law would surely be an impoverished one. And any legal code that attempted to predetermine all the moral paths a parent and child may take would be an impoverished – or overly presumptuous and intrusive – legal code!

So let's explore, as moral questions, what children owe their parents and what parents owe their children, and why.

Parental authority and its limits may be understood by answering the question: 'What would my child reasonably have wanted me to do for (and to) him once he has become an adult?' Then we may take it that upon accepting the role of parents one has agreed to deal with one's children according to the prospective answer to this question.

Would a grown person wish that his parents had guided him in certain fundamental ways when he was young? Would he wish for some sternness in this guidance – for example, that the parents refuse to let him take up smoking, require him go to bed at a reasonable hour, insist he do his homework? Suppose a child has discernible musical talent. Would the adult who had been this child have wanted her parents to apply reasonably stern discipline about developing this talent? If so – and if what parents ought to do is rear their children to grow into mature and fulfilled adults – then this would inform them about how they ought to rear their children.

The same would hold with respect to general moral standards and mores as with measures pertaining to individual development. Parents or guardians owe their children what the adult version of the child would rationally propose they should have done. (Notice that this requirement of rationality precludes any demand for the impossible – for example, what would have been unfeasible economically or otherwise.)

A crucial element of self-development is the ability to become who one will be by choice, not because one has been molded into what someone else has decided one will be. This (what we should call a) rational-reconstructive approach to child-rearing does justice to a human being's essential autonomy or free will: if we keep in focus what the adult version of our child would want us to do about his development, we seek to recognize the role of autonomous choice early on, if only in a surrogate fashion. We, as parents, stand in for the adult version of our child and thus give the child a kind of self-direction. As the child develops we encourage as much independent decision-making as we can reasonably countenance.

This approach also encourages the necessary amount of moral teaching from parents. A grown person would not reasonably desire that he had been

brought up without regard to sound moral standards. Since moral teaching involves disputed precepts – especially if complete moralities are being taught rather than just common-sense moral principles – parent moral teaching would always have to be somewhat provisional, with parents aware that someday the child will likely challenge their teachings. Parents must thus be prepared to defend them by reference to reasons that can be understood and eventually evaluated (as opposed to the easier but less enlightening ‘Because I told you so!’). Mere indoctrination or indifference to moral issues would constitute, at least in part, neglectful child rearing.

As to what children owe their parents, the issue might be approached by way of considering what parents need from children to make a feasible household and a developing child possible. A child should obey parents because this is the child’s best option for development – so long as parents are endeavoring to promote that child’s development. Since children, especially very young children, are not able to assess this well, the general prescription ‘Obey your parents’ makes sense for most parent–child relationships. But if and when the child-rearing experience ceases to be the best alternative – for example, if unnecessary beatings occur, or wildly irrational moralities are promulgated – and the child or someone representing his interest can grasp this, obedience is no longer owed and the child is justified in leaving to seek a better situation. Since a child won’t always understand what his situation is, let alone possess the wherewithal to escape it, some kind of public awareness of a parent’s child-rearing techniques must be available to remedy any abuses. Thus if a child is persistently hidden from public view, that may be *prima-facie* grounds for closer public scrutiny of what is happening in a particular family.

What about such matters as religion and politics? Here rearing would have to involve handing down some values but with the understanding that these are going to be available for personal choice later in the child’s life. It would not be rational to expect parents to avoid imparting their values to their young – indeed, it is part of their responsibility to do this. But it is sensible to expect, also, that parents make it evident to a growing child that as they grow up it is reasonable for them to assess on their own the values of the parents, hopefully in a spirit not of blind rebelliousness but of genuinely independent thinking. The way to forestall the former (if possible; it isn’t always) is to encourage and expect the latter. (Some of this will require adjustment during the adolescent years when young people are most probably especially focused on gaining an independent consciousness of ideas, values, goals, tastes and preferences.)

By projecting what children would have wanted for themselves as children once they become adults, we also assume that even while still growing up, children want to be successful adults and therefore want their parents to rear them for such success. Is the assumption rational, even if a kid bristles against reasonable discipline and counsel? Yes; and the child’s assent to this doctrine is communicated by the interest he takes in living. ‘Do well by me since I have embarked on the project of living well – something you, my parents, ought to have expected of me once I joined the human race.’

It seems, then, that a kind of teleological ethics makes the best sense of parental authority and children's obedience. Given the rational assumption that children would want to be brought up in certain ways, the conditions for such rearing are authorized for parents to secure, and even impose. And they also provide the limits to which parents may go.

There is a final topic to be considered. Clearly, children are not without rights – indeed, including some specially emergent positive rights (for example, to be fed). First, they have the rights that adults do – to life, liberty and the pursuit of happiness – albeit the exercise of these rights occurs through the judgment and help of parents. A child is a dependent being and thus lacks the full sovereignty that is required for the independent exercise of one's basic rights. Yet, even as young human beings, children do possess the rights of human beings through the guidance of their parents. They may not be killed, assaulted, stolen from, and so forth. But what they do with their lives, what actions they take, and how they dispose of their property or seek their happiness is all largely under parental supervision. That supervision, in turn, must conform to the provisions implicit in our earlier discussion about parental obligations. If there is clear and present danger that children are not being provided for, law officers would have the authority to investigate.

From the time a child is born – perhaps even earlier, depending on how the dispute over when personhood truly begins is best resolved – the child's citizenship would be recorded and all the protection to which he is entitled would also be provided. Because of the special status of children as dependants, those entrusted with the protection of their rights would have a certain legal leeway toward parents that is not accorded to them with respect to adults without children.

Parents properly expect their government to enforce the contract they have entered into on both sides. Their parental authority should gain official support; their abuse of it, official rebuke. In turn, runaway kids – at least those who have not yet reached a certain threshold of independent capacity – should be returned home, provided no evidence of child abuse is available. Laws should not ordinarily protect children as if they were independent, mature agents in cases where they inappropriately behave as adults – for example, by purchasing certain goods and services, entering into contracts, and so on. Everyone ought to be on notice that children are dependents and may not be counted upon to act otherwise.

Some measure of autonomy is due every normal child, who evolves from a state of total dependency through stages of gradually lessening dependency. Children are not zoo animals, to be barred from exploring the neighborhood or making contact with others. Furthermore, because children have been invited into the lives of their parents, and because they *are* children and not adults (indeed, in the beginning, helpless infants), parents have committed themselves to provide for them. May public authority back this commitment? Yes, because when people have children, they enter into a compact with them. This may be difficult to appreciate because it is a unique relationship, one that

is possible only with human children. Since parents choose to have children, and since children are dependents for most of their childhood, parents can only be understood as making a promise to supply what their children need to grow up. And thus to such parental support the children are entitled.

Apart from these considerations, which bear on the way a libertarian order would address the parent–child relationship, there is one other problem worth addressing here. It has to do with the difficulty of dealing with irresponsible childbearing, something that is rampant in many societies.

Those who prize a free society as I have been discussing it, one wherein the legal system concerns itself first and foremost with protecting individual rights – keeping the peace and fending off attacks from enemies – have a very tough problem to overcome in the fact that millions of people who have no business doing so keep having children. The problem arises because in a truly free society persons may not be prevented from acting freely unless they have committed crimes against others. Prospective parents who fit this description are, therefore, quite free to engage in sexual unions and these unions often bring children into the world. But many such prospective parents cannot afford to have children and quite a few proceed to rely on the government to provide the children with their basic necessities, including day care, education, and medical services. (Others will forgo their own proper development in life because they realize what awesome responsibilities they have assumed.) When the children depend on the state, withdrawing government-provided services does not deprive the parents but the children of what they need to flourish in life. And children have nothing to do with getting themselves into this kind of fix, relying on others to furnish them with what they need to live.

Accordingly, when champions of individual liberty advocate cutting government's size and scope, they are faced with a very serious obstacle. This is the understandable concern we all have for the innocent children who have been brought into this world by irresponsible parents. It is difficult to accept policies that would lead to children having to suffer, even if those who have the children brought this about, not those who want government to stick to its appointed task – to secure our rights.

How can this problem be faced in a way that does not put innocent children at grave risk?

Of course, in a free society there would be many institutions ready to take up the task of caring for children and others who are helpless without support. Even in a welfare state there are hundreds of such institutions, so if government did not offer this help by taking it from others who aren't responsible for these individuals, there would most likely be even more if government got out of the way. But there cannot be any guarantee that every child would be taken care of. Indeed, not every child is taken care of even when government becomes their guardian. But when government – which has the use of force at its disposal to transfer resources to those who need and want them – isn't available, it looks as if this amounts to cruelty or callousness.

Never mind that it is cruel enough to demand by force of law that responsible taxpayers, who have kids only when they are willing to care for them, provide for kids they did not produce. But it is also undeniable that most folks who aren't loyal to the ideals of liberty believe that helpless children and other incompetents should not be left on their own. And they are willing to enlist the force of government to do what they should be doing if they are sincere in their concern for such children and others, namely, provide them with help out of their own pockets.

In light of this, some would just abandon the ideals of a truly free society. They would accept at least the level of government expansion and expense, apart from its rights-protective mission, required to save the kids.

But with this concession to expanded government the floodgates are opened for sure. There is no end of people who would use that precedent to then lobby for government support of transfers to what they deem to be vital projects – as, indeed, they do in the welfare state all the time. How else do we explain that tobacco farmers, failing car companies, airlines without passengers and thousands of other clients march to Washington and other centers of government to demand they, too, be provided with funds taken from taxpayers who haven't been guilty of producing their losses? It is because once some segment of society, even if it is just helpless kids, get government aid, everyone starts thinking, 'Hey, there's stuff there for us, if we get there fast enough via our representatives in Congress.'

My reason for raising this issue here isn't to join up with those who will give up on the ideal of a truly free society because some problem seems intractable. It is very doubtful whether the welfare state solves this problem, given how many kids go unattended and are merely cared for in perfunctory ways. Rather, I want to point out that there will always be something that a good theory does not fully address. There will always be something we will need new thinking to solve. The task of interpreting essentially sound principles to cover problems is neverending. Yet decisions need to be made, and they can be better or worse even if never final and perfect. Here, too, the perfect tends to be the enemy of the good! In this case, too, there are suggested solutions in need of serious consideration so as to save freedom from those who would toss it aside at the slightest provocation. Adoptions, for example, could be made far easier and that would probably hold out a great deal of hope for helpless kids, hope that is now barred because of the red tape and obstacles to adopting kids. And there are probably other options, not yet thought of, that would emerge, were we to insist that liberty may not be breached even in heart-wrenching circumstances.

Still, here is a matter that needs a solution that can also be made to fly with the general public – in other words that doesn't upset ordinary sensibilities – otherwise we are left with a powerful excuse and great pressure to give up on liberty.

## Notes

- 1 See, for example, my own books: *Liberty and Culture: Essays on the Idea of a Free Society* (Buffalo, NY: Prometheus Books, 1989), *A Primer on Ethics* (Normal, OK: University of Oklahoma Press, 1970), *Generosity*, and *Classical Individualism*, and, co-authored with Jim Chesher, *The Business of Commerce: Examining an Honorable Profession* (Stanford, CA: Hoover Institution Press, 1999). Books I have edited touching on the subject include *Commerce and Morality* (Lanham, MD: Rowman & Littlefield, 1988), *Educating the Human Individual* (Stanford, CA: Hoover Institution Press, 2000), and *Morality and Labor* (Stanford, CA: Hoover Institution Press, 2000).
- 2 I have argued elsewhere that without a developed cerebral cortex no human being can exist as such, so that the point at which killing the fetus becomes homicide is around the 24–27 week of pregnancy. Prior to this time, what pro-life champions refer to as ‘unborn babies’ are in fact fetuses, *potential* human beings or infants. The development of the full organism occurs in stages, including a phase during which it exists potentially but not yet actually, just as do trees, butterflies, and so forth. Members of Libertarians for Life, mainly Doris Gordon, Edwin Vieira, Jr, and John Walker, differ. See their many essays on the web site [www.cris.com/~Bwjass/lfl/litlist.htm](http://www.cris.com/~Bwjass/lfl/litlist.htm).



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## Chapter 15

# Should Ads for Hazardous Goods be Banned?<sup>1</sup>

Libertarians are rather brazen about the freedom of the market place, although not more than they are about freedom of speech, religion or other human activities. They decry paternalistic public policies and see them as doing violence to people's fundamental rights.

Nowhere else is this more evident than in how libertarians approach the trading of hazardous products and services. Even such goods as hard drugs are thought of by libertarians as something people ought to be free to trade, provided they are informed about what it is they are buying and selling. For example, when the sugar substitute cyclamate was taken off the market because in some experiments when rats were fed large dosages they died, many libertarians facetiously proposed to have the product sold as rat poison. That wouldn't deceive anyone, so it should not be banned.

Cigarette trade has recently been the focus of much criticism – several states and the federal government have reached enormous settlements with tobacco companies that were accused of causing massive health hazards and out-and-out illnesses, despite the fact that those who fell ill had been warned of tobacco's dangers. One of the early casualties of the war against tobacco was cigarette advertising. So I shall use this as a token of the kind of bans that libertarians consider unjust and indicate why they view the matter in that light.

The American Medical Association has often and successfully called for a ban on the advertising and promotion of all tobacco products. A new wave of debate on interpreting the Constitution and on the nature of advertising followed and, indeed, has already been concluded.

In this discussion I intend to sidestep the 'public policy' and strictly legal approach to the topic and focus instead on what is less discussed: basic moral and political values. I consider the main values embodied by our Constitution to be basic moral values as well. Central among these values are liberty, limited government, and natural or human rights. I also take it that these values are not subject to majority rule. This point was clearly expressed by the US Supreme Court when it stated in *West Virginia State Board of Education v. Barnette* (1943) that

The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials, and to establish them as legal principles to be applied by the Courts.

One's right to life, liberty and property, to free speech, a free press, freedom of worship and assembly and other fundamental rights may not be submitted to a vote; they depend on the outcome of no elections.

The particular issue here is commercial speech and its deserved but by now frequently neglected protection under the First Amendment. Tobacco advertising is a clear and aptly controversial example of the principle I wish to address. It is a useful case because, as with the exercise of the right to freedom of speech in general, a principle is at issue. Tobacco advertising can serve as a good test case since in this case the exercise of this right is very much derided throughout society. A similar case was pornography and the most famous test had to do with the publication of *Hustler* magazine and its publisher Larry Flynt – a motion picture, *The People vs. Larry Flynt*, actually chronicles that case quite accurately. Flag burning, too, is often seen to serve as such a test case, although it isn't so clear-cut because burning a flag is by no means obviously a case of speaking out on a topic (whereas advertising tobacco and publishing a magazine are clearly cases of speech as the First Amendment's language makes clear).

Virtually all attacks on liberty, including the liberty to express various viewpoints, ideas, theories, beliefs, appeals, requests, and so forth, rest upon a basic moral error. This is the error of confusing basic rights with what is morally or ethically right.

The effort to ban commercial speech about tobacco products is one of the purer examples of this error. If we assume, for the sake of argument at this point, that it would be right for people to stop smoking, we have, as yet, said absolutely nothing about the rights of the case. It may turn out that coercing people to quit smoking, restricting their access to tobacco products or information about such products, violates their rights. The paradox here is that in the pursuit of what is right, one may do what is morally wrong! A similar case can be made about banning gambling or pornography, even prostitution – all these are arguably morally objectionable, at least under certain circumstances, yet banning them is arguably a violation of the unalienable right to liberty mentioned in the Declaration of Independence and arguably referred to via the Ninth Amendment of the US Constitution.

The reason for the paradox in all these cases of banning conduct is that the particular way in which the 'good' (or right thing) in question is pursued may conflict with another good that takes priority.

All social moral principles are not created equal. Some are more fundamental than others. What is characteristic of rights is that, almost by definition, they are foundational or basic. Other social values must give way to them in cases of conflict. We can see this in everyday speech. It makes perfect sense to say, 'It may not be right for someone to do (or believe) this, but he or she has every right to do so.' This is also expressed routinely when one hears it said that 'I disagree with what you are saying but will defend your right to say it.' When what someone is saying is morally objectionable

and is, therefore, disagreeable, that is where the priority of the right to say the thing is clearly illustrated.

But what rights do we have? Some rights seem to be dictated by common sense. The 'right' not to be harmed seems to be one of these rights. If this is a right, shouldn't tobacco products or information about such products be restricted or banned?

Unfortunately, common sense is not always accurate. There is in fact no basic 'right not to be harmed.' The reason for this is twofold: people can voluntarily undertake risks, and people can have their rights violated without being harmed. In the first case, people voluntarily pursue dangerous activities all the time. They take on dangerous jobs, pursue dangerous sports, drive cars, and so on. What we expect in such situations is that the people involved have some conception of the risks they are undertaking – not that they be free from harm. In the second case, if the government restricts my freedom to speak on behalf of a cause I do not believe in, I have not been harmed, but my rights have been violated. In the end, then, rights and harms are not necessarily connected.<sup>2</sup>

In a similar vein, rights and government have no necessary connection with each other. Some people mistakenly believe that rights are what the government allows us to do.<sup>3</sup> But if this were true, it would make no sense to say that governments can violate people's rights, something they have done quite often throughout human history and continue to do around the world. Since, as the American Declaration of Independence so clearly notes, we are 'endowed ... with certain unalienable rights,' we can possess rights that were not given to us by government and which government cannot legitimately take away. It is under the monarchical conception of government that it makes sense to think of rights as grants of privileges, since in such a system the monarch owns the realm and gives permission to do some things to its *subjects*.

The Declaration of Independence was written to abolish the monarchical idea of politics and maintained that individuals in society are in the position of having sovereignty in contrast to government possessing it. And the first ten Amendments were designed by the American Framers to protect us from government infringement of rights we were said to possess 'by nature.'

## **Basic Rights**

The Amendment that concerns us here is the First, but the principle behind all of them is the same: people have basic rights independent of governments. This principle further reinforces our claim that a fundamental error occurs when one confuses rights with what is right. For what one discovers about basic rights is that they represent liberties, and liberty implies the possibility of choosing a 'wrong' course of action as much as a 'right' one. This point is clearly evident in freedom of speech cases where many wrongheaded causes and ideas are allowed to have their say with the same degree of legitimacy as

those that are closer to the truth. Our basic rights, therefore, must be understood as essentially liberties; and these liberties are given political expression through Constitutional guarantees against government interference.<sup>4</sup>

The main remaining issue here is whether people can have their liberties restricted in the name of ‘paternalism’ – using the power of government to protect us from ourselves. But in a free society, if paternalism has a place at all, it would arise only where information about alternatives was suppressed and thus lacking. But clearly such is not the case with tobacco products and their use and hasn’t been for decades.

Of course, I am not arguing or conceding that smoking is the ‘wrong’ that must be protected by our distinction. Whether someone’s smoking qualifies as wrong conduct is certainly not a simple matter to decide.<sup>5</sup> Even if in some cases it is clearly wrong to smoke, there can be many others when it is not. Yet some certainly regard smoking in this way; and it is useful to recognize that even if one concedes the point about the ‘wrongfulness’ of smoking, no foundation has yet been laid for waiving basic rights or Constitutional protections. (I leave aside the issue of secondhand smoking for now because [a] there is much scientific doubt about it, and [b] even if it does harm to some persons, unless they are subjected to it under duress and not of their own free will, there is no reason to ban it.<sup>6</sup>)

In one notable case, the Federal Trade Commission (FTC) charged the R. J. Reynolds Tobacco Company with running a false and misleading advertisement (‘Of Cigarettes and Science’) on the health effects of cigarette smoking. The FTC believed the advertisement to be deceptive because R. J. Reynolds had interpreted a government study on the causes of heart disease in a way that was not detrimental to smoking. The FTC lost the case because the judge ruled that the advertisement qualified as noncommercial speech, since no prices, brands, or products were mentioned. Had prices, brands, or products been mentioned, the FTC would have had the power to regulate the advertisement under the limited First Amendment protections granted to commercial speech.

The question arises, however, as to why R. J. Reynolds would not have enjoyed full First Amendment protection even if it had mentioned its own products?

In the last few years, the courts have given commercial speech secondary status with respect to First Amendment protection. Although the courts clearly protect the right to advertise, they nevertheless subject advertisers and producers to the myriad of government regulations.

The secondary status of commercial speech is the inevitable result of trying to reconcile free speech with a regulated economy. But this reconciliation is conceptually unstable. It assumes, on the one hand, that economic activities can be divorced from communication and information about such activities. Since these two cannot be separated, the right to free speech is compromised in an attempt to retain the government’s power to regulate voluntary economic transactions. On the other hand, the reconciliation assumes that the right of free speech applies to some categories of speech and not others. Commercial speech

needs to be wrenched from other forms of speech to make this argument fly, yet no logical and legal ground can be found for this in the US Constitution.

### **‘Private’ v. ‘Public’ Speech**

The main way of trying to separate commercial from noncommercial speech is to argue that the latter is ‘public’ speech while the former is ‘private’ because it serves some private interest. This distinction is used to argue that the court has gone too far in allowing First Amendment protection of commercial speech. The First Amendment, these critics claim, was meant to cover cases of public speech, not private. They would agree with us that it is incoherent to grant commercial speech only partial protection, but their solution is to afford commercial speech no First Amendment protection at all!

The distinction between public and private speech is simply not viable. In the first place, it is typical for those who object to First Amendment protection of commercial speech also to fail to object to government regulation of the economy. But if economic matters were purely private, the government could have no ‘public’ interest in regulation; and it is the supposed public interest of government in economic regulation that refutes the claim that commercial speech is a purely private affair.

In addition, those who speak are seldom, if ever, as disinterested as the concept of ‘public’ speech would lead us to believe. Groups which have causes to advance in the name of the ‘public interest’ have at stake precisely the same things as corporations do in their advertisements: organizational growth, jobs, visibility, competitive advantage (relative to other groups with a cause), and the like. Individuals, too, seldom make disinterested public pronouncements, especially on controversial issues of public policy (for example, taxes and zoning changes). If the First Amendment is not designed to protect self-interested speech, there is precious little that it does protect.<sup>7</sup>

Finally, speech, by its very nature, is public, since it is communication. And advertising is most certainly public because it is addressed not to particular individuals but to unknown members of the public. We should abandon the distinction between private and public speech and accord commercial speech the same full First Amendment protection given to all speech.

Does it now follow that advertisers can make any false or fraudulent claim they wish about their products? The answer here is no, because there is a significant moral difference between making a promise and expressing a belief. The informational components of advertisements can plausibly be construed as an initial statement of terms between seller and buyer. This is why it is legitimate to hold advertisers accountable to some degree for the truth of their ads. Expressions of belief, on the other hand, do not function like promises, because no one is called upon to deliver a good according to the stated terms. No one has the right to defraud another. But to say that hardly justifies intrusive governmental regulation of commercial speech.

If the R. J. Reynolds advertisement had included accurate product information, the ad could not be held morally and legally culpable. The court should have ruled in Reynolds's favor, even if they had included product information as part of the advertisement. The court's attempt to dodge the issue by calling the Reynolds advertisement 'noncommercial' may have been convenient, but it leaves commercial speech vulnerable to attack.

In this respect, the court has strayed even wider of the mark in its recent ruling in *Posadas*, a case that arose in Puerto Rico in which once again the court distinguished between commercial and other types of speech, a distinction that is inexcusable despite the specious claim that the 'original intent' of the First Amendment was to cover only political speech. In fact, however, the precise meaning of the First Amendment concerns any kind of speech whatever, and a law must be interpreted to mean what it says – legislative intentions are too diffuse and varied for us to be guided by them (and, in any case, they are discerned by reference to the meaning of the terms used to indicate them, not the other way around).

It is true that the First Amendment does not unequivocally grant protection to commercial speech, but that is irrelevant – it certainly does not bar such protection either, just as it does not bar protection for religious, philosophical, ideological, poetical, or any other special kind of speech.

If this is not sufficient, as it should be, we should also recall here the Ninth Amendment which says that 'The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.' This Constitutional provision can only be understood as wisely extending protection to many matters not explicitly mentioned or foreseen by the Founders. So when the First Amendment is coupled with the Ninth, one must assume that commercial speech is still speech and hence Constitutionally protected. When we also add to all this that the Fourteenth Amendment requires that 'No State shall ... deny to any person within its jurisdiction the equal protection of the laws,' it becomes clear that a ban on any kind of honest advertising would constitute a form of discrimination against people in business *vis-à-vis* other professions, activities, and forms of speech. In short, the principles embedded in the Constitution clearly favor the argument for full Constitutional protection of commercial speech.

Nevertheless, the argument persists and is a simple one: cigarettes are 'lethal' products while the images conveyed by cigarette ads in no way convey this danger – indeed the opposite message is conveyed. The consumer is therefore deceived into believing that cigarette smoking is acceptable, attractive, or without risks and hazards. This argument, however, is nothing but a version of the old shibboleth that advertising itself is inherently deceptive.

Advertisements are said to be inherently deceptive because they 'selectively emphasize' certain features of a product to make the product appear more attractive. Since this technique ignores or de-emphasizes other features, the consumer is deceived. The moral conclusion many draw is that since advertising is deceptive, and deception is morally wrong, advertising is morally wrong.

But the case for 'generic deception' depends upon there being something wrong with presenting something in a positive light and upon the likelihood that people are unaware of the type of message being delivered. Neither condition can be satisfied.

There is nothing wrong with presenting something in its most attractive light. We do this all the time. On our résumé we do not list the jobs we lost or the failures we had. In our personal grooming we take care to look attractive and hide our 'flaws.' As to the nature of the message, what is generic to advertising is precisely the effort to present something in its most attractive light. Since attractive presentation of information is virtually what we mean by an advertisement, it is nonsensical to claim generic deception when one confronts an advertisement. Selective emphasis does not violate the canon of truthfulness *per se*, because the basic truth conveyed by advertising is that when you see it you expect to see the item portrayed in its best light. And surely there are (some) attractive people who use tobacco products.

After examining basic moral and Constitutional values, one is forced to conclude that the tobacco industry is on the side of principle in its opposition to the AMA. It is obvious that banning or restricting commercial speech about tobacco products ignores basic rights and liberties and opens the door to further coercive control of speech.

What is perhaps less obvious is the damage already done. That Congress and the media could take a proposal like the AMA's seriously, and indeed that well-educated medical professionals could be so completely ignorant of the meaning of liberty, signifies a national crisis of understanding of our own heritage of political liberty. Furthermore, the *ad hoc* attitudes of the present court concerning commercial speech offer little hope that this crisis will be remedied from this quarter.

Yet in the end, what is very disturbing is how insulting all this is. Despite continual subjection to claims about the evils of tobacco, people are being told that they are too incompetent to make up their own minds about these products. The damage that has already been done is reflected in the fact that we take such insults on a daily basis. The libertarian insists that this trend must be reversed and the insults must be identified for exactly what they are. It is a first, but necessary, step in preventing the world from filling up with fools.

## Notes

- 1 An earlier and shorter version of this chapter appeared in *The Freeman*, December 1987, Vol. 37, No 12 co-authored by Tibor R. Machan and Douglas J. Den Uyl and the latter's contribution remains part of this chapter.
- 2 For a very illuminating discussion of this, see J. Roger Lee, 'Choice and Harms,' in M. Bruce Johnson and Tibor R. Machan, eds, *Rights and Regulation* (Boston, MA: Ballinger Books, 1983).
- 3 This is what is argued by Stephen Holmes and Cass Sunstein, *The Cost of Rights* (New York: W. W. Norton, 1999).



- 4 The best contemporary discussion of how what is right by nature differs from what rights we have by nature occurs in Leo Strauss, *Natural Right and History* (Chicago, IL: University of Chicago Press, 1952), although Strauss is not very supportive of the case for natural rights.
- 5 See, for more on that, Tibor R. Machan, 'Morality and Smoking,' in David Benetar, ed., *Ethics for Everyday* (New York: McGraw-Hill, 2001). Also see Douglas J. Den Uyl, 'Smoking, Human Rights, and Civil Liberties,' in Robert D. Tollinson, ed., *Smoking and Society, Toward a More Balanced Assessment* (Lexington, MA: Lexington Books, 1986), pp. 189–216.
- 6 For more on this, see Tibor R. Machan, 'Coping with Smoking,' the *Newsweek* Education Program, *More Controversial Issues* (New York: NewsSource Unit, 1996).
- 7 It needs to be noted here that a confusion is inherent in our system because of the public ownership of the electromagnetic spectrum over which most commercials are broadcast. When one owns something, one has the authority to manage it or assign the management to those one prefers. Radio and television broadcasting is regulated by the Federal Communications Commission 'for the public' and this group may well hold that there will not be advertising for cigarettes – or for gambling, prostitution, hard liquor, and so forth – on public property. As with the former Soviet Union's publication, *Pravda*, the government here is the editor, as it were, and may not acknowledge any need to accord others the right to have their own say about various matters.

# HARD AND SOFT STATISM

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## Chapter 16

# The Ideology of Death that Will Not Die

The idea that a social system might move, that is, regress, from a supposedly superior, historically advanced socialist to a supposedly outmoded capitalist mode of production was inconceivable for Marxist theoreticians.

Paul Hollander<sup>1</sup>

Why weren't we happier about it than we were?

Shortly after the collapse of the Soviet empire, Martin Anderson – head of President Ronald Reagan's transition team and a top advisor to Reagan during the early years of his administration – spoke to the conservative Philadelphia Society. Anderson lamented that Americans were not as euphoric as we ought to be given what had just transpired. The West had won the Cold War. Capitalism was fully vindicated. The theories of Ludwig von Mises and Frederick A. Hayek, two premier economists who had long defended the free market system and predicted that communism would fall, had been confirmed in practice.<sup>2</sup> The world had seen a demonstration, albeit at great and unnecessary cost, of the hopelessness of socialism. We seemed to have witnessed the beginning of the end.

So why were we not cheering that this destructive experiment was at last over? Why were there so few celebrations?

I had a chance to speak with Anderson following his talk. What I suggested was that true believers do not give up. They merely rephrase, reformulate, reanalyze, back and fill. And since human minds can be extremely clever in bailing themselves out and rationalizing their failings, it was certainly reasonable to conclude we will by no means see any substantial retreat on the part of socialism any time soon. The fall of the Berlin Wall and the spinning off of former Soviet satellites were certainly good things and cause for optimism. But such optimism needed to be tempered, for they did not represent the final curtain on the socialist ideology.

Conveniently enough for those who don't want to relinquish it, Marxism comes with readymade escape clauses. Like any robust theology, a comprehensive system of ideas such as Marxism is prepared to cope with many social developments. Consider how the Roman Catholic Church has managed to accommodate even the most radically secular developments in Western culture – for example, evolutionary biology – without ever giving up its fundamental theology; it rests on principles sufficiently capacious and elastic to enable nearly any adjustment to inconvenient discoveries of reality.

Perhaps the most one can expect is that new renditions of the Marxist position will carry a new label. Indeed, we are today being asked to consider such milder versions of the position as communitarianism, economic democracy, and market socialism. But it is not hard to find full-throttle assaults on the market characteristic of Marxism.<sup>3</sup>

Karl Marx was above all a visionary. From his earliest writings we can detect his collectivist moral vision, one that affirmed the ultimate significance of humanity as a concrete being. It is only when we devote ourselves to humanity that we will find true happiness, he wrote in his high school separation essay.

When we have chosen the vocation in which we can contribute most to humanity, burdens cannot bend us because they are sacrifices for all. Then we experience no meager, limited egoistic joy, but our happiness belongs to millions, our deeds live on quietly but eternally effective, and glowing tears of noble men will fall on our ashes.<sup>4</sup>

And in this belief Marx never wavered even as he claimed to become a scientific socialist and to abandon the moral point of view.<sup>5</sup>

What Marx was willing to revise was his effort to convince others of his vision. For some time he believed he might employ the traditional techniques of moralists who attempted to convince people to follow the righteous path. But as he became better informed about the sweeping influence of (pseudo-) scientific thinking – that is, of scientism – he turned away from his earlier approach to embrace what he called ‘scientific socialism,’ an outlook positing the necessary development of humanity toward communism. In this new approach, communism ceased to be an ideal and become what Marx called a ‘real movement.’<sup>6</sup>

It is not my concern here whether Marx was sincere. Clearly one can convince oneself of the need to think differently about some aspects of the world in an effort to bolster other aspects of one’s thinking. In any case, over time Marx reverted less and less to the utopian socialist approach, while never relenting in his belief in the superiority of the socialist way of life. He began arguing that the socialist polity must come about regardless of what anybody does, as a result of the ineluctable working out of social laws. Marxism, in short, is flexible enough to incorporate the recent developments in Eastern Europe and sustain the belief that socialism is indeed still the best mode of community life.

In a 1883 preface to the Russian edition of *The Communist Manifesto*, Marx explained how socialism might be instituted in Russia despite the backwardness of its economy. Marx said it would be possible if the revolution served as a ‘signal’ to the proletariat of the West. ‘If the Russian Revolution becomes the signal for a proletarian revolution in the West, so that both complement each other, the present Russian common ownership of land may serve as the starting point for a communist development.’<sup>7</sup> Marx had earlier

discounted the prospect of any socialist revolution not premised on the full development of capitalism. Such a revolution, he argued, would do little else but 'socialize poverty.' Why? Because prosperity, wealth, economic growth all depended for their fullest development on the constituents of a capitalist political economy.

For Marxism, humanity is an organism, akin to a human individual as we ordinarily understand one. In *Grundrisse*, Marx even calls humanity an 'organic whole' or 'body,' in which place he also refers to the ancient Greeks as humanity in its 'childhood.'<sup>8</sup> Marx had always been a collectivist in the sense that he took humanity to be a concrete universal indeed, perhaps even a concrete individual. He regarded individual human beings as 'species-beings.' For him, this meant that they were mere parts in the larger organism of humanity.<sup>9</sup> Whatever there is of individualism in Marx's views, it certainly can mean no more than that the flourishing of any individual person is entirely dependent on the flourishing of humanity as a whole.<sup>10</sup>

One important ingredient of this collectivist humanism is the notion that the species must undergo stages of development. It experiences infancy, childhood, adolescence, a young adulthood, and eventually a mature adulthood. Furthermore, just as with individual human beings, humanity must pass through its various stages of development in the proper sequence, lest it suffer various imbalances or anxieties. A person who skips adolescence – because, say, she must deal with war or otherwise be obliged to become a young adult too early in life – will suffer certain maladjustment that will probably result in various adversities throughout her life. Indeed, this is presupposed in our understanding of what psychologists can do for us, namely, help us recover from such a maladjustment-inducing early life.

In Marx's mature understanding of humanity's development there is no place for skipping the various stages of political economy. Tribalism, feudalism, capitalism, socialism and communism must all come about in proper sequence. The Soviet experiment, insofar as it never seriously expanded beyond the borders of Greater Russia, from a Marxist point of view must be seen as futile, even little more than a fraud. In Marx's view, Russia never underwent capitalism; and without successfully absorbing Western capitalist countries that had undergone that stage of humanity's development, there was no justification for seeing it as ready for socialism. (It is important to consider, in this connection, that Soviet imperialism was a necessary adjunct to the Soviet Union's claim to be a faithful institution of Marxian revolution. Without successful imperialism, no such claim could be borne out from within the Marxian framework.)

Accordingly, when the Soviet empire collapsed in 1989, arguably, in Marxian terms, it amounted to no more than the fall of a major, traditional, semi-feudal, colonial power. The claim that it represented a flunked experiment in standard-template communist development would have to be categorically denied. All that had been attempted was some variety of the command economy or feudal mercantilism. Whatever claims were being

made linking the USSR to Marxian socialist revolutionary developments would have to be taken as at best ignorant wishful thinking or, more likely, evasive deception, even as it managed to provide certain guidelines to how the USSR was being run from the Kremlin.

What about current developments in the region? From the Marxist viewpoint these developments are now more closely on course than in the past. As with most such empire-building experiments throughout the world, once the empire collapses because of various economic and other pressures, there is initial disintegration and eventually gradual bourgeois development. This is certainly a plausible scenario for what is happening in Russia in the early twenty-first century.

It is crucial to keep in mind that dialectical or historical materialism is unlike mechanistic or reductive materialism with respect to the laws of motion that characterize it. Whereas, mechanistic materialism proposes that change occurs in a rigidly predictable, mathematically precise fashion, dialectical or historical materialism is more akin to biology, geology or, as Marx himself put it, natural history. Accordingly, there is no promise in Marxian theory – as distinct from some of Marx’s imprudent activist projections – concerning the arrival of capitalism or socialism or communism in humanity’s future. Just as psychology does not offer rigid predictions concerning the development of a given individual, so dialectical materialism does not propose a timetable for the future stages of humanity.

Current indecisive experimentation with free-market structures throughout the former Soviet bloc is thus fully consonant with Marxian theory. Just as familiar bourgeois developments did not occur in some fixed, rigid fashion, so the future of capitalism and socialism is likely to see flexible developments.

So, at least, could a Marxian approach be sketched with respect to recent world events. Indeed, when supporters of liberal democratic capitalist societies express amazement at why Marxists across the globe haven’t laid down their intellectual armaments, I am always amazed by their amazement. It is, first of all, an unrealistic expectation from a psychological viewpoint. Our experience with Catholicism should have taught us that much, with the Vatican managing to be in tune with nearly everything science and history has to offer, however much it may seem that its theology would be overburdened by it all. It is also unjustified in terms of what the Marxists have offered, indeed, in terms of what Marx himself told us.

Nevertheless, I want to argue that this Marxian thesis should be abandoned, but not because of what happened in the Soviet Union and elsewhere in the world, for all these events could have been anticipated by any conscientious Marxist. Each could have agreed with Ludwig von Mises’s and F. A. Hayek’s analysis of the futility of expecting a socialist system to accommodate the demands of economic efficiency. Marx would never have claimed that one can substitute socialism for capitalism, quite the contrary. And given human nature under the capitalist phase of humanity’s development, all the arguments about the impossibility of calculation under socialism should have

been fully acceptable to Marxists. But there is a way to avoid the problem in the Marxian view. To avoid the problem we need the 'new man', who certainly has not made its appearance in humanity. This fully altruistic, entirely socialized human being is not going to expect the kind of efficient economic organization that Mises and Hayek had in mind when they criticized socialism. The 'new man' must be the kind of human being who constitutes the citizenry, otherwise there will not be proper motivation to achieve 'from each according to his ability, to each according to his needs.' This 'new man' would be so fresh off the assembly line that no standard economic analysis could appreciate the workings of the society, economic or otherwise, based on the nature of this 'new man'. Marx was very specifically vague on the issue of what communism would be like, precisely for this reason. We cannot tell just yet. Let's wait until the 'new man' shows up, and then we'll fill out the analysis.

So Marxism has an 'out,' a way to explain all failings of socialism-as-practiced here-and-now.<sup>11</sup> But it is all wrong.

There are many reasons, but chief among them is his false view of man's essential nature. Marx inherited the scientistic and deterministic aspects of his philosophy from Hegel. Hegel had argued that although human beings are subjectively free – that is, capable of making choices in their lives – at the aggregate or holistic level, history is determined. We may only know this retrospectively but it is, nevertheless, true. A professor of mine once explained this form of determinism by comparing it to how, although you are free to make any move you want to in a chess match with Bobby Fisher, it is given that he will beat you anyway. Flail away against the tide all you want, in other words; the tide will still wash over you. No matter what you do, reason works out its necessary development through human social, political and economic history. The laws of countries, their customs and so forth are the manifestation of this progress of Reason (or Idea).

Marx took a somewhat different metaphysical view of it all but retained the determinism. And it is entirely unclear how either Hegel or, especially, Marx could find room for free will in human existence; the 'actions' of groups and nations are, after all, made up of the actions of individuals. (Yet in the Marxist view even the individual, except of course the Marxist theorist,<sup>12</sup> must fall sway to class logic, seeing the world through the lens of his economic interest.)

Determinism is an untenable and self-defeating proposition even for Marxism with all its illusory wiggle-room. I have elsewhere developed a case for the existence of free will,<sup>13</sup> however, and for now merely conclude: despite the appearance that Marxism is theoretically capable of handling recent developments in Eastern Europe, ultimately an individualist view of historical causation makes better sense of these events.

The fact may be difficult to accept, especially in the modern age when problem solving via science and technology is such a great expectation. But when it comes to human existence, there is free will to contend with, not merely inadequate knowledge of natural chaos. The social sciences must not



aim to produce theories and engineering programs that fail to take this fact into account despite the temptation to write it off as an illusion because the underlying metaphysics that many scientists and philosophers assume rules out free will and human agency.

Marxism has been and will continue to be influential not because it is true but because a great many human beings have a yearning for it to bring about what it promises, namely, a guaranteed harmonious community life for us all. It offers a mythos and a towering abstract edifice, rationalizing antagonism to capitalism, an anti-capitalism they are loath to give up no matter how dramatically the destructive consequences of any form of wide-scale economic interference with the market may be demonstrated. People choose to believe or not believe on grounds that may be sound or unsound – it is really up to them. We cannot erase this fact of choice from our lives and it will do us good to keep it in mind. It would reduce the cynicism produced by the glaring failure of utopianism that offers the panacea of resolving all human problems by means of the impersonal workings of history. It would put human individuals back into the role of decision makers, with all the attendant risk and benefits that this entails.<sup>14</sup>

## Notes

- 1 Paul Hollander, 'Why Communism Collapsed in Eastern Europe,' *Society*, 30 (Jan/Feb. 1993), p. 41.
- 2 This was admitted by Robert Heilbroner, 'After Communism,' *The New Yorker* (September 10, 1990), p. 92, who had been an avid defender of a version of Marxism for most of his career: 'Ludwig von Mises ... had written of the "impossibility" of socialism, arguing that no Central Planning Board could ever gather the enormous amount of information needed to create a workable economic system ... . It turns out, of course, that Mises was right ... .'
- 3 But see also such unreconstructed Marxian offerings as Andrew Bard Schmockler, *The Illusion of Choice* (Albany, NY: State University of New York Press, 1993), in which the author basically reiterates Marx's thesis that liberal individual liberty is nothing but a fraud – 'the most complete suppression of all individual liberty and total subjugation of individuality to social conditions which take the form of material forces.' Karl Marx, *Grundrisse*, trans. D. McLellan (New York: Harper Torchbooks, 1971), p. 131.
- 4 L. D. Easton and K. H. Guddat, eds, *Writings of the Young Marx on Philosophy and Society* (Garden City, NY: Anchor Books, 1967), p. 39.
- 5 This is the idea that human beings ought to conduct themselves in certain ways, that they ought to make certain kinds of choices based on standards of right and wrong. Marx had been a socialist of this kind – a utopian socialist – prior to championing a historical determinist approach that appears at first glance to abandon the moral viewpoint.
- 6 Karl Marx, *Selected Writings*, ed., D. McLellan (London: Oxford University Press, 1977), p. 171.
- 7 Ibid., p. 417. Some dispute that ideology guided the Soviets at all, preferring some kind of socio-economic explanation for all that happened there. See, for a good discussion, Martin Malia, 'The Archives of Evil, Soviet Studies after the Soviet Union,' *The New Republic*, Vol. 231 (November 29 and December 6, 2004), pp. 34–41. See also Igal Halfin, *From Darkness to Light* (Pittsburgh, PA: University of Pittsburgh Press, 2000), and *Terror*

*in My Soul* (Cambridge, MA: Harvard University Press, 2003) for a defense of the impact of Marxist ideology on Soviet history.

8 Marx, *Grundrisse*, p. 33, and *Selected Writings*, p. 359.

9 See *ibid.*, p. 126, where Marx states that 'The human essence is the true collectivity of man.'

10 Some, such as H. B. Acton, *What Marx really Said* (London: Macdonald and Co., 1967), have detected a kind of individualism in Marx, albeit not at all the kind we commonly identify with capitalism. See, for more, Tibor R. Machan, *Capitalism and Individualism* (New York: St. Martin's Press, 1990).

11 It is one of Karl Popper's valuable insights that this way of thinking is unfalsifiable. See *The Poverty of Historicism* (Boston, MA: Beacon Press, 1957).

12 Marx wrote:

Theoretical communists, the only ones who have time to devote to the study of history, are distinguished precisely because they alone have discovered that throughout history the 'general interest' is created by individuals who are defined as 'private persons'. They know that this contradiction is only a seeming one because one side of it, the so-called 'general', is constantly being produced by the other side, private interest, and by no means opposes the latter as an independent force with an independent history – so that this contradiction is in practice always being destroyed and reproduced.'

*Selected Writings*, p. 183.

13 Tibor R. Machan, *Initiative – Human Agency and Society* (Stanford, CA: Hoover Institution Press, 2000). See, also, Edward Pols, *Acts of Our Being* (Amherst, MA: University of Massachusetts Press, 1983) and Roger W. Sperry, *Science and Moral Priority: Merging Mind, Brain, and Human Values* (New York: Columbia University Press, 1983).

14 I develop the major themes of this view in Tibor R. Machan, *Classical Individualism* (London: Routledge, 1998).

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## Chapter 17

# Libertarianism and Conservatism

In the United States of America, libertarianism is often bundled with conservatism, mainly because many conservatives aim to retain the ideas of the Founders who had been near to libertarianism and its philosophical ancestors, such as John Locke.<sup>1</sup> However, the two are in fact quite distinct and on some levels opposite each other – for instance, methodologically conservatism tends toward anti-rationalism.<sup>2</sup>

In recent years libertarianism has nearly come of age. There are now detailed developed theories supporting this position.<sup>3</sup> Numerous organizations – academic associations, lay societies, ‘think tanks,’ and a political party – compose the libertarian ‘movement.’<sup>4</sup> Disputes, too, abound among those who would unhesitatingly identify themselves as libertarians.<sup>5</sup> Both systematic and off-hand attacks on libertarianism emanate from various intellectual, political, journalistic, social and other circles.<sup>6</sup> The opportunity to publish works discussing the positions pro and con now exists beyond the limited range of a few ‘in-group’ publishers.<sup>7</sup> Academic courses in politics and philosophy often cover the subject matter.<sup>8</sup> And the language of day-to-day politics now exhibits signs of the influence of libertarianism (as distinct from more traditional American political ideals).<sup>9</sup>

Libertarianism is, to a considerable extent, a theoretical extension of crucial concepts found in the American political tradition – for example, liberty, consent, rights, equality, due process – so the position is not a radical challenge to the American tradition. (This may be disputed by some, of course, depending on whether they regard the American political tradition as distinctive in its libertarian or in some other elements.)<sup>10</sup> As such, libertarianism is properly associated with aspects of American conservatism. Many American conservatives cherish institutions and practices that reflect libertarian ideals or principles. So American conservatives are concerned with maintaining or supporting some institutions to which libertarianism gives theoretic support. In practical terms this has led to frequent coalitions between conservatives and libertarians – for example, in their advocacy of the protection and preservation of the free market, defense of the institution of private property, support of a legal system that respects personal responsibility and places severe restrictions on the power of (at least the federal) government.<sup>11</sup>

Yet it is clear that often many conservatives are not comfortable with libertarianism despite agreements on some of the practical issues. Conservatives tend, on the whole, to be anti-rationalistic in their methodology.<sup>12</sup>

Libertarians, in the main, have high regard for reason – for uncovering objective and true principles from which to derive subsidiary political and legal principles and infer various practical policy recommendations or prohibitions.<sup>13</sup> Some embrace an empiricist rationalism, some a Cartesian, and yet others an Aristotelian/Thomistic variety, but virtually all consider the reliance on the human mind and what it can discover about reality as something to be encouraged, not demeaned.<sup>14</sup>

More particularly, the principled adherence to individual liberty – for example, the right of every individual to live by the judgments he or she makes and to be free from the imposition of others concerning his or her conduct affecting his or her life – has led libertarians to support resistance to all political and legal measures (in various ways, depending on circumstance) that aim at imposing upon human beings a way of life they individually reject.<sup>15</sup> Conservatives do not share, in the main, I contend, such a *principled* commitment to liberty and would refuse to apply this (putative) principle to many cases that a libertarian clearly would. Thus the latter would enjoin the regulation of entertainment by public authorities, even in cases deemed tasteless – for example, topless dancing. Conservatives would consider such public policy permissible – at least at the community level.<sup>16</sup> Other examples abound, but in general, I would say, conservatives tend to deny any *principle* of liberty in the first place, and they would very likely dispute some of the basic aspects of libertarianism, including some crucial elements of arguments usually advanced in support of the doctrine.<sup>17</sup>

It is my aim to show in this chapter that some of the points persistently raised by conservatives with respect to libertarianism can be met. For example, I will indicate that considerations of social morality and standards of community conduct are by no means ruled out for libertarians, who attend to them in a principled but voluntary manner. In this I will stress the point that political authority is ill-suited for purposes of preserving and upgrading the moral climate of a human community. Libertarians contend that politicians are not moral leaders!

My aim is not to seek out the most extreme versions of conservative thought, nor to attempt to explain and justify the more bizarre renditions of ‘libertarianism’ that some conservatives focus on in their scrutiny. Every point of view has its most implausible as well as its blandest versions, and an honest confrontation with it must avoid focusing on either of these. (Thus, there are ‘libertarians’ who really amount to plain old-fashioned utopian anarchists; and there are other ‘libertarians’ who make so many concessions to statism that their position is indistinguishable from those in which liberty is demeaned.) The same could be observed about practically any point of view in virtually any area of controversy. The crazy and bland versions simply aren’t worth the time in an honest intellectual examination. It seems that it is most advisable to select a reasonably formidable, distinctive, yet not impossible statement of the view one selects for scrutiny, so as not to build into the version obvious seeds of destruction.

Let me explain a few important points about libertarianism. It is, first of all, a political doctrine. It should be distinguished from the following three categories: 'metaphysical libertarianism' related to the problem of the freedom of the will;<sup>18</sup> 'social libertarianism,' namely, the view that concerning voluntary human activities and associations everything not involving coercion is equally proper, morally correct, immune from valid moral criticism, rebuke, ostracism, and other forms of opposition and condemnation;<sup>19</sup> and 'moral libertarianism' or libertinism, namely, the view that all freely chosen conduct has *equal* merit from the point of view of what is right and wrong in human behavior.<sup>20</sup>

Different arguments have been advanced in support of political libertarianism, but the doctrine itself is a claim to what is permissible for human beings to do toward each other by means of the aid of force or its threat, nothing more. This claim has been the result of different arguments, some of which are unsound, others invalid, but some indeed theoretically adequate for showing that in human communities force should only be used – in all of its extremely complicated manifestations, possibilities, and threats – for the purpose of protecting and preserving human individual liberty, nothing else.<sup>21</sup> Whether this conclusion can be established, whether it is proper to look to reasoned arguments and theories to establish conclusions bearing on political life, whether any considerations might supersede a conclusion so established (for example, requiring that although liberty should be furthered politically, something besides politics requires its neglect in certain circumstances) – are relevant issues. But let us be very clear about the principal fact: libertarianism is a claim about the scope of permissible force or threat of force among human beings, including human beings who constitute the governing administration of a given human community. It is a political claim or theory and not some other, however much it may presuppose a variety of other, nonpolitical claims.<sup>22</sup> If one assumes that this claim itself embodies the suppositions of its various arguments, then one prejudices one's criticism against a wide variety of libertarian thought. After all, the same conclusions can be derived from different sets of premises. This is an elementary point of logic. And even if some arguments for liberty are inadequate, it does not follow that none better are available. Indeed the doctrine on which all libertarians are in agreement has been defended on various philosophical grounds.

These and other points need to be kept in mind in order to appreciate what is at stake in the discussion of libertarianism. But there is another point that has especially direct bearing on the discussion of this political outlook. Unlike most others, libertarian politics, in particular, may not be assimilated into non-political ideas and ideals. It is distinctive precisely in its firm specification concerning the scope of politics in human life, namely, with the point that liberty is the paramount value to be sought by way of politics. The rest of human existence needs to be developed in an atmosphere of freedom, with all the creativity and ingenuity available to human beings. In these areas there may exist firm standards. But experimentation may also be proper.

Political principles, stated explicitly, must however guide the most awesome and dangerous instrument of human interaction, namely physical force. Such force is permissible and useful only in repelling force, not in building character, love, faith, scientific knowledge, and so on.<sup>23</sup>

Libertarianism is not addressed directly to these other spheres of human life because the method of politics cannot be extended to these spheres with moral and practical legitimacy.

What are some arguments for libertarianism? Actually, as far back in recorded intellectual history as Lao Tzu in the East<sup>24</sup> and Alcibiades in the West, certain libertarian ideas are clearly detectable. In Xenophon's *Memorabilia*, the young Alcibiades shows Pericles that only that concept of law is valid which precludes the use of force except for retaliatory and defensive purposes. Aristotle discusses the views of the sophist Lycophron who believed that the function of government is to guarantee mutual rights;<sup>25</sup> he also confronts the city planner Hippodamus who thought that only conduct wrong in itself – insult, injury and homicide – should be prohibited.<sup>26</sup> Later on in the West, William of Ockham developed certain ideas about natural rights that stress the requirement for moral choice in every man, thus limiting the range of human interaction.<sup>27</sup> Locke explicitly asserts that each individual is to be regarded as free and independent of the authority of others (in maturity, obviously), and may be subjected to elaborate legal government only with his own consent.<sup>28</sup> Mill thought that liberty should be protected and preserved wherever none has harmed another, mainly so as to secure progress.<sup>29</sup> Spencer advocated natural rights on the grounds that human evolution clearly points to a system of such rights as most in conformity with evolutionary progress.<sup>30</sup> Albert Nock did not believe that the moral nature of man could be preserved without his liberty being protected.<sup>31</sup> Ludwig von Mises believed that the economic activities of society could not continue in a most effective and sensible way unless a free market prevails and the price structure is permitted to serve as the means of communication.<sup>32</sup> Ayn Rand thought that the proper end of human life, to be pursued by each individual in accordance with standards of rationality, could not be voluntarily sought by everyone except in a free society based on the rights of man.<sup>33</sup> Robert Nozick holds that the assumption of individual rights within a human community is the best assurance we have that the structure of that community will not violate our moral precepts and intuitions.<sup>34</sup> And there are varieties of the libertarian argument beyond these more or less prominent versions.<sup>35</sup> Virtually all of these thinkers have contributed to the libertarian political tradition, even if, as in the case of Mill, Spencer, and some others, they did not remain libertarians even to the degree to be expected from them in their own times.<sup>36</sup>

Among contemporary representatives of these different strains of libertarianism, all agree with the central libertarian ideal, namely, that none should initiate force against another. But a division among libertarians beyond some of the more theoretical issues has bothered many conservatives. This is the split on the issue of government. The anarchist libertarians, led by the

late Murray N. Rothbard, whose libertarianism rests on the two traditions of Lockean natural rights and Austrian economics,<sup>37</sup> hold that governments by definition initiate coercion, so they are incompatible with libertarianism. 'Limited government' libertarianism, found mainly in the writings of Ayn Rand, John Hospers, and Robert Nozick, conceives government along lines consistent with libertarian principles – for example, without the power to tax and for the primary purposes of protecting individual rights.

It is difficult to comment on the substance of the controversy. It goes on at the present in full force and involves claims and counterclaims of considerable complexity. Moreover, in my view, anarchist libertarians are only seeming anarchists.<sup>38</sup> They use language that appears to condemn a government with exclusive jurisdictional authority within a given community (and in a given area that is homogeneous and makes the enforcement of law therefore possible). What anarchist libertarians deny is that governments have any legitimate authority to exclude alternate contenders in the task of protecting and preserving the rights of individuals. Those libertarians who advocate government claim that while such exclusion appears to be arbitrary and unjustified, and often has been throughout history, there need be nothing arbitrary about it when properly understood.

The appearance of the language of anarchism in libertarian circles has led conservatives with libertarian leanings to become fearful and suspicious. Some even claim that consistent libertarianism leads to anarchism and the denial of anarchism is a minor inconsistency that one must simply accept. (Milton Friedman seems to believe this, in contrast to David, his son, who has argued for anarchist libertarianism, though from a framework different from Rothbard's.<sup>39</sup>) In general, those who find the institution of government important in society, even if cut down to its appropriate proportions, have regarded libertarianism with suspicion because of the anarchist rhetoric, if not substance. Anarchists of the Kropotkin or Bakunin varieties, on the other hand, have made clear that they regard 'anarcho-libertarianism' as a fraud, since by their doctrine the institution and protection of private property requires some kind of legal authority, government, or similar institution in society.<sup>40</sup>

Conservatives have always found government important, but have not liked the drift toward totalitarianism evident in contemporary statist trends. They have stressed the inefficiency of most (federal) statist undertakings but have eschewed, I believe, a principled rejection of statism. Generally stated, conservatives in the United States would leave to a federal government the job of military protection even if this might involve conscription, extensive foreign alliances, and foreign intervention. They would leave to state, county, municipal, and even more localized governmental/community bodies concerns such as upholding standards in education, science, art, and entertainment. Moreover, conservatives do not object to a free market. But they would place fewer aspects of human life at the disposal of market transaction and decision than would libertarians. Take the area of the arts or entertainment, for instance,



where we may properly classify as corrupt such offerings as pornographic novels and movies. Conservatives would welcome here, let alone permit, a local government's imposition of regulations excluding or restricting the production, sale, and purchase of such items that fit within a definition of pornography (arrived at by the consensus to be used in communities – involving quasi-democratic and quasi-aristocratic methods).<sup>41</sup> Although conservatives would deny that obscenity and pornography are indefinable, as modern liberals have maintained, they would not try to define these by some rationalist argument but would leave the matter to the customs and traditions that have come to prevail in the area where the concerns arise.<sup>42</sup>

The conservative is concerned more with having certain standards of conduct insisted upon, whereas the libertarian is concerned more with avoiding any semblance of imposition, not to mention coercion, in human community life. The more this is all they focus upon, the more the two will find each other in disagreement, indeed in hostile camps. But this is to stress extremes. Credible versions of libertarianism and conservatism in America remain allied on numerous important fronts. To make this evident, I will spell out several rarely observed aspects of libertarianism. Misunderstanding about these cannot but serve to undercut the goals of both. It is possible that even after all the clarification, important differences will remain. Yet no one need be extremely concerned about this. Even a moderate individualism will call to mind that many of the differences among human beings only appear to be about principles. More often they stem from idiosyncrasies, not unimportant but still personal peculiarities – that is, the irreducible individual differences among human beings that have slipped into abstract theoretical reflections without clear notice.

The area where conservatives appear least to understand libertarianism concerns the issue of moral standards, especially in the area of social ethics. Here no outright coercion is at stake, yet conduct may be evident to the community at large and influences can make themselves felt to sensitive individuals or those who are especially vulnerable. In short, it is in the area of social standards that conservatives have the most trouble with libertarianism, apart from the more philosophical matters of rationalism, theism, modernism, and so on, even if these are not entirely separate. As former Secretary of Education William Bennett has written,

our society now places less value than before on what we owe others as a matter of moral obligation; less value on sacrifice as a moral good; less value on social conformity, respectability, observing the rules; and less value on correctness and restraint in matters of physical pleasure and sexuality. Higher value is now placed on things like self-expression, individualism, self-realization, and personal choice.<sup>43</sup>

(This was, of course, written before it was revealed that Bennett has been an unrestrained, profligate gambler.) He is also quoted as having said that

'Unbridled capitalism is a problem. It may not be a problem for production, but it's a problem for human beings. It's a problem for the whole dimension of things we call the realm of values and human relationships.'<sup>44</sup>

Conservatives, then, are inclined to fear the commitment libertarians show for the regime of individual liberty, not less so than some on the Left, such as Michael Sandel, Amitai Etzioni and other communitarians. Both conservatives and communitarians are willing to compromise on liberty so as to have the government address various social issues such as drug abuse, prostitution, sexual promiscuity, lack of service to others and so forth.

But how are social issues to be addressed for the libertarian? A libertarian draws a pretty sharp distinction between government, society, and the individual.<sup>45</sup> A government bears on everyone's life in a society and acts *for* everyone. It may thus act only in accordance with principles that apply to all, namely, regard for the individual human rights of each person.<sup>46</sup> In society, however, while all must at least abide by these principles, there are numerous other valid concerns. Different individuals, with different kinds of backgrounds, convictions, religious faiths, cultural habits, professional aims, temperaments, talents, and so forth, will develop a great variety of social relations. Are there standards which would warrant either promoting or discouraging and undermining certain kinds of social relations? Might one not insist even on their being prescribed or made illegal, respectively?

For instance, while someone like Bennett might not endorse alcohol prohibition, he would claim that prostitution, sexual frivolity, sacrilege, abuse of parental authority, or drunken binges are not socially desirable and ought to be dealt with by way of public policy and government regulation.

For the libertarian it is clearly unjustified to advocate laws against these practices. But might not one maintain that, for example, all else being equal, homosexuality is less healthy and admirable a form of sexuality than heterosexuality? Could not one maintain that when it comes to artistic exhibitions, the presentation of a festival of 'porno flicks' should far from merit the same respect as a festival of the plays of Shakespeare? One might even go further and vociferously condemn divorce, pre-marital sexual relations, and avant-garde literature, all as a matter of standards and taste.

Is it possible for libertarians to do this? Mustn't they be silent on these topics in the light of restricting themselves to matters of politics, which to them means only the defending of human liberty? Surely such a merely negative approach is inadequate for these purposes. If this follows from libertarianism, is it not then in fact deficient for coming to terms with human community life? Would not all those activities one should regard as wrong, debasing, degrading, vile, vicious, and so forth, barring those that involve outright coercion, have to be regarded by libertarians as perfectly acceptable? Would not silence about the quality of such social matters imply official approval? Would it not follow that if there is permission, from the point of view of the law, to produce, sell, and purchase pornography, the law would in fact be promoting the same? Does it not follow that in giving official

protection to the purveyors of bad social practices in the name of individual liberty – for example, when a federal court gives the First Amendment as grounds for prohibiting a town mayor from closing the doors of a movie house that is showing pornography – one is clearly endorsing conduct that is socially improper and is at once undermining the currency of liberty?

These and many other questions, put in more or less fair and intellectually honest ways, have been posed to libertarianism by conservative writers. Not every libertarian would be able to answer these questions (and their logical kin) to the satisfaction of many conservatives. Because, however, many who write on the topic have either omitted to research whether libertarians have answered these questions satisfactorily or have simply picked on select and very narrow libertarian texts to show that libertarians are not up to the task, an attempt to answer these questions here will be of some use.<sup>47</sup> The answers I can give will be reflective enough of at least a prominent line of libertarian theory so that they can safely be regarded as ‘libertarian answers.’

Libertarian political theory implies that a government functions properly when it upholds justice in human relations by the standard of natural human rights – as initially developed in John Locke’s *Second Treatise* and given more depth and scope by contemporary libertarians.<sup>48</sup> Such a government would fulfill both the ancient and the modern role of state, namely, the encouragement of virtue and the promotion of peace and prosperity. The former would be achieved by securing liberty for all, which is a necessary condition for the virtuous life in society.<sup>49</sup> If one acts because of coercion or its threat, one cannot make moral choices. A legal system in which freedom is not protected and preserved prevents individual moral responsibility. So government that protects and preserves human freedom encourages individual moral responsibility and human virtue. Such a government also makes possible the development of peaceful means by which to achieve various personal and social goals. One of these social goals is the promotion of improved conditions of life. And while in libertarian theory no one has a natural *right* to have welfare or prosperity provided by others, it is implicit within the theory that advancement in the arts, sciences, education, leisure, material wealth, and psychological health – are all valuable elements in human life, even if not in equal measure to all.

Libertarian political theory holds it as a violation of the nature of man to engage in coercive dictation of other people’s social practices, sexual habits, religious affiliations, and so forth. Nevertheless libertarianism does not preclude other means for advancing social goals. Some of these are close voluntary substitutes for outright coercion. Moreover, parental responsibility in a free society (along libertarian lines) would not preclude the use of physical force against a child within the dictates of reason. A child is normally incapable of making rational decisions concerning its behavior and could, unless at times forcibly yet reasonably forbidden from doing so, place itself in severe danger. This form of coercion is not excluded in libertarian theory.

Coercion among normal adults is forbidden, with exceptions allowed only if they have been properly defended in a court of law guided by rational rules of evidence and libertarian principle (incorporated in the common and constitutional law).<sup>50</sup> Voluntary approaches to social direction, in the variety of ways we refer to as ostracism, rebuke, boycott, and so on, are available for use to everyone and anyone. These ways can be developed into massive and severe instruments of social control and change. It would be quite illegitimate to dismiss these methods as ineffectual, especially in light of the entirely ineffectual character of coercive efforts to promote or stifle personal and social development. The libertarians cannot and will not give the false promise that coercion will guarantee the rooting out of evil and the promotion of good. The libertarian is prepared, however, to spell out realistic non-coercive prospects of achieving these ends. Outside the government's proper peace-keeping and retaliatory functions, there is ample room for the libertarian to introduce non-political means so as to cope with the problems and challenges of personal and social life.

Let me stress this again. Libertarianism is a political theory, an answer to the natural and central political question: in accordance with what basic principle(s) should a human community be organized? Never mind now that such a (rationalist) approach *appears* to assume that one can simply create society. Libertarians realize well enough that social systems emerge and evolve, but they also realize that a crucial factor in this evolution is precisely how this question is answered by human beings. So the libertarian is interested, *as* libertarian, in offering for serious consideration his basic principle as the content of a community's legal system or constitution. Contrary to what critics of the free society have said, be they Marxists such as Marcuse and Fromm or conservatives like Burke and Kristol, the principles of liberty do not preclude a broader ethical framework. These principles of liberty are, as it were, the political tip of a very large iceberg which represents a general philosophy of existence and human life. True, in a complete philosophical system politics is not independent from other elements. But it *is* distinguishable, so that political ideas may in turn be supported in isolation from their underpinnings.

The broader ethical framework that gives backing to libertarian political principles has not been fully attended to in the past by prominent classical liberals and libertarians, mainly because ethics itself has always been viewed as giving license for coercion.<sup>51</sup> If you know what Johnny should do, you may coerce him, even if it isn't little Johnny but mature John whom we are considering now! Marxists have certainly tried to convince us that if we know what is objectively socially useful, we may establish a state and make everyone's conduct conform to this. In an intellectual atmosphere in which this association between virtue (or principles of morality) and coercion prevails, it is no surprise that advocates of liberty remain silent about virtue.<sup>52</sup> Whether it be satisfaction of the will of God, the provision of some secular (hypothetical) social contract, the utilitarian provision for the greatest happiness of the greatest number, or the ushering in of the culmination of the

historical dialectical progress, in each case such value theories have allowed for, even required, coercing people to achieve the value in question.

It is a widely held view about values that only if they are intrinsic – as it were, present *within* what is to be valued – are they objective. This tends to support the view that an individual's choice of the behavior that is worthy is not central to the merits of this behavior, so that the liberty of the acting individual is thus regarded as negligible.<sup>53</sup> This has at times fostered the dichotomization of human virtue (that is, the human good) and individual liberty (that is, the choice to act virtuously).

It is not then surprising that those who have, perhaps only through common-sense reflection, perceived the importance of liberty – for example, economists, who are always being criticized for not giving enough heed to morality<sup>54</sup> – would not eagerly embrace the moral point of view and indeed proclaim their own concerns or discipline value-free. Under the perspective that the value which some state of affairs or end or behavior embodies is the goal to be achieved – not our own moral excellence, which only we as individuals can achieve – the understanding has emerged that people may be forced to do what needs to be done to achieve the good. It is the state of having *reached* the end that is morally relevant, not the process of having lived *by* seeking it or some other self-perfecting approach. This view has been devastating in the modern age.

So one main reason conservatives distrust libertarianism is that they have focused on the political results of a comprehensive philosophical outlook that has libertarianism as its political theory, namely, the view that liberty should be protected and preserved. But there is much more to this outlook. Libertarianism is only a small, politically relevant portion of it, unlike classical liberalism that preceded it.<sup>55</sup>

The broader framework underlying libertarianism is in the tradition of Aristotelian philosophy. This is the best broader framework; not, however, the only one offered. (I assume that we are concerned with a formidable defense, not with incomplete, sloganized versions.<sup>56</sup>) The main Aristotelian ingredient is metaphysical pluralism, which means roughly that reality does not have to be, nor is as we can clearly perceive, one kind of thing, but has the potential for manifesting itself in numerous ways. There is a monism, too, in this metaphysics, namely, that certain basic principles govern the *whole* of reality including all distinctive realms and features of it.<sup>57</sup> Along the lines of such a basic view, the emergence of value considerations can make sense. Ethics, politics, aesthetics, and so forth are all intelligible without having to introduce something perplexing and untenable, namely, supernaturalism.<sup>58</sup>

When life emerges in reality, objective values emerge too. The living have a lot to lose by dying. And in the case of human life, value considerations take on a *moral* component because individual human beings are *responsible* for identifying the values that will sustain and improve their lives – that is, because of the phenomenon of free will.

Since we are responsible – like it or not – for living well or badly, we must eschew any substitute for this responsibility lest we shed our very humanity in the process. Thus political liberty. The philosophy that underlies the robust theory of libertarian politics can be seen, thus, to secure a natural – as distinct from a supernatural – place for objective personal, social, and political norms. And this is just one feature of libertarianism that conservative critics have denied.<sup>59</sup> They have focused on the fact that many arguments for liberty – going as far back as Taoism and as close to our time as the position of Professor Milton Friedman – have been based on moral skepticism.<sup>60</sup> Yet there have also been other arguments, which critics have not discussed in detail and are still discussing only when the famous among us make them, even if only incompletely.<sup>61</sup>

It would not be surprising, however, that arguments for what to many appears as a very good idea are usually incomplete. The identification of principles in any domain of reality is gradual, rocky, evolving. Man is not omniscient and often makes tragic detours seeking the truth. This is ever more so when we reach realms involving norms, the difference between right and wrong, good and evil. In normative areas there is often great resistance to the process of careful, objective study. One should expect this from those who would be identified as failures were the truth known even incompletely, and sometimes from those with good will but eager to caution us about dogmatism and, in politics, about authoritarianism or the temptation many human beings have to claim a monopoly on the truths of ethics and politics.

Today the libertarian political principle does, however, enjoy the support of a reasonably well developed, rational philosophy. It may, with some risks stemming from necessary brevity, be summarized as follows: once an individual chooses to live, that individual has committed himself to living well or properly, namely in accordance with his nature; libertarianism is the political theory which best takes into account man's nature, namely, his essence as a free, rational living being whose conduct can only be made morally worthwhile by the individual himself by sustaining his commitment. This kind of life, with all of the diversity and universality it entails – based on the broad human and highly specialized individual and other characteristics every individual possesses – is what should be chosen by each individual. This kind of life involves an array of human virtues (honesty, productivity, prudence, courage, fortitude, justice, self-respect, and so on), but these virtues must be sustained and practiced by choice and their precise interpretation must be adjusted to the individual's own case. For our purposes it is crucial to note that this kind of life is not owed to anyone; it entails no other obligations than those freely chosen by the individual, even if it is true that once chosen these obligations should be fulfilled, and even if it is true that some of these obligations should be chosen by an individual because of his humanity and individual identity. And all of this is to take place in the world we are familiar with, involving numerous implications bearing on various aspects of reality (for example, parenthood, friendship, career plans, political concerns,

ownership, professional tasks, and so forth). So as to achieve such feats as a matter of individual responsibility, it is necessary that everyone enjoy the freedom in society that human beings can insure for each other without in any way being required to become indentured to others. Therefore, the free society, via the respect of everyone's naturally derived rights to life, liberty and property, is the best political order for every human being.

Concerning the social elements of a mature libertarian political theory – numerous implications may be identified. Those, however, are very specialized because of the volatile nature of human circumstances. Nevertheless, a few claims that have been made as to the social philosophy of libertarianism need attention.

For example, some maintain that libertarianism presupposes a hedonistic ethic. This is not true – it presupposes an eudemonistic individualism, as can be discerned from what has already been said here.<sup>62</sup> Is libertinism implicit in the advocacy of liberty as the highest political principle? No – libertarianism only prohibits the *forcible* squelching of indecent conduct, not its vigorous criticism, opposition, boycott or denunciation in peaceful ways. A preoccupation with material wealth is supposed to be implicit in libertarianism. But there is no requirement in that political doctrine to the effect that human beings ought to strive for material wealth, even if ordinary prudence would be expected from anyone as regards his material needs and wants. Nor is libertarianism anti-religious. Nothing in the doctrine requires the forfeiting of religious worship, although, it is true, the argument underlying libertarian politics stresses the rational identification of reality, thus by implication, fundamental reliance on faith for purposes of understanding ethics and politics is eschewed. And libertarianism is often said to presuppose a mechanistic materialistic conception of human nature. This is equally misguided. The pluralistic metaphysics that forms the basis of the philosophy in support of libertarian politics does not prejudge in favor of mechanistic materialism, even if some economic libertarians lead one to believe this by virtue of their particular social science methodology.<sup>63</sup>

No doubt, even a robust philosophical case for libertarianism, as outlined here, will conflict with several of the main tenets of contemporary conservative thought. For example, a rather optimistic view underlies the libertarian doctrine, in contrast to the view some leading conservatives have advocated. But this optimism is by no means committed to the doctrine that man is naturally or automatically good, but only to the view that man *can* be good by his own sustained effort. When conservatives claim that man has a 'proclivity toward violence and sin,'<sup>64</sup> the libertarian would have to object. Neither argument nor historical evidence supports this claim. Only a very selective, sensationalist or journalistic view of human history omits from consideration the considerable degree of human virtue and good that permeates human existence – if mainly away from the limelight. But the libertarian rejects the modern liberal, secular utopian view of man's perfectibility (by the rational organization of society or the dialectics of history). Man is perfectible, but

only by his own sustained disciplined effort. And if this be optimism, the libertarian will have to plead guilty. What the libertarian is concerned with *qua* libertarian is to make possible – not to falsely guarantee – for each human being to aspire to goodness in his own circumstances, admitting that this aspiration may be neglected. And this is not utopianism.

There is another, less fundamental but quite emotion-packed issue on which libertarians and conservatives are frequently in serious disagreement, namely, foreign policy. The foreign policy of a free society, as its domestic policy, stresses the social primacy of liberty. This amounts to a strict foreign policy of *defensivism*, as explained in an essay by Professor Eric Mack.<sup>65</sup> Some libertarians insist on an isolationist foreign policy, but that cannot be derived from the libertarian political framework, contrary to their contentions.<sup>66</sup> As to the implications of libertarian defensivist foreign policy for the conduct of the present American government, this is a very complicated matter, but not unmanageable. Libertarians have not developed the specialization for purposes of answering the numerous particular policy questions the present American government faces, but they are, quite justifiably, very suspicious of the wisdom of the *status quo*. In my view the few libertarians who have made contributions to this area of concern have remained far too abstract and have succeeded mainly in raising questions, not in answering them.<sup>67</sup> Still, it is not an exaggeration to maintain that conservatives would find libertarians too complacent about the threat of international communism, just as libertarians find conservatives too complacent about the threat of domestic authoritarianism in the wake of a policy of virtual Wilsonian imperialism. The point that should be admitted is that some very serious thinking needs to be done to discover – instead of dogmatically to assert – what a free society's foreign policy implies for those who are seeking to establish such a society from within a mixed society such as America is today.

To conclude, let me recall here some thoughts expressed by an individual whom some conservatives have called upon to give support to their anti-libertarian concerns.<sup>68</sup> The late Leo Strauss made numerous relevant points regarding the issues surrounding the present discussion, but three are especially germane. First, Strauss identified the good life for man as 'simply the life in which the requirements of man's natural inclinations are fulfilled in the proper order to the highest possible degree, the life of a man who is awake to the highest possible degree, the life of a man in whose soul nothing lies waste.'<sup>69</sup>

He also believed that: 'political freedom and especially that political freedom that justifies itself by the pursuit of human excellence ... requires the highest degree of vigilance.'<sup>70</sup>

And finally he held: 'There is no adequate solution to the problem of virtue or happiness on the political or social plane.'<sup>71</sup>

If we put these three ideas together – which, it seems to me, do give expression to Strauss's own views (as rare as this is in his writing) – we will arrive at the libertarianism I have been speaking of throughout this discussion.



This libertarianism is, put plainly, the view that the task of politics is liberty, nothing more or less, and the task of virtue, human excellence or happiness, is a task that only the individual on his own can strive to fulfill either alone or in personal and voluntary association with others, never by force or coercion.

## Notes

- 1 See, for several discussions of this, Tibor R. Machan, ed., *Individual Rights Reconsidered: Are the Truths of the Declaration of Independence Lasting?* (Stanford, CA: Hoover Institution Press, 2001).
- 2 This is clear in what Edmund Burke tells us, namely,
 

Men have no right to risk the very existence of their nation and their civilization upon experiments in morals and politics; for each man's private capital of intelligence is petty; it is only when a man draws upon the bank and capital of the ages, the wisdom of our ancestors, that he can act wisely.

Quoted in Kenneth M. Dolbeare, *Directions of American Political Thought* (New York: John Wiley & Sons, Inc., 1969), p. 11.
- 3 For example, John Hospers, *Libertarianism* (Los Angeles, CA: Nash Publishing, 1971), *Human Rights and Human Liberties* (Chicago, IL: Nelson-Hall, 1975); Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974); Ayn Rand, *Capitalism, The Unknown Ideal* (New York: Signet Books, 1967); Murray N. Rothbard, *Power and Market* (Menlo Park, CA: Institute for Humane Studies, 1971). Rand denied that she was a libertarian, yet her political principles were those of libertarianism and her work is frequently cited in libertarian literature as providing a basis for libertarianism.
- 4 For example, CATO Institute, Washington, D.C.; Institute for Humane Studies, Fairfax, Virginia; Center for Libertarian Studies, New York, New York; The Reason Foundation, Santa Barbara, California. None of these organizations is in political affiliation with the Libertarian Party and they are all educational, non-profit outfits.
- 5 Some of the subjects of serious dispute include whether government is consistent with libertarianism, whether libertarian principles give support to the claim that abortion should not be illegal, whether isolationism or some other form of principled foreign policy – for example, defensivism, as explained by Eric Mack, 'Permissible Defense,' *Reason*, 8 (July 1977): pp. 26–31 – is proper from a libertarian point of view. On abortion, see *Reason*, 9 (April 1978).
- 6 The list is very long indeed. Examples may be found in the pages of *Commentary*, *National Review*, *The New Republic*, and *The Nation*, as far as general readership magazines are concerned. Scholarly criticisms, especially of Robert Nozick's libertarian arguments, have appeared in *Philosophy and Public Affairs*, *The Public Interest*, *Political Theory*, *Canadian Journal of Philosophy*, *Modern Age*, *The Intercollegiate Review*, *Journal of Philosophy*, *Ethics*, *Human Rights*, and many other publications.
- 7 See note 5. Among major publishers who have issued works on libertarian thought are Basic Books, Macmillan Publishing Company, University of Chicago Press, Open Court, and Prentice-Hall.
- 8 For example, at Harvard University, University of California at Berkeley, Stanford University, Princeton University, University of Southern California, and many other prominent universities libertarianism is regularly covered in philosophy, economics, and political science courses.
- 9 No other political doctrine emphasized the concept of human rights as libertarianism. But libertarians have popularized the idea of victimless crimes, decriminalization, tax resistance, deregulation, and restitution for victims of crimes. The language of academic

political theory has adopted many of the ideas found in Robert Nozick's work, although it is doubtful that this indicates any substantive decline in the leftist orientation of academic humanists. Here Nozick's own prominence and philosophical competence accounts for the development of libertarian-flavored discussions.

- 10 We may recall here the Jaffa/Kendall and Jaffa/Bradford debates in conservative intellectual circles.
- 11 Any attention to libertarian and conservative publications will reveal just how often such writers as Yale Brozen, Henry Hazlitt, Milton Friedman, William Rickenbacker, and William Niskanen have appeared in both of their pages, usually expressing concerns with the topics mentioned.
- 12 For example, Russell Kirk, *The Conservative Mind from Burke to Eliot*, (Chicago, IL: Henry Regnery, 1953), Arianna Stassinopoulos, *After Reason* (New York: Stein and Day, 1978), and M. E. Bradford, 'A Better Guide than Reason: The Politics of John Dickinson,' *Modern Age*, 21 (Winter 1977), pp. 39–49. In most conservative criticisms of reason it is Cartesian or mechanistic rationality that is at issue. Moreover, not only conservatives but many others consider this version of rationality inadequate. See for example, Paul Feyerabend, *Against Method* (London: NLB, 1975) and F. A. Hayek, *Law, Legislation, and Liberty* (Chicago, IL: University of Chicago Press, 1973), vol. 1. For a most formidable criticism of the form of rationalism at issue here, see Michael Oakeshott, *Rationalism in Politics* (New York: Basic Books, 1962), although it would be very risky to categorize Oakeshott's position here. Kirk, in his later work, *The Politics of Prudence*, edited and with an Introduction by Mark C. Henrie (Wilmington, DE: ISI Books, 2004), explicitly criticizes libertarians for failing to practice 'the art of the possible.' That is like criticizing abolitionists for failing to practice the art of the possible. Come to think of it, though, thinking such as Kirk's would probably consider the abolitionist movement unrealistic and, therefore, misguided, too.
- 13 For a prominent thinker who has often been considered more of a libertarian than a conservative, though welcome in both intellectual traditions, F. A. Hayek appears to join conservatives and Michael Oakeshott in being suspicious of reason but only in the constructivist sense. Other libertarians cannot be aligned in this respect with great precision, but many with an ethical argument for the free society would regard themselves as Aristotelians or Thomists, while those with an empirical bent may be regarded as very respectful toward Humean or positivistic empiricism. For more on this, see my *Human Rights and Human Liberties*, pp. 258–64, *passim*.
- 14 But note that their conception of reason is significantly different from what most conservatives consider narrow.
- 15 For example, libertarians oppose any law, *qua* legally enforceable measure in human community life, that prescribes personal or social moral principles or rules – including those that are valid and true – and that prohibits their violation. Thus it may be wrong to engage in premarital sexual intercourse but when done with full consent, it may not be prohibited; and though it may be morally right to publish books with taste and moral awareness, a publisher may not be forced to do so (or punished for not having done so). The complications of a nation with massive public facilities – run at taxpayers' expense and given state direction – cannot be discussed here, although libertarians are far from unaware of them in their various writings. See, for example, the thirty-seven essays in Tibor R. Machan, ed., *The Libertarian Alternative* (Chicago, IL: Nelson-Hall, 1974) and twenty-one more in Tibor R. Machan, ed, *The Libertarian Reader* (Lanham, MD: Rowman & Littlefield, 1982). See, also, Douglas B. Rasmussen and Tibor R. Machan, eds, *Liberty for the 21st Century* (Lanham, MD: Rowman & Littlefield, 1995). It should be noted that forbidding the violation of side constraints – that is, the violation of individual rights – does not amount to 'the prescription of personal or social moral principles or rules' but to the protection of the sovereignty of individuals in a free society.
- 16 The evidence may be found in the widespread support such regulatory proposals have received in various elections from conservative voters and political representatives.

- 17 Bearing directly on politics, the rejection of the rationalist approach often results in the rejection of the so-called absolutist versions of the principles of the free society. See, for example, Walter Berns, *The First Amendment and the Future of American Democracy* (New York: Basic Books, 1976).
- 18 For example, C. D. Broad, 'Determinism, Indeterminism, and Libertarianism,' in *Ethics and the History of Philosophy* (London: Routledge & Kegan Paul, 1952).
- 19 See note 15.
- 20 Many conservatives believe that the secular bent in libertarian theories necessarily presupposes the subjectivist ethics of libertinism. Also, they object to the humanism often implicit within libertarianism. See for example, David Ehrenfeld, *The Arrogance of Humanism* (New York: Oxford University Press, 1978). The classic rejection of Locke's libertarianism may be found to be based on the alleged egoism of Locke. See for example Leo Strauss, *Natural Right and History* (Chicago, IL: University of Chicago Press, 1953). Strauss, unlike most conservatives, is more critical of the narrow Hobbesian egoism than of egoism *per se*. For a type of ethical theory that stresses the importance of the individual and would serve well as the moral underpinnings of libertarianism, see David L. Norton, *Personal Destinies, A Philosophy of Ethical Individualism* (Princeton, NJ: Princeton University Press, 1976) See also my 'Recent Work in Ethical Egoism,' *American Philosophical Quarterly*, 16 (January 1979), pp. 1–15, and 'Review of *Personal Destinies*,' *American Journal of Jurisprudence* (1979), pp. 213–26.
- 21 For a discussion of what counts as an adequate theory in this and other realms of inquiry, see my 'Rational Choice and Public Affairs,' *Theory and Decision* 12 (September 1980); pp. 229–58. Since no man can reasonably aspire to produce a final, unchangeable understanding of a reality that is dynamic and by no means finished, only open-ended theories can be considered even plausible, let alone adequate, especially in the human sciences. But certain criteria do apply which require a theory to be consistent and fair to the facts.
- 22 One might consider that the theory of evolution is a biological theory, even though its validity presupposes numerous facts in chemistry, physics, epistemology, and so on. The fact that Darwin did not address all the issues in these fields with bearing on his own sphere of concern does not detract from the truth of his views.
- 23 Force, even in its petty versions – for example, government regulation (which former President Ford called 'petty tyrannies') – is the enemy of creativity, imagination, and flourishing. An active being's primary faculty, namely, his reason, and all of what relies on it, are undercut when force is interjected. This is why slavery, massive or minute, simply cannot work as well as liberty, as the Nazi and Soviet experiments demonstrated.
- 24 *The Way of Lao Tzu* (Indianapolis, IN: Bobbs-Merrill, 1963).
- 25 Aristotle, *Politics* III.9, 1280b 10.
- 26 *Ibid.*, 111.7, 1267b 38.
- 27 William of Ockham, *Opus Nonaginta Dierum*, Chapter 65.
- 28 John Locke, *Second Treatise on Civil Government*, ed. J Gough (Oxford: Oxford University Press, 1956).
- 29 John Stuart Mill, *On Liberty*, ed. C.V. Shields (Indianapolis, IN: Bobbs-Merrill, 1957), p. 66. The progressivist character of Mill's thought is explained in Gertrude Himmelfarb, *On Liberty and Liberalism* (New York: Knopf, 1974).
- 30 Herbert Spencer, *The Principles of Ethics* (Indianapolis, IN: Liberty Classics, 1978).
- 31 Albert Jay Nock, *Our Enemy, the State* (Caldwell, ID: Caxton Printers, 1946).
- 32 Ludwig von Mises, *Socialism* (London: Jonathan Cape, 1936).
- 33 Ayn Rand, 'The Objectivist Ethics,' in *The Virtue of Selfishness: A New Concept of Egoism* (New York: Signet, 1964).
- 34 *Nozick*.
- 35 For the individualist anarchism that has been stressed by some as an essential part of the libertarian tradition, see James J. Martin, *Men Against the State* (Colorado Springs, CO: Ralph Myles, 1970) and Murray N. Rothbard's *For a New Liberty* (New York: Macmillan,

1973) and *Power and Market*, which present a compilation of Lockean and Austrian economic arguments for anarchist libertarianism.

- 36 By this remark I aim to stress that there is nothing odd about regarding someone as part of a tradition even if that individual's views are not exactly expressed in contemporary terminology.
- 37 See note 35.
- 38 See my *Human Rights and Human Liberties*, pp. 143–60. In my work I discuss several versions of anarchism, including the views of Professor Rothbard. To date, however, discussions of Rothbard's position have centered on Nozick's arguments against anarchist libertarianism. See the essays in *The Journal of Libertarian Studies*, 1 (Winter 1977). For my own assessment of the debate, see Tibor R. Machan, 'Anarchism and Minarchism, A Rapprochement,' *Journal des Economists et des Etudes Humaines*, Vol. 14, No 4 (December 2002), pp. 569–88.
- 39 David Friedman, *The Machinery of Freedom* (New York: Harper and Row, 1973). For Milton Friedman's explicit view on this issue, see Joe Cobb, Tibor Machan, and Ralph Raico, 'An Interview with Milton Friedman,' *Reason*, 6 (December 1974).
- 40 See several letters to the editor of *Penthouse* magazine, March 1974, in response to an essay about Professor Rothbard by Samuel Blumenfeld in *Penthouse*, November 1973. See also Sam Wells, 'Anarcho-Capitalism is Not Anarchism, and Political Competition is Not Economic Competition,' *Frontlines* 1 (January 1979).
- 41 For example, see Irving Kristol, 'Pornography, Obscenity, and the Case for Censorship,' in J. Feinberg and H. Gross, eds, *Philosophy of Law* (Belmont, CA: Dickenson, 1975), and Walter Berns, 'Free Speech and Free Government,' *The Political Science Reviewer*, 2 (1972), pp. 217–41. In this as in other of his writings, Berns insists on associating libertarianism with the doctrine that truth is relative; yet no such doctrine underlies libertarianism, quite the contrary, considering that libertarians insist on the universality of the truth of the principle of liberty. (Nor, as Berns insists, do libertarians embrace the legal philosophy of Oliver W. Holmes, Jr, who was a pragmatist and completely eschewed the doctrine of natural law, one of the most often cited theories in support of libertarianism. For more on this, see Tibor R. Machan, *Objectivity: Recovering Determinate Reality in Philosophy, Science, and Everyday Life* [London, UK: Ashgate, 2004], especially Chapter 7, 'Richard Posner's Pragmatic Jurisprudence.')
- 42 Gary North, 'Pornography, Community, Law,' *National Review*, 25 (August 31, 1973).
- 43 William Bennett, *Index of Leading Cultural Indicators* (New York: Simon & Schuster, 1994), pp. 8–9.
- 44 Quoted in David Wessell and John Harwood, 'Market Economy Begins to Reach Further Into Government, Society,' *The Wall Street Journal Interactive Edition*, May 14, 1998.
- 45 On a microcosmic level this distinction would be reflected in, for example, referee, game, and player, in basketball, with only the first having a claim to authority for using force. See Albert J. Nock.
- 46 This is explained further in my *Human Rights and Human Liberties*, Chapter 4.
- 47 For some rather clear examples of offhand references to libertarianism, see Stephen J. Tonsor, 'Liberty and Equality as Absolutes,' *Modern Age*, 23 (Winter 1979), p. 8; John P. East, 'Leo Strauss and American Conservatism,' *Modern Age*, 21 (Winter 1977), p. 18. See especially Ernest van den Haag, 'Libertarians and Conservatives,' *National Review* (June 8, 1979).
- 48 It is Leo Strauss and his students who teach the view that Locke's work is not actually *bona fide* political philosophy. See Michael P. Zuckert, 'The Recent Literature on Locke's Political Philosophy,' *The Political Science Reviewer*, 5 (1975), pp. 271–304.
- 49 For more on this, see my *Human Rights and Human Liberties*, p. 137, and 'Some Consideration of the Common Good,' *Journal of Human Relations*, Vol. 18, No 3 (1970); pp. 979–94. See also Frank S. Meyer, *In Defense of Freedom* (Chicago, IL: Henry Regnery, 1962), Donald J. Devine, *Does Freedom Work?* (Ottawa, IL: Caroline House Books, 1978), and, especially, Douglas Den Uyl, 'Freedom and Virtue,' *Reason Papers*,

- 5 (1979), pp. 1–12. A somewhat similar view is defended in Alan Gewirth, *Reason and Morality* (Chicago, IL: University of Chicago Press, 1978), although Gewirth believes that capability, too, is a necessary condition of morality and therefore one has a right to welfare (that is, the provision of such capabilities by others). For some objections to this and a discussion of a variety of human rights theories, see my ‘Some Recent Work in Human Rights Theory,’ *American Philosophical Quarterly*, 19 (January 1982), pp. 61–72.
- 50 A specifically libertarian theory of law has obviously not been developed to the extent other theories have, although the works of F. A. Hayek, Bruno Leoni, Richard Epstein, John Hospers, J. Roger Lee, Randy Barnett, and others offer many insights as to the foreseeable elements of a distinctively libertarian legal code. Since the American political and legal traditions are very close to some crucial aspects of libertarianism, legal theory in America would be of much help in the development of a libertarian legal system.
- 51 A very good example of this is found in Lord Devlin, *The Enforcement of Morals* (Oxford: Oxford University Press, 1959). In earlier times, with the close relationship of state and church, the moral commandments were often tantamount to legal edicts. For an argument for liberty which accepts that if one knows that another is doing wrong (or not doing right), one should interfere, see Cobb, Machan, and Raico, ‘Interview with Milt Friedman.’
- 52 The Founding Fathers’ greater concern for liberty rather than virtue may be appreciated along the present line of analysis.
- 53 No one quite announces the matter this way, but various doctrines of what *true* liberty means – namely the freedom from hardship, from hunger from physical or spiritual suffering (even if it does not mean the freedom from the interferences of other human beings) – amount precisely to this view.
- 54 Irving Kristol, “‘When Virtue Loses All Her Loveliness’ – Some Reflections on Capitalism and the ‘Free Society,’” in *Two Cheers for Capitalism* (New York: Basic Books, 1978).
- 55 Classical liberalism may properly be regarded as far more than political theory such as libertarianism, since it is philosophically broader involving ideas about the nature of man, God, value, science, and so on. Although libertarianism may indeed be defensible from a very specific philosophical perspective, it is not itself that perspective.
- 56 Unfortunately critics of libertarianism focus only on the slogans, or those renditions that emanate from very prominent circles, regardless of how complete and comprehensive these may be. See my ‘Considerations of the Libertarian Alternative,’ *Harvard Journal of Law and Public Policy*, 2(1979), pp. 103–24, where I examine critical discussions of Nozick’s work and try to provide some of the theoretical replies to Nozick’s critics based on a libertarian view that is much broader than his.
- 57 For more on this, see my ‘Reason, Morality, and the Free Society,’ in R.L. Cunningham, ed., *Liberty and the Rule of the Law* (College Station, TX: Texas A & M University Press, 1979).
- 58 Moreover, the political theory that presupposes supernaturalism is theoretically flawed by begging one crucial question of political life, namely, by what principles should a human community be governed? To answer that it is to be discovered by revelation, the people who do not experience it will be left automatically in the position of having to accept the words of those who do. The naturalist approach, which relied on man’s essential (natural) capacity to reason, begins political inquiry in such a way as to make it possible for everyone to learn the answers.
- 59 See note 41, Berns, ‘Free Speech and Free Government,’ p. 237. The argument runs as follows: prominent thinkers who have advocated what are political theories in the libertarian tradition have asserted the relativity of truth, but truth is not relative even by the implications of their own theory, therefore, libertarianism is false. But this argument is fallacious. It assumes that if ‘P implies R’ is true, but ‘P’ is false, then ‘R’ is false. Yet it has been argued, I believe successfully, that ‘S implies R,’ and ‘S’ is true, therefore ‘R’ is proven. We may regard ‘P’ as the view that truth is relative and ‘R’ as the libertarian

political theory, while 'S' is the view that man has a moral nature so he must choose his own moral excellence. Assuming that both 'P' and 'S' imply 'R', it won't do to keep refuting 'P' in order to refute 'R'.

- 60 For Friedman's view, see Cobb, Machan, and Raico, 'Interview with Milton Friedman.'
- 61 I am referring to the extraordinarily widespread discussions of Nozick's work, in contrast to the much more comprehensive works of Ayn Rand and Eric Mack. For Mack's work, see his 'How to Derive Ethical Egoism,' *The Personalist*, 52 (Winter 1971), pp. 735–43, 'Egoism and Rights,' *The Personalist*, 54 (Spring 1973), pp. 5–33, and 'Egoism and Rights Revisited,' *The Personalist*, 58 (Summer 1977), pp. 282–8. See also essays by Eric Mack, John Hospers, John O. Nelson, James Sadowsky, Nathaniel Branden, and me in Tibor R. Machan, ed., *The Libertarian Alternative*.
- 62 See David L. Norton, *Personal Destinies*, for a detailed exposition of this ethical position. I should not leave the impression, however, that Norton is a libertarian. I simply contend that his eudemonistic individualism provides a correct foundation to libertarian political theory.
- 63 I have in mind scholars associated with the University of Chicago department of economics, noted for their strict reliance on positivist or empiricist methodology and its presuppositions.
- 64 Russell Kirk, *The Conservative Mind*.
- 65 Mack, 'Permissible Defense.'
- 66 R. A. Childs, Jr, editor of *Libertarian Review*, has advocated what he calls 'noninterventionism' in American foreign policy, *Libertarian Review*, 8 (January 1979), p. 25, but there is no reason at all to accept that libertarianism implies this. Defensive military action can easily require foreign intervention, even in the affairs of countries that are not the direct enemies of a free society (for example, when such countries are unjustifiably complacent about military threats against them *and* such threats, pressed in identifiable actions of course, are also threats against one's own free country). The war against Iraq has been a bone of contention between many conservatives and many libertarians – probably best illustrated by how those at the Heritage Foundation and those at the Cato Institute would deal with this policy. For my own general account for the proper stance on the topic, see Tibor R. Machan, *The Passion for Liberty* (Lanham, MD: Rowman & Littlefield, 2003), Chapter 13, 'Military Defense of a Free Society.'
- 67 See, for example, Murray N. Rothbard, 'Soviet Foreign Policy: A Revisionist Perspective,' *Libertarian Review*, 7 (April 1978); pp. 7–23.
- 68 East, 'Leo Strauss.'
- 69 Leo Strauss, *Natural Right and History*, 2nd edn (Chicago, IL: University of Chicago Press, 1970), p. 127.
- 70 *Ibid.*, p. 131.
- 71 Strauss, 'Restatement on Xenophon's Hiero,' in *On Tyranny* (Ithaca, NY: Cornell University Press, 1968), p. 194.

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## Chapter 18

# Socialism Redux on the Horizon

It is the most widely championed opponent to libertarianism in our time.

Soon after the election of Bill Clinton, sociologist Amitai Etzioni, a professor of sociology at George Washington University and signatory to Bill Clinton's list of 'economists' supporting his presidential campaign, published a letter of complaint in *The New York Times*. He chided those who objected that various Clinton appointees lacked proper training in the science of economics. Particularly cited was Robert Reich – former advisor to Michael Dukakis and then a professor at the John F. Kennedy School of Government of Harvard University and now University Professor and Maurice B. Hexter Professor of Social and Economic Policy at Brandeis University and at Brandeis's Heller School of Social Policy and Management – who became Clinton's labor secretary for a spell and had been trained not in economics but in law.

Professor Etzioni was named in 2001 by Judge Richard Posner as among the top 100 American intellectuals when measured by academic citations. He is a leader of the communitarian movement, and a prominent figure in the field of socioeconomics, which is a hybrid of sociology and economics. He is an advocate of these ideas that I can only dub as new excuses to crowbar American economic policy in the direction of democratic socialism. Certainly communitarian Etzioni is highly critical of the teachings of mainstream or neoclassical economics. According to him, this field involves entirely unrealistic assumptions, namely, those embodied in modeling and mathematical analyses, including perfect competition and full equilibrium.<sup>1</sup>

Etzioni argues that because of such unrealistic assumptions, mainstream economics misguides people so that they embrace free markets and supply-side macroeconomic policies. Since, however, the basic tenets of neoclassical economics are wrong-headed, it cannot be that the proposed free markets and supply-side public policy would be healthy for the American economy. Instead we must adopt the approach championed by the socioeconomists and the communitarians. For the sake of the well-being of communities we must accept a good deal of government intervention in the economy, even if some individuals are inconvenienced thereby.

But Etzioni's laments about the alleged errors of neoclassical economics in his letter and books like *The Moral Dimension* and *Public Policy in a New Key* infer way too much from the shortcomings of neoclassical methodology; he believes that any (at least, any free-market) conclusions produced by those using such methodology are also wrong-headed. Complaining about efforts at



privatization in former Soviet colonies, he writes in the letter that to ‘urge post-Communist societies to shift to raw capitalism is to ignore the inherent social instability (which led all Western countries to welfare capitalism) of such a system, and to invite social tensions that are explosive and will contribute to removing both democratic institutions and the drive to capitalism.’ He has been joined in this prognosis by billionaire George Soros and by many other writers on the left (for example, Robert Kuttner).

In indicting the free market for lacking social stability Etzioni caricatures classical liberalism or libertarianism as being supported by nothing but the *homo economicus* or atomistic conception of human nature.<sup>2</sup> There is indeed such an atomistic conception extant; it is derived from Thomas Hobbes’s idea of human nature, which is derived in turn from his nominalist view of anything’s nature.<sup>3</sup> Yet it is only the neoclassical defense of libertarianism which invokes this abbreviated conception of human individuality, and only with regard to the modeling of market behavior. There are, indeed, some economists who embrace an imperialist position, that is, who attempt to subject all human affairs to economic analysis.<sup>4</sup> But that is not by any means the dominant idea underlying the libertarian view of political life. Etzioni believes he has conquered the citadel, but he has merely blasted a single poorly laid brick.

The modeling and mathematical analyses that neoclassical scholars conduct are most promising for the understanding of a free market and of what might be expected from government intrusions upon market activity. As Nobel laureate Milton Friedman has explained, the model is to the actual world of human economic life what theoretical physics is to the actual world of physical events.<sup>5</sup> If people would only keep this in mind when they infer public policy from the results of the analysis, things would not go astray. This approach may not be fully adequate to understanding human economic life. It has, however, offered some valuable insights and explanations of, for example, why command economies, government regulation, debt financing, minimum wage legislation, rent control and similar government boondoggles fail. Furthermore, it is by no means the only way classical liberals and libertarians approach their analysis of human community life. Economic imperialism is not even fully embraced by most neoclassical economists, let alone by all those who find the classical liberal polity a sound way to organize the basic legal structure of human community affairs. Many free-market economists (specifically, of what is called the Austrian school), reject mathematics altogether as a tool of economic understanding (except in quantitative reports of historical events).<sup>6</sup>

Thus, even if the neoclassical approach is flawed, it does not follow that free markets and supply-side policies also are. They may well be justified on other grounds – for example, because freedom is generally better for human beings than the involuntary servitude championed by communitarians. They don’t describe it in those terms, of course; they prefer to disguise their goal by deploying such adjectives as ‘responsible’ to describe their ideal – as if the

persons being socially engineered can act responsibly when forced to behave as others think they should. A problem with examining the communitarian thesis is that nearly all those who speak for it use the locution of ‘we want,’ ‘we desire,’ ‘we prefer.’ While no doubt this is true of some of the citizens in a community, it isn’t true of them all and that makes a big difference to the type of public policy implications that follow. Perhaps the most basic element of the communitarian stance is just that it refuses to acknowledge this fact, namely, that it is unjustified to speak in terms of ‘we’ when in fact only ‘some’ agree to some measure of what communitarians favor as constitutive of community life.

In any case, despite some of the excesses of the neoclassical school of economics, in a free society we are safer in their hands than in the hands of the socioeconomists. The former mostly wish to understand the economy and set the limits to government involvement in it, so government is roughly analogous to an honest judge who does not distort his adjudicative function.

It is true, as already noted, that neoclassical economists do sometimes claim more power for their approach than it actually possesses. For example, Professor Gary Becker, the 1992 Nobel Prize winner in economics, claims to be able to understand nearly all aspects of human community life – including family, marriage, crime, and suicide – by applying the methods of economic science.<sup>7</sup> Yet what social science avoids such imperialism altogether? And Etzioni’s alternative, the discipline of socioeconomics and what emerges from it, namely, communitarianism, are a confused mess because of its reliance on the admittedly small-scale yet clearly still distinctively collectivist social analysis.

Communitarianism thus serves as a cover for reintroducing various ideas of mercantilism and command economics following the demise of outright socialism.

Robert Reich and Professor Etzioni, both members of this ‘new’ school, in fact favor the old-fashioned polity of social democracy. According to social democracy, ‘we’ – namely, those in power in Washington and other headquarters of government who deem themselves authorized to speak and make policy in the name of everyone – may dictate to us all what is important for ‘the community’, by which they mean, of course, their own vision of what the community ought to do and look like. They are hostile to the idea that the best communities are those made voluntarily, by the members of the community, rather than those that have been imposed by someone from above. They treat the ‘community’ as some sort of organic body, as if adults are intrinsically incapable of exercising personal sovereignty, and thus would tolerate extensive subjugation of the citizenry in the name of community values. Just as, for a conservative like William Bennett or George W. Bush, the concept ‘family values’ justifies the imposition of various forms of private and social conduct on possibly unwilling persons, so the concept ‘community values’ justifies similar impositions in the realm of economic life for the communitarians. It’s one reason that conservative figures like

David Hume and Edmund Burke are heroes to both the conservatives and the communitarians.

Do not misunderstand these points. Communitarians are *not* socialists of the Marxist–Leninist variety. They have learned at least this much: trying to regiment a very large society in virtually every respect is a hopeless dream. Yet as a dream it does remain, albeit in scaled down form, for communitarianism aims for such an objective within smaller collective units, such as cities, towns and villages (as per Hillary Rodham Clinton’s book, *It Takes a Village*<sup>8</sup>). Yet the major feature of communitarianism is shared by those greater collectivist sociopolitical utopias, namely, the negative one of demeaning the idea of individualism.

Communitarians stress how thoroughly bound up we all are in society. We cannot think, talk, or live our lives except as members of a community. We are thoroughly dependent on other people, so that there is little which can be left to individual discretion. And here is where things turn ugly. Etzioni, whose book *The Spirit of Community*<sup>9</sup> is a pop manifesto of communitarianism, illustrated this in a letter to the editor of *Reason* magazine, which gave a rather critical review of his work. Etzioni protested the reviewer placing the term ‘public’ in quotation marks, claiming that those who are not ‘extreme libertarians’ will ‘acknowledge that the free market will not attend (or not sufficiently) to some goods – basic research, for instance. Because the yield of basic research is available to one and all, those who heed only private interests will rationally free ride.’ Guess he’s not privy to the research budgets of Google, Microsoft, et al.

This is the familiar idea that many widely desired goods that can be enjoyed by persons other than those who paid for them will on that account alone not be produced by free men and women at all. Therefore, freedom must be restricted, say the communitarians. People must be taxed to the hilt in order to make them pay for such production. They must be made to serve these goals involuntarily, even if they would rather devote their efforts and wealth to something else.

That kind of assumption is exactly what motivated the Marxist–Leninists, of course. The public just does not know what is good for it – suffering as it does from ‘false consciousness’ – so the state must force it to behave properly, to support industrialization, agricultural collectivization, uniformity in the arts, education, and sports, and whatever other straitjackets the socialists deemed vital to the common good. Communitarians are now revamping this argument, most often regarding environmental and community values – for example, conservation and social stability, respectively.

Yet the ploy doesn’t wash. There are few genuine public goods. Is basic research one of these, as Etzioni claims? What does such research focus on? *Cui bono?*<sup>10</sup>

AIDS research benefits, first of all, those who are at risk. Others have no stake in it except indirectly: as a means to avoid various levels of risk, out of concern for friends in the high-risk groups, or out of concern for the overall quality of a community. But we all have such an indirect stake in nearly

everything positive that people do. That, in turn, would imply, given Etzioni's line of thinking, that we should all be forced to contribute to the production of *everything*. Indeed, the communitarian view thus collapses into outright socialism, the thesis that is founded on the idea that we are all first and foremost social beings (or, à la Marx, 'specie' beings), and that such concepts as individual rights are mere ideological efforts to disguise this beautiful fact about us. Communitarian premises therefore rationalize the tyranny we have witnessed as a result of the last century's national and international socialism, the feudalism of earlier centuries, and even tribalism, the most primitive form of political life human beings can experience.

In fact, 'basic research' and similar notions are nothing if not broad and vague, and Etzioni and company use them carelessly, making it possible thereby to provide support for socializing all sorts of scientific activities, with all manner of beneficiaries. Consider the fact that not even roads can be very accurately characterized as public goods; certainly one could treat them as private without radical change. In some places there are private turnpikes as well as private roads (for example, in Disneyland, retirement and other residential villages). Environmental efforts, too, are often deemed to be public measures, whereas in fact they often serve strictly private concerns. Public schools, public parks, public beaches, public forests, and, indeed, nearly every other realm now designated 'public' are, indeed, private or special-interest projects in support of which the rest of us are placed into involuntary servitude. Meanwhile, the few *bona fide* public projects like crime prevention and national defense – that is, the protection of our individual rights, the very purpose of establishing a government – get neglected.

'If the Sierra Club is fighting for untrampled ski slopes for its members,' states Etzioni in one missive, 'it is acting as a special interest group. If it is acting to preserve clean drinking water for one and all, it is acting on behalf of the public.' Appealing as it may sound, this is wrong. Even skiing can be made out to be a general good, if one frames it in terms of its health benefits and other desirable social consequences. And clean water, in turn, is a 'public' good only for those who drink from the taps (when such water is provided through a government – hence 'public' – utility), not for those who drink from privately distributed bottles.

The only truly public good is the protection of individual rights. Human beings are too differentiated, too individual to be lumped into a homogeneous group with respect to virtually any possible endeavor, except insofar as each adult requires freedom to exercise his own sovereignty.<sup>11</sup> So, *pace* Etzioni, the reason 'public' should often be placed in quotation marks is that it does not really mean what it says. Most 'public' goods are in fact private goods that are being gained on the backs of an over-taxed, over-regulated citizenry.

The Etzionis of our world want to regiment not only the economy but also society as a whole, although they are willing to do it starting with one small community; hence their fascination with such programs as spot checks of automobiles in crime-ridden areas, programs that gradually establish the

public policy that whenever enough folks in a community have a worry, they may violate anyone's rights in a usually futile effort to remedy the worry.

Consider, for example, that the goals which Etzioni claims make it desirable to move from 'raw capitalism' to the welfare state have been far from achieved through the welfare state. To the contrary, in America, the welfare state has spawned more social instability and tension than we find in the near-capitalism of the early history of this country (excluding the obvious case of the unambiguously vicious and *anti-capitalist* institution of chattel slavery).

Communitarians could benefit from careful study of Charles Murray's analysis of the nature of state paternalism in books like *Losing Ground*.<sup>12</sup> But Etzioni's one reference to Murray attempts to tar him with the brush of economic reductionism, placing Murray's complex cultural and social-psychological analysis on the same footing as the curious and problematic tautological approach to the understanding of community adopted by Becker and Posner.

In fact, though, it is communitarianism which is reductive. The approach reduces ultimately to nothing more than warmed-over socialism, albeit with all kinds of disclaimers. It has proven to be a destroyer of economic performance and humane living conditions in communities across the globe.

Capitalism and individualism, although not utopian, promise solutions that are clearly far superior. The communitarians have much to learn not only from the vital lessons of recent history but also from the growing and improving literature of classical liberal social analysis.

## Notes

- 1 In the earlier discussion of economic rationality I give my own critique of neoclassical economics which, however, does not jettison that school's support for free market economics, something that clearly does not sit well with communitarianism.
- 2 The publication Etzioni edits, *The Responsive Community*, devoted a two-part essay to this effort in 1992, Thomas S. Spragens, Jr's paper, 'The Limitations of Libertarianism.' As Professor Aeon Skoble makes plain in his poignant deflation of this effort, 'Another Caricature of Libertarianism' (*Reason Papers*, No 17 [1992]), the piece is a medley of straw man arguments, as are most of Etzioni's not so subtle efforts to tar and feather individualism and classical liberalism. (Oddly enough, a similarly inaccurate and ignorant analysis is offered by someone who has seemed to be a friend of libertarianism, namely, Richard Cornuelle, in 'New work for invisible hands,' *Times Literary Supplement* (April 5, 1991), reprinted some months ago by Cato Institute's *Policy Journal*.)
- 3 I discuss this in detail in Tibor R. Machan, *Classical Individualism* (London: Routledge, 1998) and critically assess it in my *Capitalism and Individualism, Reframing the Argument for the Free Society* (New York: St. Martin's Press, 1990) as well as in Chapter 3 of this work.
- 4 See, for a collection of works that discuss this, Gerard Radnitzky and Peter Bernholz, eds, *Economic Imperialism: The Economic Approach Applied Outside the Field of Economics* (New York: Paragon House Publishers, 1987).
- 5 Milton Friedman, *Essays in Positive Economics* (Chicago, IL: University of Chicago Press, 1956).

- 6 The most comprehensive non-positivist account of the economics of capitalism may be found in George Reisman, *Capitalism, A Treatise on Economics* (Ottawa, IL: Jameson Books, 1996).
- 7 Gary S. Becker, *The Economic Approach to Human Behavior* (Chicago, IL: University of Chicago Press, 1976) and Gary S. Becker et al., *Economics of Life: From Baseball to Affirmative Action to Immigration, How Real-World Issues Affect our Everyday Life* (New York: McGraw-Hill, 1998).
- 8 Hillary Rodham Clinton, *It Takes a Village* (New York: Simon & Schuster, 1996).
- 9 Amitai Etzioni, *The Spirit of Community: Rights, Responsibilities, and the Communitarian Agenda* (New York: Crown, 1993).
- 10 For more discussion on whether the free market is capable of supporting such research, see Tibor R. Machan, *Liberty and R&D* (Stanford, CA: Hoover Institution Press, 2002).
- 11 I develop this point in Tibor R. Machan, *The Pseudo-Science of B. F. Skinner* (New Rochelle, NY: Arlington House Publishing Co., Inc., 1974).
- 12 Charles Murray, *Losing Ground: American Social Policy, 1950–1980* (New York: Basic Books 1984).

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## Chapter 19

# Two Philosophers Skeptical of Negative Liberty

On pain of living a life that's seriously immoral, a typical well-off person, like you and me, *must* give away most of her financially valuable assets, and much of her income, directing the funds to lessen efficiently the serious suffering of others.<sup>1</sup>

Peter Unger

In this chapter I am going to discuss two very prominent political philosophers who have chimed in powerfully on contemporary discussions of classical liberalism. One of them is Amartya Sen, who is a Nobel Prize winner in economics but also is a very active philosopher. He is currently at Harvard University but used to be the Master of Trinity College at Cambridge University in England.<sup>2</sup>

Sen is a very respectful critic of classical liberalism, not one who just brushes it off or treats it disdainfully. He taught at Harvard University when the late Robert Nozick was teaching there, and they co-taught a course for six years. When Nozick died, Sen gave a eulogy at his funeral.

The other philosopher is Martha Nussbaum, member of both the law and philosophy faculties of the University of Chicago and a prolific author of books in ethics and political theory, as well as an active public policy advocate on the international front, championing mainly women's and egalitarian causes.

As for Sen, he is prominent in the area of developmental economics as well as in his critique of neoclassical approaches to values. His most recently published book, *Rationality and Freedom* (2002),<sup>3</sup> contains quite a few of his powerful criticisms of market economics. He was very respectful of Peter Bauer and they often agreed on what developing countries need in order to emerge out of their underdeveloped state.

Sen is what may be called a meta-economist; someone very concerned with the underlying assumptions of the discipline. For example, he has advanced an interesting critique of the tendency on the part of many economists to write off all values as preferences. He argues that there are various ways in which the word 'preference' can be used, not merely the one many economists focus on. His ideas in this and other areas are very challenging.

In particular, however, when it comes to the concept of freedom – political-economic freedom – Sen deploys both a version of the positive freedom theory



– namely, freedom as ‘freedom to,’ meaning being free to attain certain ends by virtue of having the resources to do so – as well as the idea of freedom found in classical liberalism, that dubbed ‘negative liberty’ – which means being free from coercion by others. Indeed, somewhat problematically, he often lumps these two senses of ‘freedom’ together without alerting us to which he has in mind. This may be due, in part, to his stress on the form of negative liberty that leaves people free, *via* the democratic process, to enact public policy measures that secure positive freedom. Yet Sen is quite explicit in rejecting libertarianism and its conception of freedom. ‘In terms of its informational basis, libertarianism as an approach is just too limited ... it also neglects the most basic freedoms that we have reason to treasure and demand.’<sup>4</sup>

What basic freedoms does Sen have in mind? Those that are made possible by confiscating resources from those who own them and providing them to those who lack them but could make very good use of them. The example that is perhaps most pertinent is what is provided by way of Good Samaritan Laws – for example, medical assistance to an injured person whose freedom of movement, of getting ahead in life, is seriously impeded by way of some accident or mishap and who would lack the capability to carry on a normal life. Similar, more massive, examples that Sen focuses upon include famines, disasters, poverty, and lack of employment. The freedom involved is what has been dubbed ‘positive freedom’ and it involves a demand, as Sen recognizes, on the resources, labor and talents of others whether or not they choose to provide them.

One thing we discuss in political theory is just what kind of freedoms there are. In the last fifty years or so (but starting much earlier with such writers as Thomas Hill Green), there has been a discussion as to whether freedom is best understood as a condition of not being interfered with or rather as a power to achieve something. Is it *freedom from* other people’s interference or is it *freedom to* achieve a certain goal?

Many people who support the welfare state, or the larger than classical liberal role for the legal system and government, tend to accept the notion of *freedom to* as an enabling condition due to someone from others and to be secured by government. So that those, for example, who are poor (although nobody is interfering with them or contributing to their poverty by limiting their negative liberty *via* trade restrictions or property rights violations) and, therefore, unable to achieve certain goals it is deemed by many that they ought to be able to achieve, are not free in this positive sense of the term. Even though no one is preventing you from flying to Russia, if you can’t afford to fly to Russia but it would be good for you to fly there, then you are not free to fly to Russia and those who might enable you to do so are deemed to be depriving you of your freedom. More pertinently, even though no one has deprived you of economic liberties – for example, to produce goods and services, to enter into contracts with others – the valuable goal you might pursue of obtaining health care or old age retirement is unavailable to you, thus limiting your freedom to flourish in your life.

This sense of freedom is very often deployed by people within the modern liberal political tradition. Yet many of them have some affinity with the classical liberal school but they believe that classical liberals unjustifiably and thus unwisely neglect this important kind of freedom. They hold that this freedom is required in society – the freedom to achieve various goals that are good for people, such as education, health insurance, or social security. Some even argue that unless classical liberals acknowledge that at least the poor and deprived have a right to such positive liberty, their own theory of individual negative rights is incomplete. For example, University of Notre Dame philosophy professor James P. Sterba argues that for those entirely unable to act to advance themselves while enjoying their negative right to freedom that right is utterly meaningless – it cannot, thus, be reasonable for them to abstain from some violations of other's rights to such negative liberty, especially property rights. And they believe that once it is accepted that a government ought to protect our positive freedom or liberty, room will need to be made for a lot more interventionist public policy such as wealth redistribution and economic regulation that most classical liberals would favor.

Why does Sen think that this freedom is equally important – if not even more so – as the negative freedom requiring that people not intrude on one another? Part of the reason is the underlying conception of human nature. What that conception is makes a big difference to the sort of freedom one will champion. If one believes that, as a rule or for the most part, human beings who are not being interfered with by others have the capacity (with some help from intimates, of course) to secure for themselves what they need so as to flourish in their lives, then one is going to emphasize being *free from* interference because the central condition that an adult needs to flourish is not to be oppressed by other persons – that is to say, not to have others constrain them. In short, human beings in society require, first and foremost, their sovereignty.

Once oppression stops, normal adults can get innumerable tasks accomplished, various goals achieved – maybe not all at once, not all equally effectively, but nonetheless with considerable promise. The major obstacle to our advancing in life, based on this idea of human nature, is other peoples' interference (as identified by a theory of rights violation or freedom abridgement). Once that is fended off, prohibited, or penalized by law, people will have the chance to exercise their initiative – their capacity to make the necessary moves to improve upon their lives – and flourish in life. Thus they don't need to have others conscripted to serve them – they will find mutually acceptable ways to attain their peaceful goals.

That, certainly, is the main theme of classical liberalism, with some variations on the specifics depending on which classical liberal is talking. Having barred coercion or initiated force, the human potential to get things done successfully is unleashed; therefore, the idea that people ought to be forced to support each other is opposed and taken as the main impediment to

their flourishing in their community existence. Of course, even for classical liberals, there are some exceptional cases where people are incapacitated or in a state of emergency such that they will probably need help, but the classical liberal, who champions freedom from interference, tends to maintain that even in those emergency cases free men and women will come to the assistance of those in need. There, in short, will be voluntary organizations, service groups and so on, so there is no need or justification to get government to meddle in these affairs – society is enough, politics is not necessary, to cope with exceptional cases or emergencies.

Those, however, who believe that human beings are ill-equipped to get ahead on their own – that they are either too ignorant, too weak, too poor, or in some other way deficient to pursue a fruitful life – will hold that being free from interference by others is not enough for human flourishing. Sen is amongst those. When he uses the words ‘development as freedom’ – for example, in the title of one of his most prominent books – the word ‘freedom’ there means not just the classical liberal freedom of not interfering with people, but it means a condition of being enabled by the legal order – first *via* the negative right to freedom to vote and then the positive right to wealth redistribution – to escape their poverty, ignorance, or sickness, and to move ahead *via* such support from others. To make this possible, it is necessary to conscript others who are already well enough enabled to do work for those in need, *ergo* extensive systems of confiscatory taxation in systems of justice that characterize the welfare state or democratic socialism. Those so conscripted may not want to contribute to this goal; they may want to do something else – either productive or wasteful – with their lives. But it is taken to be a matter of justice that they must be made to yield to the conscription and expropriation that is required to secure these benefits for the needful.<sup>5</sup>

The matter may be discussed in terms of either freedom or rights. So there are then positive and negative freedom or rights advocates. The classical liberals tend to embrace the notion of negative freedom or rights whereas welfare statists and socialists are more sympathetic to the positive freedom or rights position. The idea for classical liberalism in either cases is that no one is justified to intrude on the lives, liberties and property of anyone else who hasn’t given permission for this to happen, which implies that there is a prohibition against others entering one’s sphere without one’s permission. (The exact specifications of such a sphere are to be established by various ethical and legal proceedings.)

On the other hand, those who accept the notion of positive freedom or rights – or the right to capability – tend to think that everyone in need must be provided by those able to do so with goods and services. That is to say, just for being a human being, especially in modern societies, one who is deprived is entitled to other people’s support, especially when one lacks such support relying only on one’s efforts and those who would voluntarily help out. In other words, if unable to support oneself, that *ipso facto* imposes a duty on capable others to provide the support.

That is the positive freedom or rights thesis, and that's where we get the notion that in a modern welfare state one has many entitlements to such things as social security, education, a minimum wage, health insurance, prescription drug benefits and the rest. In order to secure these entitlements – in order to get one's freedom or rights to these protected – the government may tax those already sufficiently well off and make sure that those in need are supplied with support.

Again, when discussed in terms of rights, there is an assumption underlying the negative rights position that as long as someone's negative rights are respected or protected – that is, one's right to liberty, property, freedom of religion, freedom of speech – one is going to be able to cope and flourish in one's life (perhaps with a little help from one's friends or various voluntary agencies). This is because the only thing that significantly impedes the governing of one's life – that is, one's sovereignty – is other people intruding on it. Here, too, exceptions are by no means denied but voluntary assistance is deemed by champions of negative rights to bail out those in special need or facing emergency situations. The best solution to lacking what one needs is to go to work and produce what will alleviate it. If one hasn't got a job, one is supposed to find one in the marketplace where many offers of employment are anticipated. If one lacks an education, one is supposed to get one or rely on one's guardians or parents to provide it since they have taken on this responsibility, not one's neighbors or fellow citizens.

Again, the classical liberal, libertarian idea is that young human beings are quite capable of growing up with the support of those who thoughtfully invited them into their lives – parents, guardians, and so on – and they will eventually be able to supply themselves with whatever satisfies these needs. And those in desperate straits will find support without having to violate the negative rights of anyone.

Some people are obviously more adept at coping with this task of self-development and with obtaining voluntary support from others and some are even luckier because their parents are richer or they are prettier or healthier or whatever than are others. The idea of human nature underlying negative rights, as with the idea of negative freedom, is that, providing one isn't interfered with by others who have the choice to abstain from such interference, one is going to be more or less able to secure for oneself what is necessary for a reasonably prosperous, healthy, flourishing life.

In contrast, the positive rights – just as the positive freedom – view tends to be supported by a passive conception of human nature. People are rather inert and helpless, even when nobody is intruding on them and nobody bothers them. They will basically remain poor even if the obstacles others' intrusiveness creates for them are removed – for instance, slavery is abolished, conscription is banned, criminal interferences of all kinds are stopped, and the confiscation of the fruits of their labor and luck is stopped. Despite all this, the positive rights position assumes they will probably not escape poverty, ignorance, social insecurity and so forth. (Harvard University's John Rawls,

the twentieth century's most prominent political philosopher held to such a passive view of human nature, arguing that we are molded to be who we are, including the virtues or character traits we will possess. He was reputed to be in agreement with the behaviorist conception of human nature advocated by his colleague B. F. Skinner.)

This position sees human beings not so much as active, creative, productive, self-motivated and forward-moving but as nearly fixed in a certain state or circumstance and moved only by prompters from their environment. So unless others are forced to support them, which is to say, to provide them with necessary goods and services, they will most likely remain where they are, that is, undeveloped economically, psychologically, educationally, and any other way pertinent to human flourishing.

Oddly enough, in the history of the thinking about human nature there are certain classical liberal views concerning that concept which support the positive freedom or rights position. Many classical liberals with a scientific bent of mind – which to quite a few has meant a classical mechanistic or reductive materialist viewpoint – reject the idea of free will, for example. They embrace the idea that people are complex objects being moved by various factors in their environment or genetic make-up. Only if those factors are there will they be moving forward. On their own, they are not able to do that because there is no room for initiative in their metaphysics or scientific outlook. (It is for this reason, mainly, that the concept of entrepreneurship, which presupposes the capacity for taking the initiative in economic problem solving, is difficult to make room for in neoclassical theory. This is also where the Austrian School seems closer to the more humanistic rather than the scientific tradition of social science.)

A good many people of the modern age have this view of human beings – that we are only moving because we are being moved – on our own, we would remain static, we would not make any progress. This clearly comes from classical mechanics, where any object's motion is a matter of momentum or being moved by something else. For many classical liberals with this scientific bent of mind, then, the notion was that everything naturally moves forward, so what is needed is the removal of obstacles, including government interference and regulation.

But others took a different approach. For them the idea was that the state needs to spur people into action because otherwise people will languish inertly. We lack personal initiative or the freedom of will to get things moving on our own. This second idea of the conception of inert human nature tends to support the positive rights and positive freedom idea, whereby what is important politically is to arrange things in such a way that people are given support because without it they are not going to make progress or flourish. It is this that lies behind much of the thinking that we find in, say, John Maynard Keynes when he admonishes government to stimulate employment. Yet it is also part of supply-side thinking, which focuses on stimulating production!

So for the issue of whether there is to be a genuine, *bona fide* free society and marketplace, the decisive issue is, 'What conception of human nature is actually right?' Are we self-movers, self-governors, and sovereign beings to at least a substantial enough degree that we can thrive in peace? Is our freedom *from* oppression sufficient enough to achieve a progressive forward-moving economic system? Or do we need aggressive support from above?

Now a paradox of the latter idea is that if we do need this support because people lack initiative, how do people administering public policies – that is, those in government – possess it in sufficient measure that they can change things for the rest of us? That's always an interesting question. Why are people who move into a bureaucratic office suddenly enabled to make all kinds of moves in society that are progressive, helpful, proactive and creative while those whom they are serving in society are not?

There's another source of the positive freedom or rights thesis, more of a moral position than one about human nature. This is that we all belong together, form a kind of team – what according to Marx appears as the specie-being thesis. This is the view of society as a family, clan, or tribe. Like a team, if a member isn't quite up to snuff, other members need to pitch in, even come to this member's assistance to enable the person to resume a productive role within the group. If there is someone in the family who is not proficient at self-help or self-government, the morality of familial relations requires that other members of the family pitch in.

Many people who support the welfare state believe that we ought to look at society like this, that we are all together in the same boat and if somebody is in need of certain support, it is not just a matter of generosity, charity, or compassion to help them but of a legally enforceable obligation. In this framework one isn't really being oppressed when forced to provide for somebody. Instead one's debts are being collected – *via* taxes and such – so the needy in the tribe or clan can be supported. Anyone refusing to provide that support is simply to be made to do the duty he or she owes (as a matter of social contract or natural obligation).

A lot of people have a frankly collectivist view of society, whereby individuals are not deemed to be sovereign – rulers of their own lives – but are natural team members. Not only Karl Marx but also his French near-contemporary, Auguste Comte, embraced this idea, as do such neo-Marxists as Charles Taylor. Communitarians tend not to be completely clear on this but judging by their frequent denunciation of individualism, their caricature of it as 'atomistic,' they too may be included among those who hold at least a moderate collectivist position and posit enforceable obligations we owe to the group to which we 'belong.' They hold that our legal obligations extend to everybody on the same team.

The question is, 'Is this outlook correct? Is it sound?' If it is, the positive liberty or rights position gains considerable support.

Sen seems to think it is – at least, to a significant extent. The freedom he believes is needed for development includes the positive type, whereby the

successful members of society may be compelled to do service for the less than successful ones even though they have done nothing to make the latter badly off. By this stance, we are all in the same boat; and so when people need help, the rest have a legal obligation to help. The needy are due this help, and those able to provide it may be forced by legal authorities to do so even when they have goals of their own that don't coincide with this. But their own 'egoistic' or 'individualistic' goals are not as important as their 'cooperative' obligations, given the underlying idea of human social relations. Here is the source, also, of the incessant concern with fairness or impartiality, as if society were the family dinner table at which the primary moral issue is to treat every member with equal concern. (A very good example of thinking along these lines may be found in Ronald Dworkin, *Sovereign Virtue*.<sup>6</sup>)

Many embrace some version of this view – it is very prominent and it flies squarely in the face of the classical liberal idea of a just polity, wherein one is one's own master and has the right to decide what to do, for better or for worse, even if considerable inequality in wealth and other values results from this regime of free choice. (The late Robert Nozick made the point emphatically, in his process theory of justice which he placed in opposition to John Rawls' end-state theory which stressed the importance of 'justice as fairness.')

In the classical liberal regime, if one does not choose to give help to needy people, one may – but need not – be stingy, greedy or otherwise morally remiss but nobody is authorized to coerce someone to do anything for anyone else. Ethical conduct has to be a matter of one's own free will.

The classical liberal position, of course, includes a kind of moral individualism – where even though it is recognized that individuals often have moral responsibility to others, those have to be carried out voluntarily. If you carry out an obligation to help somebody because somebody else makes you help the other person, that doesn't make you a good human being; it doesn't make you generous or charitable nor does it render your conduct morally proper. Basically if that is how it transpired that you behaved generously or charitably, you did this because you were afraid to go to jail and so you complied with the order to come up with the required support. This means, within the classical liberal tradition – especially its normative version – that one's moral nature is now being impeded because one is not free to make choices – you are not accorded the right of freedom of choice as a moral agent must be. (This idea comes through most clearly in Kant's motto that 'ought' implies 'can'.)

Sen, to a significant degree, and those even more egalitarian who share his views, deny all this; we don't have a right to our lives, at least not an unalienable right that authorizes us to fend off those who would conscript our labor and confiscate our property so as to feed the needy (and fund all those who administer the redistribution that this policy entails). Our lives belong to a considerable extent to society, race, clan, tribe, nation or humanity. He testifies to this in several of his works but perhaps most influentially in his discussion of famines and how mere negative individual rights – to liberty, private property

and so forth – fails to serve those most in need under such dire circumstances.<sup>7</sup> His discussion is extensive but boils down to the lament that when there is extensive demand for food, even if it is in plentiful supply, its price will rise and those in the greatest need won't be able to afford it. *Ergo*, governments must regulate the price, prevent gouging, protect the right to capability.

A very good example of someone who fully embraces the idea of enforceable obligation to others, mentioned earlier in this work, is Comte, the 'Father of Sociology.' Comte was going to reform religion to base it on a secular rather than a supernatural foundation without losing its moral substance that we are obligated to serve others or society (because throughout we have been bequeathed all these values). So when we come into this world, we are already obligated to everybody to repay a great debt (never mind that debts are owed to those who provide others with goods which others willingly accept on specific terms). By Comte's light we do not have the freedom of choice according to this view but are, instead, indebted in such a way that legal authority is authorized to extract payment. As Comte has it, the moment we are born we are burdened with these obligations that can be imposed on us by law. That is another way to support the welfare state.

Everything we have belongs then to Humanity... Positivism never admits anything but duties, of all to all. For its social point of view cannot tolerate the notion of *right*, constantly based on individualism. We are born loaded with obligations of every kind, to our predecessors, to our successors, to our contemporaries. Later they only grow or accumulate before we can return any service. On what human foundation then could rest the idea of right, which in reason should imply some previous efficiency? Whatever may be our efforts, the longest life well employed will never enable us to pay back but an imperceptible part of what we have received. And yet it would only be after a complete return that we should be justly authorized to require reciprocity for the new services. All human rights then are as absurd as they are immoral. This ['to live for others'], the definitive formula of human morality, gives a direct sanction exclusively to our instincts of benevolence, the common source of happiness and duty. [Man must serve] Humanity, whose we are entirely.<sup>8</sup>

Sen seems to accept this at least part of the way, although he is ambivalent because he also favors a substantial role for free-market solutions to problems. And he is also far more of an individualist, insisting that men and women require room to govern their own lives. (Sen's work on the issue of ethnic identity versus rational choice – regarding *who* any person really is – is very supportive of a classical liberal point of view.<sup>9</sup>) Yet, when certain types of needs arise, market solutions are no longer sufficient for Sen. Still, he supports, for example, liberalizing institutions, the infrastructures of various third world countries. That liberalization involves, in large measure, the classical liberal's unleashing of people's energies, thereby making countries prosperous and successful just as many classical and neoclassical, including Austrian, economists have envisioned this since and even before Adam Smith.



But it also involves making it possible for voters to support the enactment of wealth-redistribution public policies.

So Sen is one of the ‘third way’ thinkers, neither a socialist, nor a capitalist but in the middle, like welfare statist – or ‘market socialists’. They defend a certain measure of negative freedom or rights, but they don’t want too much of it; they value a certain measure of coercion – although they do not admit that this is what they value as they call it positive liberty, rights, or capability – but they don’t want too much of this either. Sen is probably one of the most prominent, intelligent advocates of this position, which he has dubbed the ‘capability approach’ and which is now an international movement very prominent, for example, on the worldwide web.

The classical liberal’s answer to that is, in essence, that trust in the government’s method of solving social problems, namely, coercion, is tragically misplaced. If human beings aren’t generally going to be kind, generous, and charitable of their own volition, as they are exposed to peer pressure and their own conscience, then there are scant grounds for believing that those administering governments are going to be that way. Governments are institutions administered by people subject not less but more to the temptation to skirt their moral responsibilities since they possess awesome powers with the law backing them. (Here is where the Left’s refrain about the alleged power of corporations misses the point: without the backing of government, those corporations would only have economic power, which is to say, the admittedly considerable ability to promote, but always peacefully, their goods and services to sovereign consumers.)

The paradox Sen and others with faith in government’s efforts to achieve a desirable distribution of benefits and burdens is that if you don’t trust other people in their free market or private sector operations to do what is right – for example, to be kind, helpful, and otherwise supportive of those who are in need – why trust those in government who possess a shield against accountability for their moral failings, called ‘sovereign immunity’ in certain legal systems? Public choice theory goes a very long way toward demonstrating that the priorities of bureaucrats and politicians, even before entering ‘public service,’ quickly start centering on advancing their own special objectives. Which is quite natural, given that the system in which they serve the idea of the public interest, and thus of public service, is so bloated and confused that only special or vested interests are left to work for. The classical liberal advances, in contrast, the far more modest notion of the public interest, namely, the protection of individual negative liberty or rights for all those who are being served by a legal system. This is a genuine public interest since all citizens are benefited from such protection. As Hayek made the point,

That freedom is the matrix required for the growth of moral values – indeed not merely one value among many but the source of all values – is almost self-evident. It is only where the individual has choice, and its inherent responsibility, that he

has occasion to affirm existing values, to contribute to their further growth, and to earn moral merit.

In particular, concerning the problem of the dire poor in, say, the circumstances of a famine, Sen seems not to be concerned about the fact that those who engage in what might be construed as gouging – or who are charging what the market will bear for the food they have available – are within their rights to do this. No enforceable obligation exists to provide food for those in dire need of it, although out of charity or generosity such food as is needed may very well be provided. That there are many in need of the food does not entitle them to it, any more than if someone needs help with some emergency in his or her home it justifies going to the neighbor with a gun to conscript the needed labor or skills. There are considerations other than need, such as personal sovereignty and autonomy, that trump any effort to extract involuntary servitude from others. Calling the provisions ‘capability rights’ does not disguise the fact that such capability is being obtained at the cost of violating the negative rights of those who are to provide them.

What appears to give plausibility to Sen’s position, and indeed the position of those championing the welfare state be this within a country or globally, is the sentiment of sympathy and concern. But such sentiments do not establish any rights to other people’s even desperately needed services.

The other thing, even more significant, that has distinguished classical liberals is that they believe human nature does not in fact support welfare statism. Human beings need mostly to be free from intrusiveness and from oppression and whatever help they require must, therefore, be obtained voluntarily. Despite the widely promulgated idea that food is more important than liberty, that coercive measures to feed them must come before the luxury of individual liberty could be afforded, unless men and women are free, they will hardly be able to produce food for themselves and their loved ones. What they produce will, instead, be confiscated and redistributed so they will generally find their work given direction by others, usually to ends that do not support their own well-being.

In a condition of freedom, when their rights are respected and protected, men and women will be able to discover how to improve their lives; even if they have a very slow start with it, even if some struggle will have to be involved, this is the most reliable way to have a society that will prosper best, one where people can have their needs best met, leave ignorance and poverty by becoming reliant on their own initiative and the initiative of their family members, neighbors, friends and those who would trade with them for mutual satisfaction (which is most likely to lead to mutual benefit). In other words, political solutions are not the answer to social problems for the classical liberal, whereas it is for the welfare statist. The two differ most decisively on their conceptions of human nature. And the argument on that issue is quite heated in our time – whether people have, for example, consumer sovereignty

or can easily be made dependent upon corporate manipulators, whether they can choose to become obese or habituated to smoking or using credit cards or whether these matters are out of their control.

Let me now turn, somewhat more briefly, to another very prominent supporter of the kind of polity Sen advocates. Sen's frequent co-author and co-worker, Martha Nussbaum – co-author of some of the essays in Sen's famous book, *Rationality and Freedom*<sup>10</sup> – advances a defense of the welfare state on an explicitly Aristotelian basis. This is interesting for me, especially, and to some others who support classical liberal thought from a neo-Aristotelian position – say, to the late Ayn Rand and Murray N. Rothbard, to Douglas B. Rasmussen and Douglas J. Den Uyl, Fred D. Miller, Jr, and Eric Mack. These all believe, along with Aristotle – as well as Nussbaum – that there is a right and wrong way to be and act based on a proper understanding of human nature (or essence). They too hold that an objective list of human moral virtues spells out the ethics we ought to practice so as to most likely lead a successful human life.

This is not an odd view at all. Without a conception of human nature, mainly along Aristotelian lines, one cannot make out a case for a universal ethical system, based not on sectarian views but on what is accessible to all people, namely an understanding of what, in essence, we all are and what it takes to live our lives best in the most general terms. Thus many thinkers still rely on this aspect of Aristotle – updating him a little, adding some modern elements, excluding some ancient ones (for example, his elitism, his endorsement of slavery and the differential treatment of women, and so on).

So how do Nussbaum and these Aristotelian classical liberals differ? How does Nussbaum end up favoring the welfare state and egalitarianism while the others consider these unjust?

Probably the most important reason is that Nussbaum believes that Aristotle's apparent endorsement of the state's cultivation of our moral virtues – of inducing us to do the right thing – is the right way to understand politics. Aristotle is also taken to be something of a communitarian who favored the interest of the *polis* to which the interest of its citizens may be sacrificed, if need be.

Aristotle had roughly this doctrine: as people grow up, at first their parents habituate them to practice the moral virtues they will need to lead an excellent human life, one that is devoted largely to making the *polis* a success. After reaching maturity, however, the rest of society and, as most understand Aristotle, even the government, takes over this task. (There is a debate afoot as to whether Aristotle really meant for the state or members of one's community to properly carry out the 'virtue-making' policies. Fred D. Miller, Jr, has argued for the latter idea. And there is also debate about whether Aristotle saw the *polis* as having priority over the citizens who constitute it.) So Aristotle is seen by Nussbaum and by others as a supporter of the paternalistic welfare state because he has a proactive view of government as far as fostering the moral virtues of the citizenry.

One source of support for this paternalistic view of Aristotle is that he discusses the ideas of the sophist Lycophron, whose position is quoted very cryptically in the *Politics* to the effect that the proper role of government is ‘a guarantee (or guarantor) of mutual rights.’ Aristotle rejects this, arguing that the government – or is it the community? – must do more, not merely protect rights. This is akin to the current debate between welfare statists and classical liberals.

Nussbaum embraces the welfare statist understanding of Aristotle and even takes it quite a bit further. Based on an Aristotelian conception of human nature, she advocates a more egalitarian *world* government. This world government or global public policy agency isn’t only to support moral virtue but substantially order our way of life by enforcing public policies that equalize conditions in society which are a source of acrimony, upheaval, and instability. (In this, Nussbaum is joined by such non-Aristotelian political philosophers as Peter Unger and Peter Singer.)

One matter that seriously differentiates Nussbaum from the classical liberal Aristotelians is that the latter do not believe that moral virtues may be enforced. They need to be practiced as a matter of choice, voluntarily, because they are accepted as a matter of conviction, not from fear of punishment and other coercive methods. (Recall the point above made by Hayek about negative freedom being ‘the matrix required for the growth of moral values.’) Yes, it is vital to be morally, ethically good but only free men and women are actually qualified to embark upon that project. Moral virtues such as generosity, moderation, prudence, and honesty are all to be practiced because one chooses to practice them, not because one is regimented to behave in line with them. (Only justice, in its political sense, may be subjected to enforcement because justice involves keeping proper borders intact between people, preserving their respective sovereignty or autonomy.)

Nussbaum’s mistake, as the classical liberal sees it, involves destroying morality and demoralizing society in the haste to reach a particular state of affairs that she deems proper – economic and similar equality among people. Even if this were the highest ethical objective, it certainly may not be the highest political one. That must fall to securing everyone’s right to liberty which, then, makes it possible for everyone to freely practice the moral virtues, perhaps including the measure of generosity and charity – *via* various private acts and organizational policies (giving, embarking on philanthropy and so on) – that will achieve the desired equality. But it is all compromised if people are forced to part with their labor and wealth to achieve this. Furthermore, the desired equality among them will also be seriously compromised by empowering some of them to engage in this forced collection and then redistribution of wealth. This must, as Robert Nozick showed so clearly with his famous Wilt Chamberlain example, lead to a substantial police state.<sup>11</sup>

I leave aside for the moment the issue of whether the egalitarian ethics of Nussbaum has merit.<sup>12</sup> Suffice it to say that Sen and Nussbaum are the kind of defenders of the welfare state – or more – with whom it is possible to join

issue, although whether they would actually engage in the discussion with a fully open mind is difficult to tell. (It is difficult to tell who is able to do that, once they have gone through much of their lives laying out what they take to be a solid enough case for their convictions.) Still, whether addressing Sen and Nussbaum directly or only those who pay close attention to their views, classical liberals need to come to terms with both of these thinkers because they are very highly respected by the scholarly community, write with finesse as well as verve, and, correspondingly, are studied widely by the young scholars and intellectuals who are preparing to become influential in how members of society will think about ethics, politics, and public policy. Indeed, arguably these two thinkers are today the most influential in global public policy and classical liberals ignore their work to the great peril of the prospects of their own ideas and ideals.

## Notes

- 1 Peter Unger, *Living High and Letting Die: Our Illusion of Innocence* (London: Oxford University Press, 1996).
- 2 I know Sen reasonably well because he was a guest lecturer at the Department of Economics of UC Santa Barbara, where I taught in the early 1980s, and we befriended each other and have stayed in touch.
- 3 Amartya Sen, *Rationality and Freedom* (Cambridge, MA: Belknap Press, 2002).
- 4 Amartya K. Sen, *Freedom as Development* (London: Oxford University Press, 1999), p. 67.
- 5 There are those who maintain that taxation amounts to no more than collection of payments due. Say you wish to sell antiques, so you rent space in a building owned by someone and agree that whenever you make a sale, some of what you fetch goes to the owner. Professor Craig Duncan, my co-author of *Libertarianism, For and Against* (Lanham, MD: Rowman & Littlefield, 2005), claims this is analogous to the nature of taxation. The country is like the building. 'The building's owner ... charges vendors a percentage of their sales intake – say, 20 percent – as payment for the opportunity to sell from one of the building's stalls ... The owner is not stealing [the vendor's] money when he demands this sum from [the vendor].' According to Professor Duncan this is how we ought to understand taxation, not, as I argue, as extortion by some members of society (the government) of the rest who live and work there. But the analogy is a bad one. No one owns a free society. No one who lives in a free society is provided with the opportunity to strike up a deal with some owner of that society or to choose from among different owners of societies in which he or she might live and work. Instead, people would be born into a free society where others, including their parents, relatives, or guardians, own homes, places of work and so on. Other people – the government – would not have the authority to coerce them into paying them 'taxes' and to put them in jail if they refuse to pay up, with no chance of bargaining about the percentage, of whether to pay a flat fee (whether they win or lose in their various commercial endeavors), a percentage of some possible take and so forth. All of these latter options are, however, possible when an antique seller rents a stall from someone who owns a building where customers may seek out vendors. But free societies, unlike the place where an antique vendor may or may not rent a stall, are not anyone's property. Professor Duncan does, however, correctly describe societies that are not free. In a feudal system, for example, the king or tsar or other monarch owns the society. In a dictatorship the dictator is the owner. In fascist societies the leader in effect owns the

society. And in democracies that aren't governed by a constitution that protects individual rights the majority owns the society. These owners then charge a rent from those they permit to live and work on their property. That kind of system is, indeed, the natural home of the institution of taxation. Such societies are also the natural home of serfdom, where others than those who own it live and work only when permitted to do so. They have no rights other than those granted at the discretion of the owners. Both serfdom and taxation arise naturally in societies that are owned by someone. In free societies, however, no one owns the society. Individual citizens may or may not own all kinds of things in such free societies – land, apartments, family homes, farms, factories, and innumerable other items that may be found before human beings have expropriated them from the wilds or what has been produced by or traded back and forth among the free citizenry. Of course, in complex, developed free societies the citizenry will most likely have instituted a legal order or government, based on the principles of freedom – individual rights to life, liberty and property, for example. And they will probably have instituted some means by which those administering such a system will be paid for their work – user fees, shares of wealth owned, a flat sum, or something more novel and unheard of (for example, contract fees). Citizens can come together, roughly along lines of how the original American colonists came together, and establish a legal order or government that will be empowered, without violating anyone's rights, to provide for a clear definition, elaboration, and defense of everyone's rights. Then, once such a group of citizens has come together and instituted a government with just powers – powers that do not violate but protect individual rights – the proper funding of the work of such a government can be spelled out. What is crucial here is that such funding must occur voluntarily, namely, as the kind of funding that does not violate anyone's rights. Unlike the case Professor Duncan gives us, where someone has prior ownership over the various items in society that can be owned, in a free society ownership is achieved through various types of free action. This includes coming upon something unowned and appropriating it – land, trees, lakes, whatever – or being given in trade various things by others or, again, being born into the world with various assets or attributes that may well be used to create wealth through production, use or exchange. A truly free society, then, does not belong to anyone but is a region or sphere wherein individuals are free to come to own things. It is one within which those who live there are free to embark on actions that involve, among other things, the acquisition of property. That is part of being free, not being coerced by others to give up what one has peacefully acquired, not being prohibited by others from embarking on various actions, including peaceful acquisition (including production and trade).

In short, a free society is based on principles of individual rights, not on having gained permission from prior owners of the society on analogy with how a renter of a stall in an antique mall comes into possession of that stall. In free societies ownership is a right everyone has by his or her nature as a human being and it isn't granted as a privilege by a prior owner.

- 6 Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Cambridge, MA: Harvard University Press, 2000).
- 7 Amartya Sen, *Choice, Welfare and Measurement* (Cambridge, MA: MIT Press, 1982), especially Chapter 16, 'Equality of What?'
- 8 Auguste Comte, *The Catechism of Positive Religion* (Clifton, NJ: Augustus M. Kelley Publ., 1973), pp. 212–30.
- 9 See Sen's short pamphlet, *Reason Before Identity* (London: Oxford University Press, 1999).
- 10 (Cambridge, MA: Harvard University Press, 2002).
- 11 Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), argued that if economic egalitarianism, *via* wealth redistribution, is a requirement of justice, then if large numbers of people pay even small amounts to someone with exceptional skills who they want to see exhibit these skills, then there would have to be frequent forcible redistribution of wealth since those with such skills would be far wealthier than others.

That, in turn, would imply a substantial police state with the powers to forcibly redistribute wealth, something that would itself be extensively un-egalitarian.

- 12 For more on that issue, see Tibor R. Machan and Craig Duncan, *Libertarianism, For and Against* (Lanham, MD: Rowman & Littlefield, 2005) in which I critique democratic liberalism for its elevation of fairness to the position of justice.

## Chapter 20

# Does Libertarianism Imply the Welfare State?

James P. Sterba contends that libertarianism, if true, would imply the welfare state – a polity markedly different from the one proposed by libertarian theorists and one that most explicitly repudiate.<sup>1</sup> Sterba contends that unbeknownst to themselves, various libertarians are laying out arguments that support just such a welfare state;<sup>2</sup> not the polity of negative individual liberty but, instead, that of substantial positive liberty.<sup>3</sup>

His argument, in summary, goes as follows: libertarians defend negative liberty because they claim that only if citizens possess such liberty or the right to it, can they act as *bona fide* moral agents. Yet there are many cases of individuals in society who, despite the protection of their negative liberty or the right to it, would not be capable of making significant moral choices because they are too poor to flourish, or even set out on a path of self-direction, let alone self-improvement.<sup>4</sup>

Sterba holds that it would be unreasonable to require the poor to sacrifice the liberty not to be interfered with when receiving the ‘surplus’ resources of the rich necessary to meet their basic needs. But since it would *not* be unreasonable to require the rich to sacrifice the liberty not to be interfered with when using their surplus resources for luxury purposes, the rich may be morally required to make such a sacrifice. Furthermore, what people are morally required to do is what is either reasonable to *ask* everyone affected to accept or, in the case of severe conflicts of interest, reasonable to *require* everyone affected to accept. So the right to life and property endorsed by libertarians actually support a right to welfare.<sup>5</sup>

In effect, Sterba asks the well-known rhetorical question: how free can someone be who has no means to exercise liberty? And if one isn’t free to act, how can one be a *bona fide* moral agent? ‘Ought’ implies ‘can,’ so without that ability, there can be no moral agency. It would presumably thus be unreasonable to hold that the poor have the moral responsibility to act in such a way as to abstain from accepting the surplus wealth of the rich. And it would be equally unreasonable to hold that the rich have no moral responsibility to provide for the poor. It would be wrong to resist having their surplus wealth taken from them for the poor – for example, *via* taxes.

Sterba concludes that the libertarian must grant that at least some people in any society have a ‘right to welfare,’ the protection of which government is properly established to secure.



But only if there would *typically* be many poor who are innocent and also incapacitated in a libertarian community would it follow that there would be many people unable to choose any other course of action, if they are to survive, than grabbing from other people what doesn't belong to them. For if the poor got that way because of their own choices, then they didn't have to become poor. If they are not incapacitated, they have the means to flourish other than stealing the wealth of others. (Consider that even in the massive disaster such as the recent tsunami in Southeast Asia, thousands of people freely chose to help and there are many other options for the needy apart from looting and robbing those who have 'surplus' wealth.)

The libertarian argues that the right to liberty, when respected and protected, will typically enable people to flourish (though it does not guarantee that they will). They can then try to do what is morally right. Thus only the right to negative individual liberty should be respected and protected; although, of course, decency should manifest on innumerable fronts. But critics, like Sterba, claim that within a libertarian system many people would simply have no chance for self-directed flourishing:

[W]ho could deny that most of 1.2 billion people who are currently living in conditions of absolute poverty 'lack the opportunities and necessities to satisfy their basic needs?' And even within our country [USA], it is estimated that some 32 million Americans live below the official poverty index [\$14,000 per annum for a family, \$7,000 per annum for an individual], and that one fifth of American children are growing up in poverty. Surely, it is impossible to deny that many of these Americans also 'lack the opportunities and resources to satisfy their basic needs.'<sup>6</sup>

Sterba needs to argue, as he does, that in a fully libertarian system massive poverty would ensue – it would be the *typical* situation for there to be great masses of deserving poor people, ones who through no fault of their own are unable to thrive. Libertarians, not surprisingly, dispute this. They counter that the most prosperous and otherwise beneficial societies are also those that give greatest respect and protection to negative individual rights. In turn, they hold that where poverty is widespread, negative individual liberty is, in the main, left unrespected and unprotected.<sup>7</sup> Libertarians base their view on both economic analysis and history, including what they take to be a sound understanding of human nature (which some of them consider only implicitly). They argue that it is the protection of negative individual liberty that provides the most suitable and hospitable social climate for the creation of wealth.<sup>8</sup>

A libertarian does not typically claim that an hospitable climate for wealth creation *guarantees* the economic success of all; but those who are poor would have either failed of their own accord or been the few unfortunate people who are innocently incapacitated and *also* do not enjoy the benefit of the generosity, charity, and compassion of others. Those are two quite massive and historically unsupported assumptions.

In a free society, there is no reason to think that there would be many such persons, at least compared to the numbers one can expect in societies that don't protect individual rights. Thus, even the most well-known opponent of capitalism, Karl Marx, was aware that unless human nature itself changes and the 'new man' develops, socialism could do no more than to socialize poverty, that is, make everyone poor. Which is a way of conceding that the free market is indeed the best social system to generate prosperity. (And Marx was indeed clear about regarding capitalism as the most productive of such systems so far in human history.)

One reason libertarians believe this is that they recognize that the lack of firmly respected and protected private property rights creates a mammoth tragedy of the commons. Persons empowered to foist their burdens on others who have not consented to accept the burden are less likely to try to steer clear of such burdens to begin with. Those coerced to share their achievements with others are less likely to pursue such achievements in the long run. This kind of tragedy of the commons and attendant dearth of incentives to produce is rampant under socialism, with predictable and by now extensively chronicled costs in prosperity *and* freedom.<sup>9</sup>

No political economies other than substantially capitalist ones have fared better in reducing poverty. The few which have done well enough – for example, Singapore – do so because of the capitalist elements they permit and despite massive political and other social failures. Overtly socialist economies have seen the curtailing of civil liberties, institution of forced labor and involuntary servitude, regimentation of the bulk of social relations, arrested scientific and technological progress, censorship of the arts and other intellectual endeavors, and so on.<sup>10</sup>

The United States and other Western liberal capitalist societies are still the freest, with many of their legal principles giving at least considerable expression to classical liberal, near-libertarian ideas. They are, at the same time, the most generally productive (and creative, culturally rich) of all societies, with their wealth aiding in the support of hundreds of others across the globe. This, of course, is not uniformly true, so there are serious exceptions, including widespread impediments to free trade such as protectionism, favoritism and state monopolization of some economic activities.

Barring impossible-to-conduct controlled socio-political-economic experiment, such historical evidence is all we can adduce to examine which political economic system produces more prosperity. No one can seriously dispute that the systems with discernable libertarian or capitalist features have fared much better than those that veer in the direction of statism, including some of Europe's major countries.<sup>11</sup> But Sterba disputes it, and he has an answer to the above. In reply to another discussion of mine of this matter, he tells us that:

Machan, seeking to undercut the practical force of my argument, has contended that when we compare economic systems to determine which produce more

poverty, 'No one can seriously dispute that the near-libertarian systems have fared much better than those going in the opposite direction, including the welfare state.' Here one would think that Machan has the US in mind as a 'near-libertarian system' because earlier in the same paragraph he claims 'America is still the freest of societies, with many of its legal principles giving expression to classical liberal, near-libertarian ideas.' Yet apparently this is not what Machan thinks since in a footnote to the same text he says, 'It is notable that the statistics that Sterba cites ... are drawn from societies, including the United States of America, which are far from libertarian in their legal construction and are far closer to the welfare state, if not to outright socialism.'

Obviously, then, Machan is surprisingly unclear as to whether he wants to call the US a near-libertarian state, a welfare state or a socialist state. Yet, whichever of these designations is most appropriate, what is clear is that the poor do less well in the US than they do in the welfare liberal or socialist states of Western Europe such as Germany, Sweden, and Switzerland. For example, 22.4% of children live below the poverty line in the US as compared to 4.9% in Germany, 5% in Sweden, and 7.8% in Switzerland, and the US shares with Italy the highest infant mortality rate of the major industrialized nations. The US also ranks 67 among all nations in the percentage of national income received by the poorest 20% of its population, ranking the absolute lowest among industrialized nations. Accordingly, the success that welfare liberal and socialist states have had, especially in Western Europe, in coming close to truly meeting the basic needs of their deserving poor should give us good reason to doubt what Machan proclaims is the superior practical effectiveness of 'near-libertarian states' in dealing with poverty.<sup>12</sup>

Okay. I didn't make clear that the term 'near-libertarian' should be read in the context of how much further from libertarianism are such systems as those in Asia and Africa and most countries in other periods of human history. But when one draws on evidence from the United States, it is vital to keep in mind that our society is indeed a welfare state, with many watered-down libertarian legal and economic elements that contribute to what ails some people in that society. These include minimum wage laws, protectionism, price supports for and subsidies to failing firms and entire industries, welfare, foreign aid, and so forth, all dependent on that major impediment to justice, confiscatory taxation (a relic of feudal times).

Having disposed of this quibble let me address the numbers Sterba cites by calling upon the charitable and generous help of other libertarians, all of whom have read Sterba's comments. As one of them states: 'My own response would be to note, among other considerations, that Western European unemployment is routinely terribly high, which suggests that there are greater troubles there than in the United States, except perhaps in some special areas, stemming from the severe curtailment of freedom in the labor markets.'<sup>13</sup>

To evaluate the relationship between the protection of negative liberty – for example, property rights, religious freedom, freedom of expression – and the condition of the poor, requires special analysis. For example, what have the poor done to avoid poverty but allegedly could not do because of negative liberty; or, how many would be poor were it not for (a) protection of negative

liberty or (b) protection of positive freedom (for example, taking from the rich in taxes and transferring some of the wealth to the poor – with the cost of the transfer being, of course, lost).

In international affairs, there are other matters to consider: Sweden, as well as other European countries, for example, has had a fairly robust welfare state until recently, but now is suffering from very serious economic shortfalls. Why? And when it did have a robust welfare state, did it not benefit from American military defense provisions against the USSR that it would have had to fund from taxes that were instead now available for welfare payments? And although Sweden has been a robust welfare state, it has no anti-trust laws curtailing big business, which gives it certain unfettered competitive conditions lacking in the United States that have economic consequences that make it better off. Furthermore, the explanation of the malaise Sterba documents in America is arguably something other than the semi-libertarian attributes of the US economy.

But I am not confident in any case that consequentialist arguments can decisively establish the superiority of one system over another. Indeed, because human beings are free to choose, they may do less than their best in a free society, at least some of the time. Coercive systems, in turn, may at times scare them badly enough so that they work harder – the Nazis and Fascists of Germany and Italy, and even the Soviets, proved that under a tyranny one can achieve some economic results, when all the might of the state is directed to those specific results (no matter what the costs are to the balance of economic life). But these instances hardly suffice to make them better systems than free societies in which perhaps the trains don't always run on time (at least not government-subsidized Amtrak trains).

What about the claim that 'the US shares with Italy the highest infant mortality rate of the major industrialized nations'? Libertarian scholar A. R. Rutten addresses the charge by first noting that infant mortality is the ratio of the number of children who die to the number of children who are born. Because of medical care, many of those who would die at or before birth survive in the United States. Thus, the denominator in 'infant mortality' in the US includes many children who aren't in that denominator elsewhere. However, since they are, almost by definition, high-risk babies, a lot of them end up dying soon after birth. *Voilà*: higher infant mortality! (Indeed, the infant mortality rate will be higher as long as greater proportions of the 'extra' babies die than of the 'ordinary' babies. Given the problems facing them, this seems almost inevitable.)

Put another way, it is dangerous to compare these statistics across countries because they really are not measuring the same things. There are people in the US statistics who just do not make it into the statistics in other countries. Moreover, it is hard to 'correct' the data so that they do measure the same things. For instance, you don't want to compare births per pregnancy across countries, since that also includes the number of pregnancies that are aborted. And, since abortions are often in response to fears about the health of the

infant, you cannot just take them out of the mix, since they include some potentially sick infants.

Sterba also contends that the poorest segment of the American population receives less of the 'national income' than the poorest segment of the population in other countries. I do not know whether this is true. If it is, part of the explanation may lie in the inability that many people in other countries encounter in attempting to rise very far above poverty – for example, in many African countries it is nearly impossible to hold on to one's wealth, given the inept and corrupt system of private property protection. It is impossible to keep track of wealth distribution. Percentages do not tell the whole story. We need to ask: percentage of *what*?

Another contributor to the discussion, Professor Stephen Cox, proposes that we consider two countries each containing a million people. In Country A, the average income is \$1000 a year. The top 20 percent of the population earn an average of \$2000 a year, for a total of \$400 million. The middle 60 percent earn an average of \$833 a year, for a total of \$500 million. The lowest 20 percent earn an average of \$500 a year, for a total of \$100 million. So the lowest 20 percent of the population earns 10 percent of the national income of \$1 billion.

In Country B, the average income is \$30,000 a year. The top 20 percent of the population earns an average of \$50,000 a year, for a total of \$10 billion. The middle 60 percent of the population earns an average of \$30,000 a year, for a total of \$18 billion. The lowest 20 percent only earn an average of \$10,000 a year, for a total of \$2 billion. So the lowest 20 percent of the population earn 'only' 6.67 percent of the national income, which is \$30 billion. Yet somehow the lowest income tier in County B is doing a lot better than the lowest tier in Country A.

Country A could be compared to Haiti while Country B could be compared to the United States. The question is, 'Which country would you rather live in, even if you were among the poorest 20 percent of the population? The one that allows you to survive more comfortably or the one that allows you to quote a more intimidating statistic?'

Moreover, chimes in Professor Jan Narveson, statistics about how many people live 'below the poverty line' are meaningless until we know what the country in question decrees to be the 'poverty line.' European countries draw these lines at more reasonable levels than we do. 'Poor' doesn't mean actual-poor in North America; it means, rather, that the official, reported family income of the individual in question falls below some percentage of the average. By such a criterion it is logically necessary that any country with any income distribution other than absolute equality would have to have a lot of 'poor' people, whatever the official percentage is decreed to be. But presumably, Sterba is interested in substance – in a family's ability to obtain 'basic needs' – things like food, transportation, as well as VCRs, multiple TV sets, air conditioners, and the other conveniences of modern life. The American poor do very well on all those fronts, and better, by far, than the poor elsewhere.

The American 'poor' (those with a family income below the officially decreed poverty line) have the highest incidence of car ownership in the world, even by comparison with the entire population of other countries, not just the 'poor' of those countries (with the single exception of Germany). They have a higher incidence of two-car ownership than any other country, including Germany. They have by far a higher incidence of indoor plumbing, water services, refrigerators, and cooking ranges than any other country in the world. Their nutritional figures don't differ significantly from those of any other 'class' in the US, including the rich. Officially poor US households, with 0.56 persons per room, were less crowded in 1987 than the average West European household in 1980. By contrast, the average Japanese household has 0.8, the average Uruguayan 2.1, the average Indian 2.8 persons per room. (Remember, again: these are comparisons between US poor and average other persons overall, not other-country 'poor'.) Nearly a third of US 'poor' had microwaves in 1987 (it's undoubtedly far more today); almost a third had two or more color TV sets. The average American poor person is more likely to own a color TV than the average person in France, West Germany, or Italy. Eighty-one percent had telephones. American poor in 1987 spent an average of 80 percent as much on food as the median American household, and 32 percent of that was spent in restaurants! The average American poor person consumes more meat than the average citizen of any other country, except perhaps Canada.

Chris Sarlo, at the end of a very careful, fair, and exhaustive study, concludes, that it is almost certain that less than 2 percent of Canada's population lives in poverty. This is taking into account the costs of balanced nutrition, housing, sanitation, transportation needs, and so on. He notes that senior couples who own their own home outright and have a family income of \$14,000 are accounted 'poor' by the Canadian statistical profile, an absurdity. By world criteria, such a couple would have to be accounted comfortably off; their real income is far above the median for the world, for example. It is the same general story as in the US.<sup>14</sup>

When first established in the early 1960s, the US poverty income threshold for a family of four was nearly 30 times greater than the median per capita income in the entire world. The American Census Bureau's survey of consumer expenditures shows that low-income households spent \$1.94 for every \$1.00 in income reported to the Census. Further, the Census ignores the entire US welfare system when calculating incomes of poor Americans. Since most of those 'poor' get Food Stamps, Medicaid, and so on, this makes a huge difference. In 1987, the unreported income of the 'poor' per family ran to about \$9000; adding that to their average reported incomes doubles the figures, roughly – leaving the American poor with a median income almost equal to the average income in all of Canada in that year, I believe. This is far higher than any other country in the world.<sup>15</sup> Thomas Sowell also points out that the American 'poor' in year  $x$  tends to contain an almost entirely different class of actual individuals than in year  $x + 10$ , or  $x - 10$ .<sup>16</sup>

Narveson adds that

Jim Sterba, like most writers trying to make an issue about the condition of the 'poor,' has been taken in by the official figures, and not even by any means all of those. He does not take seriously the political interest that officials have in exaggerating reports of poverty and any other evil that politicians think they can use to sell political programs for 'rectifying' those evils to the people whose votes they seek.

It can still plausibly be argued, by the way, that if there had been no American welfare system at all, the American 'poor' would still be even better off today, even in purely material terms, than they are, taking their government benefits into account.<sup>17</sup> The point is that there is no substance to the claim that America is a country with a vast 'poor' population.<sup>18</sup>

Another libertarian contributor to this discussion, Professor George Selgin, an economist, observes that even allowing that the official statistics on poverty cited by Sterba are accurate given the definitions used, one has to consider the underlying definitions before drawing any policy conclusions. For example, it is well known that official US poverty statistics define poverty in terms of monetary earnings: a family that earns less than X dollars per year is said to be below the 'poverty line.' Such a definition (which is contrary to both economic theory and common-sense notions viewing poverty as a stock concept, referring to a low level of 'wealth') is problematic in two respects. First, many individuals (retired persons especially) live on very modest annual money earnings, yet have substantial wealth, for example, they own their houses outright. Quite a few such persons are very misleadingly included among the 'poor' in official statistics.

'Income' measures of wealth also do not include real or in-kind transfer payments, for example, the value of subsidized housing, food stamps, and so on. This last fact points to an irony in conventional 'anti-poverty' measures because the state defines poverty in terms of low *monetary* earnings but addresses the poverty problem mainly through in-kind transfers. It logically follows that the 'war on poverty' can never succeed! No matter how much you subsidize housing and consumption *via* real transfers, the beneficiaries remain just as 'poor' according to official statistics. Moreover, any increase in the welfare roles represents an increase in poverty even if the persons affected consume just as much as before!

Selgin wonders: 'Could it be that welfare bureaucrats like this arrangement, which assures that there will always be a poverty problem to keep them gainfully employed?' Perhaps. But even if this cynical view isn't justified, the fact remains that official poverty statistics have to be taken with a grain of salt.

One can also, however, stipulate for the sake of argument that the numbers are true and ask whether they actually mean anything. The single greatest predictor for children living in poverty is whether they are living in a single-parent household headed by a female (which is 90 per cent of all

single-parent households). The US has a significantly higher rate of single-parent households (9 percent) compared to Denmark (4 percent), Sweden (3 percent), Germany (7 percent).

There are two significant contributors to the higher rate of single parent households. One is divorce. The divorce rate per 1000 married women is 21 in the United States, compared to 11 per 1000 in Canada, 13 in Denmark, 2 in Italy, and 12 in the UK. The second contributor is the incidence of teenage motherhood, which is much higher in the US than in any European country or Canada. As to infant mortality – when you compare rates in industrialized countries it's a pretty useless statistic. The infant mortality rates in Europe, the United States, Australia, and Canada cluster between 6–8 per 1000. The rate in the US was 7.9 in 1995. It was 7.1 in Australia, 6.9 in Austria, 8.4 in Israel, 7.0 in the UK. Such infant mortality statistics need to be compared to Africa, where most rates are over 100, and to South America, where in Argentina the rate is 28.8 per 1000 and in Brazil 57.2 per thousand.

So the rates in 'Western' countries are actually quite low. Add to this the high rate of teenage pregnancy in the United States (teenage pregnancies have higher infant mortality than 20–29 year old pregnancies) and the US rate looks quite good. Then add the fact that, as discussed earlier in this paper, in this country a baby born at 26 weeks will be treated as a 'live-born' infant. Most countries don't even attempt to treat infants with that degree of prematurity. So infant mortality, which seems like a simple statistic, is in fact rather complex. Unless one compares similar populations – age, income, prematurity – one is comparing apples to oranges.

We must also consider the fact that in most European countries the 'basics' cost a lot more than they do in the United States. Elsewhere, things like food and clothing are more expensive and require a greater fraction of income to buy. As reported by professor Eleftheria Maratos-Flier, of Harvard's Medical School,

Worldwide, Americans spend the lowest percentage of total private income on food – 8.3 percent compared to 15 percent in Denmark, 16.3 percent in France, or 19 percent in Switzerland. The amount of time it takes to buy a 'standard meal' is 2:35 hours in Washington DC, compared to 5:20 in Paris, 3:52 in London or 4:42 in Rome. So maybe these countries re-distribute income 'better.' But if it takes more income to buy necessities the redistribution may not be all that helpful.

Professor Randy Holcombe, an economist, notes that yet another little factor to consider is that the United States is a large and heterogeneous country being compared to smaller and more homogeneous countries. Income inequality is greater in Europe overall, for example, than it is in Germany, Switzerland, Italy, or any other individual nation. Conversely, there is less income inequality in California, Ohio, Mississippi, or Arkansas, than there is in the United States as a whole. When the poverty line is drawn by comparing those at the bottom end of the income distribution to the rest of the distribution,



larger and more heterogeneous populations will have more apparent poverty simply because of the way the statistics are compiled.

It does not appear, then, that Sterba has used his statistics very wisely, certainly not with sufficient refinement to make a convincing case for the position that countries with greater government welfare services than what is available in the United States of America have thereby attained a better standard of living, especially for those whom Sterba calls their poor. Indeed, his unwarranted assertion defies common sense. The number of people attempting to gain entry into the United States continues to be considerably higher than those aiming to emigrate to other societies. *They* know where the money and opportunities are.

There is another point to be stressed, though, which is that in a libertarian society – indeed, in any society – for some people being relatively poor may not be that big a liability. Not everyone wants to, or even ought to, live prosperously.<sup>19</sup> For some individuals, a life of comparative poverty could be of substantial benefit. Contenders would-be monks, hobos, ‘starving artists’ and the like, who despite the protection of their negative liberty do not seek economic prosperity, at least not in preference to other important objectives. Among the citizens of a libertarian society, then, we may find some who are poor but who are not, from their own perspective therefore, worse off than the rich. This is not hard to understand provided we do not regard economic prosperity as the sole index of well-being.

At one point Sterba suggests that libertarians may not care sufficiently for the poor because they do not see the need to affirm as a principle of justice the right to welfare. As he puts it: ‘Machan seems reluctant to take the steps required to secure the basic needs of the poor.’ He then asks, somewhat puzzled, ‘Why then does he balk at taking any further steps? Could it be that he does not see the oppression of the poor as truly oppressive after all?’<sup>20</sup> Although Sterba’s question is confusing, it may be worth addressing the point he seems to be driving at.

Libertarians are certain not theoretically required to be callous or uncaring where the cultivation of care is warranted, although libertarianism, as has been stressed throughout this book, is concerned with political issues not with every challenge life has to offer. As human beings libertarians may well be every bit as much and even more committed to generosity and charity than are others, especially those who wish to leave these matters to public policy and thus distance themselves from personal involvement and effort. Compassion *via* the government is not true compassion but *via* coercion.<sup>21</sup>

But it is true enough, as many libertarians would contend, that being poor in and of itself does not necessarily warrant being cared for, just as being sick in and of itself does not warrant being cared for – especially if the sickness is the result of self-abuse, gross negligence, or is the condition brought about by the actions of a thoroughly evil person. Moreover, suppose there are other tasks someone ought to pursue rather than help those in need? A good bit of humanity, for example, is occupied with scholarship, science, child-raising,

education, and the arts, rather than the tasks that people like Mother Teresa take up as their full-time concern. Unless a strict code of altruism is the right ethics by which we ought to live, compassion is not an all-consuming virtue displacing every other consideration of life.

In short, being poor in and of itself does not justify special consideration.<sup>22</sup> Being in need of what it takes to attain one's well-being can warrant generosity and charity from others, if the need is a matter of natural misfortune or injury from others. But poverty does not always constitute such neediness. Justice requires that we examine individual cases, not merely mandate a blanket response to an undifferentiated class of persons, 'the poor,' among whom individual circumstances may vary greatly.

Sterba may also underestimate what Marxists might call the objective generosity or charity of libertarians. If one considers just how much greater the long-range prospects for economic well-being are for everyone within a libertarian political economy, the libertarian could well be regarded as the political theorist with the greatest concern for the poor (as measured by the actual consequences of his doctrine). It is more benevolent to treat people as if they are capable of attaining prosperity than to treat them as if they are inherently inept at it; more benevolent to foster institutional conditions in which they will be much better off than they would be in any dependency-encouraging welfare state.<sup>23</sup>

James Sterba has not shown that libertarianism implies the welfare state. He has failed to appreciate the analytical and historical context within which libertarianism is argued. He has also failed to appreciate that although in some cases a person might not be morally required to respect the rights of others – for example, in a rare case of helpless destitution, one could forgive a desperate person for stealing an apple off the fruit stand – nothing follows from the exigencies of such life-and-death circumstances regarding the rights that everyone in society has by virtue of being a human individual living in a community of other human individuals. As Den Uyl and Rasmussen so carefully argue, the polity of negative individual rights is a meta-normative system or, in other words, a political framework, within which human beings normally would and should pursue their highly varied flourishing.<sup>24</sup> It does not function to solve all human problems, not even moral ones. It is a flaw of much utopian thinking, as Plato appears to have taught, to expect politics to provide solutions to the challenges of human living.<sup>25</sup>

We all face many problems, *vis-à-vis* our health, economic solvency, educational development, romantic aspirations, artistic fulfillment, scientific progress, recreation and so forth. Life is in part a struggle. These specific problems cannot and should not be addressed by legal coercion however urgent they may seem and however tempting it may be to use the force of the state to solve them. The law employs the concept of 'unnecessary force' to indicate when police officers sacrifice due process out of urgency or over-enthusiasm. Political theory, too, needs to acknowledge and work to combat this temptation. The few emergency circumstances in which we do not find

the conditions. To quote Locke, ‘where peace is possible’<sup>26</sup> – and in which there may thus be a moral requirement to disregard the negative rights of others – do not justify systematic abrogation of the system of justice that does, in fact, best suit human beings in their communities.

In response to some of what I have written on these matters, Sterba has claimed that I do indeed accept the ‘theoretical thrust’ of his ‘argument that a libertarian ideal of liberty leads to a right to welfare.’<sup>27</sup> This is wrong. What I have argued for, quite independently of anything Sterba has said on the subject,<sup>28</sup> is only that there are rare cases in which some innocent person who is in dire straits may properly disregard individual rights to property. Such a person on rare occasions may be justified in taking from another what he or she needs if that is the only way to survive at all.

Following the work of John Stuart Mill, Ayn Rand<sup>29</sup> and Eric Mack,<sup>30</sup> I have argued that when conditions make the respect and protection of rights impossible, morality can require one to disregard rights.<sup>31</sup> Rights are not ethical primaries. They are based on more fundamental moral principles. In my view, classical egoist ethics is sound and gives rise to individual rights to life, liberty and property. But when community life – peace – is impossible, then emergency social ethics come into play.<sup>32</sup>

This idea is not novel. Mill, for example, argued that a person’s liberty may be disregarded on rare occasions, as when he or she is about to step, unknowingly, on a collapsing bridge. Common sense also attests to this – it may be proper to restrain someone who is hysterical so as to prevent his harming himself or doing other wild things.

But none of this constitutes *carte blanche* for violating rights or for so-called welfare rights. As the saying goes: hard cases make bad law. A society would not be just for incorporating the ethics of emergency into its legal system. And the circumstances in which last-ditch courses of action are adopted should be those in which truly no other alternative – say, offering something in trade or simply asking for help – can serve to fill the need.<sup>33</sup>

In a free society in which property rights and other individual rights are protected in principle, such alternatives expand and proliferate. In unhampered markets, entrepreneurs find new, better and cheaper ways to empower people all the time, and certainly those with the most limited resources or capacities are among the chief beneficiaries of such innovation. If shut-ins who ten years ago had great trouble earning a living can now pay their bills thanks to PCs, PayPal and eBay, that is no thanks to welfare-state-enabled violence against the rights of others; it’s thanks to markets and the rights-protecting institutions of the free society that foster and reward the innovation and production of others.

It is true enough that if the world were such that the respect and protection of individual rights engendered general unhappiness, including poverty, then libertarianism would be kaput. It is also true enough that if pigs had wings, perhaps they could fly. But such assertions are no proof that we live in a world in which pigs can fly and libertarianism is wrong.

Furthermore, if, conceivably, libertarianism were wrong, it does not follow that the welfare state would be right. The right to welfare is in effect a right to involuntary servitude from other persons. Even if people are in dire straits, let us say in deadly straits, it does not follow that they acquire rights to the lives and labors of other persons – to enslave others. This is so even if the lives and labors in question are rich ones – constituting what Sterba likes to call ‘surplus wealth,’ an undefined term if ever there was one.<sup>34</sup>

It seems to me that the welfare state – indeed, the claim that people have a right to welfare (that is, provisions from others who do not choose to offer them) – needs a defense that does not piggyback on the theories of socialism, feminism, libertarianism or any other position in political theory. This effort to derive welfarism from other systems is, as far as I can discern, a dead end. That is not to say, however, that a concern with how unfortunate but decent people might fare in a free society is misguided. It is vital that both the rights of individuals to make their own significant choices in life and their prospects for prosperity and happiness be addressed in a detailed political treatise.<sup>35</sup>

## Notes

- 1 The one exception might be Jeffrey Friedman, the editor of *Critical Review* who embraces what he calls ‘post-libertarianism,’ an uneasy hybrid of libertarianism and the welfare state intimating that political ideas need to be defended on purely consequentialist grounds and that sometimes the protection of the right to individual liberty may not yield the best possible consequences for society.
- 2 Eric Mack has presented his views in various papers and collections of essays (for example, in Tibor R. Machan, ed., *The Libertarian Alternative* [Chicago, IL: Nelson-Hall, 1973], *The Libertarian Reader* [Lanham, MD: Rowman & Littlefield, 1982], and Tibor R. Machan and Douglas B. Rasmussen, eds, *Liberty for the 21st Century, New Essays in Libertarian Thought* [Lanham, MD: Rowman & Littlefield, 1995]); Rasmussen and Den Uyl present their position in *Liberty and Nature, An Aristotelian Defense of Liberal Order* (LaSalle, IL: Open Court Publ., 1990); my own case is to be found in *Human Rights and Human Liberties* (Chicago, IL: Nelson-Hall, 1975); *Individuals and Their Rights* (Chicago, IL: Open Court Publishing Co., 1989); *Capitalism and Individualism* (New York: St. Martin’s Press, 1990) and *Private Rights, Public Illusions* (New Brunswick, NJ: Transaction Books, 1995); Jan Narveson lays out his arguments in *The Libertarian Idea* (Philadelphia, PA: Temple University Press, 1991). And Robert Nozick explains his (later modified or amended) reasons for libertarianism in *Anarchy, State, and Utopia* (New York: Basic Books, 1974).
- 3 Sterba has advanced his views in many forums, including his introduction to a book he edited, *Justice: Alternative Perspectives* (Belmont, CA: Wadsworth Publ. Co., 1991); several papers for scholarly journals such as *The Journal of Social Philosophy*, *Social Theory and Practice* and *Ethics*; his contribution to the volume he organized, *Morality and Social Justice* (Lanham, MD: Rowman & Littlefield, 1995); another volume he edited, *Social and Political Philosophy* (Belmont, CA: Wadsworth Publishing Co., 1995); and his single author volume on political philosophy, *Contemporary Political and Social Philosophy* (Belmont, CA: Wadsworth Publishing Co., 1995). Some of these discussions are repeated nearly verbatim, although when others respond Sterba attempts to address the new or reiterated twists in their arguments.

- 4 In many of his essays, some of which included responses to my criticism of his earlier rendition of his thesis, Sterba makes ambiguous use of the concept of 'liberty.' For example, he says in one: 'My contention is that in such situations [where negative rights cannot be secured because, to quote H. L. A. Hart's paraphrasing of John Locke, it is not a situation "where peace is possible"] the liberty of the poor has moral priority over the liberty of the rich despite the fact that the rich usually have the power to enforce a resolution favoring themselves.' James P. Sterba, 'A Brief reply to Three Commentators,' in Christopher Gray, ed., *Philosophical Reflections on the United States Constitution* (Lewiston, NY: The Edwin Mellen Press, 1989), p. 197. Is this negative or positive liberty? It seems to be positive liberty in the case of the poor, negative liberty in the case of the rich. The poor have negative liberty in that no one is preventing them from pursuing their ends – this is done through their unfortunate circumstances (poverty, illness, ignorance, and so on). What they lack is positive liberty – that is, being enabled to do what they want or ought to. Yet Sterba seems oblivious to this ambiguity, making it appear that the liberty the poor lack is the sort that he favors violating when it comes to the rich. Indeed, Sterba's focus should be on whether the rich really own what they are said to have property rights to, not on liberty at all. He seems to believe that when some lack what they (really badly) need, they mysteriously come to own what others have but do not (really badly) need.
- 5 James P. Sterba, 'Reconciling Conceptions of Justice,' in Sterba, *Morality and Social Justice*, pp. 7–10.
- 6 Sterba, *Morality and Social Justice*, p. 15. There is little discussion in Sterba's work of why people are poor or otherwise experience circumstances that afford them little or no opportunities for flourishing. Many libertarians would agree that many who face such circumstances make significant contribution to their plight; certainly in societies where opportunities and resources are generally abundant. Of course, libertarians draw a sharp distinction between those who are in dire straits through no fault of their own, and those who fail to act in responsible and possible ways that could extricate them from their adverse living conditions. In the philosophical literature that draws on the legacy of Marx and Engels and their followers, this distinction is not easy to make, since in this tradition human behavior is taken to be *determined* by a person's economic circumstances, into which persons are simply deterministically deposited. So one is bound by one's situation and cannot make choices that would overcome them. More generally, in modern political philosophy there has been a strong tendency to view human beings as passive, unable to initiate their own conduct, moved by innate drives or environmental stimuli. Thus those who are well off could not have achieved this of their own initiative, nor could those who are badly off have failed in significant ways. Accordingly, all of the poor or badly off, be they victims of others' oppression, casualties of misfortune or products of their own misconduct, are regarded alike. It is not clear how much Sterba's reasoning may be under the influence of these considerations. But he appears to view life as largely a zero-sum game.
- 7 As to many of Sterba's allegations about the situation in the United States of America, see W. Michael Cox and Richard Alm, *Myths of Rich and Poor* (New York: Basic Books, 1999). These allegations, that innocent poor people in America are going hungry and cannot meet their basic needs, give intuitive support to Sterba's position that a largely capitalist society – what I have called a 'near-libertarian' system – is not prosperous enough to be considered healthy or beneficial to people. Of course, that, even if true, would not defeat libertarianism. Comparative analyses would be necessary and even those are not decisive.  
 Suppose that some systems lacking the respect for and protection of individual liberty flourish in certain respects (Mussolini makes the trains run on time, Hitler builds fabulous Autobahns, no one goes completely hungry in Cuba or some such thing). It could still be the case that the presence of respect for and protection of individual liberty is indispensable to justice, even more so than the production of health and welfare.
- 8 Here most libertarians would invoke views drawn from philosophies of human nature, action theory, motivational psychology, and so on. In the main, libertarians embrace the

position that when human beings are not being subjugated, they tend to work toward their improvement, regardless of where they are on the continuum between destitution and abundance. Libertarians differ on the details, of course, with some subscribing to a neo-Hobbesian idea about what leads people to act, while others subscribe to a view of agency drawn from Ayn Rand and others. Some embrace the Hayekian notion of natural evolution. Or some combination of these ideas. None accept what seems to underlie many statist positions, namely, that most people are congenitally passive, even when they are not kept in subjugation. On this statist view, neither the lazy poor nor the greedy rich can be credited or blamed for their economic position in life. Nor, of course, can those who resist Sterba's analysis be blamed for possible moral blindness (which doesn't prevent Sterba from implicitly making this charge about libertarians!) – since they, too, presumably are the way they are because of circumstances beyond their control.

- 9 See, for more on this, Tibor R. Machan, *Private Rights and Public Illusions*.
- 10 See note 8.
- 11 It is notable that the statistics Sterba cites are drawn from societies, including the United States of America, which are far from libertarian in their legal construction and are far closer to the welfare state, if not to outright socialism. It is surprising why Sterba does not consider that perhaps what accounts for those statistics is *insufficient* freedom, given that there is ample historical evidence for the detrimental impact of socialism on economic conditions around the globe. Seeing, then, that socialism does not improve the general welfare and that the welfare state leaves a great many people badly off, it would seem natural to push for more negative individual liberty if one is to achieve the kind of results that Sterba desires.
- 12 Sterba sent his last comments to me via email in June, 1996.
- 13 Anonymous reply to email query for comment on Sterba's claim, to which several libertarian scholars have responded.
- 14 See, for more on this, Chris Sarlo, *Poverty in Canada* (Vancouver, BC: Fraser Institute, 1992). See also Chris Sarlo, 'The Politics of Measurement,' *Fraser Forum*, September 2003, pp. 29–30. For a detailed analysis of the issue being discussed here, see James D. Gwartney and Robert A. Lawson, *Economic Freedom of the World, 2004 Annual Report* (Vancouver, BC: Fraser Institute, 2004), the latest in a series of comparative analysis of the impact of political economic systems on the economic conditions of people across the world.
- 15 See, for more on this, Robert Rector, 'How 'Poor' are America's Poor?' in Julian Simon, ed., *The State of Humanity* (Oxford: Blackwell, 1995).
- 16 Thomas Sowell, *The Vision of the Anointed, Self-Congratulation as a Basis for Social Policy* (New York: Basic Books, 1995), in which Sowell notes that 78 percent of the individuals in the lowest 20 percent in some year were in the middle or even upper classes 10 years later.
- 17 In terms of 'spiritual' welfare, that is, real psychic well-being in other respects, there is no comparison. In the hard-core cases generated by the American welfare system, which reinforces the destruction of the family, production of illegitimate children, use of hard drugs, violent crimes, and so forth, genuinely poor people in most of the world are probably much better off. But that's another matter.
- 18 These were posted on the 'libprof' list on the Internet. The comments by the other libertarians cited here also came from a discussion conducted on that list during the month of June, 1996.
- 19 This is obvious from the fact that in some religions it is a mark of virtue to renounce wealth. In some cultures, in turn, alternative objectives are deemed to be more significant than seeking wealth so lack of wealth cannot be construed as any kind of failing there – it is, rather, a deliberate choice.
- 20 Sterba, 'From Liberty to Welfare,' *Ethics*, Vol. 105 (October 1994), pp. 64–98, note 34. Of course, Sterba begs the question when he asserts that the steps he recommends are the ones 'required to secure the basic needs of the poor.' When one considers that the positive right to welfare Sterba advocates comes to nothing less than the legal institution

of forcibly taking from people what they have obtained through their own work and/or voluntary exchange – that is, coercion – it is clear that Sterba claims that theft ought to be legalized for certain cases. That would encompass stealing from formerly poor people who have struggled hard to secure their basic needs and more than their basic needs. The libertarian disputes that this is sound jurisprudence or public policy. A national policy of subjecting all those who do reasonably well in their lives to involuntary servitude seems the farthest thing from what is required to help the poor. Instead structural reform, encouraging work and occasional charity, would appear to be more productive and moral all around.

- 21 For more on this, see Tibor R. Machan, *Generosity, Virtue in Civil Society* (Washington, DC: Cato Institute, 1998).
- 22 This may account, in part, for the indignation some poor people feel when they are offered help. Their dignity has been offended, for they know that their poverty follows from their conscious or implicit choices, ones they believe are best suited for their lives and which may indeed be fully justified for them. (This attitude was often exhibited by those who used to be called ‘hobos.’) Others may know that they are making progress and are capable of emerging from poverty if only left alone to do so. Or they may simply believe that they are responsible for their own lives and, even if just scraping by, don’t want to become dependent on others unless emergency requires it.
- 23 Sterba fails to appreciate the difference between meaning (or intending) to do good and actually doing good. His implied charge gains its moral force from what seems to me a misunderstanding of morality along certain Kantian lines according to which what counts is how intensely one cares or wants things to turn out well, never mind whether they will actually do so. So-called tough love, for example, which is concerned with consequences, often in opposition to *showing* care and considerateness, has no place in such a moral framework.
- 24 Douglas J. Den Uyl and Douglas B. Rasmussen, *Liberalism Defended: The Challenge of Post-Modernity* (Northampton, MA: E. Elgar, 1997).
- 25 For more on this, see Leo Strauss, *Natural Right and History* (Chicago, IL: University of Chicago Press, 1950).
- 26 Quoted in H. L. A. Hart, ‘Are There Any Natural Rights?’ in A. I. Melden, ed., *Human Rights* (Belmont, CA: Wadsworth Publishing Company, Inc., 1970), p. 61, n.2.
- 27 James P. Sterba, ‘Progress in Reconciliation: Evidence from the Right and the Left,’ *Journal of Social Philosophy*, Vol. 28 (Fall 1997), p. 102. It might be worth pointing out that there is little ‘Right’ in the formal ideological sense about libertarianism. The Right as I understand it is conservative, even reactionary, and has traditionally rejected many of the tenets of libertarianism, even its principled adherence to the right to private property and free trade. Think of Pat Buchanan’s vociferous opposition to free trade, or Edmund Burke’s and Russell Kirk’s criticism of individualism, a central feature of the libertarianism at issue here. Indeed, by some accounts libertarianism is ‘Left’ because it is closer than traditionalist conservatism to Enlightenment ideas that champion reason and science. Of course, some writers may express a combination of both inclinations.
- 28 See note 17, above.
- 29 Ayn Rand, ‘The Ethics of Emergencies,’ in *The Virtue of Selfishness, A New Concept of Egoism* (New York: Signet Books, 1961).
- 30 Eric Mack, ‘Egoism and Rights,’ *The Personalist*, Vol. 54 (1971), pp. 5–33, and ‘Egoism and Rights Revisited,’ Vol. 58 (1977), pp. 282–8.
- 31 In an undated radio interview, posted on the Internet [October 23, 1997], Ayn Rand is quoted as having said that

I would say that *you would have the right* to break in and eat the food that you need [were you to land from a shipwreck in front of someone’s closed but well-stocked house], and then when you reach the nearest policeman, admit what you have done, and undertake to repay the man when you are able to work. In other words, you may, in an emergency situation, save your life, *but not as ‘of right’*.

[My emphasis.] In these statements Rand seems to contradict herself – however, both the placing of her second reference to rights and essay ‘The Ethics of Emergencies’ indicate her position by showing that what she has in mind is that one is morally justified (‘right’ with respect to the standard of one’s own survival) to disregard the rights of others in such emergencies, but that it is not a matter of having *the right* to violate the rights of others. A similar point is raised by John Locke with regard to the status of rights when ‘politics is impossible.’ Douglas B. Rasmussen and Douglas J. Den Uyl, in *Liberty and Nature*, propose to clear up any confusion arising from the apparent conflict of moral justification by way of the concept of meta-normativity, one that characterizes the moral status of political principles.

- 32 See Tibor R. Machan, *Classical Individualism* (London: Routledge, 1998). Sterba, too, seems to embrace a form of egoism. He says it is unreasonable to demand of someone in dire straits that such a person respect the rights of others to their property – or ‘surplus wealth.’ This relies upon certain elements of a classical egoist position, according to which individuals ought first and foremost to strive to flourish in their lives and may make use of other persons, their wealth, and so forth, if there are no alternatives left. But one cannot then subvert this insight by making it a principle of society that actually systematically undermines rights and the conditions required for individuals to prosper, as a Sterba-defended welfare state would do.
- 33 Indeed, I argued this point some time before Jim Sterba and various libertarians began debating this issue in the journals. See my article ‘Prima Facie v. Natural (Human) Rights,’ *Journal of Value Inquiry*, Vol. 10, No 1 (1976), pp. 119–31. See, also, Mack, ‘Egoism and Rights.’
- 34 It is very risky, philosophically, simply to borrow a concept from Marx while omitting the rest of the Marxian edifice. Thus the concept of ‘surplus wealth’ makes sense in the context of Marxian economics, with its theory of exploitation, concepts of human nature, economic determinism, alienation, revolution and so forth all attached. But one can’t try to skip past the controversies implied by all those fundamental principles and latch onto a derivative principle as if it were self-evident.
- 35 I develop some of these points in my most recent discussion of Sterba’s position, ‘Does Libertarianism Imply the Welfare State?’ *Res Publica*, Vol. III, No 2 (Autumn 1997), pp. 131–48, much of which forms the basis of the earlier sections of this chapter. Sterba and I have also debated these issues at Vanderbilt University in October 22, 1997, and March 24, 1999.

The issue concerns the importance of both the protection of the right to individual liberty (and other, derivative rights) and the prospect of well-being for all in a just human community. It is fair, I think, to believe that much of Western liberal-democratic-constitutional-republican politics touches upon this matter. How can people secure within their communities the protection of their basic rights to life, liberty and property while not promoting a callous, ungenerous way of life for anyone who is not deserving of it? It’s a legitimate concern but, unlike Sterba, I find the answer in the principles and practice of ethics and culture in a free society, not in forcing others to do one’s purportedly charitable bidding. (See, in this connection, Machan, *Generosity*.)



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## Chapter 21

# Democracy in Public Life and Corporate Management

This chapter concerns the encroachment of democracy into too much of our social life, especially corporate commerce, and we will need to outline some relevant history.

But before that, in this discussion ‘corporation’ is used as a short term for ‘business corporation.’ I will not be referring to corporations such as charities, churches or things like that, but only about business corporations. What I want to discuss is how has there been so much success with the effort to put corporate business under a kind of democratic rule.<sup>1</sup> We would generally not think of placing the press or religion under democratic rule and yet it seems to be perfectly acceptable to millions of Americans (not to mention people abroad) that corporations ought to be governed not by those who own them, but by society at large in some sense.

We have to go back a little bit and remember that commerce itself has not had a very good reputation. For as long as I can remember, when I read about human thought, starting with Plato’s *Republic*, on to Aristotle, then on to the Bible and to Thomas Aquinas, and so on, we have always had intellectual consternation about the role of commerce in human society. For example, in the *Republic*, Plato pretty much consigned the merchant, the tradesman, to the lowest rung of humanity. So much so that in the *Republic*, it is impossible, in the ideal city, for someone who is a merchant to ever lead a noble life – the good human life is impossible to the merchant. If you move quickly over 400 years to the Bible, you have to remember that the only time that Jesus ever got violent is when he ejected the moneylenders who exploited the Temple. But of course, many other people exploited religion – be they thieves, adulterers, or child molesters – all kinds of sinners go to church and use the church for their illicit purposes – but Jesus only picked on the moneylenders. It did not give commerce, especially commerce involving money, any kind of high moral standing in the Christian tradition.

In Aristotle, who followed Plato, there is a small concession. You can find commerce to be valuable, but only instrumental – only as a means to higher purposes – like giving to charity, promoting religion or advancing other noble causes. Commerce and commercial agents in and of themselves do not do the right thing. They always contribute to the right things through commerce, but commercial activities, *per se*, are never good.

Only with Aquinas does the Christian church begin to have a more tolerant view of commerce; and even there, it is not completely whole-hearted. Usury begins to be less of a sin in Aquinas. What is unusual with him is that he begins to recognize that the market may be the best means to determine what a just price is. Prior to Aquinas, the notion of a just price was common; and it was generally believed that somehow it could be determined by theological speculation and even enforced by the state. But according to Aquinas the closest you can come to determining the just price (which was later discredited as a concept) was through market transactions. Presumably people on the ground, as it were, had the requisite knowledge and moral sensibilities to reach an understanding of what things should cost, how much people should be paid for work, and so forth. This role of the market as a place for discovering the right solutions to various problems of human interaction began with Aquinas.

We move on to the modern era and commerce becomes business. People now begin to realize that you do not just engage in what we might call amateur commerce but can guide commerce with some professional savvy or understanding. Just as once there could be amateur medicine, and later those with special skills, the doctors, so there could once have been amateur commerce and later a new group, business people. These are the people whom we are talking about nowadays – business professionals – who are like doctors in the field of health care: professionals in business may be said to be experts in wealth care.

For a long time the idea of commerce was treated with disdain by much of Christian civilization. One of the reasons that Jews were pressured into the business world was that they did not have the same kind of prohibitions against wheeling and dealing that Christians did. As a result, a great deal of business fell into the hands of the Jews who were virtual nomads – or displaced persons – in Europe and did not belong to local communities. The prohibition against commerce, and especially against making interest from lending money, did not apply to them as strongly as it applied to the Christians.

Also, once Aquinas had Aristotle's works translated into Latin from the Arabic, and thus reintroduced Aristotle's friendly attitude toward the physical world *via* his embrace of science, the Christian world began to be more accepting toward conduct and institutions that made life successful and prosperous on earth. Thus, about the time of the fourteenth and fifteenth centuries it began to dawn on monarchs that commerce had one useful value. It could generate wealth – and wealth to them was not so much to enhance the welfare of the population, but to feed armies and support conquest.

In time, in support of this goal, many monarchs established joint-stock companies, the predecessors of corporate business. These gave a monopoly position to certain people who would then establish corporations and even protected them against disasters through limited liability. That is one of the reasons that in England the corporate 'Inc.' is 'Ltd,' which signifies limited liability status so that the owners would not have to shoulder the burden of

their misfortunes and misdeeds. Some of the liability would fall on the king and on insurance companies and society in general so that companies could undertake risky businesses like transporting materials on the sea, or engaging in mining – endeavors that routinely faced hazards.

This was the origin of the idea that many people from the left who look upon commerce today – for example Ralph Nader – find something objectionable about corporate business, namely, because they enjoy protection against the full burden of their possible misdeeds or mishaps. If a ship sinks, people die, and property gets lost they are only responsible to restore so much of it. That is why they needed the involvement of the monarch. Their limited responsibility was not something that was established by contract but by royal edict.

A significant crucial element of the American Revolution was that, by way of the Declaration of Independence, it changed the relationship between government and those who fell under its jurisdiction. Prior to the American Revolution, the official understanding (although there were rumblings against this) was that society had a pyramidal structure, with a king as head either fully empowered or with limited powers. Everyone else was a subject – meaning ultimately subject to the will of the monarch or the monarch's court or government. This is the exact reverse – at least in principle – of the political ideals sketched in the Declaration of Independence. There, sovereignty belonged not to government but to the individual human beings of the country – citizens – who had unalienable rights. Whoever wished to interact with citizens could do so only with their consent.

It is difficult to appreciate just how radical this idea is, even today. Most people cannot or refuse to grasp it. Only those who are convinced of the validity of the classical liberal tradition of political and social philosophy take it very seriously. The rest of the world finds it pretty much unbelievable either because they grew up in a hierarchical family and then moved into a hierarchical society with social structures or because they would like to be of the ruling class and realize that taking individualism seriously, resting a legal system on it, stands in the way of that.

One of the more optimistic aspects of the classical liberal, libertarian movement is that it's up against a very long tradition of abuse of individual rights and it is only in the last 300 years – and in terms of the age of humanity that is a very short period of time – that the notion of individual sovereignty and, thus, severely limited government, has gained some measure of official standing. Before anyone else may act invasively – be that a dentist, a doctor, or a politician – they have to get the consent of the person involved.

This was recognized in the US Constitution with respect especially to the press and religion. Unfortunately, the Constitution did not recognize it with respect to commerce and indeed many other endeavors, and so their professionals are widely regimented by government regulatory agencies.

To be precise about this, in Article 1, Section 8, the interstate commerce clause, commerce is treated as part of public policy. Public policy at that time was very friendly toward commerce, aiming toward the promotion of the free

flow of commerce. It did not, however, say what it ought to have, namely, let's keep our hands off commerce altogether, just as we must keep our hands off the press or religion. Because it was an activist – managerial rather than *laissez-faire* – public policy, anything that influences public policy could ultimately gain influence over the government's attitude toward commerce.

As the adherence to the idea – widely but not by any means uniformly held by America's early leaders – that what is best is if a non-interventionist government became less firmly accepted, the courts began to allow democratic influences on almost everything other than the press and religion. Perhaps the major turning point came with Justice Oliver Wendell Holmes, Jr's dissenting opinion in the *Lochner v. New York* case. Here is how Holmes made his case:

The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by school laws, by the Post Office, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not. The Fourteenth Amendment does not enact Mr. Herbert Spencer's *Social Statics*. The other day we sustained the Massachusetts vaccination law. *Jacobson v. Massachusetts*, 197 U.S. 11. United States and state statutes and decisions cutting down the liberty to contract by way of combination are familiar to this court. *Northern Securities Co. v. United States*, 193 U.S. 197. Two years ago we upheld the prohibition of sales of stock on margins or for future delivery in the constitution of California. *Otis v. Parker*, 187 U.S. 606. The decision sustaining an eight hour law for miners is still recent. *Holden v. Hardy*, 169 U.S. 366. Some of these laws embody convictions or prejudices which judges are likely to share. Some may not. But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.

Holmes added this crucially important point of jurisprudence, one that is the rule now rather than the exception:

I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law. It does not need research to show that no such sweeping condemnation can be passed upon the statute before us. A reasonable man might think it a proper measure on the score of health.

To claim that only laws that 'a rational and fair man *necessarily* would admit that the statute proposed would infringe fundamental principles,' (my emphasis) is to declare that majorities or their representatives may do

anything they want, since *nothing at all* can meet that condition. Indeed, in this tradition not even the First Amendment to the US Constitution is secure against legislative fiat.

Anyway, the policy against government interference with commerce became weaker and weaker. What transpired is that after the political leaders and the members of the US Supreme Court no longer took it as their public policy priority to promote commerce, they began to hold that commercial enterprises or businesses follow an agenda that the public demands. After all, Congress was empowered to regulate interstate commerce. So, in this respect, Ralph Nader actually has it right – that there is a kind of argument (which I call the ‘creature of the state’ argument) supporting the notion that in US law corporate commerce does not enjoy the kind of freedom that people in the press or religion does.

Let us get clear on this: if a legislature proposes that a government regulatory body oversee religion, that would immediately find courts striking down the idea even if it had majority support. The same holds regarding professional journalism. There are some gray areas here – mainly when it comes to the relationship between the press and criminal trials and, perhaps, *vis-à-vis* religious practices that violate other individual rights – but basically those are the two most absolutist libertarian principles of the American legal tradition. None of that exists with respect to business and commerce nor with respect to the institution of the right to private property.

Because robust business is so dependent upon a legal infrastructure that recognizes the right to private property, business subject to government regulations – be this democratic or non-democratic – enjoys less freedom than members of the press or religious institutions. Needless to say, this is a form of unjust discrimination – it clearly violates the principle of the Fourteenth Amendment, as Holmes’ remarks showed so clearly. One might say, Justice Holmes ‘dost protest too much.’ As a result of the victory of Holmes’s dissent during the New Deal, we now have a situation where, legally speaking, there is hardly any defense – except the traditional momentum – against the incursions of democratic procedures toward the regimentation of business by politicians and bureaucrats. There are some courts that change their attitudes – they begin to see that if governments start regulating business too much, it may in fact involve assuming greater powers for the state than the founders meant for them to have.

However, it is not a well-entrenched legal tradition in the US to give people in business the sort of strict protection to proceed in their avenues of development, ventures or entrepreneurship as people in journalism do. Consider, for example, insider trading – it is illegal by virtue of the rules of the Securities and Exchange Commission, yet there is nothing wrong about it unless it involves fraud or failure to perform one’s fiduciary duties. Those infractions could be handled within the criminal or contract law. What is at issue there is not insider trading but that people stole or violated the client–professional code of conduct.

Insider trading, as such, actually has to do with what many in the field of business ethics complain, namely, that it is unfair. In other words, insider traders rely on some information that is not yet public, to gain an advantage in the marketplace. This is widely believed in business ethics circles throughout the country to be morally wrong because it involves taking advantage of information that not everyone possesses. Ideas such as the imperative to be fair, to compete on a level playing field, not to cash in on special advantages – these are what lie behind the condemnation of insider trading.

Yet the same attitude is not shown to journalism. Think about the widely sought after and praised activity of scooping – as when, say, *The Washington Post* scoops *The New York Times*; it would be absurd to claim, ‘That’s unfair!’ Instead, journalists get Pulitzer Prizes for scooping. Yet, the very opposite attitude holds when it comes to business. The source of this, amongst other things, is the perverse tradition that not even in US law, which is most hospitable to commerce relative to other countries, is there a full measure of protection of private property rights and of the sovereignty of business professionals.

One telling point against business is that major corporations are getting this extra measure of protection through limited liability. So government regulation is simply a means by which this unfair advantage is offset.

However, there is nothing sacrosanct about limited liability; it could be done away with. Then protection would be given to corporate business *via* limited liability law – you take your risks and you get what is coming to you as a result. There would be no special protection for such entrepreneurs any more than for anyone else in the society.

Justice requires that the government be removed from its proactive role in the field of business. It should not have a policy of promoting or opposing business; it must be neutral toward it as it is toward religion or the publishing of newspapers. It ought to keep its hands off and then we will see where business goes, with the enforcement of the criminal law as its only guide to legitimate conduct.

The idea is not all that shocking. Why not see government, which is an expert at wielding force, as having only a defensive or retaliatory role in social life? Why is this so difficult to grasp – after all we do tend to accept that ordinary force, such as beating people up, slapping them, holding them down or making them leave an establishment against their will, may occur only if they have themselves engaged in violent conduct. Otherwise we must deal with people in a civilized, peaceful fashion. So, when the government is deemed necessary, the purpose for which it must exist must itself be such as to justify the use of force, namely, resisting crime or foreign aggression. That is the expertise of government, its *raison d’être*.

In the last several decades of the twentieth century many countries in the world began to adopt relatively free market policies, at least in some economic spheres. This has enabled working people, including business, to

become globally competitive. That also means that no longer can workers and business in the original semi-free market societies command the prices and wages they once could.

Sadly, many people now believe that for the US to remain as far ahead of the rest of the world as it used to be, there is a need for a proactive protectionist business policy from government instead of simply allowing a free market society to take care of the problem by relying on human ingenuity and adaptability. Yet, people will continue to be entrepreneurs; they will reinvent themselves to engage in novel enterprises that those in other countries are not embarking upon. In short, they will more than likely find ways in which to prosper – they do not need a managed state to guide them in that direction. Unfortunately, that idea is not being promulgated by sufficient numbers of teachers, let alone politicians and bureaucrats who are only glad to take up the task of managing the economic and other affairs of others.

So now we have a society in which the purpose of businesses is beginning to be altered through the implementing of public policy. Instead of just allowing businesses to do whatever they want to do, justified by the confidence that on the whole they will tend to discover and do the right thing, now they are being legally required to engage in various tasks that the leaders believe need to be accomplished. This includes not only adhering to various rules and regulations that promote domestic business and worker interests, but, also, the rectification of social wrongs such as cleaning up the environment, remedying the lot of members of minorities and generally taking up socially responsible projects.

We now have the spectacle of one of the most prosperous free societies in the history of humankind being urged by many leaders to be ruled by the democratic management of its business sector. Not only is democracy supposed to set the goals of business enterprises but, even within the firm, there is to be democratic organization.

There is no easy way of reversing such a destructive and unjust trend. It is not an easy task to direct (or redirect) an entire country toward the principles of individualism and natural inalienable human rights, in part because in America, especially, there has always been the problem of its history of slavery and other social wrongs – it brings to mind changing the course of an aircraft carrier. One may assume that this is especially problematic for a society whose legal system is very ambitious and has always been promoted with self-righteousness. Such a society is likely to receive far more criticism and skepticism than those that simply plod on and make no claim to being special. In a country like America, there will always be a stark blemish on the country's history because of slavery. So while some carry on saying such things as 'In the good old days when we were free,' that is offensive, and rightly so, to those millions of people whose ancestors suffered enslavement. One can only say, justifiably, 'when white people were free', but not 'When we were free.'



**Note**

- 1 In this chapter I do not provide a full enough discussion of democracy. I have done that in Chapter 10, 'The Democratic Ideal,' in my book, *The Passion for Liberty* (Lanham, MD: Rowman & Littlefield, 2003). For a full-length exploration of democracy, see William N. Nelson, *On Justifying Democracy* (London: Routledge & Kegan Paul, 1980).

# CONCLUSION

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## Chapter 22

# The Dependence of Equality on Liberty

False assumptions can hinder an investigation. It is often assumed, for example, that the political ideals of liberty and equality are in inescapable, natural conflict.<sup>1</sup> A great many political decisions in contemporary democracies are, in large measure, aimed at producing equality by limiting liberty, short of extinguishing liberty completely.<sup>2</sup> Nevertheless, the conditions of a good human community, properly understood, do not require compromising either liberty or equality.

To understand fully the conditions of a good human community we must examine the nature of human beings and the nature of community.<sup>3</sup> Many of today's political thinkers are deeply skeptical that we can identify human nature or what is objectively good for human beings insofar as they are members of a community.<sup>4</sup> Yet, we cannot adequately understand political affairs if we fail to understand the nature of moral and political excellence and what constitutes a good or just human community.<sup>5</sup> My own position, as developed in this book and in other works, is that in good human communities both liberty and equality would be fully secured.

Fortunately, human nature is not a will-o'-the-wisp. It can be identified by a careful examination of ourselves and those like us throughout human history. Let me reiterate here some of the points covered in earlier portions of this work before I go on to a discussion of the relationship between liberty and equality.

A fairly clear conception of human nature has emerged throughout history, despite debate surrounding the issue.<sup>6</sup> It is evident that human beings are distinguishable as animals with the capacity to think, the capacity to initiate the process of conceptual consciousness. The activities, creations, inventions, worries, emotions, institutions, failings and the entire history of people are best explained by reference to the fact that they are capable of choice and thought.<sup>7</sup>

We rarely find people in total isolation, yet we can consider what the worth of community life would be to someone with the option to join a society.<sup>8</sup> This analysis can lead us to answer the question of what kind of community would be best for us.<sup>9</sup>

We share with lower animals the value of life. But we lack their ability to pursue the sustenance and improvement of our lives automatically. Instead, we can choose to learn general principles by which to guide our actions toward successful living. It is this choice to engage in directed (rational) thought that distinguishes us from other animals. For humans, the right course of conduct

to follow for human beings is always the rational course. Only the exercise of reason enables a person to reach excellence in life, to succeed at living.<sup>10</sup> The moral point here is very general – each person ought to pursue success in life, and to do this should think clearly to the degree of his capacity. Many specific virtues follow from this for private and social life; although some will apply less at one time or place than others,<sup>11</sup> the virtue of being rational, *per se*, is always relevant.

Now we can ask, given this fact, what kind of community is right for people. Surely, it is one in which the life proper to persons – the moral life – can flourish? And surely the legal framework of such a community *must* respect – which implies also that it will guide the protection of – the proper conditions of moral existence, above all the liberty of each and every person. Right conduct cannot be produced by force. It must be up to the agent to choose to engage in it. And because we are able to refrain from abridging the liberty of others, and because such abstention is proper for human life in society, we *should* all refrain from abridging the liberty of others. The liberty of all will not guarantee, but is a necessary condition for, everyone's excellence. Individuals must produce their own success in life, but they require freedom in order to do this to the extent possible to them.

Complete details of what liberty in community life would look like and how it would be defended are beyond the scope of this chapter. But the structure would resemble that of the classical liberal model.<sup>12</sup> My argument for it differs from what Locke, Mill or Spencer produced. But as they envisioned, a good human community would consist of a legal system that specifies the liberty of all and enables the administrators of a properly instituted government to protect and preserve that liberty. Perhaps not 'perfect justice,' but at least properly conceived political justice, can be achieved through the legal system of such a community.<sup>13</sup> Its basic principles would consist of the natural rights each person possesses to life, liberty, and property, that is, the pursuit of a successful life on earth. All of these rights, and derivative contractual rights, would involve strict requirements of protection and preservation in a good human community.

Clearly, extreme egalitarian, socialist or communist goals, of whatever political persuasion, could not be pursued *politically* within such a community. The law would not permit the imposition of such equality. Nor would it tolerate a spiritual or economic welfare state.<sup>14</sup> Government would not be acting properly in seizing people's property, whatever the goal; what it requires for its own operation would have to be purchased in the market! As extreme as this may seem, the establishing of such boundaries and restraints is nonetheless the proper approach to instituting a lawful government.

Prohibiting the use of coercive force to achieve egalitarian equality – of either a Leftist or Rightist variety – does not imply either the absence of *political* equality or the impossibility of achieving egalitarian economic or religious goals in the community. However, the coercive imposition of economic or spiritual equality is both unjust and practically impossible.<sup>15</sup>

In contrast, forcible maintenance of political equality – consisting in equal protection and preservation of the natural rights of each citizen – is both just and possible.<sup>16</sup>

In a just legal order, characterized by the officially authorized protection and preservation of the rights of each individual, equality finds a central place. The legal system regards all persons as equal in the crucial and only relevant respect of their human nature. Each individual is treated as a moral agent, an end-in-himself, and not as a prospective tool for the advancement of goals he has not willingly chosen to pursue. Each person, in such a framework or system of laws, possesses moral dignity, the *capacity* for moral excellence.<sup>17</sup>

By incorporating principles of natural rights into the legal framework, those who administer the law ensure that equal justice will be systematically pursued.<sup>18</sup> Individuals differ from each other in many respects and share certain characteristics only with larger or smaller subgroups of the entire society, but they all are moral agents, responsible to live an excellent life within their own contexts. Natural rights specify what is right for each individual *qua* human being in a social context – not what is right for nurses *per se*, students, fathers, women, Italians, cooks, and so on.<sup>19</sup> But if one is not thwarted in functioning as a human, thus moral, creative, and productive being in a society, one is also able by that very fact to function in any of these more specific capacities, so long as one's efforts are peaceful.

A good human community treats human beings as equal in the only respect relevant to political existence. Of course in various areas of life one can also reasonably value equality of treatment: when it comes to how a professor treats his students, a father his children, a dorm supervisor his residents, a sales clerk his customers. But for purposes of political justice the only relevant equality is equality under the law, which preserves and protects the natural rights of each citizen. To strive politically for universal equality of any other kind is to strive for what is impossible and therefore wrong to pursue.<sup>20</sup> To attempt it would be to abandon the distinctive purpose of political institutions, the pursuit of justice for all within a social context. The function of politics, and, thus, government, is to aim for justice for all citizens, not for the special values and benefits people can obtain in various subgroups of society through voluntary cooperation. (Other types of inequality are very much a part of nature; they would and do exist independently of anyone doing anything to anyone else. Thus to attempt to remedy these would not amount to rectifying an injustice. At most it would involve forcibly extracting requirements of generosity or charity from some toward others.<sup>21</sup>)

Many see the idea of political equality outlined here as insufficient when compared with the popular, egalitarian view of equality. But that view assumes, among other things, that justice is achieved when we can all be observed to be equally well off. Attempting to achieve such economic equality is not proper for human life in view of the inadequacy of the framework in which human distinctions are attributed to human agency rather than (a) natural accidents and (b) personal choices; *making* us all equal would be to rob us of our moral

equality, the natural right to strive for our success in life in our own fashion, depending both on what and who we actually are.

Egalitarians are concerned mostly with distributive justice. Aside from the fact that coercing someone to be part of such redistribution – by conscripting his or her labor or confiscating his or her resources – in and of itself implies a lack of equality of political status for all, the view that justice consists of equal division of wealth is false. Consider, for starters, the simple reality that those with different desires, goals, aspirations, talents, and age want and are capable of achieving different economic conditions. The wealth of a J. Paul Getty might be a great nuisance to someone whose main concern in life is to write the great American novel or to experience the conditions of existence available in isolation on a tropical island. (Winners of the lottery sometimes report that they are more miserable since winning it!)

It is not clear why many very influential philosophers, such as Sen and Nussbaum, have accepted the view that equality in economic conditions is always good, as well as worthy of forcible imposition. Equality is good only if human beings are, by nature, best off by being equal to each other with respect to the attribute, status or condition in question. Economic status is by no means the highest priority in human life, let alone within the law, nor is one's education, social position, or housing conditions, however important these may be. What is central to each individual is the opportunity to excel morally, to make the best of life within the context of one's age, location, talents, and many other highly diverse factors.

It is possible to be misled about the advisability of universal economic equality by the significance of equality in special contexts – for instance, family life or certain kinds of games. But other conditions could also be mistaken for universal values on similar grounds. For instance, stability, harmony, order, and safety are just a few conditions we could value in certain contexts without elevating them to the status of the political *summum bonum*.

To the extent that we are citizens of a country, we are entitled to be treated as equals under the law, for the legal authorities of such communities serve citizens (or should) in the capacity of protecting and preserving their right to liberty. Here equality is of value as it relates to the legitimate function that a legal authority or government has in our lives, namely securing the general good, and everyone's right to liberty. When more than this is attempted, for example, by attempting legally to establish equal pay for equal work, a minimum wage, or educational equality, they abandon their proper task and create a welter of irresolvable conflicts, a veritable Hobbesian war among all vested interest-groups.

When a state subsidizes special goals – child care, moon projects, symphony music, auto safety, faith-based charities, or the abolition of various personal vices – it is perceived as having a procedural duty to give equal treatment to all. Thus when some special projects and groups receive special legal aid, others who do not will consider themselves deprived of their due.

When, say, government gives subsidies or special legal protection to agriculture or loans to the airline industry, by its procedural duty to give equal treatment to all citizens it is obliged to provide subsidies to all other segments of society. (Of course, the fact that great need for help exists in the airline industry or in agriculture does not imply that such help is needed elsewhere or must be provided at all.) When married women receive special help to obtain jobs from airlines, then another special group, for example, obese men, will also demand it, *ad infinitum*. These are not predictions but merely observations about the logic of political dynamics. Given the procedural features that must attend governmental action purportedly predicated on equal treatment of all citizens, when governments undertake improper functions the same procedures must be followed – or else the idea of equal treatment of all citizens must be abandoned. These conflicts and contradictions can be avoided. Instead of engaging in charity, governments should confine their work to preserving and protecting natural human rights equally for all.

Liberty and equality, in the respect in which these are possible conditions and valuable features of a human community, are not only compatible but mutually dependent on each other for the purposes of maintaining political justice.<sup>22</sup> Misunderstanding of the nature of equality, as fostered by egalitarian political theories, has led to the denial of this fact. Though the job of uprooting that misunderstanding and promulgating a rational view of the relationship between liberty and equality may be a tough one, the quality of our human communities nonetheless depends, in part, on how successful we are in persuading concerned citizens that both are essential to a just community.

## Notes

- 1 See Sidney Hook, *Pragmatism and the Tragic Sense of Life* (New York: Basic Books, 1975), especially Chapter 5, 'Absolutism and Human Rights,' pp. 79–98. See also Gregory Vlastos's 'Justice and Equality' in A. I. Melden, ed., *Human Rights* (Belmont, CA: Wadsworth Publishing Co., 1970), pp. 76–95. Of course, there are those who deny such a conflict but to do so they embrace a conception of human rights dubbed 'positive rights.' For more on this see Chapter 19, 'Two Philosophers Skeptical of Negative Liberty.'
- 2 For a good discussion of how this has resulted in Britain's political conditions see Robert Moss, *The Collapse of Democracy* (New Rochelle, NY: Arlington House Publishers, 1976). Almost all liberal democrats or social democrats aim for some such fusion. See the works of Amartya Sen and Martha Nussbaum discussed in Chapter 19.
- 3 A clear argument for this requirement is given in Leo Strauss, *What is Political Philosophy* (Glencoe, IL: The Free Press, 1959). I develop such an account in Tibor R. Machan, *Individuals and Their Rights* (LaSalle, IL: Open Court Publishing Co., Inc., 1989).
- 4 Relativism and subjectivism concerning not only normative matters but even the hard sciences is so prevalent that hardly any documentation is required. For the former, consider the claims of most of those in the social sciences; for the latter, the recent popularity of Thomas S. Kuhn's conception of the paradigm-dependence of any scientific claim, in *The Structure of Scientific Revolutions* (Chicago, IL: University of Chicago Press, 1962), and



- Richard Rorty's view that truth is community dependent, in his *Objectivity, Relativism and Truth* (Cambridge: Cambridge University Press, 1991). Cf. Tibor R. Machan, *Objectivity, Recovering Determinate Reality in Philosophy, Science, and Everyday Life* (Burlington, VT: Ashgate, 2004).
- 5 Excellent beginning for this task may be found in Hanna F. Pitkin, *Wittgenstein and Justice* (Berkeley, CA: University of California Press, 1972), and Barry Stroud, 'Wittgenstein and Logical Necessity,' in George Pitcher, ed., *Wittgenstein* (Garden City, NY, Anchor Books, 1967).
  - 6 See Tibor R. Machan, *Human Rights and Human Liberties* (Chicago, IL: Nelson-Hall, 1975), as well as Machan, *Individuals and Their Rights*, for a discussion of this and several other related issues.
  - 7 For an elaboration of this, see Tibor R. Machan, *Initiative – Human Agency and Society* (Stanford, CA: Hoover Institution Press, 2000).
  - 8 So-called 'state of nature' analyses deploy this method. Among libertarian political philosophers this is best developed in Jan Narveson, *The Libertarian Idea* (Philadelphia: Temple University Press, 1989).
  - 9 See Thomas Hobbes, John Locke, Immanuel Kant, John Rawls, Robert Nozick, David Gauthier, and Jan Narveson for somewhat similar yet also distinctive 'social contractarian' approaches.
  - 10 The claim here is, of course, terribly controversial, yet true in the sense that there can be truth concerning such issues. The Aristotelian naturalist ethical position is still the theoretically most adequate alternative available to us. Moral skepticism, in turn, is not only a defeatist position but quite baseless, because its major support, strict empiricism, collapses into solipsism.
  - 11 Cf. Tibor R. Machan, 'Law, Justice and Natural Rights' in *Western Ontario Law Review*, Vol. 14 (1975).
  - 12 See my discussions of this in various of my books, as well as in such essays as 'Reason, Morality, and the Free Society,' Robert L. Cunningham, ed., *Liberty and the Rule of Law* (College Station, TX: Texas A&M University Press, 1979).
  - 13 Consider Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), especially Chapter 7.
  - 14 Often people overlook the fact that both the Left and the Right tend to promote a welfare state of sorts, though with different criteria as to what constitutes welfare – for the Left it tends to be mainly economic well-being or capability, for the Right it is mainly spiritual or a certain version of moral well-being (preparatory of everlasting salvation in the afterlife).
  - 15 Nozick, *Anarchy, State, and Utopia*. Of course, the late Robert Nozick is by no means the only one who has shown this – see, also, Murray N. Rothbard, *Egalitarianism as a Revolt Against Nature and Other Essays*, 2nd edn (Auburn, AL: Ludwig von Mises Inst., 2000).
  - 16 Machan, *Human Rights and Human Liberties* and *Individuals and Their Rights*.
  - 17 To appreciate the difference between naturalistic worldviews which deny this and those which affirm it, see B. F. Skinner, *Beyond Freedom and Dignity* (New York: Knopf, 1971), and Tibor R. Machan, *The Pseudo-Science of B. F. Skinner* (New Rochelle, NY: Arlington House, 1974). There are disputes, of course, about the exact political implications of this idea of human dignity – see, for example, Tibor R. Machan and Craig Duncan, *Libertarianism, For and Against* (Lanham, MD: Rowman & Littlefield, 2005).
  - 18 The idea here is to take the 'oath of office' of members of the government far more seriously than we tend to do at present.
  - 19 See my papers 'Human Rights: Some Points of Clarification,' *Journal of Critical Analysis*, Vol. V, No I, pp. 30–39; 'Prima Facie versus Natural (Human) Rights,' *Journal of Value Inquiry*, Vol. X, No 2; 'Law, Justice and Natural Rights.'
  - 20 For a discussion of the pursuit of utopias in a free society, see the last section of Nozick, *Anarchy, State, and Utopia*. As to whether it is wrong to pursue what one knows to be an impossible dream – no, unless one has something better to do, which is almost always.

- 21 For more on this, see Tibor R. Machan, *Generosity, Virtue in Civil Society* (Washington, DC: Cato Institute, 1998).
- 22 For a very instructive discussion, see Roderick Long, 'Equality: The Unknown Ideal,' <http://www.mises.org/fullstory.aspx?control=804>

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## Chapter 23

# Why Agreement Is Not Enough

Agreement can be very nice. Wouldn't it be wonderful if we could all just get along? But much depends on what it is we're supposedly agreeing to – and maybe a little bit, too, on whether we ever actually agreed to anything at all.

Social compact theories seek to explain the rationale for or genesis of social or political norms – or even the norms of personal conduct – in terms of what we 'as a society' supposedly agree to. But a contract is, strictly speaking, a legally enforceable agreement. Social contracts, being pre-legal in nature, are better classified as compacts, and that is the term I will use.

In the realm of personal conduct, social compact theory is a version of conventionalist metaethics – according to which right and wrong is whatever folks traditionally agree is right and wrong, rather than something that can be objectively determined. In the realm of social, political or legal norms, social compact theory contends that the proper principles of community life are those that either actual or hypothetical participants in a community *agree* to be legally bound by. For social compact theory, it is agreement alone that underlies the principles guiding social-political life.

I will argue here that any sound political system requires not only agreement (and not necessarily universal agreement, at that) but also logically prior, non-conventionalist ethical principles, or, at any rate, some sort of natural drives (like a drive for self-preservation). I dispute the notion that social compacts by themselves can *establish* binding norms of any sort whatsoever, norms that can be demonstrated to obligate one to act one way or refrain from acting another way.

Nothing follows morally from the fact that everyone within a group has agreed to abide by certain guidelines unless the agreement itself enjoys normative force. (After all, what if they all agree to march across the river as a gang and beat up or kill some innocent, just for the fun of it? Surely the act does not become morally obligatory merely because everyone in the group has assented to it?) Nor can this compact derive its moral significance from a prior compact, which must then derive *its* moral meaning from an even earlier one, and so on, *ad infinitum*. Unless there is some independent norm that can underlie an agreement, the agreement fails to obligate morally (although of course it may, practically speaking, be imposed by dint of physical threat mustered by a majority against all others). Agreements as such can have moral force only if *promising* as such has moral force, regardless of any other consideration.

One could also hold that an inborn motive or drive impels those party to a compact to live by it. Then the norms are binding not because of the

agreement *per se* but because the agreement *had* to be made (so as to respond to fear of death, secure safety, or preserve life), then *had* to be followed by the self-interested parties to it. This proposal may or may not be plausible, but it is at least an attempt to explain the strong motivation to abide by the compact. Yet, many political theorists seem to hold that even absent any prior ethical norm or natural drive impelling the requisite behavior (at least among normal parties to the agreement) a social compact can set up binding and enforceable guidelines.

After my critical remarks I will now sketch an approach to establishing social or political norms that captures some of the appeal of social contract theories while offering a more robust and plausible basis for them. Social compact theories, I argue, *implicitly assume* that prudence is a moral virtue (or at least a natural drive) that we ought to (or will be motivated to) cultivate and in line with whose dictates we ought to (or will) agree to the provisions of a social compact.

For thinkers like Kant and Rawls, the alleged contractual basis for the legitimacy of law and government is supplemented by the very strict requirement that the resulting norms be self-consistent. But once this requirement of internal consistency is isolated and set aside, what remains of the social compact that could provide a foundation for social norms and law is both meager and inadequate.

To be sure, one might argue that self-consistency is naturally demanded of every theory – that it is a meta-theoretical criterion which virtually goes without saying. But if such self-consistency is not inherent in a system that rests on agreement but is, rather, itself a distinct normative requirement, then it seems evident that normativity – the relevance of value judgments – cannot easily be omitted from any sphere of human concern.<sup>1</sup>

Still, must rationality be a prerequisite for any social compact? After all, it might be possible for a particular group to reach a consensus on irrational rules of governance; and many irrational groups do in fact exist. The world is rife with organizations that embrace irrational ideas as their guiding principles. Terrorists, Nazis, and skinheads might each establish their rules on the basis of nothing but agreement, without these rules having any legitimate moral force. (Though even here, a moral doctrine of some kind or another, however crude or indefensible, usually motivates the program, for example, the notion that the purported racial superiority of the group's members justifies harassing or destroying the members of other races – a moral claim of sorts.) That the purposes sought by way of such irrational rules cannot be conscientiously and consistently acted upon, is, of course, much of my point: something more than sheer agreement is needed to establish viable and coherent social compacts, let alone morally binding ones.

To deny that rules spawned by a social compact resting entirely on agreement can be irrational flies in the face of history and common sense. To claim that these principles have moral force simply because they have been agreed to implies that they have moral legitimacy simply because they have

been agreed to. Yet we criticize such groups precisely because they clearly *lack* moral legitimacy. The lynch mob may feel that it is justified, but we know that it is not. And we would not indict a person for breaching an agreement who, after a change of heart, proceeded to violate the norms of the Nazis or the Mafia, flouting their compact.

Yet Kant explicitly alleges that the ‘idea [of social compact] alone enables us to conceive of the legitimacy of the state.’<sup>2</sup> He stipulates that the social compact is a ‘mere idea of Understanding, which has, nonetheless, its doubtless (practical) reality.’

[It] obligates every lawgiver to advance his statutes so that they could have emerged from the united will of the whole people, and to consider every subject, as regards his desire for citizenship, as though he had been party to accepting that will. For that is the basis of the legitimacy of every public enactment.<sup>3</sup>

New life has been breathed into this idea by John Rawls, whose hypothetical social compact is said to have been formed behind ‘a veil of ignorance.’<sup>4</sup> There are other more Hobbesian versions of social compact theory, but among contemporary political philosophers the Kant–Rawls version enjoys prominence. Yet, their theories are not free of normative presuppositions either, and thus do not qualify as pure social compact theories. Both Kant and Rawls import certain norms into the social compact; norms that delimit what can count as a *bona fide* compact. For Kant, a strict rationalism – the will to reason – is part of the contract. For Rawls, it is his insistence on a ‘reflective equilibrium’ among basic intuitions that favor fairness, including respect for the principles of self-consistency. So for both thinkers the compact is generated by much more than sheer agreement.

Hobbes may be a better representative of pure social compact theory. According to Hobbes, when scarcity and congestion reach a critical mass in the state of nature, the self-interested motivation of individuals drives them to convene and reach a consensus. They then devise certain rules of social life, to be enforced by a monarch or government that is empowered to impose strict sanctions against law-breakers. At this point everyone forfeits all of the ‘natural rights’<sup>5</sup> he had possessed in the state of nature, save for the right to resist being killed.

The Hobbesian theory does not specify the content of the rules, though it assumes the rules would aim to maintain the peace and preserve human life. For Hobbes, the only public good is peace, and there is no stipulation as to the moral content of the rules to which we assent for the sake of achieving it. In the Kantian–Rawlsian version of social compact theory, however, more is required of the agreement than the mere laying down of rules – they must be rational and fair.

Why is the Hobbesian conception so appealing, especially among supporters of the Enlightenment-based, liberal tradition of politics? Because it seems to offer an empirically-based, hence ‘scientific’ explanation of the

origin of preferred laws, without the necessity of enlisting messy and perhaps controversial moral values. Even Kant embraced as much for the so-called phenomenal world, the world in which the practical task of politics is to be realized – for example, in his discussion of how people pursue happiness as a matter of natural necessity.

The notions that human action must be explained by reference to deterministically compelling motives (as distinct from purposes, which are goals set by us, not powers driving us willy-nilly); that morality is mainly a social invention; that people lack freedom of the will, at least from the scientific, practical point of view; and that their conduct is neither morally right nor morally wrong except as a matter of their relationship to certain social goals – all these and related assumptions are thought to accommodate liberal goals of anti-authoritarianism and scientific respectability.

According to the empiricist-scientistic viewpoint, prior to being driven to be bound by ‘their own’ decisions, members of a social group cannot be bound by moral standards. By this understanding of human life, it is not true that people ought to live one way rather than another, and that they are capable of individually discerning what the moral way is even apart from whether anybody agrees. Such an ‘ought’ would imply that they have the capacity to do otherwise, that they possess free will and are able to initiate their own conduct, without needing to be forced into a particular course of action by others. Instead, according to the empiricist view people are inclined, or rather driven – naturally motivated and determined – to act as they do. *Contra* Frost, there is no road less traveled by; we take the only road open to us.

For advocates of this position, the idea that one can ‘cause’ one’s own conduct is simply incoherent. And therefore (if morality is deemed possible at all, within a determinist framework), free will cannot be a necessary ingredient of morality; ‘ought’ cannot really imply ‘can.’ To be moral means simply to behave in accordance with certain rules, even if one had no ultimate choice but to do so. On this view, Hobbes, albeit a mechanistic materialist, may legitimately espouse a moral system. For to do so implies only the promotion of certain kinds of behavior and the discouragement of others. The success of that advocacy may depend entirely upon deterministic factors, one of which is the advocacy itself.

With the demise of the classical idea of natural law – the view that human life has an end and that freely chosen, self-caused right conduct ought to and can further this end – the thesis of a hypothetical social compact seemed to present the best chance of resurrecting some shard of respect for moral and legal principles.<sup>6</sup> But eager as some might be to sweep the whole matter under the carpet, the issue of the nature of morality, including social norms, persists. Are we in fact driven to conform to social norms under certain optimal circumstances, or can we choose to comply with such norms on our own initiative (which suggests the possibility, too, of evaluating those norms and finding them wanting)?

If the only hope for some semblance of moral and political standards arises within a deterministic framework, the function of a moral or political norm will be taken over by an instinct or innate motive. For Hobbes, that innate motive is fear, self-preservation, or survival. The drive to survive is what propels people to form a social compact – even if Hobbes felt obliged to hem and haw as to how a deterministic account of this drive amounts to ‘morality.’ (Philosophers often try to splice concepts that do not really jibe.) Any incidental iteration of the familiar language of ethics notwithstanding, however, at root the Hobbesian system is an effort to dispense with morality altogether. The vision of man is that of mechanistically impelled ‘matter in motion,’ not purposeful, volitional consciousness.

But whether one proposes natural-law-based morality or innate-drive-based ‘morality,’ the social compact in and of itself cannot subsume the full measure of normativity often imputed to it. That is why both Kant and Rawls invoke much more than mere universal agreement in their efforts to extract from the compact moral and legal standards that can be considered binding. Rawls believes that the compact must be confirmed by intuitively acceptable moral conceptions placed in rational equilibrium.<sup>7</sup> He also introduces the idea of the ‘veil of ignorance’ to establish a basis for (collectivist) consistency. It seems that everybody in society who is party to the hypothetical compact ‘would’ agree to a Rawlsian scheme of redistributionism if only suitably protected from knowledge of their own natures and potentials. And so Rawls stipulates that the parties are thus blindfolded. Agreement will be thwarted if the contractors possess important individual characteristics, so with a wave of his metaphysical wand Rawls strips all the contractors of individuating characteristics. Consent is thus generated by the (ill-informed) intuitions Rawls imposes on the pre-individuated contractors.

Why is a mere agreement not sufficient? If no other source of norms is available – as is especially true in the case of Rawls – why not simply insist that norms come from brute human choices, be they rational, self-consistent, irrational, illogical, arbitrary, or whichever?

I think the reason this road is blocked for Kant and Rawls is that they both reject any sort of metaphysical or ontological grounds for morality. Rawls was very clear about it in his Eastern Division APA Presidential Address when he averred that ‘much of moral theory is independent from the other parts of philosophy.’<sup>8</sup> Kant, too, locates morality in the hermetically sealed land of pure reason, *sans* external foundations: ‘Every action is right which, in itself, or in the maxim on which it proceeds, is such that it can coexist along with the freedom of the will of each and all in action, according to a universal law.’<sup>9</sup> In the social realm, Kant enjoins us to ‘act externally in such a manner that the free exercise of the will may be able to coexist with the freedom of all others, according to a universal law.’<sup>10</sup> An example of what he means: ‘If a man and a woman have the will to enter on reciprocal enjoyment in accordance with their sexual nature, they must necessarily marry each other; and this necessity is in accordance with the juridical laws



of pure reason.’<sup>11</sup> (One suspects that ‘pure reason’ might be abetted by the social mores of the day.)

In the case of Rawls, the attempt to deny the dependence of personal and social morality on other branches of philosophy also fails.<sup>12</sup> There is no way to explicate the meaning of ‘rational’ without consulting the philosophy of mind, questions of ontology or metaphysics, the subject of free will versus determinism, and so forth. If, for example, being rational implies, as Kant suggests, that an agent is free to make choices and to initiate his own conduct, this alone is enough to make a difference with respect to the ethics and politics that human beings ought to adopt. While it is true that in many ordinary human circumstances rough-hewn common sense can advance the discussion with sufficient clarity and precision, under certain skeptical assaults this will not suffice (and even unselfconscious common sense implicitly relies upon assumptions about the nature of reality, the possibility of objectivity, and the like). We all manage to deal with the physical, chemical, sociological and economic realities that surround us for a good while without resorting to specialists, but at certain points we find we must rely on them. So too with ethics and politics. Common sense is the beginning, not the end, of inquiry.

It might also be argued that for social compact theories, each person appraises proposed social morals on the basis of his or her own interest, given the interests and powers of others. So if one’s acceptance of some point of philosophy, say in metaphysics, affects one’s interests in a way that calls for a new ingredient in the social compact, that may well be defensible, and will be added to the list of points being negotiated. An example might be the need for free inquiry in the society – that is surely a plausible item. So it is tossed into the hat. But does this desire for free inquiry become part of the discussion because some metaphysical fact implies the benefit of such inquiry? Or because disagreements between parties about what indeed are the metaphysical facts spawn the practical question of how these differences are to be socially dealt with both in negotiating the compact and in the affairs of the resulting society?

Yet if there are some facts of any kind, including metaphysical or ontological facts, that permeate social life – for example, the fact that all human beings are sovereign agents and that their agency is a precondition of a moral life – these facts and their ethical implications cannot be contracted away, nor will they wither away. Such provisions will be a necessary part of a coherent human social life whether they are itemized in the compact or not. To the extent that they are violated, human life and the potentials of human life will be hindered.

Suppose that the members of totalitarian societies (or tribes) can be somehow regarded as having signed the social compact that ordains the soul-stomping regimentation to which they must meekly submit every day. The totalitarian regimes would still be way out of line, morally, no matter how many signed copies of the agreement there might be, no matter how many

bows a chief receives. Or let's say it is a feature of the social compact that some people in society will be slaves. In parts of Ghana, for example, young virgins are forced to become sex slaves of priests, purportedly to atone for the grave sins of some family member. And maybe everyone party to this compact in such a Ghanaian sub-society really believes this. Nevertheless, coercive sexual subjugation of innocent virgins violates a basic requirement of human life, the need of each individual to choose, himself or herself, how he or she will live.

Slavery is a basic violation of one's humanity. Social compacts that ignore this fact must fail (as must the theories based on such compacts), but not because they violate either their own explicit terms or some procedural protocol. They fail on moral grounds. The agreement itself fails to comply with the principles it ought to comply with. A compact cannot be morally self-justifying; it cannot confect its own ethic from scratch, solely within its own asserted boundaries. It must consult a wider moral and metaphysical context.

Immanuel Kant attempts to secure the foundations of morality in pure reason, removed from that impossible field, metaphysics. This attempt itself relies upon a kind of metaphysics, but of a tortuous sort. What we do see in Kant, though, is that social compact theory rests on requirements of how human beings ought to act that do not themselves rest on agreement, that is, that are valid independently of any consensus about them. The particular moral principles Kant thinks govern human life may not be the ones we indeed ought to live by, but it is clear at least that some such principles are needed if social compacts are to be morally palatable.

No matter what kind of social compact theory we are addressing, whether Kantian, Hobbesian, or Rawlsian, it is always reasonable to ask the common-sense moral question of whether what people willed – whether behind a veil of ignorance, in unison, or at some great convention – *should* have been willed by them.

Now, some might argue that the very point of making agreements, normally, is to settle something. If asking the above question amounts to renegeing on a done deal, we should have heard about the question a bit sooner.<sup>13</sup>

But this assertion makes the very point against which it is attempting to protest. Where does this judgment that 'we should have heard about it sooner' come from? It's a claim based not in a prior compact but in something more fundamental, some natural law or objective moral principle. If someone agrees to do X and later disputes the force of the agreement, it can well be said: 'You ought to have considered your doubts earlier.' But could this 'ought' itself rest solely on some prior agreement, in turn empowered by an 'ought' stipulated by a still prior compact, and so on, *ad infinitum*? If not, the moral force of the compact must be grounded in something outside of itself, in moral truths we know and take heed of apart from what we are agreeing to in the compact itself. (Here we need to keep in mind that agreeing to something that imposes burdens on un-consulted third parties – other than the 'burden' of abstaining

from aggression – is perverse not because there is an agreement against such a procedure but because consent is fundamental in adult human relationships ... whether the propriety of this consent is agreed to or not.)

When someone in the state of nature thinks about entering a social compact, it makes sense for her to ask, ‘Ought I to join in the search for some way of solving our problem?’ The ability to ask the question suggests the availability and relevance of standards that could help one make the right choice. This foremost standard one would want to consult is called prudence: the virtue of taking good care of ourselves, including when we embark upon social life. (Rawls himself admits that some such standard might be discovered but regards it as obstructionist to wait for it.<sup>14</sup>)

It would not be cogent for the determinist to insist, on the basis of his view that entering the compact is a matter of being driven by fear to do so, that such a question cannot arise. For if we are indeed determined to behave as we do, this will be just as true after the social compact comes into existence as it was before. So no judgments as to what we ought to do will be applicable now, either. What if one’s sundry urges motivate one to ignore the agreed-upon compact? On deterministic premises, a social compact has no more moral weight than any other moral stricture. One will just do what one must, and there is nothing morally to be said for or against it.

But if ‘ought’ does imply ‘can’ after all, then this, too, is a fact that is true both before and after the social compact. And then it is also true that, prior to the compact, there can be standards of ascertaining what one ought to do.

A recent example of social compact theory is advanced by Jan Narveson in his *The Libertarian Idea*.<sup>15</sup> He argues that

the principles of morality are (or should be) those principles for directing everyone’s conduct which it is reasonable for everyone to accept. They are the rules that everyone has good reason for wanting everyone to act on, and thus to internalize in himself or herself, and thus to reinforce in the case of everyone.<sup>16</sup>

But this is problematic because it builds into the social compact the requirement of reasonableness, even though, as we have seen, agreement need not be reasonable at all.

The normative requirement that we ought to be reasonable cannot be assumed as automatically constitutive of agreements and, thus, of social compacts. After all, some prospective signatories could ask, ‘Why should we be reasonable?’ Granted, this may seem like a silly, even incoherent, question. Yet it is certainly one that has been raised by philosophers and, especially, literary and religious figures. It may not be reasonable to have faith in God but many believe that faith is just what we ought to have. It may not be reasonable to indulge one’s momentary feelings or passions thoughtlessly, yet there are famous figures throughout history who have promoted just this notion. (And many of the rest of humanity who have acted in accordance with it.) Why are they wrong, if they are? Why should we obey the advice of Socrates to follow

reason instead of fancy? There are reasons why we should follow reason, even if the validity of reason itself is self-evident.

The contractarian stance does not answer the question but simply takes the indispensability of reasonableness for granted. As Narveson puts the point,

Those who insist on being unreasonable aren't being metaphysical drop-outs; they are simply being sociopaths, and social contract theory explains very succinctly how to deal with such people: no contract, nothing is disallowed, and you do whatever you think necessary, period. If the 'unreasonable' don't like that, then they have their answer to the question, 'why be reasonable'.<sup>17</sup>

Yet, it is philosophically impoverished to provide this kind of answer to all those who have championed unreason. Such people may be wrong without being sociopaths. Indeed, if only sociopaths defended unreason, all the efforts by certain philosophers and others to rebuff, for example, the postmodernist zeitgeist, with its very large dosage of irrationalism, would be pointless.<sup>18</sup> There would be no need to dispute all those who have maintained that being reasonable is somehow sectarian, biased, or an expression of Western prejudice; only the frothing madmen of insane asylums would be babbling such notions, not tenured professors.

Of course, it might not be easy to reorient irrationalists toward reason. But that the effort is made suggests both that many who are capable of being reasonable choose not to be so, and that many advocates of reason see some hope of convincing some such champions to become reasonable (perhaps by appealing to the modicum of reasonableness they do exhibit). And at the least, an articulate defense of reason can help inoculate those who are disposed to be reasonable against the sophistries of those who are not so disposed, as well as guide us directly in the living of our own lives. While some aspects of why it is right to be reasonable are obvious to men of good will, not everything about reason or being reasonable is equally obvious.

A full defense of reason would explain that we are by nature rational animals; that nature, in turn, is a rational order (in the sense of being ruled by the laws of identity and cause-and-effect), not some random, chaotic mess; and if we are to deal with nature successfully, it is vital that we be reasonable. These conclusions, in turn, need to be supported as well – a full philosophical case would show why they are true, not simply taken for granted. And for that purpose it isn't sufficient to rely solely on common sense.

There are other problems with contractarianism, too, among them the fundamentally fully egalitarian stance its champions often adopt. The parties to the contract are viewed as having equal standing. Yet why should this be so? What if some are born with superior sensibilities and thus are in a better position to decide what rules ought to guide all of us? Or favored by the Gods?

This egalitarian assumption needs to be defended, not just assumed, yet social compact theories typically inaugurate their theorizing with the assumption that parties to the compact possess an equal measure of required

sensibilities (like prudence and self-regard) or other attributes (like talent and intelligence). In the case of Rawls, as we have seen, a 'veil of ignorance' had to be deployed – blinding participants in the compact (and also, Rawls may have hoped, his readers) to any relevant particulars.

Furthermore, if prior to the compact certain ethical standards already bind us, then it may well be that certain social compacts are ill-formed and should never have been entered into. Indeed, given that social compact theory is often invoked to justify laws or systems of rules that reach far into the future, after all actual and 'hypothetical' participants in the agreement are long dead, one can easily raise the question of whether posterity is obliged by the contractual provisions. Should American citizens be loyal to the US Constitution, for example? How about the Charter of the United Nations? Or the laws that arise from the Hobbesian or Rawlsian social compact? Could there not be moral grounds for dismissing some of the provisions of these and other social compacts? Are such grounds themselves valid only because some later assembly of citizens have affirmed them? And what's the status of the documents that amend old compacts: do these new amendments qualify as social compacts, too? If they do, why is that so? How do we handle folks who disagree about that?<sup>19</sup>

These are objections to social compact theory that need to be addressed. I do not believe they can be, successfully. The question that remains then is whether and where the social compact approach is still required, given its shortcomings and given that from different philosophical perspectives it would not be necessary. I believe its power rests mostly on the scientistic, non-normative understanding of human conduct whereby we are driven to act as we do by inborn psychological dispositions that we cannot resist as a matter of choice.

Once, however, the theoretical veil of empiricism and scientism is lifted, I think the appeal of social compact theory would be narrowed considerably. In other words, while agreement may be important for the purposes of implementing certain principles, it is not agreement *per se* that would make these principles the ones we ought to adopt for the purposes of community life. Agreement is important, for example, with respect to conventions that equally well implement the same valid principle – even if another convention might have been equally viable. If you don't like the convention that red means 'stop,' you are still, and properly, culpable if you endanger others by interpreting red to mean 'go.'

But the orthodoxy of empiricism, in abandoning any hope for metaphysics, lacks philosophical as well as, for the time being, cultural force. The field is thus wide open and new beginnings can readily be forged.<sup>20</sup> A reconsideration of the Greek conception of human nature, specifically the Aristotelian conception, would provide greater promise for grounding justice than any such truncated approach as social compact theory.

Now comes the \$64,000 question: why do social compact theorists reject this approach to grounding politics and law? For Narveson the answer is easy:

There are people out there, apparently, who don't agree with the Greeks about how to live – or anyway, don't seem to. Aristotle is telling us how to be happy, and if he's right and we genuinely disagree, then we shall be unhappy. So what? What business is it of [anyone] whether I am unhappy?<sup>21</sup>

But the same objection can be raised about the results of the social compact! 'There are people out there, apparently, who don't agree with the drafters of the social compact about how to live – or anyway, don't seem to.' Big problem, isn't it? There are indeed people out there who do not agree with Narveson about how we ought to act toward one another as human beings, as fellow citizens, as neighbors. We are, after all, not living in the fully free society laid out in Narveson's social compact. And what's so bad about that? So what if we are not free? We simply won't be able to do as we want to, right? We're simply living under a social compact forged in accordance with values alien to our own. Can we still say that, agreement or disagreement aside, there is good reason why *in fact* freedom is better than, say, being sexually subjugated by the local parson ... or escorted to the gas chamber?

But as soon as the Narvesonian theorist agrees that there is *some* reason, having to do with the value of human life, for seeking to institute, preserve and protect a free society, he has exited the confines of self-justifying agreement.

There can be no short cut here. It is just as much a philosophical and social hassle to agree or disagree with Narveson or other social compact theorists as it is to agree or disagree with Aristotle. Yes, it would be nice if we could all just get along and see eye to eye on everything with easy good will and mutual understanding, without ever having to sweat out an argument. But part of the reason we do philosophical work is to try to convince people of that which they do not already believe. Social compact theory cannot escape the problems we face as a result of our disagreements. If it could, social compact theory would have long since produced the results Narveson believes flow from it: namely, widespread agreement about the value of individual liberty and the resulting protection of that liberty throughout human societies.

Theories of all kinds will encounter skeptics. We still need to know which of them is best. If it turns out that people in fact ought to strive to be happy and promote their own lives, then that is a premise to which our thinking about how to live must attend. Certainly, it must be attended to when we consider what kind of communities are best suited for us, since those that ban us from pursuing our happiness will fail us just for that reason. It is no accident that the American Founders concluded that a free society is the one most conducive to the pursuit of happiness, and that they ought, therefore, build the kind of legal order that would best protect that freedom.

All this does not mean anyone can *impose* a vision of how to live on anyone else, nor even that anyone is authorized to try, apart from erecting obstacles to imposing such visions.<sup>22</sup> One's business in learning how we ought to live is just that: to learn it and to do it and, maybe, once in a while, explain it to others. But once one has learned it, one can continue to try to figure out the

implications of this view for social and political life. And it turns out that the political framework that makes the pursuit of happiness possible also makes possible the rejection of that pursuit.

In any case, the defense of liberty inspired from within a neo-Aristotelian moral and political libertarian philosophy does seem to hold out philosophical promise. Aristotle's naturalism abandoned the Platonic aspiration for timelessly fixed natures from which eternal standards of good and bad, right and wrong, may be derived. He supplies us with an alternate, more robust conception of what is meant by 'the nature of X,' one that can produce a revitalized naturalistic ethics.<sup>23</sup>

An understanding of human beings as free, responsible agents provides us with norms we ought to apply in our own lives. Human beings are at their best when they freely, of their own initiative, actualize their potential to live rationally. This is an ontological foundation for the ethics that the social compact theory presupposes without argument. It implies, furthermore, that insofar as we are social beings who require some type of community, we face the question of what kind of community will be most hospitable to our task of living the right way. The standards of such a community are, among other ingredients, the natural rights that all members will be required to observe and will not be able to violate with impunity.

The social contractarian feature of this way of thinking of political norms includes, most prominently, what an economist might call the ultimate exit option: no one may be coerced to remain part of the community. At some level, the consent of the governed *is* required for government to have authority to administer the (just) laws. But no one may 'consent' to governmental deeds that would be immoral to perpetrate in private.

So what remains of social compact theory is, indeed, very important: namely, the value of freely reaching agreement among human beings, and the justifiability of certain kinds of efforts to reach it. When a sufficient number of participants in the polis can and do in fact agree on how to maintain and preserve appropriate standards of social justice (as well as on who should administer the effort), something crucial to the lives of the participants is achieved – the conditions for proper social intercourse. The compact provides, as well, the political will to enforce the conditions.

Human beings do not always do what is right *vis-à-vis* their fellows. To impress them with the need to abide by the proper norms, force is sometimes necessary. Such force would be ineffective if the political will did not exist to back it. If, as the classical liberal tradition holds, the proper norms provide individuals with jurisdiction over their significant actions – with, that is, sovereignty – responsible individuals will be the first to become involved in political action.

It is not enough to learn the true principles of justice; it is also vital to apply them. And applying them is not possible without widespread (not necessarily universal) agreement – to wit, a social compact or contract. The compact and the institutions and processes it generates are to be the

method by which political norms are upheld and enforced in society. That method – in the Western legal tradition referred to as ‘due process’ – is itself always open to evaluation. When consent secures due process, something enormously valuable is secured: the prospect of success in the maintenance of justice.

Social compact theory fails as the first word about social and political norms. A social compact cannot suffice as *the* grounding of how we ought to comport ourselves in each other’s company. Our agreement, and the means of implementing our agreement, can be very important. But mere agreement does not establish what is socially or politically right. For that we also (and more fundamentally) need a clear, if general idea of how we ought to live.<sup>24</sup> And then, yes, we can all get along.

## Notes

- 1 Indeed, even when one considers discussions such as this one, one of the first questions that comes to mind is: ‘Is the author right or wrong in dealing with this topic?’ It seems to arise quite apart from any *agreement* about standards.
- 2 Immanuel Kant, *Metaphysical Elements of Justice*, trans. John Ladd (Indianapolis, IN: Bobbs-Merrill, 1965), p. 80.
- 3 Immanuel Kant, *Werke* (Berlin: Bruno Cassier, 1914), Vol. 6, pp. 380–81 (my translation).
- 4 John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971), p. 36.
- 5 Hobbesian natural rights are, strictly speaking, non-normative – unlike Lockean ones – but a feature of the life-sustaining innate drives of those in the state of nature. Some will dispute that Hobbesian rights are non-normative but at the price of neglecting a crucial element of morality, namely, the capacity to freely choose whether to take one or another action. Such ‘moral’ theories are actually at most theories of value or good, not theories of rightly or wrongly chosen conduct.
- 6 For a survey, see Shirley Robin Letwin, ‘Modern Philosophies of Law,’ *The Great Ideas Today* (Chicago, IL: Encyclopedia Britannica, 1972), pp. 105–53.
- 7 John Rawls, ‘The Independence of Moral Theory,’ *Proceedings and Addresses of the American Philosophical Association* (Newark, DE: University of Delaware, 1975), p. 5.
- 8 *Ibid.*
- 9 Immanuel Kant, *The Philosophy of Law*, trans. W. Hastic (Edinburgh, 1887), reprinted in *Great Books of the Western World* (Chicago, IL: Encyclopedia Britannica, 1952), vol. 42; p. 436.
- 10 *Ibid.*, p. 398.
- 11 *Ibid.*, p. 419.
- 12 Tibor R. Machan, ‘A Note of Independence,’ *Philosophical Studies*, 30 (1976); pp. 419–22. Natural law and rights theories achieve what the veil of ignorance aims for, namely the securing of moral equality, but only for the purposes of understanding political life. They focus on human nature, something we all share, but not at the expense of ignoring individual differences or pretending that they do not exist.
- 13 Narveson noted this in personal email exchange (December 1996).
- 14 Rawls, ‘The Independence of Moral Theory,’ p. 21.
- 15 Jan Narveson, *The Libertarian Idea* (Philadelphia, PA: Temple University Press, 1989). Another prominent social contract theorist is Tristan Engleheart, a specialist in bio-ethics and author of several books on the topic.



- 16 Ibid., p. 131. Narveson appears to be talking here about ‘the principles of morality,’ yet in the earlier mentioned personal email correspondence he states that ‘social contract theory is quite obviously only aimed at interpersonal rules which are indeed “norms of community life.”’
- 17 Ibid. Personal email correspondence.
- 18 For example, Steven Hicks, *Explaining Postmodernism* (Tempe, AZ: Scholargy Custom Publishing, 2004).
- 19 Similar difficulties face pure democrats – if majority rule *establishes* the soundness of legal or political principles, how would one defend these principles to those about to embark upon participation in the democratic process?
- 20 As an example, consider Edward Pols’s recent book, *Mind Regained* (Ithaca, NY: Cornell University Press, 1998), which argues for a fundamental reconsideration of the scientific, empiricist, and behaviorist orientation concerning theories of mind as well as the foundation of human moral life. In particular, the work mounts a frontal assault on the belief that teleological explanations of human action are unfounded – a belief underlying accounts of the normative dimensions of human life framed solely in terms of drives and motives.
- 21 Narveson’s email.
- 22 This is why a constitution of individual rights does not require full explicit consent of all those who live under it, any more than one requires the consent of a mugger to defend oneself against attack. See, for more on this, Randy E. Barnett, *Restoring the Lost Constitution* (Princeton, NJ: Princeton University Press, 2004). This is also the best reason for why the military of a free country is not authorized to carry out wars of liberation, as *per* President George W. Bush’s grand plan to liberate the world from tyrants. For more, see Tibor R. Machan, *The Passion for Liberty* (Lanham, MD: Rowman & Littlefield, 2003), Chapter 13, ‘Military Defense of a Free Society.’
- 23 See Tibor R. Machan, *Individuals and Their Rights* (LaSalle, IL: Open Court Publishing Company, Inc., 1989). See also Tibor R. Machan, *Classical Individualism* (London: Routledge, 1998).
- 24 For a full treatment, see T. R. Machan, ‘Individualism and the Problem of Political Authority,’ *The Monist*, 66 (1983); pp. 500–16 (which is also Chapter 7 of, *Individuals and Their Rights*). Why, for example, would it be wrong to contract for the use of some third party who has not consented? Because that party has rights and, regardless of any contractual determination, it is wrong to violate rights.

The concept of ‘meta-norm’ is advanced by Douglas B. Rasmussen and Douglas J. Den Uyl, *Liberty and Nature, An Aristotelian Defense of Liberal Order* (LaSalle, IL: Open Court Publishing Company, Inc., 1991). It means those norms the function of which is – in organized human communities or systems of justice – to enable other norms, those which directly guide action, to be freely and well practiced.

## Chapter 24

# Against Fairness

Everyone has been told that life isn't fair and generally it is deemed unwise to insist that we all get the same breaks – good health, good looks, a pleasant region in which to live, parents who are responsible and loving, as well as well off, and the rest of what is generally hoped for by most. It is, however, also argued by some that what most of us really want isn't happiness at all but comparable advantage, the condition to be as well off as the next person, at least.<sup>1</sup>

Some prominent political thinkers – for example, Rousseau – have made the more serious argument in support of a very strong moral, even political, imperative that people – in a society or throughout the world – must be treated fairly, as basically equal and with equal benefits and burdens for them all. Among those today who promote this idea explicitly is Kai Nielsen,<sup>2</sup> Ronald Dworkin,<sup>3</sup> and Peter Unger.<sup>4</sup>

The policy implication of this view is extensive and continuous wealth redistribution. No one has the right to keep extensive assets, for example, that he or she came by either *via* hard work, good luck, or the contributions of others. A beautiful model, especially, who gains considerable wealth because millions of others wish to pay to see her, for example, is to be taxed extensively and the funds taken from her are to be spread out to others who do not enjoy this advantage, who are disadvantaged. Even a very hard-working executive, paid a large salary with bonuses because he or she has successfully put a corporation on a firm economic footing, may not keep these earnings but is taxed progressively – not proportionately – and the funds are to be redistributed by politically appointed bureaucrats (though not before they are paid for this work quite handsomely). Someone who is lucky and wins a huge amount of money in a lottery must also part with a substantial portion of his or her winnings and that, too, will be redistributed. As Unger puts the point, 'On pain of living a life that's seriously immoral, a typical well-off person, like you and me, must give away most of her financially valuable assets, and much of her income, directing the funds to lessen efficiently the serious suffering of others.'<sup>5</sup>

All in all, the ideal of fairness or equality doesn't even allow the sort of differences in wealth and poverty that would remain after the familiar taxation policies of most welfare states – they do not go far enough, the champions of these ideals such as Unger argue. There are various philosophically interesting reasons offered why this ideal really is a political imperative and why the law ought to be guided by it. One reason is hinted at in John Rawls' discussion of whether people deserve the wealth they obtain in market transactions.<sup>6</sup>

Rawls claims that they do not because none of us really earns anything since we are basically socially conditioned to be hard-working, entrepreneurial individuals.<sup>7</sup> Our ambition or effort really isn't something we cultivate in ourselves so that we should be rewarded for it. It is entirely accidental who will be ambitious and who will not, so leaving it at the original distribution that comes from voluntary exchanges must be unfair. Nagel, explaining a possible global implication of Rawls's position, tells us that 'The accident of being born in a poor rather than in a rich country is as arbitrary a determinant of one's fate as the accident of being born in a poor rather than a rich family in the same country.'<sup>8</sup>

But Rawls himself rejects this implication because, as Nagel explains,

The important point for our purposes is that Rawls believes that this moral principle [of fairness] against arbitrary inequalities is not a principle of universal application ... . Rather, in his theory the objection to arbitrary inequalities gets a foothold only because of the societal context. What is objectionable is that we should be fellow participants in a collective enterprise of coercively imposed legal and political institutions that generate such arbitrary inequalities ... . One might even say that we are all participants in the general will. A sovereign enterprise for mutual advantage.<sup>9</sup>

So, some kind of collective or state decision, in which of course not all take part – as in, say, the decisions of the Rotary or Elks Club, where a good deal of wealth redistribution goes on with full consent of all members – authorizes this equalization process within a given society.

Why is this a sound idea? No clue other than the assumption, entirely unproven, that such collective decisions (*via* the Rousseauian general will) are just. Yet this is hardly a proof of the Rawlsian justice as fairness stance. As David Gordon points out, 'Nagel fails to see this obvious point because he regards the sovereign state as the only way, under modern conditions, for people to escape from a Hobbesian condition of anarchic violence.'<sup>10</sup> As with other egalitarians, such as Dworkin, the state is a given and requires no moral justification. In consequence, its scope, too, remains unlimited other than by the collective or state decision process.<sup>11</sup>

The second argument in support of fairness rests on intuition: many feel deeply that it is simply natural for us all to share in the common wealth of society – we know this to be so intuitively. But this argument is a really bad one and I will not spend much time on it other than to note that intuitions are notoriously unreliable guides to what we ought to be doing. As the writer W. Somerset Maugham pointed out, 'intuition, [is] a subject upon which certain philosophers have reared an imposing edifice of surmise, but which seems to me to offer as insecure a foundation for any structure more substantial than a Castle in Spain as a ping-pong ball wavering on a jet of water in a shooting gallery.'<sup>12</sup> Ernest W. Pettifer makes clear, in the following passages, why Maugham is right:

To us today the revelations of the legal murders and cruelties connected with the trial of children are revolting. We have become so habituated to the kindly and even anxious atmosphere of the Children's Courts, that it is hard to believe that the full ceremonial, the dread ordeal, of the Assize Courts could have been brought into use against little children of seven years and upwards – judges uttering their cruel legal platitudes; the chaplain sitting by assenting; the Sheriff in his impressive uniform; ladies coming to the Court to be entertained by such a sight – the spectacle of a terrified little child about to receive the death sentence which the verdict of 12 men, probably fathers of families themselves, had given the judge power to pass.<sup>13</sup>

In short, intuitions are in constant flux and, based on them, slavery had to have been fine in one age, not in another, as with the abuse of women and children and prisoners of war, to name just a few areas wherein we clearly seek for moral stability but aren't provided with it by intuitions. Intuitions – or as they are better known, common sense – can be an initial clue to where the truth lies but it cannot be decisive.

Yet another argument is a serious challenge to individualism and individual rights. It maintains, along the lines we already saw in Nagel, that people are by their very nature parts of a larger whole – society, tribe, humanity, the ethnic group or the community – and so belong to a group the members of which are owed loyalty and solidarity from them. Socialists like August Comte and Karl Marx held this view, as do some contemporary communitarians like Charles Taylor. These thinkers insist that the classical liberal polity rests on the false belief in atomistic individualism. This holds that we are independent, self-sufficient beings who can do without society altogether and for whom social relations are entirely optional. Such a view is similar to what some economists work with as they analyze market relations, but critics claim classical liberals rest all their ideas on it.

This ant-colony/beehive notion of human social life gains some support from the Aristotelian idea that we are all essentially social. But to take it to where socialists and communitarians do is an extreme leap. It denies that individuals can form ideas of their own, govern their own lives in the light of these ideas and be responsible for the result. Others should not be burdened if they live in misguided ways. And it is wrong to believe that we are obligated to shoulder burdens and share rewards, as if we did belong to some natural club or tribe. But fairness or equal treatment does follow if we do, so this idea is often invoked to support the redistributionist state.

In fact, though we are social beings, there is an essential individuality to our lives as well, and this demands that we enjoy sovereignty in how we live, rather than involuntary servitude to people with whom we did not chose to associate. As such, it is not unfair at all to be better off than others – they aren't owed our lives and labors, contrary to how egalitarians think.

Concerning fairness or equality, one reason in our time that these seem such ubiquitous imperatives is that in a reasonably abundant society children

grow up being treated rather fairly by parents who owe all of them (in the family) decent treatment. Just as a teacher is supposed to attend to all of his or her students – having in effect made a promise to all of them to serve them with his or her skills – so parents have basically promised their kids to treat them equally well, provided they have the wealth to do so.

But all of this is highly conditional and by no means basic – it is the *responsibility* to keep the promise to provide service or good rearing that is. Yet having grown up with the justified expectation, based on the promise, of equally good treatment or fairness from parents and teachers, it makes some psychological sense that this expectation would be extended to governments that claim to be providers for their citizens – not just providers of equal protection of their basic rights to be free, but of whatever governments (politicians) promise (in a welfare state, for instance).

Yet this expectation is misguided for two reasons: the government is not a parent, and governments should not attempt to provide citizens with everything they would like.

The Rawlsian case is a bit more complicated because it rests on a very controversial yet widely championed idea in our time, namely, determinism. This is the idea that all people behave as they must, based on the factors that impel them to do so. Whether because of genes, evolutionary forces, peer pressure or whatever, there is a widespread idea, drawn from extrapolation from classical physics, that none of us is free and responsible and thus deserving of either gains or losses. It's all a matter of accident.

Paradoxically, however, from this picture, based on a deterministic view of human life, a moral conclusion is drawn that is incompatible with determinism: namely, that we all ought to work to fix the accidental distribution of benefits and harms, gains and losses, by means of a political order that is guided by fairness. Since 'ought' implies 'can,' this imperative cannot be reconciled with determinism.

But, just as Kant believed that a deterministic (phenomenal) world coexists with a (noumenal) realm where choice is possible, so Rawls and his followers embrace this two-world picture, one in which determinism rules, and another in which freely chosen moral and political conduct would remedy matters and where those opposing such remedies are to be morally faulted for their stance.

These last points not only indicate the paradoxical nature of the Rawlsian-based fairness imperative but also undermine it. It turns out that we are after all, moral agents and we can act in ways that make us morally deserving, quite possibly even deserving of greater wealth than what others, lacking such desert, obtain.

Furthermore, there is a *non sequitur* in this version of the fairness imperative: just because one doesn't deserve some portions of one's assets, it doesn't follow that others may take them from one. One doesn't deserve a lot of things which others have no authority to take from one – say, an extra kidney, a good second eye, one's good looks or talents, and so on. And many

of these assets are possessed by individuals with no one seriously considering taking them without their consent; yet these are serious sources of inequality – life's many instances of unfairness, if you will – inasmuch as those who lack them often desire and could benefit from them a great deal. A homely person would want quite badly to be beautiful; someone without any musical aptitude may eagerly desire it, and someone who lacks athletic prowess might want to gain and benefit from it considerably.

Yet, even if we were to leave the matter with intuitions, it is clear that few would claim that their intuitions tell them they could deprive those who possess these advantages. Such intuitions do not seem to be the province of most people and tend to be induced by a prior embrace of certain moral notions. The focus on wealth redistribution, in any case, is not matched by any similar focus on other assets that would enrich people who lack them. Whatever advances those lacking the assets might make in their lives is pretty much left to various types of initiative, including generosity, charity, and ingenuity.

For these reasons – probably among others that have to do with the debilitating nature of trying to implement an egalitarian regime – the fairness imperative is grossly misguided. It is also impossible, since in the effort to accomplish the massive redistribution of benefits and harms, those who take on this task obtain an inordinately greater measure of power over others. That, in turn, is the most insidious inequality or unfairness that a human community can contain.

## Notes

- 1 This, roughly, is the theme of Richard Laynard, *Happiness, Lessons from a New Science* (New York: The Penguin Press, 2005). But see also Helmut Schoeck, *Envy: A Theory of Social Behavior* (New York: Ardent Media, Inc., 1966; Indianapolis, IN: Liberty Fund, Inc., 1987).
- 2 Kai Nielsen, *Equality and Liberty: a Defense of Radical Egalitarianism* (Totowa, NJ: Rowman and Allanheld, 1985).
- 3 Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Cambridge, MA: Harvard University Press, 2000).
- 4 Peter Unger, *Living High and Letting Die: Our Illusion of Innocence* (New York: Oxford University Press, 1996).
- 5 *Ibid.*, p. 134.
- 6 John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971).
- 7 *Ibid.*, p. 104. Rawls believes that the assertion that we 'deserve the superior character that enables us to make the effort to cultivate our talents is ... problematic; for such character depends in good part upon fortunate family and social circumstances in early life for which we can claim no credit.'
- 8 Thomas Nagel, 'The Problem of Global Justice,' *Philosophy & Public Affairs*, Vol. 33 (April 2005), p. 119.
- 9 *Ibid.*, pp. 127–8.
- 10 David Gordon, 'Indifference to the World,' *The Mises Review*, Vol. 11 (Spring 2005), p. 9.

- 11 Thus, a country may have a limited monarchy or democracy, or an unlimited or absolute one, but these are not requirements of justice, only those of the general will.
- 12 W. Somerset Maugham, *A Writer's Notebook* (Baltimore, MD: Penguin, 1967), p. 325.
- 13 Ernest W. Pettifer, *Punishments of Former Days* (East Ardsley, England: EP Publishing, Ltd., 1974), pp. 35–6.

# Epilogue

Libertarianism asks: what are the most basic principles of community life, of interacting with one another as human beings? What are the minimal but indispensable prerequisites of moral coexistence among the members of a society? When other persons are encountered, how must they be treated – and what actions are they entitled to take if such treatment is not forthcoming?

Of course, there is much more to living than abiding by basic principles of human interaction. There is much we do that pertains to ourselves alone – choosing a career, selecting flowers for our gardens, pictures for our walls, what to eat for breakfast, and so on. There is much we do that pertains specifically to our own families, friends, clubs, and other associations. The activities of our lives are not strictly political matters, but they exist within the framework established by politics. In pursuing our lives, we are obliged to respect established political principles (when those principles are just). When we engage in sports, commerce, science, and the like, we are obliged to do so without violating the rights of others. None of us must use unwilling people for medical experiments, steal our breakfast, or plagiarize another's novel or scientific report.

Besides such requirements, which may be enforced in order to uphold the conditions of civilization, a great deal else must be heeded in order to live well. Although these principles of good living may not be political matters as such, they can and often do relate to politics.

Our political ideas and ideals will be largely guided by our nature as human beings. Politics also depends on some psychological facts about us. Nor is it independent of various physical laws of nature: it is impossible, for example, for two persons to occupy the same space at the same time. Sociology, economics, history and other disciplines all concern what may be of political importance. One need only consider that the age when someone may take part in political decision-making or reach maturity with respect to criminal responsibility will have an impact on political matters. The ecology of our lives – what can spell a danger to us in our relationship to our environment – will also bear on politics and law.

The libertarian does not deny the reality of gray areas and borderline cases. Not all questions can be resolved with Solomon's axe. But neither is the libertarian reduced to skepticism therefore, thinking that the tough cases make it impossible for us to figure out what we should do altogether or, more pertinently here, what are our basic rights.

The story of how we must interact in human communities is not a finished one – it cannot be. People create so much, some of it quite new and unanticipated, and the rest of reality, too, proceeds to unfold in often



unexpected ways. So the necessity of extending our principles, adjusting them to new facts, refining and tweaking them as our understanding is improved or amended, is simply a fact of life. An instrument like a constitution must not be framed in terms that pretend to be final. It must be given support by way of the forums of case law. When wisely framed, its terms need not be either ambiguous or impossible to extend to future problems.

What the libertarian claims is that respect for human nature – the freedom of men and women to think and to govern themselves unmolested, with their individual sovereignty intact – is the best policy to foster in human communities. This is the principle I have defended in these pages.

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