

Ordered Anarchy
Jasay and his Surroundings

Edited by
Hardy Bouillon
and
Hartmut Kliemt

ORDERED ANARCHY

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Jasay and his Surroundings

Edited by

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ASHGATE

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Hartmut Kliemt, born in 1949, received degrees in management science and philosophy. After holding positions as research assistant in operations research, and philosophy of law, as well as temporary professorships in Munich and Frankfurt, he became full professor for practical philosophy at Duisburg in 1988. Since 1992 he is also an adjunct research associate of the Center for Study of Public Choice in Fairfax, VA. Since 2006 he is professor for economics and philosophy at the Frankfurt School of Banking. He has published articles and books on political philosophy, health ethics and economics, and, together with Werner Güth on game theoretical topics. Jointly with H. Geoffrey Brennan and Robert D. Tollison, Kliemt has been co-editor of the *Collected Works of James Buchanan*.

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Jan Narveson, professor emeritus at the University of Waterloo in Canada, and Officer of the Order of Canada. He is the author of *Morality and Utility* (1967), *The Libertarian Idea* (1989/2001), *Moral Matters* (1993/1999), *Respecting Persons in Theory and Practice* (2002), and some hundreds of articles on moral and political theory and practice, and engages in many seminars, conference presentations, and colloquia in several countries. In nonacademic life, he is the founder and president of the Kitchener-Waterloo Chamber Music Society, in which role he sees to the presentation of some 50–60 chamber music concerts in a typical year in his own home in Waterloo.

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Foreword

Liberalism has become a term that, like the American sports cap, fits all. It is applied indiscriminately to Socialist positions as well as to Libertarian ones. Given this wide range of application it is hard to say what the distinctive common features of all these diverse approaches might be. But there are certain kinds of family resemblance and certain centres of gravity which impose some order on the specter of in the widest sense of that term “liberal” positions. The centers of gravity are presumably best characterized by naming certain authors whose works stand out as paradigms of specific traditions. On the one hand, there are contractarian liberals. John Rawls – at least if his concept of the priority of liberty is not taken as seriously as it should be – may stand in for the somewhat leftist modern variant of contractarian Liberalism, James Buchanan for centrist classical contractarian Liberalism, Robert Nozick for contractarian Libertarianism. On the other hand, there are Humean non-contractarian liberals. In the Humean tradition of Liberalism, Ken Binmore – who strangely and as we think mistakenly calls his Humean approach “contractarian” – provided the Whiggish, the Hayek of the “Constitution of Liberty” the centrist, and Anthony de Jasay the conservative libertarian paradigms.

All the aforementioned authors provoked rather extended discussions. Jasay is no exception to that but as a relative late-comer who started to write on fundamental issues of political philosophy only after turning 50 (see on this the essays by James Buchanan and Ian Little) he did not yet receive the full attention he deserves. This volume tries to make some progress in this regard by focusing on the dominant Jasayan themes of “ordered anarchy.” It can emerge from individually rational pursuit but has to be defended “against politics” and the allegedly helping though in the last resort destroying hand of the state. For Jasay as for John Stuart Mill there is nothing more dangerous than the illusion that in democratic governments it is “us” who govern and therefore individual liberty is secure. The “rule of submission” whose force derives from the alleged legitimacy of so-called “self-governance” is a threat to liberty and so is our intellectual submission to the prevailing tides of thought. Studying Jasay’s work is a good counter measure against the latter kind of intellectual submission and we hope that the contributions to this volume may facilitate this.

Hardy Bouillon and Hartmut Kliemt

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PART I
Introduction

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Chapter 1

Introducing Tony de Jasay

James M. Buchanan

The book, *The State*, was advertised in the *Times (London) Literary Supplement* in early 1985. Contrary to my usual book-buying habits of the time, I ordered the book based on its promised content. I was pleasantly and interestingly surprised. Here was a book by someone of whom I had never heard—a book that was provocative in its argument and sparkling in its style, even as it seemed, somehow, out-of-date by several decades. I made an initial effort to contact the author, but was not successful. I asked one of my very few French friends, Henri Le Page, who could offer me no help.

I did not follow up the initial search (there was no Internet at that time). Several months later on a hot summer's day while I was, literally, hoeing my cabbages, I received a phone call and a British voice said, "I am Ian Little, and I understand you have been inquiring about Tony Jasay." I did not know Little personally, but I knew with whom I was talking immediately, since I was familiar with his work in welfare economics and especially his earlier critique of Arrow. Little told me that he had been Anthony de Jasay's tutor at Oxford, along with details of Tony's subsequent career. He explained that Tony had recognized early on that, for a right-wing Hungarian-born economist, the prospects for academic employment in Britain would be slim, thereby prompting the shift to France and a successful career in investment banking. With early retirement, Tony was able to return to his first love, the world of ideas, a return punctuated by the publication of *The State*. The apparent time lapse in analytical jargon was satisfactorily explained.

Let me now depart from the direct de Jasay narrative in order to justify and explain my title. In the 1970s, Neil McCleod, as president of Liberty Fund, was seeking avenues through which the basic ideas of classical liberalism might be re-examined and brought to the widened attention of intellectuals and academicians everywhere. I suggested to Neil, who had himself been involved in the earlier efforts, that Liberty Fund sponsor a new series of long conferences modeled, in part, on the successful Volker Fund conferences of the 1950s. In my entrepreneurial role, I also suggested that our Center for Study of Public Choice, in Blacksburg, might organize an initial conference. Along with my colleague, Geoffrey Brennan, who did much of the chore work, then and later, we inaugurated the series in 1977, with Robert Nozick as one of our three main lecturers. These long conferences, more than a week in length, were continued as annual events until our center shifted to Fairfax in 1983. Over these years, we did, indeed, manage to attract several first-class scholars as primary lecturers.

Soon after the shift to Fairfax, Geoffrey Brennan returned to Australia, and Viktor Vanberg assumed the role as primary organizer of the annual conferences, under my general supervision, and, also, the length was somewhat reduced. After my own

somewhat excited reading of *The State*, Anthony de Jasay seemed to me to be a “natural” for a primary lecturer role. I proceeded to invite him for the July 1986 conference.

On 9 July 1986, Anthony de Jasay gave his first lecture at the Liberty Fund conference in Fairfax, Virginia. From my own journal’s notes, written at the time, the lecture was “discursive, rambling, and quasi-incoherent,” and the discussion “too semantic.” I learned later, from Tony himself, that the lecture was his very first “performance” before a live academic audience in more than two decades. It is little wonder that the lecture was not an outstanding success. By comparison and contrast, Tony really came into his own in the coffee breaks, receptions, meals and off-conference talks generally. Here, again my notes say that he is a “funny man, a joker, whose cynical, skeptical view of the world is indeed engaging.”

I deem it one of my entrepreneurial accomplishments to have introduced Anthony de Jasay to the wide, wide world of those who stake claims to being first-hand dealers in ideas, who transcend provincial and disciplinary boundaries, and, to be brutally honest, who continue to be subsidized by those whose respect supercedes their understanding. Once launched into this world, we know that Tony, despite being a late-comer, has more than matched the early promise.

Return to Ian Little’s initial reference classification of de Jasay as a “right-wing economist.” On careful consideration, neither part of this term is accurate. Tony surely does not qualify as an economist today, given the sorry state of the discipline as practiced. His work would perhaps best be classified as political philosophy or even as philosophy of science despite his early education as an economist. And the right-wing epithet scarcely applies in the modern environment of political discourse, where the term “right-wing” implies some prior ideological commitment. But perhaps Little may be excused here, because in the rhetoric of the 1980s with the residues of socialism’s fatal conceit still omnipresent, anyone who challenged collectivist efficacy, on any grounds, was likely to be labeled as right-wing, or worse.

The second entries in my 1986 journal are accurate. Tony Jasay is the thoroughgoing skeptic, who stands bemused at the absurdities around him that pass muster in putative academic-intellectual discourse. And his contribution toward clarification of the ongoing discussion cannot be questioned. He fills the role of the skeptic well, and especially as he does so with great good humor. We sense that he is indeed laughing at the fools, whom he suffers gladly, almost as his meat and drink.

Personally, however, I remain puzzled about the ideas left unsaid, those that go beyond the realm of folly and possibly verge onto constructive dialogue. Does Tony himself think of his work as cautionary, as a necessary cleaning up of the linguistic and conceptual landscape before genuine societal improvements can take place? Such a stance would allow progress to remain within the possible. Or does he consider his acute and often persuasive observations to drain all hope from the Enlightenment dream? Are we headed back to the jungle?

A mutual friend, Marsha Ard, asked me: “What would be Tony’s take on the November 2005 French riots?” Perhaps it is a reflection of my respect for Tony’s originality and independence that I responded, “I have no idea.”

Make no mistake, however. Anthony de Jasay has made a difference after his re-entry into the world of ideas. And, as noted, I am personally proud of the small part I played in the launching.

PART II
Principles of Ordered Anarchy

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Chapter 2

Rights, Liberties, and Obligations

Hardy Bouillon

Introduction

It is a real delight to comment on some ideas of one of the greatest social philosophers of our time. In fact, I do not hesitate to confess that to me he is not one but *the* greatest social philosopher of our time. On a personal note, I would add that not only is he a man of admirable good manners, which these days one hardly finds accumulated in a single person; Anthony de Jasay is also a noble and gentle man of the old school who lives what he preaches. He likes himself and others to keep an agreement, and he dislikes himself and others to breach it. This might explain to some degree the emphasis with which he argues in favor of agreements and its binding force. However, far be it from me to dabble in psychological explanations why an author of his stature selects the subjects he likes to choose.

Jasay is a most precise thinker, *and* a most precise reader. I remember one of his comments on a passage that contained a sloppy use of the word “naturally.” In fact, in the sentence in which I wrote it, it served as unnecessary verbiage, even worse, it was misleading. All this he revealed without compromising me by simply writing in the margin “why ‘naturally?’”

It is the way he puts it, which in itself calls for admiration. This applies to his own and most original system of ideas as well as to his manifold criticisms of competing intellectual frameworks. His criticism is always sharp, often amusing, but never invidious. Take, for instance, sentences like the following one. Alluding to constitutions, he wrote: “It should come as no surprise to students of human nature and the history of thought that some ideas are credited with a significance rather out of proportion with their intrinsic content.”¹ And with respect to politics, he states: “The intrinsically dangerous, naked-razor nature of politics arises, not from politicians being cynical and bureaucrats incompetent, though it surely does not help if they are.”² Finally, referring to Locke’s famous provisos of the original appropriation of land, namely “mix of labour” with the land and leaving for late-comers “enough and as good,” he bluntly, but also elegantly, says: “The latter proviso can be dismissed as one that is impossible to fulfill except in fanciful conditions of abundance, where property rights are irrelevant in any case, so it does not matter how valid they are.”³

¹ Anthony de Jasay, “The concept of rule-bound collective choice and the idea of constitutional safeguards,” in: Hardy Bouillon (ed.), *Do Ideas Matter? Essays in Honour of Gerard Radnitzky* (Brussels, 2001), p. 55.

² See Anthony de Jasay, *Choice, Contract, Consent: A Restatement of Liberalism* (London, 1991), p. 114.

³ *Ibid.*, p. 72.

Even the titles of his papers are telling. Take “Justice as something else,” “The cart before the horse,” “The rule of forces, the force of rules,” “The twistable is not testable.” The list could be much longer, and behind these titles, the most valuable criticisms on contributions to political philosophy by Brian Barry, John Gray, James Buchanan, and Karl Popper are to be found.

His standing would not be the one it is, if in his writings the *pars destruens* were not matched by the *pars construens*. In other words, the criticism by Anthony de Jasay generates its strength from the ingenuity of his approach to social philosophy. His system of ideas is unique. He is a libertarian in a class of his own. If it were not misleading, I would call his position *individualistic contractarianism*. I doubt that he would be happy with this branding. His criticism of contractarianism added a flavor to the term which remains true even in another intellectual ambience. Therefore, I fear that perhaps he would disdain the term *individualistic contractarianism*. Whether the political philosophy (potentially) resting on this principle should be called individualistic contractarianism or not is anyway another matter.⁴

Rights Stem from Contracts

Out of the many insights we owe to Anthony de Jasay, I shall stress the following one.⁵ Jasay reminds us that rights do not fall from the sky, they are not self-evident nor in any way logically deducible from natural or social facts of life. Even if they would, they would not provide innate proof of the alleged unanimous consent of the parties involved. Jasay’s rights theory avoids this calamity. His position could be described by the slogan: Contracts breed rights, not the other way round.

It is exactly this starting point that allows us to say what establishes rights. To Jasay, “contract is their obvious, self-evident source, because only contracts provide proof that the correlative obligation has been *agreed to* by the obligor, hence its existence does not depend on controversial claims.”⁶

Jasay does not exclude other potential sources of obligations:

There is one clear case where the obligor can be placed under an unrequited obligation without unjustly harming his interests: when the obligation in question does not deprive him of any liberty, nor of any right, that *he would otherwise have had*. The obligation to respect the property of another acquired by “finders keepers” would be of this kind; the wider obligation to respect the *status quo* can be derived along the same lines ...⁷

⁴ I do not know if Anthony de Jasay uses any token for his position. Though in his *Choice, Contract, Consent* he clearly speaks in favor of “strict liberalism,” I wonder whether he would label his position this way. Strict liberalism may be a perfect name for the preferred outcome of an intellectual enterprise such as his, but it seems less appropriate to describe comprehensively the intellectual approach that gives birth to it. (In recent private conversation he called himself a conservative anarchist.)

⁵ Of course, it would be tempting to dwell on more, for instance the insight that public goods do *not* derive from a prisoner’s dilemma.

⁶ See Jasay, *Choice, Contract, Consent: A Restatement of Liberalism*, p. 91.

⁷ *Ibid.*, p. 92.

Nevertheless, he does *not* conclude that to respect the property of another acquired by “finders keepers” or any other unrequited obligation which does not unjustly harm a person’s interests is an obligation to which a corresponding right exists that is of the nature of a contractual right.

Thus, we arrive at a generating dilemma. (1) There are contractual obligations on one hand and non-contractual (unrequited) obligations on the other hand. (2) Non-contractual obligations consist of two classes, one that deprives the obligor of any liberty or any right, and one that does not. Hence, the latter class is not a *tertium quid* amongst contractual and non-contractual obligations, but a subsection of non-contractual obligations. Even to representatives of this class Jasay’s observance applies, that they “have a status that is, to put it as soberly as one can, not comparable to the status of contractual obligations.”⁸

Interestingly, while Jasay painstakingly emphasizes that rights should not be confused with liberties and rightly blames the fashionable “rightism” talk of causing confusions, he is less rigid when it comes to the use of obligations: While rights exist only as contractual rights, obligations can be either contractual or non-contractual. All I can say here is that it leaves me with some uneasiness to accept this asymmetrical use. Although he clearly distinguishes the two sorts of obligations, talking of obligations in both cases might give rise to confusion.

Freedoms, Rights, and Obligations

Notwithstanding the prior observance, it is the distinction between contractual and non-contractual obligations where the distinction between rights and liberties takes its beginning. Whatever a freedom is or is not, it is not a right. This to ignore is to misconceive one of Jasay’s most basic assumptions.

In addition to this assumption, Jasay repeatedly emphasized that rights deriving from contracts are only worth the paper on which they are written if the contracts are voluntarily agreed upon by all parties included. Along this line of reasoning, verbal or tacit agreements are valid only, if they are consented by all parties included. Consequently, forced contracts establish neither rights nor (corresponding) obligations.

While rights thus require some creationist activity, namely consent, freedoms do not, according to Jasay. If I am not mistaken, he does not explicitly define freedom in the singular,⁹ though he stresses, of course, that freedom includes the absence of coercion in a person’s set of feasible acts. The point he is making about coercion is the following:

Coercion is an intentional act by A, whether actual or threatened, whose effect is to change B’s set of feasible alternatives as to make his chosen alternative different from what A

⁸ Ibid., p. 93.

⁹ For those interested, I pondered on that question in a separate book, titled *Freiheit, Liberalismus und Wohlfahrtsstaat* (Baden-Baden, 1996), pp. 79–128. For a short version see my “Defining libertarian liberty”, in: Hardy Bouillon (ed.), *Libertarians and Liberalism. Essays in Honour of Gerard Radnitzky* (Aldershot, 1996), pp. 95–103.

presumed B's preferred alternative to be. Successful coercion must make B act otherwise than A thought that he had intended to act. It achieves this by intrusion into B's feasible set. Successful coercion alters the cost of alternatives so as to make B choose as A wishes, and not as A thought B wished.¹⁰

A point about this definition is that it does not lose its applicability if one replaces the term *coercion* either by *trade* or *seduction*. For what else does A, who intends to enter into trade with B or wants to seduce B, than perform "an intentional act, whether actual or threatened, whose effect is to change B's set of feasible alternatives as to make his chosen alternative different from what A presumed B's preferred alternative to be."

Be this as it may, to me two most remarkable aspects of Jasay's analysis of freedom are (a) that he assumes freedom to have an enabling condition ("It is trivial that the enabling condition of freedom is feasibility. I am, alas, not free to have a stately home, but the star football player surely is."¹¹) and (b) that man's liberties are faculties "that we suppose to exist until proof is brought to the contrary."¹²

(A), here I disagree. The reason for this disagreement might rest in different ways of looking at language. To me, feasibility is an enabling condition to power, but not to freedom. However mighty he is in pecuniary terms, the football player cannot buy a stately home unless such a purchase is feasible (unless he has someone who sells it to him, for instance). Also, freedom is an enabling condition to power. If a person is unfree (coerced by a third party), he has no access to the power he would have if he were free. I think it is advisable to separate these two enabling conditions of power.

(B) If I understand his reasoning correctly, he basically makes an epistemological argument. Unless there is proof to the contrary, a person is free to do what is feasible for him/her. Liberties do not need to prove their existence, but their denial does, because it is epistemologically and practically impossible to exclude the existence of any possible legitimate objection to the liberty in question, whereas it is relatively easy to request from the person denying to provide one case that supports her position.¹³

Thus, when it comes to the question whether or not a person is free to do X, for instance, when a challenger asserts that there is one or some reasons sufficient for prohibiting X,

¹⁰ See Anthony de Jasay, *Before Resorting to Politics* (Cheltenham, 1996), p. 26.

¹¹ Anthony de Jasay, "Freedom from a mainly logical perspective," in *Philosophy* 80/4 (October 2005): 565–84, p. 576.

¹² See Jasay, *Choice, Contract, Consent: A Restatement of Liberalism*, p. 93.

¹³ As Gerard Radnitzky has pointed out, this is an analogous case to methodology. Scientific theories can never be proved to be true. Over a period of time they can only be corroborated by tests and corresponding test statements. The potential to be falsified one day remains. On the other hand, given that a falsifying test statement is less problematic than the theory it claims to falsify, then the theory in question is falsified. That is what (Popperian) methodology requests.

In addition to that, Jasay also stresses the analogy to jurisdiction. The culprit is innocent until proven guilty.

[t]he proposer may well show each reason that is advanced to be insufficient, but new ones can always be construed. No matter how many he has rebutted, he can never demonstrate that none is left unrebutted. The case is one of the haystack containing infinitely many wisps of hay, any one of which may be concealing a needle. It is logically impossible to falsify that X is (or should be) unfree. Verification of it, however, is logically perfectly possible if the challenger can mount a strong enough case that at least one reason speaking against X is a sufficient one. In deciding whether X is free or unfree, the burden of proof is on the challenger who contests its freedom.¹⁴

I think this argument is valid.¹⁵ However, saying that the burden of proof should be with the denier of a liberty does not prove the existence of freedom in any normative sense. Or to put it this way, saying that you do not have a right to intervene in my freedom unless you prove your title, does not imply that I have a right to be free in the way I have a right to do things as the consequence of an existing contract. In other words, an action taken (only) in freedom has a different status than an action taken in accordance with an existing contractual right. Of course, an action can be taken in freedom as well as in accordance with an existing contractual right. Moving into the house one has just bought or doing the job for which one gets paid. All these actions are free and rightful.

In a way, freedom is similar to “finders keepers.” The freedom of A as well as the “finders keepers” principle place the obligor B under an unrequited obligation without unjustly harming his interest. Unfortunately both, the case of freedom and the “finders keepers” principle, cannot be made stronger. Freedom imposes obligations on others, and the status of these obligations is not comparable to the status of contractual obligations. The corresponding rights and liberties are likewise incomparable. Though it might be difficult in practical terms, universal individual contracting would be a way to give actions taken in freedom an additional status, namely that of rights.

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¹⁴ Jasay, “Freedom from a mainly logical perspective,” p. 574.

¹⁵ Notwithstanding the validity of this argument, I doubt that in the debate with loose liberals this argument is as strong as the argument in favor of contractual rights; whatever this objection may be worth. After all, the validity of an argument remains untouched by its potential as a useful weapon in an ideological debate.

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Chapter 3

Anthony de Jasay on Liberties and Rights

Jan Narveson

There are no writers on political matters who command my admiration more than Anthony de Jasay, whose acquaintance I first made in his remarkable *Social Contract, Free Ride*,¹ and so it has not been easy to find anything in his works known to me with which I disagree. In the present essay, however, I do want to suggest a need for correction or supplementation, or at least more argument. This concerns a very fundamental matter: the foundation of rights and duties, which arises in connection with his distinction of rights and liberties.

The point I wish to consider is his insistence that “the same word ‘right’” has been used in the social sciences “to denote two radically different types of relations between agents, objects, and actions. ... both when we mean a right and when we mean a liberty ...” The “great down-to-earth divide” between them, he says, is a

burden: both in the sense of cost and of the burden of proof. A right confers a benefit on its holder. In order for him to enjoy it, an obligor must fulfill the corollary obligation – which is generally onerous to some degree ... A liberty, on the other hand, is exercised without calling for specific performance by any other party; apart from negative externalities that may be generated by my using it, my liberty is costless to everybody else.²

His example, admirably chosen for the purpose, is the case of his typing his essay versus his having his secretary (if he had one) do so. The latter would be an exercise of a right stemming from the arrangement or contract between him and her: he then has the right to ask her to do this thing, and she a duty to do it. Indeed, she has this duty in consequence of his having the right—though in turn he has this, and therefore she that, owing to their having mutually concluded the agreement of employment in question. By contrast, in deciding to write his essay in the solitude of his study, his liberty depends only on three conditions: his being able to do it if he decides to, his being under no incompatible obligation, and on the “compatibility of [his] [...] exercise of this liberty with the exercise by others of their liberties.”³

This third condition is, as he says, not so easily specified. In particular, it brings up the possibly vexed subject of negative externalities:

Any feasible action of mine that is harmful to you ... for which redress is as a rule provided by convention or law, is a tort incompatible with your liberty. Beyond this core area, there is a less well defined belt of negative externalities, where the exercise of a liberty of mine – to smoke in public, to litter in the park ... – interferes with the liberties of others without

¹ Anthony de Jasay, *Social Contract, Free Ride* (Oxford, 1989).

² Anthony de Jasay, *Against Politics* (London and New York, 1997), p. 219.

³ *Ibid.*, p. 221.

providing a solid enough ground for remedy. My conduct in this twilight area, while clearly annoying to others, is not grave enough to call for redress.⁴

And he adds, in what may strike some as a cop-out, that “The arbiter of what is a tort (to be redressed) and what an externality (to be borne, even if with bad grace) is best taken to be social convention ... It is not a violation of the liberty of others, nor an occasion for legislation.”⁵ But this last assertion is, as he will surely appreciate in 2002, contestable—or at least, contested. It has been the occasion for much legislation since. And if he wishes to deny that it is such an occasion, then that is evidently a normative claim—though one with which I would concur. He can hardly be saying that it is *impossible* for legislation to be made concerning such things, since it has in fact been, often enough. (I think here, for example, of a question arising in a suburb of Minneapolis, U.S.A., as to whether a certain proposed law, requiring that employees even in strictly private workplaces refrain from smoking while on the job, should be rescinded.) He must think, rather, that this sort of legislation would be relevantly objectionable—as do I. But then, why is it? I would think that many, myself included, would indeed find such legislation a violation of liberty, that is, of the owners of those establishments. Would others not find it such? Or is it that they simply don’t care? Either way, I think, we have a problem.

What it comes to is that the claim that someone “has” a liberty is either a normative claim or not. Now, there has been imagined, by writers on legal philosophy since Hohfeld, a supposed category of rights called “liberty” rights, which have the interesting feature that they impose no obligations on anyone else. I have long objected that this is a muddle. The very point of rights is to impose obligations on others, and anything which does not do so is not a right and only misleadingly termed such. (The confusion perhaps began with Hobbes, who asserts a “right of nature” to do anything we please—and then backpedals furiously, seeing that this is equivalent to no right at all.) If we think that a *liberty* can be “violated”—that that kind of terminology is the right one to employ—then we imply that the holder of that liberty has, indeed, a right to it. It isn’t just that he is in fact able to do the thing—the first of Jasay’s conditions; it is also that someone who would act so as to prevent his doing this thing is thereby acting wrongly, that is, committing a tort, unless at any rate that person can point to some harm or violation of some other obligation which the other agent would be effecting by his action, in which case his right to do the same is denied.

All of which means that what Jasay thinks must, after all, really be that we do indeed have in general the right to do these harmless or only mildly annoying things which the exercise of our capabilities so typically consists in. This is what we libertarians regard as the general right to liberty.

And so I am inclined to deny that what Jasay claims is a confusion is so. One of the things we indeed can do and often actually do is to make arrangements with others which specifically impose obligations on them, as his secretarial example well exemplifies. But in saying that those who “violate” our liberty, which is to say,

⁴ Ibid.

⁵ Ibid.

who render it by their actions impossible or unnaturally costly to do the thing, are acting wrongly in doing so, is to imply that we have the right to do the thing, in the specific sense that their doing that sort of thing is such that others have an obligation to refrain from upsetting the course of action in question.

Now one line that some have taken is one to which Jasay also subscribes in the same article.

Justifying liberties as such is straightforward. They rest on three rough-and-ready normative propositions: that doing harm ought to be barred; that promises ought to be kept; and that subject only to these two propositions about torts and obligations, no one is entitled to prevent a person from doing what he chooses to do.⁶

He agrees that these norms are contestable, and have been “ceaselessly contested,” but says “Yet they still stand and preserve some of their appeal to common sense and to the liberal dispositions”—and then sweeps the subject (perhaps reasonably enough given the focus of that piece) under the carpet, saying “I do not propose to defend them here.” But by this time it is pretty clear that some kind of better defense than a blanket assertion of common sense is really needed, philosophically speaking—and also that the claim that liberties and rights differ approximately as noonday and midnight is not a sustainable idea. In truth, the distinction has evaporated and a right to liberty is being implicitly asserted.

There is, certainly, a distinction between classes of actions specifically covered by a relevant agreement made between one or some definite persons and one or some definite other persons, by which one becomes entitled to performance, the other being thereby subject to a duty to perform, and another class of actions not so covered. Is there any comparable structure, then, to the claim that we have a right to liberty? On the face of it, there is not. Obviously we did not at any time make a specific agreement with each other to refrain from killing and cheating. Nevertheless, I think it plausible to claim that there is such a comparable structure. Here we have Jasay in his study writing. He thereby imposes, we claim, no negative externalities of any sort on anyone—or does he? Well, the Leveller might maintain that in sitting at that desk, Jasay prevents others from occupying the same place, as they logically could and might actually want to. Why should we not say, then, that he is *imposing on the liberty* of others, despite the peaceableness of his activity? More generally, anyone in doing anything might thereby incite in someone else the desire to displace him in some way—to dispossess him of whatever items he might be employing in that action, including even his body. (The “right of nature,” says Hobbes, is to use anything, including “another man’s boddee”⁷) All such examples require us to firm up the distinction that Jasay invokes, between harming someone else and imposing some lesser “negative externality.” But to talk as he does is to imply that there is a sharp distinction here, and it is not so. A harm is a negative externality: person A, in harming person B, acts in such a way as to create what A, for some reason, conceives to be a benefit to himself or to some other party on whose behalf he takes himself to be acting, and yet his action makes B an involuntary co-producer of that good, but

⁶ Jasay, *Against Politics*, p. 225.

⁷ Thomas Hobbes, *Leviathan* (London, 1985), chapter 14.

without payment; or if, as might be less cumbersome, we talk of “public bads” as well as public goods, then the point is that A produces a bad in whose production B has and wants no part.

One may, as many appear to do, take the option of insisting that there can be no genuine account of this normative stance. But so long as some insist on denying it, as they so frequently do, I see no use in falling back on intuition or silence at this point. We must instead—or at least it would surely be nice if we could—forge ahead and find a reason that is genuinely and undeniably a good and sufficient reason for proscribing the actions in question—undeniably not only to those who already agree with the point in question, but also to those who claim to deny it. That may be a tall order, but it can hardly be one that there is no point or benefit in pursuing if it can be done.

In doing whatever I do, I present an opportunity for someone else to undo it, should it occur to him. This other person might simply hate me, or he might find it in some other way advantageous to engage in action that effectively prevents me from doing the thing. Why should he accept an obligation to refrain from so doing? He does have this obligation, or so we think; and yet he does not have it as a result of some specific arrangement with others.

... Or doesn't he? For any given action by person A, we can well enough imagine a society without a convention forbidding persons B from wantonly interfering with A's performance of that action. It is not quite so easy to imagine a society with no conventions prohibiting any performances of anything by anyone, though that is just what Hobbes attempts to depict in his construction of the “state of nature.”

Or does he? Some may think that Hobbes intends only to envisage a social condition with no political and (thus?) no legal system. But whatever his intentions on that point, it is a ready extension of the political idea to take it into the moral realm as well. The “moral state of nature,” as we might call it, would be that condition of society in which it is not considered wrong by anyone that anyone else does anything whatever, including acts that greatly affect someone else, for example by causing the latter's demise. In the case of Hobbes, it is not much of an extension, since he wants to argue that in the absence of government we would actually have no right against the deleterious actions of others—that those actions would not in fact be wrong. But Hobbes himself seems aware that he can't be serious about the latter point. He can't, because his Laws of Nature, as he calls them, are asserted as supplying the foundation for the agreement in which, he thinks, consists the justification of Sovereignty. Political theory rests on moral theory, in short—not vice versa.

The fundamental law of nature is, Hobbes tells us, a law in the general sense of a requirement of reason: “a Precept, or general Rule, found out by Reason, by which a man is forbidden to do, that, which is destructive of his life, or taketh away the means of preserving the same; and to omit that, by which he thinketh it may be best preserved.” It is just in that sense, then, that he proclaims his laws of nature, the first of which is claimed to be the fountainhead of all the others. That first law has it that “every man, ought to endeavour Peace, as far as he has hope of obtaining it; and when he cannot obtain it, that he may seek, and use, all helps, and advantages of War.” Endeavoring peace consists, as he has also assured us, simply in the absence

of war, or more precisely of aggression, since this first law assures us of a right to defend ourselves.⁸

The first law is asserted—but why? Clearly, in Hobbes’s view, the habit of attacking others is “destructive of his life”—that is, the life of the attacker. This is because of two things: first, the very great likelihood that those attacked will defend themselves, and that their efforts to do so will result in harm or loss to the attacker. But that likelihood depends, evidently, on the attacked person’s being capable of defending himself, either on his own or with the assistance of others who, Hobbes surmises, may be enlisted to help out in the matter. Hobbes has already asserted (in the previous chapter) a general condition of equality among people. The lynchpin of that assertion is this: “For as to the strength of body, the weakest hath strength enough to kill the strongest, either by secret machination, or by confederacy with others, that are in the same danger with himself.”⁹

It is to Jasay himself, more perhaps than any other recent writer, that we owe the rational reconstruction of the Hobbesian account. Aggressors deprive others of the necessary condition for their accomplishing anything whatever, namely *peace*, which is the absence of molestation and of the high likelihood of same. That each of us has an essential interest in such noninterference is obvious on reflection. Even thieves need noninterference with their thieving activities if they are to succeed; murderers don’t want to be prevented from murdering people. But the thief himself, since he engages in that very interference in relation to his victims, is acting, Hobbes thinks, unreasonably. For he invites, what he very often does encounter, namely serious resistance (and retaliation) by his intended victims. He might well do better to confine himself to peaceable ways of making his living. Those peaceable ways are likely to include a considerable amount of specific cooperation in various positive endeavors. But whatever along that line they might include—and it might be nothing, since there might be an option of solitary activity as well—the workability of it all rests on the prior condition of peace, without which we can do nothing, and thus cannot live.

Hobbes and various others have taken up the idea of a “social contract,” which would be the general terms of social living. The social contract is pretty obviously not one that we can be thought to have “signed” in any very literal sense. But that’s the point. It is an unsigned but rational treaty of all with all, that we will refrain from aggression, provided only that others refrain as well. (The idea was scarcely new with Hobbes; Epicurus before him espouses it, as does, nearly, Glaucon, a character in Plato’s *Republic*.)

Recent political thinkers attempt to expand the terms of this general understanding, to include very much more than sheer nonaggression. If we think these expanded terms are mistaken, we need to show why. I think this can be done. Obligations going beyond sheer nonaggression incur costs of a much larger order than the cost of nonaggression itself, to the nonaggressor. And there really is a question whether those costs are worth bearing. Jasay is right to point to costs entailed by what is normally called “obligation.” But there is also a cost to nonaggression, after all: we thereby

⁸ Hobbes, chapter 14.

⁹ Hobbes, chapter 13.

forego the advantages of theft, murder, and whatever other sorts of depredations we might engage in if we take a notion to. We do, yes: but those advantages are readily outweighed by the disadvantage of others inflicting similar costs on ourselves. When we think about it generally and abstractly, those costs are so palpable as to lend themselves to the thought that they are of a different kind from any other costs we might be made to bear. That would seem to be a phenomenological point of some sort, and a plausible sort. Few of us suffer from the horrors of peace—for example, of not engaging in the sort of violent activity that wars, in their busy moments, involve. But that we are not usually much aware of these costs does not mean that they are not such at all. On occasion, no doubt, every normal person is seized by an impulse to molest or despoil some other people, and on those occasions there may be a psychological cost of considerable magnitude in resisting the impulses in question. Even so, though, the realization that to succumb to such impulses is to invite similar behavior from others, which in turn leads to costs that are more than psychological, is enough to put most of us off from such succumbing.

In turn, the mark of obligation or duty is cost—but cost that is imposed on the bearer of the obligation, rather than voluntarily accepted by him. In doing what is a duty, we refrain from doing what might be advantageous or otherwise attractive; the cost of duty is essentially opportunity cost. It is wrong to say that if a duty is purely negative, that is, if it is simply a duty to avoid doing something rather than a duty to do something, then it has no cost. What is true is that it is usually very easy to comply with such duties, because you can comply with them without doing anything at all. Since doing something does take trouble and time, this makes it appear that there is no cost. But as we have seen, that is not relevantly true. Inevitably, there is an opportunity cost in suppressing the impulse to invade and destroy. It's just that it's a cost worth paying, socially speaking. And for this reason, we talk quite correctly of a right to liberty, which is a genuine right, as much as any that we incur by making specific agreements with others. More, really—for it underlies all the others. There can't be any thought of making the kind of ordinary transactions with each other, commercial and otherwise, that we so routinely do if we cannot meanwhile rely on not being knifed in the back, carried off in a sack, pushed into a ditch, or any other major alteration of our courses of action.

The duty to refrain from imposing costs on others is, by definition, the flip side of this right. Jasay tends to talk as though the duty to avoid these evil activities is self-subsistent. I disagree. The duty is founded on the right, not vice versa. Why should we agree with me on this matter instead of him (if, as I doubt, he really thinks that)? Why think that the right is in some sense the foundation of the duty, rather than vice versa?

This brings up what some regard as a large issue in moral theory. But I don't agree that it is such. It is odd to think of duties as being the *natural* quantity, the one that *gives rise* to rights. Rather, we have interests, desires, values, which we pursue in life, and if problems for our pursuit of such interests arise, then they do so in the course of our pursuits, rather than vice versa. We have duties only if it is advantageous for us to take them on, and what makes them advantageous are our general interests in life. Our duties reflect others' rights, but those rights are ones we are willing to accept on condition that the others respect ours. And the case,

overwhelmingly, is for general noninterference by others. The benefit of accepting this restriction, in the form of everyone refraining from invading and despoiling, very much exceeds the costs involved. And so, rationally, we accept the duties in question. But what we are claiming in doing this are really *rights*, the duties in question being the consequence. For a duty is not, in itself, something desirable to the duty-bearer, whereas a right is. My rights are your duties; your rights are mine. So the conceptual stage is set for a rational exchange.

It remains, of course, that our sheer ability to do this or that does not stem from any moral considerations at all. We simply are able (or not) to do various things: eat, walk, go to the movies ... But as soon as we begin to complain about others' violation of our liberty, we are into moral considerations. We insist that what those who thus violate are doing is wrong, relevantly objectionable. We cannot talk this way if talk of liberty is simply neutral and imposes no requirements on anyone.

But if it does impose requirements, then we need to know why. This in turn requires serious work on the logical structure of morals. I offer here a very brief account of the essentially Hobbesian ideas about this, which I presume Jasay would share with me. Morals are "memes," in the favored recent terminology: that is, ideas which are capable of influencing behavior, and capable of being socially conveyed, traded, expounded, inculcated. This particular sort of meme is a general rule of behavior, that is, a vectored depiction of sorts of behavior as being to be done or refrained from. "To do or not" takes in a considerable range, because it sounds on-off, but is capable of being refined and administered, so to say, in degrees. We do this by indicating approval or disapproval, and a tendency to react more or less strongly, to behavior in accordance with or contrary to the intended rule.

Morals are intended to be rules for all—all in the community in question, of course—but that community "in question" is expansible, the outer limit being, simply, everybody who is capable of understanding any of this sort of thing and responding to same. Which is to say, every normal person.

A moral theory needs to explain why we would want to have any such general rules at all, and in so doing, of course, explain, in a general way, which set of rules to have. It would enable us to generate new such rules and suggest repairs on or even rejections of old ones. Any such explanation must be an explanation that makes sense to the individuals who participate in the exercise—this being all there are in the way of rational beings capable of understanding and reacting in such ways.

The suggested rule is one calling generally for respect for other people. This involves taking the fact that others are harmlessly performing some action as sufficient reason why outsiders should not feel free to invade the people performing them. Such a general rule is one that every individual has a serious, major stake in supporting in his own case. There being billions of others around us who conceivably could engage in the harmful activities in question, as well as dozens or hundreds of nearby people who not only conceivably could, but who genuinely could, if they were so minded, make life difficult or impossible for us if they chose to do so, it behoves any rational person to get into the habit of viewing negatively those who make free to engage in harmful behavior, and supporting those who refrain from doing so even when it might have been locally advantageous to do it. We all have a major stake in this, in short.

There are said to be many rival accounts of morals: appeals to intuition, or religion, or to aristocracies or powerful subsets of persons. But none of those make any sense. Intuition explains nothing, but merely restates what needs explaining; religion is ultimately circular, since the gods being invoked are so only if they have adopted the desirable moral ideas one is plumping for; and any group of persons less than the whole are sure to be pushing their own interests against others instead of acting on behalf of all. So there is no real option to stating the case in terms of the major interests of all concerned and acting accordingly.

There is a tendency to go from there to some version of utilitarianism, identifying the “interests of all” with the sum of all interests, and plumping for maximization of this supposed sum. But that, as Jasay among many others have made painfully clear, is a nonsolution. The supposed sum is not one that any of us have a necessary interest in maximizing. What is needed is not the net sum of all good, but the common good. The rule of liberty is the only one that can credibly claim to be promoting the common good among all people, who differ so much in their particular goods. That common good is nothing more than the freedom to pursue one’s good as one sees it, within the restriction of allowing all others to do likewise. Everyone can see, taking the broadest view, that this is a rule whose observance by all would be good for each—and also one that requires, in order for this great utility to be realized, the adoption of the same attitude by all. And that means crediting everyone with, and inculcating acceptance of, a general right of liberty.

It is Jasay, perhaps more than any other, who has done so much to explain why individuals reacting to each other’s behavior is the basic social mechanism that can steer us to mutually optimal behavior, rather than the intrusion of a powerful state. Respect for other people’s freedom in daily contact is very much the norm. It is very nearly the opposite of the norm in politics, however: there, mere citizens seem to be regarded as fair game for a virtually unlimited level of intrusion. There the agents are equipped with powers to compel people to their wills as expressed in legislation and the like—and the baleful consequences of this indiscriminate disregard for personal liberty are everywhere to be seen.

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Chapter 4

No Exit: Framing the Problem of Justice

Tom G. Palmer

Recent years have seen a marked retreat from cosmopolitan liberalism in moral and political theory. What is remarkable is that that retreat has been carried out under the banner of liberalism. Many modern “liberals” (in contrast to “classical” liberals) have taken as their touchstone adherence to the redistributive welfare state. The obligations and benefits allocated by welfare states are normally limited to particular groups of subjects or citizens; they are not universal.¹

John Rawls has prepared the field for much of that retreat. In his books and various articles Rawls has combined powerful sources of legitimacy for institutions and practices—mutual advantage, fairness, and agreement—into one account: justice as fairness. When he stipulates that the principles of a just society “are those a person would choose for the design of a society in which his enemy is to assign him his place,” Rawls builds in a highly illiberal premise into his theory of justice by foreclosing the exit option.² What was implicit in *A Theory of Justice* is made explicit in *Political Liberalism*: in setting out “the context of a social contract,” Rawls insists that “membership in our society is given, that we would not know what we would have been like had we not belonged to it Since membership in their society is given, there is no question of the parties comparing the attractions of other societies.”³ Rawls finds that for his construction to work it must be restricted to “a structure of basic institutions we enter only by birth and exit only by death”;⁴ strikingly, “the question of our entering another society does not arise.”⁵ Rawls has attempted to generate allegedly liberal outcomes from a choice situation that is highly illiberal. Cosmopolitanism, universalism, and internationalism—defining characteristics of traditional liberalism—disappear in the Rawlsian enterprise. That disappearance represents a general trend in contemporary political theory. Communitarians, socialists, welfare statists, nationalists (and the various combinations among those) have been drawn away from cosmopolitanism for many of the very same reasons that Rawls posits “a structure of basic institutions we enter only by birth and exit only by death.” The case for preferring coercion over free association rests on an assumption that is both hardly self-evident and incompatible with core elements of

¹ Rights theorists traditionally distinguished “connate” and “adventitious” obligations: the former are universal and are justified on grounds of universal features of human life or sociality, whereas the latter are particular and accordingly require particular justifications, albeit according to universal principles. See Samuel Pufendorf, *The Political Writings of Samuel Pufendorf*, ed. Craig L. Carr, trans. Michael J. Seidler, (Oxford, 1994), esp. p. 51.

² John Rawls, *A Theory of Justice* (Cambridge, Mass., 1971), p. 152.

³ Rawls (1993a), p. 276.

⁴ *Ibid.*, pp. 135–6.

⁵ *Ibid.*, p. 277.

the liberal tradition. “Fairness” is a solution to a problem that was slipped into the specification of the choice situation by fiat, by arbitrarily excluding well established, well understood, and widely employed principles of free association from the options available to choosers.

The sleight-of-hand involved is remarkably similar to that typically involved in specification of the choice situation governing the provision of public goods. Once a decision has been made to produce a good on a non-exclusive basis, it is then asserted that the good cannot be produced through voluntary, uncoerced cooperation. Or the demonstration begins by assuming the existence of a good from which consumers cannot be excluded (or can only be excluded at some cost), when the problem is to produce such goods in the first place. Assuming that the good exists is hardly a solution to the problem of how to produce it. Similarly, by excluding exit or choice among options *as* an option, the problem of distribution of rights and obligations is converted into a pure bargaining game, which sets the stage for Rawls’s voluminous writings and the many jots and tittles added by his followers. By eliminating such options, Rawls does not solve a problem of justice or fair division; he creates it.

What follows is a brief excursion through the Rawlsian choice situation, setting out several unresolved problems and showing the significance of a quite problematic assumption that has received too little attention.

Mutual Advantage and Distributive Justice

In order to elicit agreement to the basic structure of society, Rawls argues, all groups, including the worst off, must benefit from the scheme of cooperation that governs a society: “since everyone’s well-being depends upon a scheme of cooperation without which no one could have a satisfactory life, the division of advantages should be such as to draw forth the willing cooperation of everyone taking part in it, including those less well situated.”⁶ Rawls stands firmly in the tradition of social contract theory in seeking to ground the social contract on mutual advantage. All must expect to benefit, in order for all to be obligated.

Rawls believes that people seeking their mutual advantage behind a veil of ignorance would insist on a benchmark of equality in the distribution of resources, departures from which would require justification. As Rawls states, “from the standpoint of one person selected arbitrarily”:

Since it is not reasonable for him to expect more than an equal share in the division of social goods, and since it is not rational for him to agree to less, the sensible thing for him to do is to acknowledge as the first principle of justice one requiring an equal distribution. Indeed, this principle is so obvious that we would expect it to occur to anyone immediately.

Thus, the parties start with a principle establishing equal liberty for all, including equality of opportunity, as well as an equal distribution of income and wealth. But there is no reason why this acknowledgment should be final. If there are inequalities in the basic

⁶ Rawls, *A Theory of Justice*, p. 15.

structure that work to make everyone better off in comparison with the benchmark of initial equality, why not permit them?⁷

The reason that inequalities may be to the advantage of those who end up with less, is that if “these inequalities set up various incentives which succeed in eliciting more productive efforts, a person in the original position may look upon them as necessary to cover the costs of training and to encourage effective performance.”⁸ That leads Rawls to the formulation of his “difference principle,” according to which “social and economic inequalities are to be arranged so that they are both: (a) to the greatest benefit of the least advantaged, consistent with the just savings principle, and (b) attached to offices and positions open to all under conditions of fair equality of opportunity.”⁹

How Much Inequality does the Difference Principle License?

In an early review of *A Theory of Justice*, Thomas C. Grey raised a serious objection to the justification of the difference principle, suggesting that it suffers from “a

⁷ Ibid., pp. 150–51. Note that Rawls uses the term “reasonable” to restrict claims for more than an equal share and the term “rational” to preclude acquiescence to less than an equal share. In *A Theory of Justice*, Rawls claims, in effect, that the “reasonable” can be deduced from the “rational,” understood in terms of maximization of interest satisfaction: “The theory of justice is a part, perhaps the most significant part, of the theory of rational choice” (p. 16). That claim is retracted in his later book, *Political Liberalism*, in which he argues that his earlier statement was mistaken, that it did not accurately express his intentions: “There is no thought of deriving those principles from the concept of rationality as the sole normative concept” (p. 53). Rawls cites approvingly T. M. Scanlon’s essay, “Contractualism and Utilitarianism” (T. M. Scanlon, “Contractualism and Utilitarianism,” in Amartya Sen and Bernard Williams (eds), *Utilitarianism and Beyond* (Cambridge, 1982), pp. 103–28, in which Scanlon argues that the contractualist enterprise is properly understood as driven by “the desire to find and agree on principles which no one who had this desire could reasonably reject” (p. 111) and that that “moral argument” (p. 111) is to be distinguished from the rational calculation of advantage. Scanlon concludes his distinction between contractualist views driven by the “rational” and those driven by the “reasonable” as follows: “On one view, concern with protection is fundamental, and general agreement becomes relevant as a means or a necessary condition for securing this protection. On the other, contractualist view, the desire for protection is an important factor determining the content of morality because it determines what can reasonably be agreed to. But the idea of general agreement does not arise as a means of securing protection. It is, in a more fundamental sense, what morality is all about” (p. 128). After rejecting his earlier formulation of the theory of justice as a part of the theory of rational choice, Rawls claims, in *Political Liberalism*: “I believe that the text of *Theory* as a whole supports this interpretation” (p. 53). The distinction in the text cited Rawls, *A Theory of Justice*, pp. 150–51, in which “reasonable” limits claims for more and “rational” limits acquiescence in less, supports this interpretation, but it still leaves problems in the justification for inequality in Rawls’s theory, as we shall see later, and may leave unjustified certain central Rawlsian principles.

⁸ Rawls, *A Theory of Justice*, p. 151.

⁹ Ibid., p. 302.

psychological or moral if not a logical inconsistency.”¹⁰ The inconsistency concerns the combination of the insistence of a baseline of equality in the distribution of wealth, arising from the alleged “moral irrelevance” of natural or inherited talents or capabilities, and the admission of incentives in the justification of divergence from equality and the establishment of a regime of inequality in the distribution of wealth.

Grey argues that that justification suffers from a “failure to establish any limits of justice on the bargaining power of those with more than average productive abilities. The standard is in principle indeterminate between complete equality of income, on the one hand, and income wholly determined by productivity, on the other.”¹¹ As Grey notes, “The principle apparently contemplates some extra payment to those with scarce or special skills ... [in the belief that] paying differential incomes to those with extra skills will bring forth extra production from them.”¹²

How can I justly bargain for more than an equal share by threatening to withhold my scarce talent? It must be because I have some special claim on these talents and their fruits. But if they are considered a social asset—as Rawls apparently regards them—I can have no such special claim. On the other hand, if my talents and the fruits of the use I choose to make of them belong to me, then there can be no justified coercion of me if I do not choose to share them with others. The inequalities which Rawls would permit suggest some acquiescence in this view. But those who press this view to its limits will reject the notion that greater equality of income is a legitimate aim of public policy.¹³

Let us press that view to its limits: the difference principle either results in no deviation from voluntary market outcomes, as the allowance of incentives entails the recognition of claims by possessors of natural assets and consequently of bargaining rights, *or*, if the difference principle *is* to realize a redistributive aim, it requires both premises and outcomes that are highly objectionable and counterintuitive, and certainly highly *illiberal*.¹⁴ Rawls’s attempt to justify a redistributive state can only

¹⁰ Thomas C. Grey, “The First Virtue,” *Stanford Law Review*, 25 (1973): 286–327, p. 325.

¹¹ *Ibid.*, p. 322.

¹² *Ibid.*, p. 322.

¹³ *Ibid.*, p. 325.

¹⁴ The fundamental issues I will deal with were first raised by Grey, “The First Virtue”; others who have trod this ground, in one way or another, are the following: Robert Nozick, *Anarchy, State, and Utopia* (New York, 1974), esp. pp. 183–97; Jan Narveson, “A Puzzle about Economic Justice in Rawls’s Theory,” *Social Theory and Practice*, 4 (1976): 1–27 and, by the same author, “Rawls on Equal Distribution of Wealth,” *Philosophia*, 17 (1977): 281–92. Also see on these issues Donagan, Alan, *Morality, Property, and Slavery. The Lindley Lecture 1980* (Lawrence, Kans, 1981); Brian Barry, *Theories of Justice* (London 1989); and G. A. Cohen, “Incentives, Inequality, and Community,” in Grethe B. Peterson (ed.), *The Tanner Lectures on Human Values, Volume Thirteen* (Salt Lake City, 1992), pp. 263–329.

I intend to draw on some of their arguments, but also to extend the critique further and to connect these problems with the problem of the membership of the contracting group, that is with Rawls’s “closure” move discussed above. Barry notes that “Rawls has never, it seems to me, addressed himself to this line of attack” (p. 234). I believe that, although he

succeed by rejecting such fundamental liberal precepts as the right of exit and the universality of principles of justice.

A problem ancillary to the problem that Grey identifies as the indeterminacy of the difference principle “between complete equality of income, on the one hand, and income wholly determined by productivity, on the other,” is, What is the baseline of equality in the distribution of wealth from which inequality is to be measured? Given that there is some wealth in existence at any given time, are we to say that inequalities are to be measured from the base currently existing at time t_1 (Wt_1), with Wt_1 to be shared out precisely equally? Setting aside the perhaps insuperable difficulties in determining how much inequality (not too much and not too little) is necessary to satisfy the difference principle from any base we can ask why the total wealth later on, say at t_2 , should not be shared out equally. How are we to determine the baseline of equal distribution of wealth from which inequality is to be justified? Why use Wt_1 rather than Wt_2 as the baseline of equal wealth distribution? Given that production is a process that takes place over time, why should any one of the periods $Wt_1 \dots \infty$ be subject to strict equalization, but not others? There seems little in the specification of the original position to lend us guidance; certainly the discussion in *A Theory of Justice* of “intergenerational justice”¹⁵ is no guide.

Besides those problems of determining the baseline and the allowable divergences therefrom, there is the far more serious problem of determining just why some are allowed to demand more than are others. Under a principle of strictly equal distribution of total product, one who produces more would be expected to produce for the benefit of others, as well as for herself, since out of a population of k she would receive only $1/k$ of the increase in productivity due to her additional efforts. But Rawls specifically insists that we cannot expect individuals to serve one another in that way:

One might think that ideally individuals should want to serve one another. But since the parties are assumed not to take an interest in one another’s interests, their acceptance of these inequalities is only the acceptance of the relations in which men stand in the circumstances of justice. They have no grounds for complaining of one another’s motives. A person in the original position would, therefore, concede the justice of these inequalities.¹⁶

What is being asserted, then, is that those who insist on being paid more to produce more are allowed to demand a larger share of the total product than others receive. What they are allowed to say, in effect, is that they will not produce anything, or they will deliberately produce less, unless they are allowed to demand (and to receive) a special incentive in the form of an unequal share, that is, unless they are allowed to make an “unreasonable” claim.¹⁷

does not address those criticisms directly, Rawls’s move to close entry and exit options to the contracting parties can be understood as his response to problems of this sort.

¹⁵ Rawls, *A Theory of Justice*, pp. 284–93.

¹⁶ *Ibid.*, p. 151.

¹⁷ Recall that Rawls writes that “it is not reasonable for him to expect more than an equal share in the division of social goods” (Rawls, *A Theory of Justice* p. 150). Narveson

The very idea of incentives for greater production (as opposed to covering the costs of training and production, which is fully consistent with equal distribution of consumer goods, so long as no residual remains over the costs of production)¹⁸ is an admission of a *right* of the better endowed, or of those who are simply better at bargaining (which need not entail any absolute advantage in productive capacity), to demand a larger share of the product. If a person must be *allowed* to “hold out” for more, it can only be because she has a right to do so. Having a right *not* to work entails a right to bargain for a larger share of the product in exchange for working; if she has a right to employ or to withhold her time, labor, and endowments, then she has a liberty right to them (to employ them) and a claim right (to exclude others from employing them against her will). Rawls, however, has committed himself to the position that such factors as intelligence, strength, cleverness, and even motivation (and *certainly* bargaining ability), are “undeserved” and that they are therefore morally irrelevant in the decision of a fundamentally moral problem, the distribution of goods in society.¹⁹ Yet by introducing incentives for greater production, he tacitly allows those “morally irrelevant” factors to play a role in the distribution of goods. The difference principle seems to allow either voluntary market distribution or completely equal distribution; nothing in between complete equality and completely voluntary arrangements (which may, of course, also be equal, depending on the voluntary choices of the cooperating agents) seems to be derivable from Rawls’s arguments. There is a fundamental contradiction in Rawls’s enterprise.

Exile to the Production Frontier

Rawlsian justice faces a problem: either it amounts to classical liberal voluntarism, with no fairness-based coercive redistribution of income, or it demands complete equality in the distribution of wealth. The latter route leads Rawls away from traditional liberalism and universalism, for if the difference principle were taken seriously as a redistributive principle, it would entail an enforceable obligation to produce at one’s production frontier, that means, work could be made compulsory on the principle of conscript labor. As Alan Donagan notes, the difference principle “is a principle of servitude: not only does it expropriate to a common pool everything

responds to the claim that those who receive less “have no grounds for complaining of one another’s motives” as follows: “they *do* have a ground for ‘complaining of one another’s motives.’ The ground is that they are likely to end up with less, with a smaller than equal share, if people are permitted to be motivated by self-interest (say) instead of by equality. Indeed, Rawls’s argument here really seems to concede my basic point, which is that on this showing, the motive of justice would always direct one to sharing equally with one’s fellows” (p. 287). Cohen claims that “when true to itself, Rawlsian justice condemns such incentives, and ... no society whose members are *themselves* unambiguously committed to the difference principle need use special incentives to motivate talented producers” (Cohen, “Incentives, Inequality, and Community,” p. 310).

¹⁸ See Narveson, “Rawls on Equal Distribution of Wealth,” pp. 285–6.

¹⁹ Rawls, *A Theory of Justice*, p. 102: “No one deserves his greater natural capacity nor merits a more favorable starting place in society.”

above the minimum to the social product, returning only what is necessary to ensure that the difference will continue to be produced, but it also requires a social structure that takes away the option of idleness when one's own needs and the demands of beneficence have been met."²⁰ Rawls's scheme, to be made operational, would entail a duty to work up to the point where the worst off have been made as well off as possible, as "social and economic inequalities are to be arranged ... *to the greatest benefit of the least advantaged*"²¹ (emphasis added).

Rawls is not saved by his first principle of justice (equal liberties) from the unpleasant conclusion that forced labor may be justified to enforce the universal obligation to produce one's maximum product so as to enable redistribution to the greatest benefit of the worst off group, because the only liberties he includes in the "basic liberties" are "political" and, in Donagan's words, "*these basic liberties would not directly exclude the conscription of labor in time of peace.*"²² What *could* save the principle, according to Brian Barry, is the second half of Rawls's second principle, which Rawls states as follows:

Social and economic inequalities are to be arranged so that they are both (a) to the greatest benefit of the least advantaged and (b) attached to offices and positions open to all under conditions of fair equality of opportunity.²³

Part (b) of the second principle above, Barry claims, "looks like a pretty strong statement of the importance of occupational choice, and I think that, even if Rawls does not list it among the 'basic liberties,' the best interpretation of his theory is that he regards it as having priority over the difference principle."²⁴ So construed, the

²⁰ Donagan, p. 21. Rawls, *A Theory of Justice* characterizes the Kantian principle of treating persons as ends in themselves as follows: "To regard persons as ends in themselves in the basic design of society is to agree to forgo those gains which do not contribute to their representative expectations. By contrast, to regard persons as means is to be prepared to impose upon them lower prospects for the sake of the higher expectations of others" (p. 180). Donagan does not directly raise the following point in his critique, but his approach suggests the further specification that, if leisure (or even simple idleness) is a good, and the attainment of an additional increment of it a gain, which seem plausible enough assumptions, then parties to the contract must forgo leisure or idleness that does "not contribute" to the representative expectations of others less well situated than they are. That would imply a duty to produce until, at least, the well being of the least well situated is maximized.

²¹ Rawls, *A Theory of Justice*, p. 302; Rawls adds "consistent with the just savings principle."

²² Donagan, p. 19. Nor, it might be added, in time of war.

²³ Rawls, *A Theory of Justice*, p. 83.

²⁴ Barry, p. 399. Donagan considers and rejects this interpretation of the significance of fair conditions of equality of opportunity, noting *en passant* that "the word 'opportunity' is less than felicitous when the inequalities are burdens rather than rewards" (p. 19). It is also a bit difficult to understand how an inequality of liberty or of opportunity would enhance the liberty or opportunity of those with the lesser liberty or opportunity; if liberty is precisely the sort of thing that can be distributed precisely equally, how can diminishing the liberty of one increase the liberty of another? Rawls notes this problem obliquely when he distinguishes between "liberty" and the "value of liberty." As Rawls notes (*A Theory of Justice*, p. 204),

constraints placed upon the difference principle by the second half of the second principle make the limitation on inequality of wealth (or income) otiose, because one can always claim that one wants (or “needs”) a larger than equal share of the product, and back up the claim by a threat not to produce if one does not receive a larger share. That threat would be justified by Barry’s construal of part (b) of the second principle. There is a further problem: even if conscripted labor services *were* ruled out by the principle of open offices and fair opportunity (something that is *not* entirely clear from the priorities of principles that Rawls lays out, but which seems a fair enough move to make in defense of the Rawlsian approach), the principle of fair equality of opportunity would *not* be inconsistent with taxation of labor at its highest assessed use, as land and other assets are taxed.

To understand how such a capacity tax would work, consider the case of taxation of the productive asset of land. Land is typically taxed on the basis of an assessment of its most highly remunerative employment (measured in money), regardless of whether it is actually being employed in that way. In the same way, a capacity tax could be assessed based on what one “could earn” even if one were not in fact earning that at the moment because one placed a high value on leisure or simply because one does not like the occupation that would produce the highest income.²⁵ That would not run afoul of the “principle of fair opportunity,” even under its most generously liberal construal of it, although the effects of such a capacity tax would

“liberty and the worth of liberty are distinguished as follows: liberty is represented by the complete system of the liberties of equal citizenship, while the worth of liberty to persons and groups is proportional to their capacity to advance their ends within the framework the system defines. Freedom as equal liberty is the same for all; the question of compensating for a lesser than equal liberty does not arise. But the worth of liberty is not the same for everyone.” On the other hand, if opportunities are differentiated from simple liberty (for instance, as in the sense in which we say, “A had more opportunities than B,” even though they were equally free to take advantage of what opportunities they did face), then we could arrange *inequalities* in opportunities so that “an inequality of opportunity . . . [will] enhance the opportunities of those with the lesser opportunity” (*A Theory of Justice*, p. 303). Why would such an allowable inequality of opportunity not extend to limiting one’s access to choice of occupation? (“Affirmative action” requirements and mandatory hiring quotas, by limiting the opportunities of some groups in competition with others, limit the opportunities of those who are excluded or who are not included in the quotas; the excluded certainly no longer enjoy “equality of opportunity.”) And if the principle is admitted that choice can be limited in this way, then could it be limited to one option, and one only? If so, that would be equivalent to a mandate to pursue the one remaining option, which result would lead us from the principle of fair equality of opportunity, construed as differentiated from equality of liberty, *not* to a defense of labor market freedom against coercion, but to a justification of inequalities in choice options in labor markets, with the choice set reduced to one, all in pursuit of advancing the opportunities (or perhaps the value of the opportunities) of the least advantaged.

²⁵ For proposals along these lines, see Richard Arneson, “Lockean Self-Ownership: Towards a Demolition,” *Political Studies*, 39 (1991): 36–54 and “Property Rights in Persons,” *Social Philosophy and Policy*, 9/1 (1992): 201–30. Also confer James Sterba, “From Liberty to Welfare,” *Ethics*, 105/1 (October 1994): 64–98.

be difficult to differentiate from chattel slavery.²⁶ If such a capacity tax were deemed to maximize the position of the least advantaged, then it would seem to be demanded by the difference principle; and there must surely be some wealth producers (or even classes of them) who are producing less wealth than they *could* produce; were they to produce more of those goods there would be a larger surplus available for distribution to the least well off; hence, by not producing what they *could* produce, such “slackers” are diminishing the prospects of the least well off, relative to what the least well off could enjoy were the “slackers” to produce more.

Who is Everyone?

The considerations above go to the question of whether Rawls has developed an authentically *liberal* theory of justice. If forced labor were the outcome, it would be hard to see how that could be squared with the tradition of liberalism, which has, after all, the concept of liberty in its very name.

One could attempt to make a system of illiberal coercion universal, but Rawls does not take that approach. In the process, he abandons cosmopolitanism, as well. The reason is embedded in the difference principle itself, for when Rawls refers to “inequalities in the basic structure that work to make everyone better off in comparison with the benchmark of equality,” (*A Theory Of Justice*, p.151) he leaves ambiguous the question of whom he is designating by the term “everyone.” Does it mean every party to a transaction, or every party to the social contract, or does it mean literally every human being, or even every rational creature? Who is covered? Presumably, Rawls intends every member of the basic cooperating group governed by the contract and that is invariably cashed out to mean the subjects of a particular nation state. Allan Gibbard, in his review of Brian Barry’s *Theories of Justice*,²⁷ addresses the issue of the membership of the group over which the difference principle is to extend. In response to Brian Barry’s challenge, on grounds of “impartiality,” to extend the principle to the entirety of humanity, Gibbard draws out of Rawls’s work an approach that does not “hover uneasily . . . between impartiality and mutual advantage,” as Barry claims, but that is “intrinsically reciprocal.”²⁸ Gibbard imagines a “well-off person” putting to Rawls the following question: “Why limit myself in pursuit of my own advantage?”²⁹ Gibbard answers for Rawls as follows:

²⁶ This lesson was learned by the indigenous inhabitants of Africa and South America, among other places, when European states colonized them and, perhaps in line with the principle that taxes must be paid for benefits received, imposed taxes that could be paid, of course, only in European money. The only way for most of the indigenous inhabitants to get this European money was to work in plantations and mines owned by Europeans. See Parker T. Moon, *Imperialism and World Politics* (New York, 1926) for a graphic and detailed description of colonial taxing policies in Africa.

²⁷ Allan Gibbard, “Constructing Justice,” *Philosophy and Public Affairs*, 20 (Summer 1991): 264–79.

²⁸ *Ibid.*, p. 266.

²⁹ *Ibid.*, p. 269.

Rawls, in effect, gives this answer: “You have what you have only because others constrain themselves, in ways that make for a fair cooperative venture for mutual advantage. Constrain yourself by those rules in return, and you give them fair return for what they give you.”³⁰

Gibbard offers a thought experiment to clarify the notion of reciprocity: imagine that “each person sprang into existence on a separate island, adult and able, and each was protected by the water from threats and takings” and that the islands differ in fertility.³¹ Gibbard concludes that

from the bare assumption that fertility is morally arbitrary, no obligation to share follows. The lucky ones could still admit that their luck is morally arbitrary, and still ask “Why share?” One answer that they could not be given is that sharing pays others back for their cooperation or their restraint. No one has cooperated and no one has restrained himself, and so there is nothing to pay back. Motives of fair reciprocity, then, would not lead the lucky ones to share, even though they freely admitted that their luck was morally arbitrary.³²

Rawls takes up that theme in *Political Liberalism*, endorsing Gibbard’s approach and maintaining that “the idea of reciprocity is not the idea of mutual advantage.”³³ Gibbard’s attempted solution comes at a high cost, however, in the form of contradicting openly another basic Rawlsian tenet. Among the “formal constraints of the concept of right” in *A Theory of Justice* are the requirements that conceptions of justice must be general, universal, public, capable of imposing a transitive ordering on conflicting claims, and final.³⁴ In his elaboration of the penultimate item on his list of formal constraints, the requirement that a concept of right create a transitive ordering of competing claims, Rawls notes that “it is to avoid the appeal to force and cunning that the principles of right and justice are accepted. Thus I assume that to each according to his threat advantage is not a conception of justice.”³⁵ But a consequence of the very definition of an “intrinsically reciprocating group,” to which Gibbard and Rawls limit the range of the principles of justice, is that they rest the entire theory of justice on threat advantage, on the possibility of the employment of force and cunning. Those who can make credible threats of harm are accorded membership in intrinsically reciprocating groups and are entitled to be treated “fairly,” while those who cannot make credible threats do not deserve to be treated justly.

Gibbard sets up his thought experiment by specifying that among the islanders “each was protected by the water from threats and takings.” In his scenario there is no *reciprocity* of restraint, because the islanders have no intercourse whatsoever; the islanders need not even know of each other’s existence. There is neither mutual advantage nor reciprocity. But if the parties *are* capable of harming each other it

³⁰ Ibid., p. 269.

³¹ Ibid., p. 269.

³² Ibid., p. 269.

³³ John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), p. 17.

³⁴ Rawls, *A Theory of Justice*, pp. 130–36.

³⁵ Ibid., p. 134.

might reasonably be said that they *do* reciprocate simply by *abstaining* from aggressive “threats and takings”; if not killing or stealing qualifies as “cooperation,” then, Gibbard’s argument maintains, the difference principle *does* extend over all of the islanders—lucky and unlucky—as a group and inequalities among them must be specially justified (if, that is, such inequalities can be justified at all, given the problems with “incentives” noted above). Gibbard and Rawls define “intrinsically reciprocal” groups by determining whether the members of the groups have the capacity to harm one another, which seems more congenial to starting with a Hobbesian threat advantage (which Rawls dismisses from his construction) than with the idea of people joined voluntarily together in an ongoing project of social cooperation.

There is an ancillary problem: if “everyone” (however defined) must be made better off, what does “better off” mean? Jan Narveson distinguishes two possible meanings of the phrase:

D1. “Everyone is better off” = “No one is worse off” (persons outside the transaction may be unaffected, compatibly with the requirement)

D2. “Everyone is better off” = “Each person’s situation is improved by comparison with what it was before the transaction” (persons outside the transaction must be favorably affected, to meet the requirement)³⁶

As Narveson notes, interpreting the phrase in the first way would make the difference principle otiose, and interpreting it in the second way makes it indeterminate, for the reasons that Thomas Grey offered. What “make everyone better off” must mean, if the difference principle is not to be rendered otiose (as Narveson’s interpretation “D1” would do), is that some people are to be given a veto power over the mutually advantageous interactions of others. Thus, even though C is *not hurt* by A’s and B’s voluntary cooperation, C is able to insist forcibly that A and B not be allowed to cooperate unless C receive a payment for not exercising her veto; the payment would come in the form of some share (in principle indeterminate) of the results of A’s and B’s cooperation. That means that C has a kind of ownership claim over A and B; she would determine how A and B shall use their resources and demand a payment from them for the privilege of being allowed to cooperate together.³⁷

³⁶ Narveson, p. 9.

³⁷ If my analysis of Gibbard’s formulation of the principle of reciprocity is correct, and the group over which the principles of justice are to apply is apparently defined by whether they can hurt each other through “threats or takings,” then this begins to sound more like a classic “protection racket,” in which parties must pay third parties to be able to cooperate in peace, than like a cooperative venture. Gibbard, “Constructing Justice,” indicates that something of the sort must be the case when he notes, “It is not only cooperation that is at stake in questions of justice, but mutual restraint: nonaggression and respect for a system of property rights. Just people forgo chances to seize advantage, and the idea of Justice as Fair Reciprocity is that they forgo these chances in return for others’ voluntary support of just arrangements. Now a coalition that withdraws from society renounces any claim to justice from those who remain” (p. 272). If those who attempt to withdraw have *no claim to justice*,

If it were to be responded that Rawls only intends for the difference principle to be embedded in the “basic structure” and not to be applied to individual transactions, one can point out that *all* the transactions to which it might be applied necessarily *are* individual transactions (there being no abstract or universal transactions), and that the principle must be applied over some temporal horizon, whether transaction-by-transaction (regardless of the duration of the transaction), or on a daily, monthly, yearly, or some other basis. The difference principle may be *articulated* at the stage of determining the basic structure in the Original Position, but it is *exercised* upon the transactions that take place after the basic structure has been determined. Which time horizon is chosen, from minute-by-minute to every hundred years, is not relevant to the general point I am making. One group (C) is given a right of veto over the voluntary transactions of others (A and B) unless they (C) get a cut, and that amounts to holding a claim right or a power against the members of A and B, by being able to stop them by force from transacting.³⁸ If mutual advantage defines socially cooperative groups, and therefore the membership of the social contract, one can legitimately ask why a group cannot separate out if they believe that *their* mutual advantage would lie in a contract governing distribution of a joint product produced *without* the cooperation of others who might produce a smaller share and then demand and enforce a share of the product disproportionate to their contribution.³⁹ Allowing such withdrawal would undercut the difference principle by allowing the exit of those who believe that they could do better without having their product redistributed to others.

It is for that reason—to salvage the difference principle—that Rawls must “close the door” of exit, by insisting that entry into society “is only by birth and exit from it

then those who remain are indeed free to attempt to enslave the withdrawing members, as Gibbard notes. Perhaps a more truly liberal approach would be to construe “cooperation” such that withdrawal from it need not mean dropping all restraint from aggression against persons and property; withdrawal would be simply an attempt to get away from other aspects of a cooperative scheme that are not to the interest or liking of the withdrawing parties. The proper reciprocal response to mere nonaggression, it seems, is simply nonaggression, rather than equalization of assets subject to the difference principle; if that is so—if withdrawal from a group need not entail complete withdrawal from all considerations of morality and justice, as it does for Gibbard—then why cannot any group of cooperators withdraw from the reciprocal scheme governed by the difference principle, but remain in the more limited “cooperative” relationship of not aggressing against one another? This would make the difference principle a truly voluntary principle among full cooperators, defined by those who actually consent to remain within the “fully cooperative” group. Just as the members of a club of equals might arrive at a principle of equal distribution, but are not constrained to do so if they agree to another principle, those who agree to cooperate in Rawls’s favored sense would be bound to his principles of distributive justice, while others would not.

³⁸ Rawls, *A Theory of Justice*, p. 282: “Because they start from equal shares, those who benefit least (taking equal division as the benchmark) have, so to speak, a veto. And thus the parties arrive at the difference principle.”

³⁹ Compare Barry, p. 243: “It is fairly clear that allowing the withdrawal of whole blocs from the society to define alternative nonagreement points would pose severe dangers to the claim that the difference principle is better for (almost) everyone than they could do in the absence of cooperation.”

is only by death.” If individuals were to be able to withdraw and form other groups at will, the core problems of fair distribution with which Rawls is concerned would effectively disappear. The closure move does not so much solve a problem of justice and fair division, as create it.

Joint Products and the Problem of Distribution

The Rawlsian enterprise rests on the idea of the “fair distribution” of a joint product. Before discussing “fair distribution,” an examination of the idea of a “joint product” is in order. Social cooperation may be valuable for a number of reasons, but surely prominent (if not foremost) among them is because cooperation results in a product greater than would be possible in its absence. The problem of justice is (at least principally) a problem of how that joint product is shared, allocated, or distributed, or of how the rewards of cooperative activity are imputed to those who have contributed to such activity. As Russell Hardin poses the problem, “If the bulk of what we enjoy is the result of collective endeavors in our society, then the bulk of what we have is up for redistribution.”⁴⁰

Economic science has something to say about the distribution of joint products among cooperators. In general, when markets exist (meaning, in this context, alternative uses of goods and free choice of factor owners among alternative employments of their factors) and factors of production are complementary and non-specific, meaning that they can be combined in various ways and put to a range of productive uses (for example, land for farming, recreation, or housing), then the proportion of the anticipated final value of the joint product imputed to the factors, that is, the *prices* paid for the factors, will tend to reflect their marginal value product (MVP). (To be more precise, what is imputed to the factors of production is the *discounted* marginal value product (DMVP) with the discount reflecting preference accorded to the time between the payment of the factor and the realized value or sale price of the final product.) When two or more factors of production are complementary but purely product-specific, then no market (in the sense of alternative uses of the factors, which entails the existence of opportunity costs) exists, meaning that a

⁴⁰ Russell Hardin, *Morality Within the Limits of Reason* (Chicago, 1988), p. 134. Rawls is even more strenuous in setting the non-agreement point and therefore the inclusiveness of what is up for distribution: “The difference principle represents, in effect, an agreement to regard the distribution of natural talents as a common asset and to share in the benefits of this distribution whatever it turns out to be” (Rawls, *A Theory of Justice*, p. 101). It seems that *everything*, and not merely “the bulk of what we enjoy,” viz. what we enjoy in excess of what we could have in total isolation from others, is up for distribution. See also David Gauthier, *Morals by Agreement* (Oxford, 1986), p. 254: “In seeking to treat persons as pure beings, freed from the arbitrariness of their individuating characteristics, Rawls succeeds in treating persons only as social instruments. In denying to each person a right to his individual assets, Rawls succeeds in treating persons only as social assets. In denying to each person a right to his individual persons, Rawls is led to collectivize those assets.” Thus, Rawls’s own account suffers from the same defect on the basis of which he rejects utilitarianism, namely that it “does not respect the distinction between persons” (Rawls, *A Theory of Justice*, p. 27).

determinate marginal value product cannot be imputed to the factors in the form of a price or dividend paid; all that can be determined is a joint MVP, namely the MVP of the combination of the two factors. (When the factors can only be combined in fixed ratios, then there is no way to determine marginal value product at all.) That is to say, the MVP to be imputed to the two factors together is equal to the total product (TP) minus the sum of the MVPs of all other factors. The proportion of the residual joint MVP of the specific factors to be shared by the factor owners will be purely a result of bargaining and cannot be determined by reference to marginal product. It is precisely the lack of an alternative employment or allocation of the factor that results in an indeterminate distribution of imputed value over which the factor owners must bargain or arrive at some salient or “reasonable” distributive outcome or principle.⁴¹

One way to *create* a situation of bargaining over the distribution of a joint product is to eliminate all alternative uses of the factor inputs by not allowing factor possessors to withdraw some or all of the factors and employ them elsewhere or not at all. If alternative uses disappear—perhaps due to radical changes in technology—or are cut off by fiat, the result is an indeterminate range of distributions (or imputation) of the value of the joint product to the factors in the form of the prices that they can command.

In effect, what Rawls and his followers are arguing is that “society” is a joint product the distribution of the value of which cannot be allowed to result from market principles of voluntary choice among alternatives, principles which normally result in a tendency for factor owners to receive their marginal value products.⁴² The

⁴¹ Note that a similar problem exists in the case of bilateral monopoly, in which there is both only one seller (“monopoly”) and only one buyer (“monopsony”), meaning that only a range of prices could be theoretically established, namely between the lowest price that would be accepted by the seller and the highest price that would be paid by the buyer. Precisely where the actual price would fall between these two boundaries is purely a matter of bargaining. As Richard Posner notes, “When a monopolistic supplier of labor confronts a monopsonistic buyer of labor, the exact price and quantity that will be set depend upon the parties’ relative skills at bargaining, ability to use intimidation or bring political pressures to bear, and perhaps other factors” (Richard Posner, *Economic Analysis of Law* (Boston, 1972), p. 136).

⁴² If the idea of the margin is rejected as entirely inappropriate to the analysis of justice, perhaps because individual contributions to the “joint product” in question (the products of social cooperation) cannot in any way be identified, then the basis of the difference principle itself is altogether obliterated. As Robert Nozick notes, “When it is necessary to provide incentives to some to perform their productive activities, there is no talk of a joint social product from which no individual’s contribution can be disentangled. If the product was all that inextricably joint, it couldn’t be known that the extra incentives were going to the crucial persons; and it couldn’t be known that the additional product produced by these now motivated people is greater than the expenditure to them in incentives” (Nozick, p. 189). Knut Wicksell, in his “A New Principle of Just Taxation”, similarly argued against Mill’s principles of distributive justice, for even when considering activities of the state (rather than all social activities, as Rawls does), “The discussion is almost always concerned with this or that change in the scope of the State’s operations, this or that extension or (much more rarely) contraction of the separate branches of public activity” (Knut Wicksell, “A New Principle of Just Taxation” in Richard A. Musgrave, and Alan T. Peacock (eds), *Classics in the Theory of*

reason is that no alternative allocation of the factors, including our labor power, can be considered that will generate reservation prices capable of establishing at least a set of highest and lowest exchange ratios (or set of baselines) within which the value product is to be determined. It then follows that, as Hardin notes, “the bulk of what we have is up for redistribution.”⁴³ This notion of a joint product attributable to factors of production that are *specific* (that is, for which there is no market or range of uses among or within which they may be allocated) is crucial to the enterprise of generating fair principles of distribution. It is the *closing off* of alternative uses by fiat that results in a pure bargaining or agreement problem.

One could argue that I am guilty here of the fallacy of affirming the consequent:

(A) If two or more factors of production have no alternative employments, then there is a bargaining (or rational agreement) problem.

(B) There is a bargaining (or rational agreement) problem.

(C) Therefore, there are two or more factors of production that have no alternative employments.

This would be a fallacious argument. Rawls has, however, saved me from falling into fallacy by specifically noting that, in order to avoid admitting market principles of voluntary agreement into “the political,” entry and exit options (that is alternative employments of our resources, most notably of our persons) are to be shut off.

In *Political Liberalism*, Rawls straightforwardly acknowledges that freedom of entry and exit do generate “measures of worth” and therefore “a basis for contractual calculations” (other than bargaining, salience, or some other form of agreement). But he claims that that applies only to “particular agreements” and not to “the political.” In the case of association,

one simply notes how the venture or association would fare without that person’s joining, and the difference measures their worth to the venture or association. The attractiveness of joining to the individuals is ascertained by a comparison with their opportunities. Thus particular agreements are reached in the context of existing and foreseeable configurations

Public Finance (2nd edn, New York, 1994), p. 78). Wicksell defends the marginal principle against Mill’s claim that “Government must be regarded as so pre-eminently a concern of all, that to determine who are most interested in it is of no real importance,” which means that allocation of burdens on the basis of benefits is beside the point. (quoted by Wicksell on p. 78)

⁴³ Note that Hardin does not write “distribution,” but “*redistribution*,” implying that assets have already been allocated and must now be *reallocated*. If the initial distribution occurred in compliance with the rules of justice, and then the results were judged to merit redistribution, then the rules of justice that resulted in the initial distribution are not action-guiding, in the sense of ensuring that when they are followed the parties need not fear coercive sanctions; the redistribution principle is incompatible with the rule of law. Rawls asserts otherwise, but his characterization of redistributive taxation could just as easily be applied to rape, muggings, or lynchings: “Taxes and restrictions are all in principle foreseeable, and holdings are acquired on the known condition that certain transfers and redistributions will be made” (Rawls, *Political Liberalism*), p. 283.

of relationships within the basic structure; and it is these configurations that provide a basis for contractual calculations.

The context of a social contract is strikingly different, and must allow for three facts, among others: namely, that membership in our society is given, that we cannot know what we would have been like had we not belonged to it (perhaps the thought itself lacks sense), and that society as a whole has no ends or ordering of ends in the way that associations and individuals do. The bearing of these facts is clear once we try to regard the social contract as an ordinary agreement and ask how deliberations leading up to it would proceed. Since membership in their society is given, there is no question of the parties comparing the attractions of other societies. Moreover, there is no way to identify someone's potential contribution to society who is not yet a member of it; for this potentiality cannot be known and is, in any case, irrelevant to their present situation.⁴⁴

Rawls acknowledges that free allocation of resources among alternative employments generates "measures of worth" but states that "there is no way to identify someone's potential contribution to society who is not yet a member of it." That is patently false; many people *do* make decisions to emigrate from one society to another, sometimes more than once, and they do so on the basis of the kinds of estimations that Rawls asserts are not possible.

In order to avoid market solutions to the problems he intends to treat, Rawls must stipulate that "membership in society" is "given," that is, unalterable. It is a stipulation that is contradicted by the experience of millions of persons. In addition to being an unhelpful characterization of the problem of political choice, the stipulation that parties cannot choose "membership in our society" does not help us to *solve* problems of "distributive justice," for it *generates* them instead.

Fairness and inescapable public goods

Rawls places great weight in the generation of obligations on what he calls "the principle of fairness." According to Rawls,

The main idea is that when a number of persons engage in a mutually advantageous cooperative venture according to rules, and thus restrict their liberty in ways necessary to yield advantages for all, those who have submitted to these restrictions have a right to a similar acquiescence on the part of those who have benefited from their submission. We are not to gain from the cooperative labors of others without doing our fair share.⁴⁵

Rawls even claims, quite implausibly, that "All obligations arise in this way."⁴⁶

⁴⁴ Rawls, *Political Liberalism*, pp. 275–6.

⁴⁵ Rawls, *A Theory of Justice*, pp. 111–12. Rawls acknowledges a debt to H. L. A. Hart's essay, "Are There Any Natural Rights?" (H. L. A. Hart, "Are There Any Natural Rights?," *Philosophical Review*, 64 (1955): 175–91, reprinted in Jeremy Waldron (ed.), *Theories of Rights* (Oxford, 1984), pp. 77–109).

⁴⁶ Rawls, *A Theory of Justice*, p. 112. Rawls distinguishes "obligations" from "natural duties"; the former "arise as a result of our voluntary acts" and are "normally owed to definite individuals, namely, those who are cooperating together to maintain the arrangement in

The cooperative venture with which Rawls is concerned in setting out his theory of justice as fairness is “the basic structure of society, or more exactly, the way in which major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation.”⁴⁷ It is significant that he refers to the basic structure of society as “the arrangement of major social institutions into *one* scheme of cooperation”⁴⁸ (emphasis added). Rawls is a very careful writer, and I believe that in *A Theory of Justice* he had, even if not in a fully articulated way, the idea that the option of comparing alternative “arrangement[s] of social institutions” would not be allowed to play any role in agreement on the principles of social cooperation. In effect, by insisting on that restriction, he conjured up the very problem that his work was written to solve.

The social cooperation made possible by the basic structure is to the advantage of all members of society, and that advantage is demonstrated through their agreement to the basic structure governing the division of the advantages: “the guiding idea is that the principles of justice for the basic structure of society are the object of the original agreement.”⁴⁹ The choice situation, as well as the agreement itself, are understood “as a purely hypothetical situation characterized so as to lead to a certain conception of justice.”⁵⁰ Robert Nozick has responded to that assertion of the principle of fairness with a counterargument and a counter-assertion. The counterargument concerns the coherence of Hart’s general argument about the generation of special obligations,⁵¹ and the counter-assertion is as follows:

On the face of it, enforcing the principle of fairness is objectionable. You may not decide to give me something, for example a book, and then grab money from me to pay for it, even if I have nothing better to spend the money on.⁵²

question” (p. 113), while the latter “apply to us without regard to our voluntary acts” (p. 114) and “are owed not only to definite individuals, say to those cooperating together in a particular social arrangement, but to persons generally” (p. 115).

⁴⁷ Ibid., p. 7.

⁴⁸ Ibid., p. 54.

⁴⁹ Ibid., p. 11.

⁵⁰ Ibid., p. 12.

⁵¹ The counterargument is that, in Hart’s argument, what Nozick refers to as “the point” of special rights to force others to behave as they are obligated can only be illustrated against a background of a general right not to be forced; this would, argues Nozick, entail that “only against a background of *permitted* forcing can we understand the point of *general* rights,” which would undercut Hart’s claim (Hart, “Are There Any Natural Rights?,” p. 90) that “in the case of special rights as well as of general rights recognition of them implies the recognition of the equal right of all men to be free” (Nozick, p. 92). The general force of Nozick’s response is that “rights of forcing” are not strictly deducible as corollaries from obligations, even of the strong sort (distinguished from moral duties) that Hart is describing. An alternative account of special obligations that entails no corollary “right of forcing” is to be found in Randy Barnett (1986a and 1986b). In this “consent theory of contract” such obligations are to respect property titles that have been transferred by contractual means, rather than to perform certain actions; in the case of nonfeasance the remedy is not specific performance, entailing a “right to force,” but transference of a property claim, for example, a non-performance bond.

⁵² Nozick, p. 95.

On its face, Nozick's counter assertion seems quite plausible, at least for most situations, especially considering the experience so many have had in airports with disciples of messianic religious or political leaders thrusting books or flowers into their hands and then insisting on "contributions." We cannot admit a theory of obligations that allows people gratuitously and unilaterally to impose benefits on others and thereby to create obligations with corollary "rights to force" on the part of the unilateral benefit-imposers.⁵³

But perhaps Rawls and others in the tradition of "hypothetical" social contract have only a certain class of benefits in mind: those from which one "cannot" escape. They may readily admit that the pressing of a flower into the hand of a traveling passenger does not generate an enforceable obligation on the part of the recipient to pay her "fair share" of the costs of producing and distributing the flowers. These goods are private goods, the enjoyment of which is best left to the voluntary choices of producers and consumers; that is so because such benefits are easy to "escape."⁵⁴

A significant literature has emerged defending the fairness principle on the grounds of the inescapability or presumptive benefits of public goods. Richard Arneson, for example, admits the force of Nozick's objections to the principle of fairness but argues that it can be "revised" such that obligations and corollary rights to force only arise in the case of "particular types of benefits"⁵⁵ that satisfy certain carefully specified criteria: the benefits must derive from the provision of "pure public goods," characterized by jointness of consumption, nonexcludability, and equal consumption by all members of the group.⁵⁶ In such cases, to allow "free riders to enjoy the benefit of the scheme without helping defray its cost ... [is] often morally repugnant."⁵⁷

Arneson carefully specifies the cases in which free-riders are to be distinguished or selected out from the class of potential beneficiaries, to wit, with respect to a

⁵³ It may be worth nothing that benefit-based obligations are infiltrating contract law itself, and not just political theory, as P. S. Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford, 1979), pp. 764–70 shows.

⁵⁴ The language of "escaping" is borrowed from Albert Hirschman's treatment of public goods: "The distinguishing characteristic of these goods is not only that they *can* be consumed by anyone, but that there is *no escape* from consuming them unless one were to leave the community by which they were provided" (Albert Hirschman, *Exit, Voice, and Loyalty* (Cambridge, Mass., 1970), p. 101).

⁵⁵ Richard Arneson, "The Principle of Fairness and Free-Rider Problems," *Ethics*, 92 (July 1982): 616–33, p. 618.

⁵⁶ *Ibid.*, p. 618. Limiting the class of benefits to "pure public goods" obviates the necessity for voluntary acceptance, asserts Arneson, for, "once a pure public good is supplied to a group of persons, there cannot really be any voluntary acceptance or enjoyment of the benefit by individual consumers. One cannot voluntarily accept a good one cannot voluntarily reject" (p. 619). Attention should be paid to the emphasized terms: "*once* a pure public good is supplied"; and "a good one *cannot voluntarily reject*." The assumptions that the good has already been supplied and that one cannot escape it are crucial—and highly problematic—moves in the argument, for they foreclose the option of pre-contract excludability; they assume away the problem of *producing* goods by assuming that they already exist; and they may limit the applicability of the principle to a very tiny class of "inherited" goods that are found (assuming no investment in the finding) and not produced.

⁵⁷ *Ibid.*, p. 621.

group of beneficiaries “G” of a good “B,” it is specified: (a) that B is genuinely collective with respect to G; (b) that the benefits to each member of G are greater than her “fair share” of the costs of supplying them;⁵⁸ (c) that “no beneficiary who has a disinterested motive for not contributing ... is required to contribute”;⁵⁹ (d) that it is unfeasible to provide B through the supply of private benefits to “each

⁵⁸ Note that application of this criteria to providers of collective goods could create havoc for, among others, the airline, cinema, and hotel industries, which engage in “discriminatory pricing” as part of a profit-maximizing strategy, charging often widely different rates for physically identical benefits, such as a hotel room or a seat in an airplane or a cinema. (The losers in such schemes are often professional business travelers, who must book in advance and spend a Saturday night away from family, in the case of the travel industry, and young to middle-aged movie goers, who are charged more than children, students, and senior citizens.) The existence of the hotel facilities (corridors, elevators, security, and so on) and the fact of the plane’s flight and the movie’s showing, regardless of whether it is empty, half-full, or full, are clearly collective goods with respect to those staying in rooms or sitting in seats; however, discriminatory pricing, that is, a clear case of “unfair shares,” are among the most effective means of providing such collective goods by charging the most to those who receive the most benefit from the nonrivalrous good, as measured by willingness to pay.

⁵⁹ Arneson explains in a footnote that that criterion is “intended to ensure that the principle of fairness will not lay obligations upon those who are genuinely conscientious objectors to the scheme for supplying public goods. My understanding of the requirement is that, in order to have a disinterested motive, the beliefs which give rise to the motive cannot be acquired or sustained in a culpably irrational fashion.” How one would determine “the beliefs that give rise to the motive” is left quite unclear, except for his explanation (Arneson, “The Principle of Fairness and Free-Rider Problem”, p. 632) that “If Jones has a deeply entrenched belief grossly at variance with the facts, and this counts as negligent or culpable ignorance, his obligation stands. Just having bizarre beliefs about the origins of the collective benefits one enjoys does not relieve one of the obligation to pay one’s fair share.” Thus, it might seem that the Amish belief that the Social Security System in the United States is a retirement plan (given current actuarial facts, this certainly may qualify as a “bizarre belief” by itself) and their view that divine providence requires their abstention from commercial insurance and retirement plans because participation evidences a lack of faith in providence, “does not relieve [them] of the obligation to pay [their] fair share.” That entails, then, a right on behalf of admitted beneficiaries to override *stated* preferences of others in pursuit of their own benefit; as David Schmidtz remarks of what he calls “honest holdouts” and Arneson refers to as “genuinely conscientious objectors,” after discussing the difficulties of distinguishing free riders who are strategically passing themselves off as honest holdouts: “The prospect of justifying institutionalized coercion as a solution to public goods problems depends upon whether there is a prior justification for engaging in actions that can be expected to force some people (perhaps a minority, but not necessarily so) to help pay for other people’s projects. Without this prior justification, the argument begs a most important question: Coercion may be necessary to force honest holdouts to pay for other people’s projects, but what exactly is it that makes pursuing this goal permissible in the first place? Merely pointing out that coercing people is the most efficient way for others to get what they want does not even begin to discharge the burden of proof” (David Schmidtz, *The Limits of Government: An Essay on the Public Goods Argument* (Oxford, 1991), p. 84).

beneficiary” sufficient to induce her contribution;⁶⁰ (e) that each person finds her “fair share of the costs” to entail a disutility;⁶¹ (f) that “no member’s choice is made under the expectation that it will influence any other member’s choice”;⁶² (g) that “No single member of G ... [nor] any coalition of a few members of G find it possible to divide the costs of B among the members of the coalition so that each member of the coalition will find the benefits of B to him outweigh the cost to him of contributing toward the supply of B according to the terms of the coalition. A large number of persons must contribute toward the supply of B if the benefits each receives are to overbalance the cost of each one’s contribution.”⁶³

⁶⁰ That would eliminate the enormous category of public goods that can be provided through “tie-ins” with private goods. See for instance, Daniel Klein, “Tie-Ins and the Market Provision of Public Goods,” *Harvard Journal of Law and Public Policy*, 10 (1987): 451–74 and for a classic case study Ronald Coase, “The Lighthouse in Economics,” *Journal of Law and Economics*, 17 (October 1974): 357–76.

⁶¹ That seems to exclude cases where altruists might derive pleasure from the sheer knowledge that they were helping to bring about a pure public good. How we would know what the motivations of contributors are is not explained, and may render this criterion non-operational.

⁶² That criterion is a bit puzzling. Arneson (in Arneson, “The Principle of Fairness and Free-Rider Problems”) offers in a footnote the explanation that “No single individual’s decision is expected to influence the decisions of others, but note that this is compatible with individuals basing their choices on expectations about what the aggregate of others will decide.” If the aggregate of others is intended to mean unanimity-minus-yourself, it would mean that expectation of unanimous contribution would be an acceptable motivation to contribute, but the knowledge that another has agreed to contribute on the condition that you do would not be an acceptable motivation, presumably because, unless it is a two person game, there might still be free-riders who are outside of the agreement. Such a requirement would eliminate those solutions to collective goods problems set forth in Earl R. Brubaker: “it seems worth proposing an additional rival to the free-rider hypothesis, and for convenience it might be called the golden rule of revelation. It asserts that under pre-contract group excludability the dominant tendency will be for each individual to reveal accurately his preference for a collective good provided that he has some assurance that others will match his offer in amounts he perceives as appropriate” (Earl R. Brubaker, “Free Ride, Free Revelation, or Golden Rule?,” *Journal of Law and Economics*, 18 (April 1975): 147–61, reprinted in Tyler Cowen (ed.), *The Theory of Market Failure* (Fairfax, Va., 1988), pp. 99–100). That thesis has been expanded and provided additional evidence from experimental economics by Schmidt; see especially chapters 4 and 5 on “conditionally binding assurance contracts.” Such contracts would only meet Arneson’s criterion “f” if the group of contractors included each and every beneficiary of the pure public good and the decision were made simultaneously and with no stepwise movement toward unanimity. That strikes me as a strange and unreasonable limitation on the provision of public goods.

⁶³ That seems to rule out voluntary solutions to public goods problems that exhibit the “straddle payoff” considered by de Jasay (in Anthony de Jasay, *Social Contract, Free Ride: A Study of the Public Goods Problem* (Oxford, 1989)), under which “under certain conditions being a ‘sucker’ is superior to having the exchange regime” (p. 144), a condition found more commonly than one would expect were one looking through lenses ground to Paul Samuelson’s specifications. See, for example, the study of voluntary and non-patent protected industrial and technological innovation in Tom G. Palmer, “Intellectual Property: A Non-Posnerian Law and

Under those conditions, according to Arneson, “each person who benefits from the cooperative scheme supplying B can correctly reason as follows: either other persons will contribute sufficient amounts to assure continued provision of B, or they will not. In either case, the individual is better off if he does not contribute If this reasoning induces an individual not to contribute, he counts as a free rider.”⁶⁴ Free riding is, according to Arneson, unfair and therefore activates the “rights to force” entailed by the fairness principle.

Not only has the range of applicability of the principle been limited to a very small set (perhaps the null set) of goods, leaving obligations to do our “fair share” for all of the rest unjustified (at least by that principle), but perhaps more importantly, he has made it very difficult to know precisely whether any good actually meets those criteria. That is so not only because it requires asking questions about motivations and “reasoning,” which are notoriously difficult to ascertain, but because if the good *is already produced* by the state and funded coercively on the basis of the principle of fairness, we cannot know whether it *could* have been produced through discriminatory pricing, tie-ins, altruism, conditionally binding assurance contracts (for example, “matching pledges”), or “straddle payoff” strategies.⁶⁵ Especially considering that such factors as technology, motivation, and expectations figure in Arneson’s criteria, it is difficult to imagine how we would determine whether a good should be provided collectively or privately, in the absence of the competition made possible by voluntary choice,⁶⁶ and, if collectively, whether it satisfies the criteria set out by Arneson and that we should therefore conclude that the burdens of its production should be shared on the basis of the principle of fairness.⁶⁷

Economics Approach,” *Hamline Law Review*, 12 (Spring 1989): 261–304, reprinted in Adam Moore (ed.), *Intellectual Property: Moral, Legal, and International Dilemmas* (New York, 1998), pp. 179–224; Jack Hirschleifer, “The Private and Social Value of Information and the Reward to Inventive Activity,” *American Economic Review*, 61 (1971): 561–73; and George Bittlingmayer, “Property Rights, Progress, and the Aircraft Patent Agreement,” *Journal of Law and Economics*, 76 (1986): 227–48.

⁶⁴ Arneson, “The Principle of Fairness and Free-Rider Problems,” p. 622.

⁶⁵ Actually, the last would, apparently, be considered “unfair” and hence unjust to those who produce the good. Contrast with Arneson’s conclusion of injustice the interesting discussion in Jasay, *Social Contract, Free Ride: A Study of the Public Goods Problem*, chapters 9 and 10. Jasay reaches rather different conclusions from Arneson. “Straddle payoff” games have structures similar to “battle-of-the-sexes” coordination games; for a description of the latter, see Jean Hampton, *Hobbes and the Social Contract Tradition* (Cambridge, 1986), pp. 151–61.

⁶⁶ See F. A. Hayek, “Competition as a Discovery Procedure,” in F. A. Hayek, *New Studies in Philosophy, Politics, Economics and the History of Ideas* (Chicago, 1978), pp. 179–90.

⁶⁷ The criteria might even limit the class of goods subject to the principle to those *already* produced (or in a sense inherited), and since the good is *already produced*, there is no problem of allocating the burdens of its production. What might arise, however, would be problems of equal or universal access to such already-produced collective goods. An example might be the so-called Royal Roads of England, so-called not because the crown produced them but because the crown seized them (they were produced centuries before by the Romans). Issues of access to collective goods are discussed in Carol Rose, “The Comedy of the Commons:

We should remember, further, that the difference between a collective good and a private good is not an inherent quality of the good as such, at least for most conceivable goods, namely those for which the publicness is not definitionally a part of the good (as publicness would be, for example, for the good of “republicanism”).⁶⁸ As Kenneth Goldin has argued:

The evidence suggests that we are not faced with a set of goods and services which have the inherent characteristics of public goods. Rather, we are faced with an unavoidable choice regarding every good or service: shall everyone have equal access to that service (in which case the service will be similar to a public good) or shall the service be available selectively: to some, but not to others? In practice, public goods theory is often used in such a way that one overlooks this important choice problem.⁶⁹

Thus, collective or private provision may be a matter of choice, and not of the inherent characteristics of the good as such. The choice may indeed be a response to high costs of exclusion or of contractual mechanisms in some cases, but it is *no less a choice* for that.⁷⁰ To say that the publicness of the good entails an obligation is to say that *the choice to produce it publicly* is what determines the obligation, which simply means that the *choice* of the majority can obligate the minority (or vice versa), thus undermining the claim that it is a problem of fairness *simpliciter* that generates obligations and rights to force non-contributors.⁷¹ To take the constantly raised “hardest” case, the current political system of nation states, for example, conjures up “units” of “national” defense when it is not at all clear that citizens of, say, Hawaii and New Hampshire are naturally “enjoying the same good of defense,” such that citizens of one may be coerced on the basis of the principle of fairness into paying

Custom, Commerce, and Inherently Public Property,” *University of Chicago Law Review*, 53/3 (Summer 1986): 711–81. I disagree, however, with the range of goods to which Rose’s reasoning might apply: I do not see how her arguments apply to goods that must be produced, rather than merely found without any opportunity cost incurred in the finding.

⁶⁸ To define the good as including state (or “public”) action is to rig the game; goods such as community, which people may actually desire, should not be defined in terms of how they are produced, as doing so renders the conclusion that they can only be produced in that way merely trivially true.

⁶⁹ Kenneth D. Goldin, “Equal Access vs. Selective Access: A Critique of Public Goods Theory,” *Public Choice*, 29 (Spring 1977): 53–71, p. 68.

⁷⁰ If there are good reasons for collective provision, then there are benefits to the parties that can be offered to induce holdouts to become participants. If the response is that the beneficiaries of public provision don’t *want* to forgo some of their benefits in order to induce others to cooperate, then one response may be that they have no right to force others to “cooperate” merely in order to gratify *their own* desires at the lowest cost.

⁷¹ Jasay notes that it is not “logistics” but “social choice” that determines which goods will be provided publicly: “Instead of being public because it was non-excludable, a good became non-excluded because the ‘public’ wanted it so” (Jasay, *Social Contract, Free Ride: A Study of the Public Goods Problem*, p. 156). See also the treatment in Antony de Jasay, *Justice and Its Surroundings* (Indianapolis, 2002).

for the defense of the other.⁷² Arneson attempts to meet Nozick's objection to the fairness principle by arguing that "a principle that Nozick cannot disavow without disavowing central commitments of his political philosophy requires acceptance of a revised principle of fairness."⁷³ Arneson's argument is that, if appropriation of property is to be justified, not on the basis of universal consent, but on the basis of the benefits generated even for those who face diminished opportunities of common use, then the principle of benefit can certainly be used to generate obligations without voluntary consent. While it is not clear that Nozick would agree with this argument, there is some evidence in the text of Locke to support a Lockean "fairness principle."⁷⁴ It is true that there is an implicit appeal to fairness at work as a part of Locke's account of political obligation,⁷⁵ but it is less clear that his argument for rights of appropriators to protect their justly appropriated property and exclude others from its enjoyment must rest solely or even partially on the *benefits* to the excluded; Locke argues strenuously that they are not *harmed* by this appropriation, but that they are equally *benefited* is not necessary, since Locke is seeking to avoid entirely the problem of "Consent of all the Commoners": "And the taking of this or that part, does not depend on the express consent of all the Commoners."⁷⁶ Indeed, one can argue not only that the Lockean enterprise is not about demonstrating the benefits of appropriation to all the nonappropriators, but that it is the benefit

⁷² Of course, it should also be noted that one person's benefit may be another person's bane. As Albert Hirschman notes, "[H]e who says public goods says public evils. The latter result not only from universally sensed inadequacies in the supply of public goods, but from the fact that what is a public good for some—say, a plentiful supply of police dogs and atomic bombs—may well be judged a public evil by others in the same community" (Hirshman, p. 101).

⁷³ Arneson, "The Principle of Fairness and Free-Rider Problems," p. 617.

⁷⁴ As Locke argues in the *Second Treatise* of the transfer of rights of enforcement of the law of nature from the individual to the political society: "For being now in a new State, wherein he is to enjoy many Conveniences from the labour, assistance, and society of others in the same Community, as well as protection from its whole strength; he is to part with as much of his natural liberty in providing for himself, as the good, prosperity, and safety of the society shall require: which is not only necessary, but just; since the other Members of the Society do the like" (John Locke, *Two Treatises of Government*, Peter Laslett (ed.) (Cambridge, 1988) II, §130, p. 353).

⁷⁵ See the treatment of this issue generally from a Lockean perspective in Simmons (1993), pp. 248–60.

⁷⁶ Locke (1988), II, §28, p. 289. Locke's contractarian argument is limited to political institutions, and not to moral institutions or practices generally. He is a "state contractarian" and not a "moral contractarian", to use Jean Hampton's terminology in her essay "Two Faces of Contractarian Thought" (in Peter Vallentyne (ed.), *Contractarianism and Rational Choice* (Cambridge, 1991), pp. 31–55). Locke, in fact, explicitly *rejects* "moral contractarianism" by insisting that the principle of property in one's person and subsequent appropriation of unowned resources "do not depend on the express consent of all the Commoners." Contractual agreement is used only to justify—and limit—political institutions. The realms of justice, morality, and the state for Locke are not, as they seem to be for Rawls, virtually co-extensive. As Hampton remarks, "Interestingly, Rawls does not even question the state's legitimacy in *A Theory of Justice*" (p. 32).

to *appropriators* that is the central issue; Locke shows that “commoners” should *become* appropriators both in their own interest and, of great if not equal importance, in order to secure freedom:

[Y]et being given for the use of Men, there must of necessity be a means to *appropriate* them some way or other before they can be of any use, or at all beneficial to any particular Man. The Fruit, or Venison, which nourishes the wild *Indian*, who knows no Inclosure, and is still a Tenant in common, must be his, and so his, *i. e.*, a part of him, that another can no longer have any right to it, before it can do him any good for the support of his Life.⁷⁷

The key phrase is “a part of him,” for “Though the Earth, and all inferior Creatures be common to all Men, yet every Man has a Property in his own Person. This no Body has any Right to but himself.”⁷⁸ Pace Rawls, our fundamental rights are to our bodies, and those are rights that are in no way held in common with others (that is, each person owns her own body and only her body, rather than a share in common rights to the use of all bodies). Without property in corporeal objects there is no way to delineate for embodied persons the spheres of action that constitute individual liberty, within which it would be unjust to initiate violence.⁷⁹

The generation of benefits for others need not figure prominently in a Lockean justification of rights of appropriators, and therefore endorsing a Lockean defense of property need not entail endorsement of the principle of benefit-based obligations. Arneson’s appeal to the text of Locke fails to provide support for his revised principle of fairness.

To deal with the problem of “honest holdouts,” George Klosko has sought to ground fairness-based obligations by identifying “presumptively beneficial” goods, which “must be desired by rational individuals regardless of whatever else they desire, though even this account presupposes a background of generally accepted values and beliefs.”⁸⁰ Identifying such goods, Klosko argues, negates the validity of claims on the part of non-contributors to be “honest holdouts” or “genuinely conscientious objectors.” According to Klosko:

There can be little doubt that the citizens of many modern states enjoy nonexcludable presumptive goods that depend upon the cooperative efforts of their fellows. Among such goods are ... national defense, protection from environmental hazards, and public health assurances. I think it is clear that individuals are obligated to contribute to the provision of these goods ... the principle of fairness presents an attractive account of the nature of their obligation.⁸¹

⁷⁷ Locke II, §26, p. 287.

⁷⁸ *Ibid.* II, §27, p. 287.

⁷⁹ For one Lockean grounding of natural property rights in property in one’s person, see Samuel C. Wheeler, III, “Natural Property Rights as Body Rights,” *Noûs*, 14/2 (1980): 171–94.

⁸⁰ George Klosko, “The Principle of Fairness and Political Obligation,” *Ethics* 97 (January 1987): 353–62, p. 353.

⁸¹ *Ibid.*, p. 356.

Klosko *asserts* that the principle of fairness provides an “attractive account” of the obligation he claims, but he gives no *argument* for it. The closest that he comes is a citation of a series of studies, mainly of American subjects, purporting to show that “people’s feelings that they are obligated to bear various burdens are significantly affected by their assessment of the burdens that other individuals are bearing or willing to bear.”⁸² This may show that some—or even most—Americans believe in the principle of fairness and “doing one’s share” in paying taxes, but it is hardly an *argument* for “doing one’s fair share” being obligatory or coercively enforceable. It may simply reflect the fact of decades of state control of education, and not of some universally (or even widely) intuited truth.

The dependence of “publicness” on choice, rather than on inherent characteristics of goods, leads us to the conclusion that the principle of fairness does not apply to goods from which we *cannot* escape, but to goods from which we will not be *allowed* to escape. In Arneson’s terms, “once a public good is supplied,” that means, after a decision has been made by some group with the power to make such decisions, then “One cannot voluntarily accept a good one cannot voluntarily reject.”⁸³ The “principle of fairness” depends on closure of exit options, on a *choice* by some not to allow others to evade alleged benefits.

A Hypothetical Contract with People you Cannot Escape

It is central to the Rawlsian social contractarian enterprise that parties to the contract not be allowed to escape from either its benefits or its burdens, and that the terms of the social contract must reflect that inescapability. The consequences of that inescapability are significant. If, for example, you cannot escape from your enemies in order to associate only with your friends, or at least with those who bear you no ill will, then it makes sense to establish rules of a rather different cast from those you would establish if you *could* escape those who are liable to make various coercive demands on you. Rawls raises that very scenario in *A Theory of Justice*,

⁸² Ibid., p. 357.

⁸³ Arneson, “The Principle of Fairness and Free-Rider Problems,” p. 619. There may be some externalities from which we cannot, in fact, escape that may pose fairness problems; they are negative externalities—such as air or noise pollution—for which there are threshold effects, for example two people enjoying wood fires or two people playing rock music is not a negative externality, but three people doing so is. A property rights approach can solve the problem of such externalities by enforcing rights against coercive interference with our property rights (for instance tort law) and by allowing contractual internalization of the externalities, but those activities below the threshold necessary to produce a rights-violating externality could be considered allocatable on the basis of fair access (for example by taking turns or auctioning off the rights), since strong Kantian-like solutions (“nobody may enjoy log fires, because if everybody did it would be disastrous”) are clearly sub-optimal, for *some* log-burning or rock-music playing below the rights-violating-externality-producing threshold produces goods for some without harming others. Griffin (in James Griffin, “Some Problems of Fairness,” *Ethics* 96 (October 1985): 100–118) suggests fairness-based solutions to such cases.

[T]he two principles are those a person would choose for the design of a society in which his enemy is to assign him his place.⁸⁴

Perhaps a better way to “protect themselves against such a contingency” would be to have exit rights from the start so that parties could escape from situations in which their enemies might assign them their places. What is remarkable about Rawls’s formulation is that the supposition that our enemies will assign us our places in society, even if only an “as if” constraint in the choice situation, implies a concern for the strategic interaction of rationally maximizing parties with conflicting interests and no preexisting moral restraint, something that is denied in Rawls’s work. Since we know that the constraints on the original position entail complete symmetry of interests, knowledge, and the like, we “can view the choice in the original position from the standpoint of one person selected at random.”⁸⁵ The consequence of that symmetry and of reduction to the situation of a single individual choosing among principles is that “the parties have no basis for bargaining in the usual sense.”⁸⁶ The ignorance of the parties

makes possible a unanimous choice of a particular conception of justice. Without these limitations on knowledge the bargaining problem of the original position would be hopelessly complicated. Even if theoretically a solution were to exist, we would not, at present anyway, be able to determine it.⁸⁷

Yet Rawls supposes that a party should adopt a conservative strategy, “reasoning as if” the party were coping with a situation in which “his enemy is to assign him his place.” The allegedly “hopelessly complicated bargaining problem,” contrary to Rawls’s assertion, is amenable to solution by specifying a suitable set of initial endowments (along the lines of Lockean self proprietorship) and allowing free exit rights in accordance with principles of voluntary association. (That would be to take the proposal of David Gauthier in *Morals by Agreement*⁸⁸ a step further, not only establishing a non-agreement point to serve as a baseline for distribution of the cooperative surplus over non-agreement, but introducing as well the very realistic option of choosing from among a variety of contracting groups.)

In his later work, Rawls spells out in detail why in the choice situation one can not be *allowed* to escape and how one should reason to principles accordingly. In *Political Liberalism*, Rawls takes great pains to differentiate “a well-ordered democratic society” from a “community” and from an “association.”⁸⁹ The form of cooperative endeavor about which Rawls is writing “is closed ... in that entry into it is only by birth and exit from it is only by death.”⁹⁰ Further, “we are not seen as

⁸⁴ Rawls, *A Theory of Justice*, p. 152. Rawls goes on (p. 153) to assert that the parties “should not reason from false premises,” but that the parties are still to reason as if they “were forced to protect themselves against such a contingency.”

⁸⁵ *Ibid.*, p. 139.

⁸⁶ *Ibid.*, p. 139.

⁸⁷ *Ibid.*, p. 140.

⁸⁸ David Gauthier, *Morals by Agreement* (Oxford, 1986).

⁸⁹ Rawls, *Political Liberalism*, p. 40.

⁹⁰ *Ibid.*, pp. 40–41.

joining society at the age of reason, as we might join an association, but as being born into society where we will lead a complete life.”⁹¹

Justice and Exit Rights

Rawls rejects the exit option in the specification of the choice situation for two primary reasons. First, exit rights cannot be cited to warrant the justice of an arrangement. Thus, “While the principles adopted will no doubt allow for emigration (subject to suitable qualifications), they will not permit arrangements that would be just only if emigration were allowed.”⁹² Rawls writes: “Political society is closed: we come to be within it and we do not, and indeed cannot, enter or leave it voluntarily.”⁹³ The reason is that “the right of emigration does not make the acceptance of political authority voluntary in the way that freedom of thought and liberty of conscience make the acceptance of ecclesiastical authority voluntary.”⁹⁴ Thus, “The political is distinct from the associational, which is voluntary in ways that the political is not.”⁹⁵

Rawls may have in his crosshairs the theory of John Locke, who offered as an argument for an obligation to submit to certain commands of government the claim that continued residence on a territory attached to a political society and governed by a government to which the members of that political society had entrusted their executive powers, and from which exit was not blocked by force, constituted tacit consent to submit. David Hume accused Locke and his followers of building “a tory consequence of passive obedience, on a whig foundation of the original contract.”⁹⁶ But it is a mistake to assume that advancing a Lockean or Lockean-type argument entails asserting that exit rights *guarantee* the justice of a political arrangement; other conditions may also be necessary. If, for example, you were deliberately to create a dependency of some sort in another party through coercive means (for example by injecting a poison to which only you have the antidote), and only after that had been accomplished were you to unlock the door and offer to allow her to leave, the resulting dependent relationship would not be warranted as just merely because of the now available exit option. Exit options alone do not guarantee justice, but they do, in a Lockean-type argument, satisfy three desirable purposes:

⁹¹ Ibid., p. 41.

⁹² Ibid., p. 277. Rawls does not tell us why the principles adopted would “no doubt” allow for emigration, nor why any “suitable qualifications” would be necessary, unless all of the justificatory work is being done by the term “suitable,” in which case “no qualifications” might be consistent with “allowing” emigration.

⁹³ Ibid., p. 136.

⁹⁴ Ibid., p. 136.

⁹⁵ Ibid., p. 137.

⁹⁶ David Hume, “Of the Original Contract,” in David Hume, *Essays, Moral, Political, and Literary* (1777; Indianapolis: Liberty Classics, 1987), p. 487.

1. they are just in themselves, as recognitions of a fundamental human right;
2. they are an engine of further liberalization and extension of human freedom and prosperity, by constraining political associations and authorities to recognize the rights of subjects or risk losing their human capital to other states and systems that offer more attractive arrangements; and
3. they can warrant the justice of political arrangements that *are* entered into voluntarily and in accordance with just procedures (i.e., they serve, in effect, as a background requirement for “justice preserving transformations” in matters of political order).⁹⁷

To avoid the “tory consequences” of which Hume warned, it is only necessary to specify further conditions relating to how one enters into a political society and what is necessary to exit it.⁹⁸ Eliminating entry and exit options from the choice situation is unwarranted, adds a needless element of *irreality*, and contradicts a fundamental liberal principle.

The right to leave does not, of course, entail any correspondingly symmetrical right to enter. My right to quit my membership in a chess club need not entail a right to be accepted by any other chess club. In a world governed by cosmopolitan principles, it is possible (but quite unlikely) that no one would be willing to associate with or accept some particular emigrant. In the world of national states, such as largely exists today and as almost all other theorists posit, exit rights actually are restricted in some places and entrance rights are tightly controlled everywhere. For example, to keep out potential cooperators (or recipients of taxpayer funded benefits) the U.S. government apprehends (and sometimes kills) would-be immigrants along the U.S.-Mexico border, despite the willingness of other American citizens (and land owners) to receive them. Although it is logically possible that no current U.S. citizen would accept immigrants on to their land, it does not seem likely, and certainly far, far, far less likely than the stark certainty of encountering the barbed wire, guard dogs, and armed guards currently deployed by nation states.

Natural Assets and Desert

The second motivation for Rawls’s making closure move explicit seems to be to meet David Gauthier’s objection to Rawls’s formulation of the redistributive difference principle on the grounds that it does not meet the criterion of mutual advantage. Gauthier challenges Rawls’s assertion that natural assets are “not deserved,” noting

⁹⁷ On the idea of justice preserving transformations, see Nozick, pp. 150–53.

⁹⁸ For example, territorial monopoly combined with inalienability of land, at least with respect to the political society to which it is attached, may be inconsistent with a properly Lockean or Lockean-type liberalism that seeks to avoid “tory consequences.” One could, for example, exit from the state without having to leave the territory or piece of land on which one currently lives. For such proposals, see: Johann Gottlieb Fichte, *Beitrag zur Berichtigung der Urtheile des Publikums über die Französische Revolution*, Reinhard Strecker (ed.) (1793; Leipzig, 1922); Herbert Spencer, *Social Statics* (1850; New York, 1970), pp. 185–93, and Randy Barnett, *The Structure of Liberty: Justice and the Rule of Law* (Oxford, 1998).

that although “they are not undeserved, they are not contrary to desert.”⁹⁹ Gauthier asks why, if mutual advantage and contractual agreement are to be the bases of the principles of justice, parties would not adopt a difference principle that would guarantee each an improvement over their non-agreement points. Writes Gauthier,

Behind the veil of ignorance, no one knows her natural abilities and talents, and hence no one knows what she would get in the absence of agreement. Yet each knows that she has certain natural abilities and talents, and that people differ in this endowment, so that in the absence of agreement people would secure different levels of well being. It is therefore possible for everyone to take account of the “no agreement point” in their reasoning, even though no particular person knows how it will affect her.¹⁰⁰

In response, Rawls rejects his earlier insistence on mutual benefit, by jettisoning entirely the options of no agreement and of comparison of alternative agreements, and therefore of bargaining. For the “rational” Rawls substitutes the “reasonable,” which is certainly a less exacting and less rigorous concept. In a defense of that move, Samuel Freeman, in a paper cited approvingly by Rawls in *Political Liberalism*, combines the highly questionable assertion of the inescapability of one’s “given” society with an explanation of reasonableness:

What is inescapable ... is one’s being a member of a social group, recognizing the group’s system of norms, and understanding how the norms function as reasons in public argument. Though that requirement does not involve endorsing all the norms of the group, whatever they may be, it does mean that one who is unwilling to cooperate with others on *any* terms except those most conducive to achieving his own particular ends is being *unreasonable*.¹⁰¹

Further, “For Rawls there is no place for comparing the benefits and burdens of cooperation with cooperation-free interaction ... noncooperation is not a viable option for us.”¹⁰²

⁹⁹ David Gauthier, “Justice and Natural Endowment: Toward a Critique of Rawls’s Ideological Framework,” in David Gauthier, *Moral Dealing: Contract, Ethics, and Reason* (Ithaca, N.Y., 1990), p. 161. Robert Nozick makes an objection similar to that of Gauthier, but it is not followed up in such detail and Rawls seems nowhere ever to address it. Nozick questions whether the fruits of cooperation to be distributed on the basis of the difference principle are to include the total product, or the total product minus “what each individual gets acting separately.” If the “noncooperative shares” are to be considered, “we should note that this certainly is not how people entering into cooperation with one another would agree to conceive the problem of dividing up cooperation’s benefits” (Nozick, pp. 184–5).

¹⁰⁰ *Ibid.*, p. 154. It is worth asking why “no agreement,” rather than a range of alternative agreements, is the appropriate alternative to “agreement.” Rawls sees the point in his response to Gauthier and not only insists that we *must* agree, but that we must come to *one* agreement, and one only, without being allowed to consider the possibility of entering into alternative contractual groups with different principles of association.

¹⁰¹ Samuel Freeman, “Reason and Agreement in Social Contract Views,” *Philosophy and Public Affairs*, 19 (Spring 1990): 122–57, p. 132.

¹⁰² *Ibid.*, p. 136.

Rawls associates the political exclusively with territorial monopoly, which is not a timeless feature of political association, whether past or present, and conflates state, nation, and society. As Rawls notes in contrasting the associational and the political, “the government’s authority cannot be evaded except by leaving the territory over which it governs, and not always then.”¹⁰³ (The claim is clearly false. Every day hundreds of millions of people—possibly billions—evade governmental authority without ever leaving home.¹⁰⁴) Rawls concludes from that patently false claim that,

The government’s authority cannot, then, be freely accepted in the sense that the bonds of society and culture, of history and social place of origin, begin so early to shape our life and are normally so strong that the right of emigration (suitably qualified) does not suffice to make accepting its authority free, politically speaking, in the way that liberty of conscience suffices to make accepting ecclesiastical authority free, politically speaking.¹⁰⁵

The social contract is *hypothetical*, rather than actual, because it takes as *already preexisting and unquestionable* an inescapable political unit—the nation state, with its all embracing claim over the full life of the individual—and offers a purely hypothetical justification for its power. No alternative is or can even be considered.

Kantian Constructivism and Inescapable Groups

Immanuel Kant explains the nature of the hypothetical contract as follows:

we need by no means assume that this contract (*contractus originarius* or *pactum sociale*), based on a coalition of the wills of all private individuals in a nation to form a common, public will for the purposes of rightful legislation, actually exists as a *fact*, for it cannot possibly be so.¹⁰⁶

Despite his explicit criticisms of Hobbes, Kant posits a hypothetical social contract establishing an absolute state with an absolute sovereign. He is moved to do so by the specter of anarchy: “universal violence and the distress it produces must eventually make a people decide to submit to the coercion which reason itself prescribes (i.e., the coercion of public law), and to enter into a *civil* constitution.”¹⁰⁷ In the *Metaphysics of Morals*, he claims that

¹⁰³ Rawls, *Political Liberalism*, p. 222.

¹⁰⁴ In extreme cases, they withdraw from the state entirely. See Victor Azarya and Naomi Chazan, “Disengagement from the State in Africa: Reflections on the Experience of Ghana and Guinea,” *Comparative Studies in Society and History*, 29/1 (January 1987): 106–31.

¹⁰⁵ Rawls, *Political Liberalism*, p. 222. I have already dealt with the concern expressed here that exit rights do not by themselves guarantee or warrant the justice of a political arrangement. What is notable here is Rawls’s explicit identification of political order with a territorial monopoly and with a particular nation.

¹⁰⁶ Immanuel Kant, *Political Writings*, Hans Reiss (ed.), H. B. Nisbet (trans.) (Cambridge, 1992), p. 79.

¹⁰⁷ *Ibid.*, p. 90.

Experience teaches us the maxim that human beings act in a violent and malevolent manner, and that they tend to fight among themselves until an external coercive legislation supervenes. But it is not experience or any kind of factual knowledge which makes public legal coercion necessary. On the contrary, even if we imagine men to be as benevolent and law-abiding as we please, the *a priori* rational idea of a non-lawful state will still tell us that before a public and legal state is established, individual men, peoples and states can never be secure against acts of violence against one another, since each will have his own right to do *what seems right and good to him*, independent of the opinion of others.¹⁰⁸

Kant and Rawls are engaged in moral and political constructivism, an exercise in pure “autonomy.” As Rawls remarks,

The parties in the original position do not recognize any principles of justice as true or correct and so as antecedently given; their aim is simply to select the conception most rational for them, given their circumstances. This conception is not regarded as a workable approximation to the moral facts: there are no such moral facts to which the principles adopted could approximate.¹⁰⁹

Kant insists, as Rawls does after him, that the social contract presupposes people who cannot escape one another, that is with whom one “cannot avoid having intercourse”:

[T]he first decision the individual is obliged to make, if he does not wish to renounce all concepts of right, will be to adopt the principle that one must abandon the state of nature in which everyone follows his own desires, and unite with everyone else (with whom he cannot avoid having intercourse) in order to submit to external, public and lawful coercion.¹¹⁰

Thus, the account of social contract for Kant, as for his follower Rawls, presupposes the unavoidability of a natural or inevitable political unit—the nation-state—made up of people “with whom one cannot avoid having intercourse”. The logic of the Rawlsian hypothetical social contract dictates that that is, and must be, a closed group.

The choice to close off exit options in the specification of the choice situation of the social contract is supposed to produce fundamentally liberal conclusions, but it violates at the outset a fundamental liberal principle, the principle of exit rights and freedom of movement, and important elements of the liberal tradition, that is cosmopolitanism and internationalism. It is also starkly at odds with Rawls’s statement that people do have the right to emigrate, a statement offered *en passant* and without justification.¹¹¹ (Is Rawls claiming that when people do decide to emigrate, they should not “consider the attractions of other societies?” But, if so, on what basis would they decide whether to emigrate, and to where?)

¹⁰⁸ Ibid., p. 137.

¹⁰⁹ John Rawls, “Kantian Constructivism in Moral Theory: The Dewey Lectures,” *Journal of Philosophy*, 77 (1980): 515–72, p. 564.

¹¹⁰ Kant (1992), p. 137.

¹¹¹ Rawls, *Political Liberalism*, p. 68.

But why must persons acquiesce in any “given” political arrangement? Why should they not be free to choose those arrangements most conducive to their needs or desires, in voluntary association with others equally free, and to reject those that they find oppressive or unbearable. According to those following the logic of the Rawlsian project, “a coalition that withdraws from society renounces any claim to justice from those who remain.”¹¹² In other words, outside of the nation state, justice is simply unthinkable. Presumably that means that before there were nation states, there was no justice.

“Given” a justified, inevitable, inescapable collectivity (invariably a nation state) within which one comes to be and without which one would be nothing at all, that collectivity has complete ownership of all assets “within” it, none of which may be withdrawn. The problem of allocating the benefits of social cooperation is thereby

¹¹² Gibbard, “Constructing Justice,” p. 272. In pressing the logic of the difference principle toward an extreme enforced egalitarianism, Cohen dismisses trans-communal moral principles applicable between individuals of different “justificatory communities.” He argues that the existence of a “justificatory community” entails “a set of people among whom there prevails a norm (which need not always be satisfied) of comprehensive justification” (Cohen, “Incentives, Inequality, and Community,” p. 282) Further, “an argument for a policy satisfies the requirement of justificatory community, with respect to the people it mentions, only if it passes the interpersonal test. And if all arguments for the policy fail that test, then the policy itself evinces lack of justificatory community, whatever else might nevertheless be said in its favor” (ibid., p. 282). The “interpersonal test” “asks whether the argument could serve as a justification of a mooted policy when uttered by any member of society to any other member” (ibid., p. 280). Some arguments, Cohen asserts (but does not demonstrate) fail to meet this test: “The incentive argument does not serve as a justification of inequality on the lips of the talented rich” (ibid., p. 280). Cohen concludes from this that those who could not justify their behavior in this way fail the interpersonal test and that if they “do not think that they *need* to provide a justification, then they are forswearing community with the rest of us in respect of the policy issue in question. They are asking us to treat them like a set of Martians in the light of whose predictable aggressive, or even benign, behavior it is wise for us to take certain steps, but whom we should not expect to engage in justificatory dialogue” (ibid., p. 282). Cohen makes a significant unjustified move in attempting to press the extreme egalitarian case: he moves from the idea of failure of “comprehensive justificatory community,” defined by the interpersonal test, to failure of *all* “justificatory dialogue,” for which move he offers no argument, although one is clearly needed, as his notion of “comprehensive justification” does not encompass all forms of justification or of justificatory dialogue. Further, his “test” of whether justification fails is not as rigorous as it at first appears, for clearly “could not justify” does not mean “could not utter a claim with meaning,” but rather, something like “would feel queasy or uncomfortable or guilty making the claim if she were to make the claim.” That, however, is a matter of psychology, and intuitions and feelings could differ. Imagine a Cohenite untalented person making the following claim to a talented person (I specify “talented person” and not “talented rich person,” because there would be no rich people, only talented and untalented, in Cohen’s ideal world): “You must work longer and harder at no additional benefit to yourself, entirely so that I may benefit.” At least some untalented people would feel uncomfortable, queasy, or guilty in making such a claim. For an examination of the myriad errors and confusions in Cohen’s argument for radical egalitarian redistribution, see Tom G. Palmer, “G. A. Cohen on Self-Ownership, Property, and Equality,” *Critical Review*, 12/3 (Summer 1998): 225–51.

reduced to a pure bargaining problem. No person and no assets get out; no person and no assets get in (because they would have had to leave another collectivity, which is not allowed).¹¹³ But in order to institute the “fair” distribution, with all “social and economic inequalities . . . arranged so that they are both (a) to the greatest benefit of the least advantaged,”¹¹⁴ recourse must be had to withdrawal of assets the margin, which is excluded from the principles on the basis of which calculations are to be made in the first place.

Slamming shut the exit door creates the problem to which fairness is alleged to be the answer, but it also makes it impossible to put the solution into practice. Not only is the game rigged; it is not even possible to play it by the rules stipulated.

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¹¹³ As I argued in section three above, all assets must be employed to their fullest. But then, without prices, no one could know what the “fullest” use of any resource would be. Prices require exchange, which requires property and the liberty to add or withdraw units at the margin, which is precluded by fiat. The enterprise rests for its fulfillment on the very principle—free withdrawal or addition of assets—that is precluded at the outset. See Ludwig von Mises, *Socialism: An Economic and Sociological Analysis* (1922; first English edn, 1936; London, 1972).

¹¹⁴ Rawls, *A Theory of Justice*, p. 83.

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PART III
Ways to Ordered Anarchy

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Chapter 5

Concepts of Order

Frank van Dun

Dans toute l'histoire politique du monde, même celle de l'Occident "chrétien", on a l'impression que, lorsqu'il s'agit de l'Etat, les triomphes de la justice sont presque des accidents, des anomalies.

R.L. Bruckberger¹

Unabashedly theoretic, Anthony de Jasay's analysis of human interaction does not seek to create a technocratic framework within which rulers-managers (or their academic surrogates) can find handles for steering and manipulating the actions of other people towards some preferred optimal state of society. There is no trace in his work of the presumption that rulers and managers are, or can be, related to society in the same way that an engineer is related to a piece of machinery or an experimental biologist to the animals in his laboratory. Jasay's bottom line is that rulers and managers are part of the real world of interacting agents that the theorist needs to analyse and understand. His arguments against the supposed necessity or desirability of the state derive much of their force from his refusal to compromise on that proposition.

If Jasay's analysis of the problems of conflict and order among humans has not received the recognition that it deserves, the reason may be that the entire classical liberal tradition, to which it so clearly belongs, has been sidelined in contemporary debates and argumentation. To understand the pertinence of his arguments, one has to grasp the relevance of that tradition. That is no easy task for those—most of us—who have been educated by the state to look at the world as if it were inherently chaotic and in need of a firm government to protect it from self-destruction. Many liberals today construe liberalism as a scheme of organisation that can and must be imposed politically on society by an enlightened government, as if the arguments by which some intellectuals convince themselves of the superiority of the scheme would make every person oblivious to the opportunities offered by the mode of imposition itself. However, classical liberalism was not about imposing freedom but about safeguarding it. Its premise was that the human world has a natural law or natural order² of its own, and that respecting personal freedom is crucial to that order. Consequently, the role of government, if it is to be lawful, must be restrained to maintaining respect for the natural law of the human world. Many authors in the

¹ In the whole of political world history, even that of the "Christian" Western World, one has the impression that as soon as the state is concerned, the triumphs of justice are little short of accidents, anomalies [my translation].

² On the interpretation of "law" as order, see Frank van Dun, "The Lawful and the Legal," *Journal des économistes et des études humaines*, 6/4 (1996): 555–79.

classical liberal tradition accordingly devoted their intellectual efforts to specifying “constitutional restraints” that would keep the state within the bounds of law.

Although Jasay eschews any notion of natural law that cannot be explicated in terms of his rational choice approach, he is fully committed to the view that there is indeed a natural order of the human world and that it will be attained most fully under conditions of lawful anarchy, that is to say in a regime of full freedom and unrestricted self-defence. Thus, he pushes the classical liberal argument to a radical conclusion: assuming that “rational choice” covers political man as well as economic and indeed every other sort of man, there is no reason to expect that it is possible to confine the government of a state to its legitimate function. In a nutshell: granting the state the monopoly power to maintain the law is to grant it the power to abuse the law—and, as Jasay famously asked, “What would you do if *you* were the state?”³ What would you do if you had the power to abuse the law without having to fear the one organization entrusted with protecting the law? What protection does a constitution offer against the state if the state is to be the guarantor of the constitution?

The purpose of this essay is to give a logical assessment of the classical liberal conception of law and order in the human world within an analytical framework defined by the general conditions or causes of conflict or disorder in human interactions. The first part (Interpersonal conflict), surveys the main positions on conflict and order in Western thought. Classical liberalism exemplifies one of those positions. Part 2 (Types of order), juxtaposes the relevant concepts of order and analyzes their constitutive relations. The analysis highlights the differences, discussed in the third part (Conflicting orders: liberalism and socialism), between the classical liberal concept of the “convivial order” or “natural law” of human affairs and the concept of “social order” that is central to all forms of philosophical socialism. “Rational choice” in the convivial order and in political society, the fourth and last part, concludes the essay with a short discussion of the application of “rational choice” analysis, in particular the prisoners’ dilemma model of interaction, to convivial and social orders.

Interpersonal Conflict

Causes

Let us consider the necessary and sufficient causes of interpersonal conflict as well as its possible cures. We shall begin our inquiry on a faraway island inhabited by only two persons, A and B. Because we are interested in interpersonal conflict, there have to be at least two persons. Evidently, this condition, which we shall refer to as “plurality,” is a necessary condition or cause of interpersonal conflict.

Obviously, plurality is not a sufficient condition. A and B must exhibit some diversity. They must have different opinions, values, expectations, preferences, purposes, or goals. If they were of one mind in all respects, in immediate agreement

³ The first sentence of his *The State* (Oxford, 1985).

on all questions, there would be no possibility of conflict between them. Therefore, we should add diversity as a necessary cause of conflict.

Plurality and diversity do not constitute a sufficient set to explain significant conflicts other than mere differences of opinion. If plurality and diversity were the only conditions that mattered, A and B could easily agree to disagree and that would be the end of the matter. However, agreeing to disagree is no solution if A and B have access to some object M that is scarce in the sense that it can serve the purpose of either but not simultaneously the purposes of both of them. If A succeeds in getting control of the object, then B must live at least temporarily with the frustration of not being able to get what he wants—and vice versa. There is at most one winner and at least one loser. Therefore, we must add scarcity and free access to the list of causes.

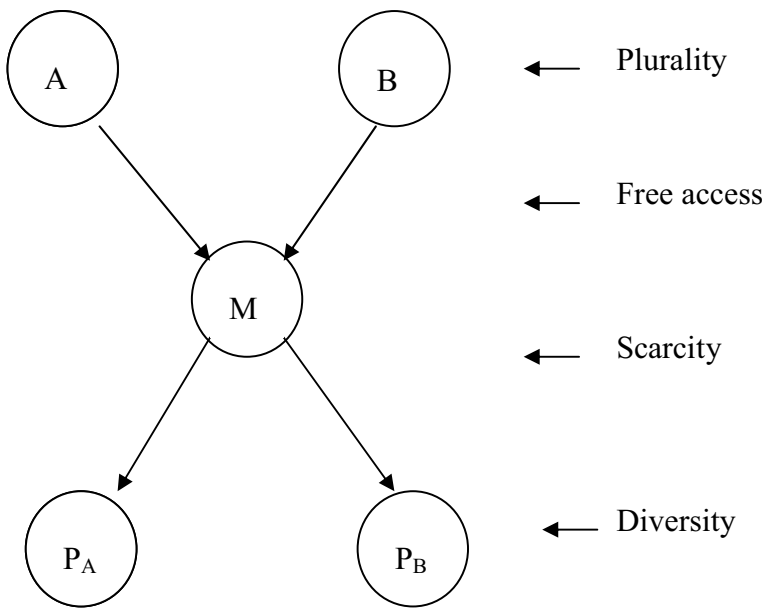


Figure 5.1 Causes of conflict

We can visualize the situation on the faraway island in the conflict-diagram, which depicts the separately necessary and jointly sufficient causes of interpersonal conflict.

Cures

Given that each of the causes is necessary, it is sufficient to eliminate only one of them to eliminate the possibility of interpersonal conflict between A and B. Let us assume that we can tackle each of the four causes independently. Then there are four pure strategies for eliminating the possibility of interpersonal conflict. The first involves replacing plurality with its opposite, unity; the second replaces

diversity with uniformity or consensus; the third eliminates scarcity and gets us into a condition of abundance; finally, the fourth introduces property, thereby getting rid of free access.

Confining ourselves to a “binary” classification that considers only two possible states for a cause (either it is present or it is not), we see that there are also eleven mixed strategies. Obviously, such a binary classification is not adequate if we want to study the “dynamics” of conflict and conflict-resolution, but for our analytic purpose it will do. Questions about weakening the causes to various degrees, about how much to invest in attempts to do that, about trade-offs between different solutions, and so on, are not on the agenda here.

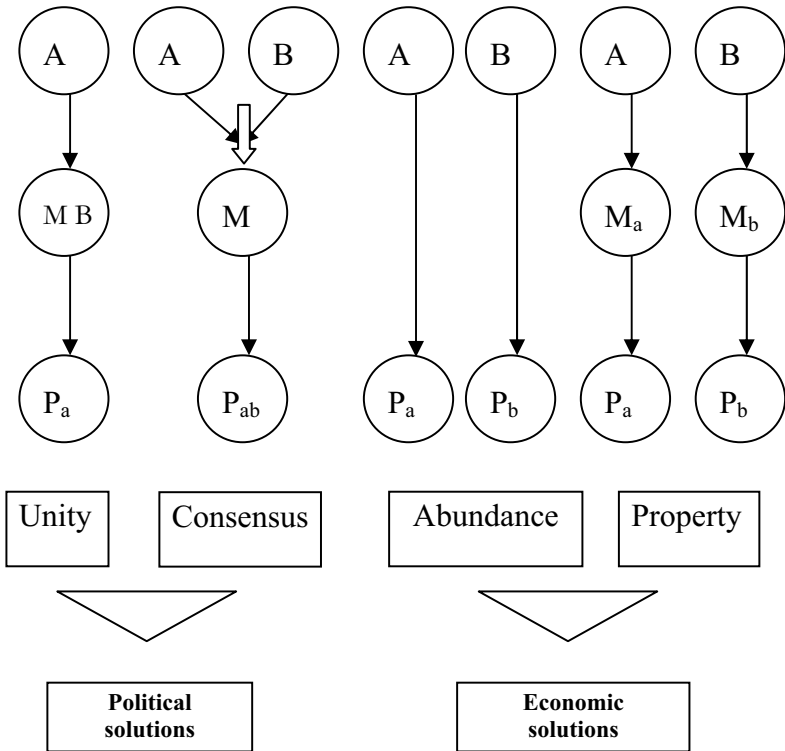


Figure 5.2 Solutions of conflict

Unity involves the merger of A and B into a single person or else the reduction of a person (B) to the status of a mere means or an unconditionally loyal subject of the other (A). In any case, only one decision-maker or ruler remains. Consensus, on the other hand, requires that a set of opinions, valuations, preferences and the like is available in terms of which A and B can agree on the purpose for which and the manner in which M will be used.

As the graphical representation makes clear, Unity and Consensus involve the replacement of a plurality of independently chosen actions with one common,

collective or social action. They imply a subordination of the actions of many to what has been called a “thick ethics”, one that stipulates not just how but also which ends are to be pursued. In particular, they subordinate “law” (which they typically interpret as legislation or authoritative commands and regulations) to some ruling opinion about what is good and useful. In the case of Unity, that is the ruler’s opinion. In the case of Consensus, it is an opinion shared by the people that matter. For this reason, we may label Unity and Consensus “political solutions.”

Note the contrast with Abundance and Property. Neither of these eliminates the plurality of independent actions. There is no single “thick ethics” that guides the actions of all concerned. Nevertheless, Abundance and Property are formulas of order. They subordinate any person’s ethics to the requirements of law, which defines the boundaries within which persons can seek to achieve their ends. Abundance and Property thus leave the plurality of persons and the diversity of their purposes intact. They only affect the scarce means. For that reason, we may label them “economic solutions” of the conflict-situation. Abundance is a condition in which it is possible for every person to do and get whatever he wants, regardless of what anybody else might do and therefore also without having to rely on anybody else’s co-operation or consent. Property requires only that each person can know which parts of the set of scarce means are his and which are another’s.

Each of the pure strategies has had its share of famous defenders in the history of Western philosophy. Plato⁴ and Hobbes⁵ immediately come to mind as strong advocates of unity. Despite the fact that we usually place them at the opposite poles of almost any dimension of philosophical thought and method, for both of them unity and only unity provides an adequate solution to the problem of interpersonal conflict. Like Plato’s philosopher-king, Hobbes’s Sovereign has the first and the last word on everything. Both argued forcefully that the slightest fissure in the structure

⁴ In his last work, *The Laws*, Plato still defended unity, even if he appeared to have given up the hope that it ever might be realized: “The first and highest form of the state and of the government and of the law is that in which there prevails most widely the ancient saying, that ‘Friends have all things in common.’ Whether there is anywhere now, or will ever be, this communion of women and children and of property, in which the private and individual is altogether banished from life, and things which are by nature private, such as eyes and ears and hands, have become common, and in some way see and hear and act in common, and all men express praise and blame and feel joy and sorrow on the same occasions, and whatever laws there are unite the city to the utmost—whether all this is possible or not, I say that no man, acting upon any other principle, will ever constitute a state which will be truer or better or more exalted in virtue. Whether such a state is governed by Gods or sons of Gods, one, or more than one, happy are the men who, living after this manner, dwell there; and therefore to this we are to look for the pattern of the state, and to cling to this, and to seek with all our might for one which is like this” (*The Laws*, Book 5, 739c,d).

⁵ “For by Art is created that great Leviathan called a Common-wealth, or State (in latine Civitas), which is but an Artificiall Man; though of greater stature and strength than the Naturall, for whose protection and defence it was intended; and in which, the Sovereignty is an Artificiall Soul, as giving life and motion to the whole body” (Thomas Hobbes, *Leviathan* (London, 1968), Introduction).

of unity would lead to a breach of the political wall that protects the citizens from the ever-present threat of conflict and war.

Aristotle based his political thought firmly on the requirement of consensus. As he put it, political society (and its first imperfect manifestation, the family) demands a consensus on what is good and useful.⁶ What he meant, obviously, was not the sort of ad hoc consensus that we find in transactions on a market. The latter require no more than a contingent agreement on such small things as a particular good, its price and time of delivery. Nor did Aristotle mean a consensus on the conditions that make such transactions possible.⁷ While he agreed that justice in exchange is important, it was far from him to accept it as a respectable solution to the problem of conflict. What he had in mind was a sort of “deep consensus” to which the members of a political society⁸ could always appeal to resolve their initial disagreements—a consensus on fundamental values and opinions that marked the very identities of the persons involved in it. Such a consensus could not take root except in the soil of shared experiences and longstanding affectionate and practical relationships.⁹ It required common history, tradition and custom to ensure that all the citizens would be educated to respect and esteem the same outlook on life in its theoretical, practical and above all moral aspects. Rousseau’s *Du Contrat Social* also exemplifies the consensus-solution. However, unlike Aristotle’s, his consensus could not be assumed to be historically given and transmitted almost as a matter of course from one generation to the next. It had to be created *ex nihilo* by skillful legislative and political manipulation on the basis of no more than a formal agreement to agree. It was, at least initially, an artificial construction of the sort that only an exceptional political genius, working on a “young, not yet corrupted people,” could hope to accomplish.

On a naive level of understanding, abundance merely involves a sort of equilibrium of supply and demand in the sense that resources are available in adequate quantities, so that everybody can satisfy his wants with ease and without detriment to anybody else. Before the technological and industrial revolutions of the nineteenth century, abundance was associated mainly with asceticism. Regardless of changes on the supply-side, there would be plenty for everybody if only people would reduce their desires (“demand”). Philosophies of asceticism stress control of desire and elimination of greed and covetousness. They look forward to a

⁶ See T. A. Sinclair’s translation of Aristotle’s *Politics* (Book I, section 2), 1253a16–18: “[H]umans alone have perception of good and evil, right and wrong, just and unjust. And it is the sharing of a common view in these matters that makes a household or a city.”

⁷ Aristotle, *Politics* (Book III, section 9), 1280a31–1281a1.

⁸ At least its more notable members, those that fulfil the rather stringent conditions of citizenship that made them fit to rule. Among the inhabitants of a city that did not qualify as citizens Aristotle also counted the free men that were engaged in manual labor, trade and making tools. Their part in the political consensus of the city was minimal. It consisted in no more than acknowledging the right to rule of the best citizens.

⁹ Although Aristotle made much of the fact that the *polis* was a “moral” rather than, like the family, a biological association, he insisted that it could not function well unless it was composed of family-groups that “occupy the same territory and can inter-marry” (Aristotle, *Politics* (Book III, section 9), 1280b35).

harmonious order of human affairs that should result from the adoption of a moral attitude of self-denial and contentment with a simple and natural life. The Cynics come to mind as proponents of this view, but we can give examples from more recent times as well (such as some of the more fundamentalist factions of today's "Greens"). However, since the Enlightenment the idea of abundance rests primarily on the prospect of an enormous increase in the productive powers of mankind. Thus, abundance or liberation from wants and frustration now is identified with satisfaction of all desires, regardless of their number, quality or intensity. Many early nineteenth-century utopian socialists already fitted this description, but it was not until Marx had reinterpreted the old gnostic doctrine of total spiritual liberation in terms of material and social conditions that abundance came to mean the eradication of scarcity by the expansion of productive power.¹⁰

Property rests on the idea that the physical, i.e., finite or bounded, nature of individual human beings, who are also rational agents and producers, is the primary fact that needs to be taken into account in any consideration of human affairs and relations. The objective or natural boundaries that separate one person from another also entail objective boundaries that separate one person's words, actions and works from those of another. What lies within a person's boundaries is his property. In so far as people respect each other's property, there is order and justice; in so far as they do not respect it, there is disorder and injustice. Indeed, justice is respect for the natural order, i.e. the natural law, of the human world. Thus, justice requires human persons not only to respect other human persons but also their rights to the extent that these do not upset the natural law nor result from an infringement of it. For any person, these respectable rights are the accomplishments of which he is the author—the things that come into being under his authority, as his property. Being the rights of natural persons acting within their natural boundaries, they properly are called "natural rights." In short, justice also requires restriction of access to any scarce resource to those who are by natural right entitled to it.

In Antiquity, the idea of Property apparently was taken up only by some of the Sophists. Unfortunately, with few exceptions, their thoughts are nearly inaccessible except through secondary and often hostile accounts. Their better known opponents, Plato and Aristotle in particular, were concerned primarily with the socio-political ordering of the city—with the positions, roles and functions that define its organization, and the selection of its officials. Thus, their city implied a radical division between

¹⁰ In *The German Ideology, Part I*, there is the famous statement that, under communism, "I can do what I want, while society takes care of general production." That might mean that human life is split up in an autonomous spiritual part (the gnostic's divine self?) and a material social part without any autonomy at all, which Engels described in his essay "On Authority" (1872). However, in his early manuscripts, Marx also hinted at true abundance with his vision of Man and Nature becoming truly One—the final realization of the gnostic's dream of recapturing the original status of the true God, who knows himself to be All and therefore wants nothing. "This communism ... is the genuine resolution of the conflict between man and nature and between man and man—the true resolution of the strife between existence and essence ..., between freedom and necessity, between the individual and the species" (from the essay "Private Property and Communism" in Marx-Engels-Gesamtausgabe, vol. I, 3, 114-15, Moscow 1932).

insiders and outsiders as well as between the higher and lower orders of socio-political organization. They paid little or no attention to human affairs and relations among persons in so far as they were not defined in terms of social positions and functions. For them, the city was to a large extent the measure of the human person. In contrast, many of the Sophists apparently did develop a universalistic human perspective.¹¹ For them, the concrete, historical, particular, finite natural human beings are at any time and place the measure of all things, including the city. They saw cities and other conventional social organizations as no more than ripples or waves, continuously rising, falling, and disappearing, on the sea of human nature. As the sea rarely is without waves, so human history rarely is without social and political entities. However, just as no single wave is permanent and no wave is the fulfillment of the nature of the sea, no city or other socio-political organization is more than a transient phenomenon, shaped by a fleeting and contingent constellation of forces in human nature and its environment. Human beings may be sociable by nature, but they are not wedded by nature to any particular social order.¹² Thus, for the Sophists, it was imperative to pierce “the corporate veil” of the city. They were interested in what people really did to one another, not in the conventional representation of their activities by political, social or cultural authorities. For them, law was “a surety to one another of justice,” and societies were “established for the prevention of mutual crime and for the sake of exchange.”¹³ Distant precursors of classical liberalism, they were not prepared to sacrifice the law of natural persons on the altar of any political organization, even one that was dedicated to the production of happiness and virtue.

It was not until the spread of the biblical religion that the idea of persons and their property acquired a fundamental significance in western civilization. That religion presented the world as essentially an interpersonal affair founded on mutual respect and covenant. It posited a relationship between a personal God (whom orthodox Christian doctrine eventually construed as a unified complex of three persons) and the human world (also an interpersonal complex involving many separate persons). According to its fundamental code, the Decalogue, the principal source of order in the relations between God and the world and in the relations among human beings is respect for the distinction between “thine” and “mine.” Politics had no part in this. While Jesus proclaimed that he had come to fulfill the Law (Matthew 5:17), he repudiated the offer of “all the kingdoms of the world, and the glory of them” (4:8).¹⁴

¹¹ Eric Havelock, *The Liberal Temper in Greek Politics* (New Haven, 1957).

¹² Cf. their rational capacities may be natural but no particular language is *the* natural language of mankind.

¹³ Aristotle, *Politics* (Book III, section 9), 1280b11 and 1280b30.

¹⁴ “Il est impossible qu’il y ait entente absolument cordiale ... entre l’Etat et les chrétiens. ... [I] leur est même impossible de prendre l’Etat et sa raison tout à fait au sérieux. ” [It is impossible that there is complete unanimity between the state and the Christians. ... It is not even possible for them to take the state and its *Raison* completely seriously [my translation].] R.-L. Bruckberger O.P., *L’Histoire de Jésus-Christ* (Paris, 1965), p. 177. Of course, Bruckberger was not referring to twentieth-century European Christians, which he called “une collection de ballotins” (p. 176), a collection of empty paper boxes.

By the end of the seventeenth century, John Locke could give an account of order in human affairs that was entirely based on an appreciation of the human condition as an interpersonal complex, in which no person can claim any naturally given social position, rank or privilege. Understandably, a person's property—the manifestation of his being, life or work in the natural order of the human world—was seen as his primary natural right, which reason could not but acknowledge as eminently respectable. "Property" took on its classical liberal guise.

Ranking Solutions

Which type of solution one prefers depends on one's opinions about the feasibility and desirability of eliminating or attenuating one or another of the causes of conflict. Few people believe that it is possible to do much about scarcity, although, as noted before, there have been those for whom it is really no more than an illusion, the effect of a false consciousness. As for plurality, diversity and free access, many people appear to believe that they are far easier to manipulate than scarcity; however, they are also likelier to be considered values in their own right.

As we have seen, Abundance and Property tackle scarcity in different ways. Abundance refers to the elimination of scarcity in the fundamental sense of *intrapersonal* scarcity. That sort of scarcity refers to the fact that one can and therefore has to make choices. One cannot eat an apple and use it to make apple pie; therefore, one must choose what to do with it. Property leaves intrapersonal scarcity intact but removes free access and therefore *interpersonal* scarcity, which is the fact that one cannot have or use exactly the same thing that another person has or uses. Both sorts of scarcity imply the inevitable frustration of some wants, but only intrapersonal scarcity implies frustration for which one cannot blame another person. It depends solely on the variety of one's goals and the limitations of one's options. Even Robinson Crusoe, during the first lonely months on his island, had to face up to the intrapersonal scarcity of resources and to make choices about their most advantageous uses.

A person confronts intrapersonal scarcity when he becomes aware that whatever choice he makes has opportunity costs. Either he does *a* and gets whatever the consequences of doing *a* are, but then he cannot do *b* and therefore must forego its consequences; or else he does *b* at the cost of giving up whatever benefits doing *a* might produce. Choice and opportunity costs are inextricably linked.¹⁵ The cause of the inability to do *a* and *b* simultaneously may be in the nature of the person himself (his physical constitution) or in the nature of the external means at his disposal. The latter aspect—one cannot have one's cake and eat it too—need no further comment. However, the physical constitution of the person is equally relevant. Human persons are finite beings, not only because they are mortal but also because at any moment

¹⁵ Only he that has no choices faces no costs. No matter what he does, it is the best because the only possible course of action. Hence the Stoics' prescription for happiness: Renounce the illusion of freedom of choice, accept whatever happens as what is inevitably fated to happen, and so eliminate the risk of frustration and disillusionment. That, of course, is a classic ascetic version of the abundance-solution.

their capacity for consumption is limited just as their productive capacity is limited. Consequently, a person, even one with infinite productive powers, or with immediate access to boundless supplies of consumption goods, would have to make economic choices. Unless he was completely indifferent with respect to all possible sequential orderings of enjoyments, he still would face the risk of getting much less out of life by choosing the wrong sequence of acts of consumption. Apparently, only a person with infinite capacities of consumption in an environment of superabundant consumption goods of every kind would be free from want and frustration.

Now, contemplate the co-existence of two or more persons, all of them with abundant material resources. From any person's point of view, all others are external resources that can be put to many uses. Therefore, to the extent that one has desires and ideals that can be satisfied or realized only if others are or do what one requires of them, scarcity persists despite the abundance of other, non-human resources. True abundance, then, is a tall order. However, if it were possible, abundance would have nothing to fear from plurality, diversity or free access. The disappearance of intrapersonal scarcity takes the sting out of those other causes of conflict.

Compared to Abundance, the other solutions, Unity, Consensus, and Property, are less fantastic. However, they are not equal. Unity seems to be a more demanding condition than Consensus and the latter a more demanding condition than Property. Unity implies that diversity and free access have been eliminated as causes of conflict. The single remaining decision-maker has privileged access to all scarce resources and sets priorities for their use. Unity, however, may break down under the stress of scarcity. The decision-maker could make the wrong choices and thereby undermine his position, leaving him with too few resources to maintain his command amidst general dissatisfaction with his rule. On the other hand, if he could maintain unity, then, in a worst-case scenario, all of his subjects would perish with him if he made the wrong choices.

Consensus implies that scarce resources will not be accessed by anyone in a controversial way. In other words, it implies the elimination of free access. However, like Unity, it is vulnerable to the problem of scarcity. It could be a consensus on choices that are unsatisfactory in their effects and so provide incentives to defect to those people on whose consensus it relied. Alternatively, the consensus may hold but at the cost of collective disaster. Moreover, given that Consensus leaves plurality intact, it must invest in strategies that will ensure that the consensus does not become spurious. Thus, Consensus is always threatened by scarcity and by plurality.

Property, finally, only solves the problem of free access. Compared to Abundance, Unity, and Consensus, it is very nearly merely a technical matter. We may presume that most people will rise to the defence of their property as soon as they begin to understand how it can be taken away from them; and we may presume also that there is no iron law giving the advantage to the aggressors rather than the defenders. Thus, the property-solution appears to require no more than an adequate organization of self-defence. However, Property is vulnerable to the effects of scarcity, plurality and diversity, which it does not eliminate but merely accommodates.

Because of such considerations, we can rank the different pure solutions on a single scale (see Figure 5.3). The ranking turns on the fact that a solution may imply the neutralization or elimination of more than one cause of conflict. Thus,

Abundance requires the elimination of scarcity and implies the neutralization or elimination of all conditions under which Plurality, Diversity, and Free Access would give problems. If it were possible, it would also, for that very same reason, be the most complete solution to the problem of interpersonal conflict. With Property, the reverse is true. It requires elimination of free access but does not imply a reduction of plurality, diversity, or scarcity. Because it requires little tampering with the conditions of human existence, it is also the most vulnerable solution.

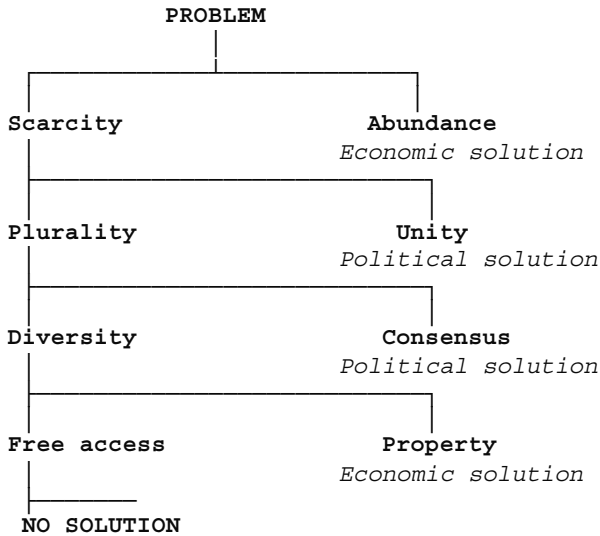


Figure 5.3 Ranking solutions

Utopianism

Abundance and Unity are more likely to be referred to as “utopian solutions” than either Consensus or Property. Marxian communism, with its prospect of a radical

liberation from scarcity, fits the utopian idea very well. So does Plato's idea of Unity.¹⁶ While Hobbes is rarely charged with utopianism, there nevertheless is a strong utopian undertone in his work. His definition of war as consisting "not in actual fighting; but in the known disposition thereto, during all the time there is no assurance to the contrary,"¹⁷ leaves us with a definition of peace that is distinctly utopian.¹⁸ His Commonwealth—"a reall Unity of them all, in one and the same Person"¹⁹—is supposed to be the necessary condition of that utopian peace.²⁰

If Consensus in its classical Aristotelian version cannot plausibly be charged with utopianism, the modern version, epitomized by the writings of Rousseau and other apologists for the sovereign republican State, does have a pronounced utopian streak. It derives from the idea that the republican state requires that human nature be changed.²¹ The actual transformation of human beings into "true citizens" is necessary to produce a genuine political consensus without which the "general will" cannot but remain a lifeless legal fiction (and an easy target for the analytical attacks of rational choice theorists).

¹⁶ See the quotation from *The Laws*, Book 5, in note 4 above. Note, however, that in his better-known *Republic* (Book II, 369–75) Plato appears to argue that Unity should be restricted to the political sphere (the state) as the preferred way to eliminate uneconomic (violent, warlike) attempts to satisfy wants and desires. In other words, Unity is a way of sanitizing politics so that it will not interfere with the natural economic order of the supposed primordial "Golden Age". In this interpretation, Plato should be seen as the first theoretician of the nineteenth-century's *political* liberals' ideal of a "constitutional state" with its radical separation of economics ("private law") and politics ("public law"). Needless to say, nineteenth-century constitutionalism failed to heed Plato's warning that the "guardians of the state" (civil and military servants) should be separated from the economic order of society not only physically, by being confined to barracks, but also psychologically, by being subjected to an educational regime aimed at eradicating every trace of personal interest or affection for anything not ordained by the state. Interestingly, Aristotle's idea of a political constitution differs from Plato's precisely by not envisaging a separation of political and economic power. Aristotle's political citizens were the heads of the society's economic units (households). This may be seen as a prefiguration of the modern corporate state, where the heads of significant interest groups ("corporations") are the politically relevant (ruling, policy-making) citizens.

¹⁷ Hobbes, Part I, chapter 13.

¹⁸ Leibniz noted this in his "Caesarinus Fürstenerius," in Patrick Riley (ed.), *Leibniz: Political Writings* (Cambridge, 1988). Against "the sharp-witted Englishman," Leibniz argued that "no people in civilized Europe is ruled by the laws that he proposed; wherefore, if we listen to Hobbes, there will be nothing in our land but out-and-out anarchy" (p. 118). According to Leibniz, Hobbes's argument was a fallacy: "[H]e thinks things that can entail inconvenience should not be borne at all—which is foreign to the nature of human affairs... [E]xperience has shown that men usually hold to some middle road, so as not to commit everything to hazard by their obstinacy" (p. 119).

¹⁹ Hobbes, Part II, chapter 17.

²⁰ Eric Voegelin, "The New Science of Politics," in M. Henningsen, *The Collected Works of Eric Voegelin*, vol. 5, *Modernity without Restraint* (Columbia and London, 2000), p. 218 also notes the gnostic-utopian theme in Hobbes's argument.

²¹ J.-J. Rousseau, *Du Contrat Social*, Book II, chapter 7.

It was Plato who first adumbrated the theme of the transformation of human nature as a prerequisite of a just political order with his detailed description of the process by which natural human beings must be transformed into guardians of the city. Rousseau, an admirer of the Greek's theory of political education, also shared his notion that among human beings the state cannot be justified. That idea, that human nature rules out a justification of the state, is the foundation of individualist anarchism,²² but Plato and Rousseau turned it into the proposition that to justify the state one should replace human nature with something that is by definition compatible with the state—"guardianship" or "citizenship." However, states did not begin to control formal education on a scale and with a determination approaching the requirements of Plato's or Rousseau's program until the twentieth century. Whether openly proclaiming their utopianism or disguising it as piecemeal social engineering, modern Western states embraced the notion of a "revolt against nature," sweeping away much of Europe's Christian and classical liberal heritage.

Arguably, Property is immune to the charge of utopianism. Neither the Sophists nor those in the modern Lockean tradition are prominent figures in the literature on utopian thought. Descriptions of what a liberal or libertarian world might be under ideal conditions fail to give an impression of utopianism. Even with the problem of free access solved and property as secure as it can be, people still are left to their own resources, or dependent on the charity of others, to make something of life. Indeed, those "ideal conditions" merely ensure that *nobody* has any guaranteed immunity from the slings and arrows of life. It is no wonder that Property gets short shrift in an age dominated by utopian hankering after guaranteed satisfaction of wants, except perhaps in the "ersatz" form of allegedly market-friendly government-imposed pro-growth policies—that is to say, as a means to approach the Abundance solution to the problem of order. Incisive and logically compelling as they are, Jasay's arguments for the virtues of anarchy as a principle of order cannot but fail to strike a chord among those who have been indoctrinated with the notion that partisan politics—the art of externalizing costs—can be universalized into the art of eliminating costs.

Types of Order

Social Order and Convivial Order

Unity and Consensus, as political solutions, require social organization: a social order or society, with a structure of command and obedience, and a hierarchical stratification of rulers and subjects, leaders and followers, directors and members or employees. Abundance and Property, on the other hand, as economic solutions, require no such thing as a society in that sense. The order they constitute is a convivial

²² Referring to the theory of rational choice, Anthony de Jasay's *The State and Against Politics* (London, 1997) offer many detailed arguments for that proposition. It has been a constant theme in the work of, among others, the late Murray N. Rothbard, e.g. *The Ethics of Liberty* (Atlantic Highlands, NJ, 1982).

order,²³ in which people live together regardless of their membership, status, position, role or function in any, let alone the same, society.

A society is an economy in the classical sense of “a household.” It is also a teleocracy (a system of rule aiming to achieve a particular set of ends, which may be fixed by the society’s constitution, or left to the discretion of its leading organ). However, many societies have more or less extensive nomocratic²⁴ sectors, which are defined by general rules of conduct rather than end-specific rules. For example, in modern politically defined or state-dominated societies of the Western type, “private law” (*le droit privé*, the regulation of the so-called private sector and the interactions of private citizens) often is nomocratic.

A family, a club, a ranch, a firm, a corporation, a church, a criminal gang, a state, or a state-like concoction such as the European Union—these are all examples of societies in the sense that is relevant here. At this point in the argument our interest is in the difference between the social and the convivial types of order *per se*; it is not in the manner in which order is achieved or maintained. Therefore, we need not consider here the obvious differences between, say, a criminal gang or a state, on the one hand, and, on the other hand, societies that pursue their economic, religious, cultural or recreational goals in peaceful ways, without resort to violence, coercion or fraud.

Because of their teleocratic structures and the unity of their planned collective actions, it makes sense to personify societies and to regard them as artificial or conventional persons defined by their constitution and social decision-rules. It does not make any more sense to personify a convivial order or to ascribe plans, opinions, values, decisions or actions to it, than it does to ascribe such things to its opposite, war. Thus, it makes sense to ask whether and how a particular society participates in the convivial order; but there is no sense in asking about the participation of the convivial order in a social order.

A convivial order is not a society. It is a catallaxy, an order of friendly exchange among independent persons.²⁵ We can find examples of convivial order in daily life, especially in the relations among friends and neighbors, among travelers and local people, and among buyers and sellers on open markets. We find them, in fact, wherever people meet and mingle and do business in their own name, whether or not they belong to the same or any social organization. There is no need for them to be aware of each other’s social affiliation or position, or of any teleocratic or nomocratic regulations that might be imposed by some society or other. Dealings between a natural and an artificial person (a society or one of its officials) or between two artificial persons may be said to be convivial by extension and analogy if they

²³ From the Latin *convivere*, to live together. I use “conviviality” primarily because its literal meaning is the same as that of the Dutch “samenleving” (literally, living together), which stands in contrast to “maatschappij” (the Dutch word for society).

²⁴ As far as I know Michael Oakeshott (*Rationalism in Politics and Other Essays* (London, 1962)) introduced the terms “teleocracy” and “nomocracy.”

²⁵ On the distinction between “economy” and “catallaxy,” see F. A. Hayek, “The Confusion of Language in Political Thought”, in F. A. Hayek, *New Studies in Philosophy, Politics, Economics, and the History of Ideas* (London and Henley, 1978), pp. 90–92.

conform to the patterns (or laws) of friendly exchange among independent persons. However, the paradigm of conviviality is a relation between natural persons.

Although a convivial order is not a teleocracy and is an order maintained by adherence to general rules of conduct, it would be unwise to refer to it as a “nomocracy.” The latter term, like “autocracy,” “democracy,” and “aristocracy,” suggests a system of rule, government and administration, which does not apply to the convivial order.²⁶ A simple example of a nomocracy would be a soccer game. It is played according to a set of rules that apply equally to the competing teams and do not aim at a specific outcome of the game but nevertheless are eminently artificial and imposed legal rules. Similarly, a state-imposed nomocracy, for example in the form of “competition law,” is the implementation of a policy by the social authorities. Nomocracies are social constructs just as much as teleocracies are.²⁷ In contrast, conviviality is an objective condition of interaction. Like its opposite or negation, which is war (disorder or confusion in, or a breakdown of, convivial relations), its presence or absence can be ascertained without reference to the rules of any organization, system of government or administration. Consequently—to use what once was a commonplace among lawyers—the laws of conviviality must be discovered; they need not be invented. From the point of view of political science, the convivial order is anarchical, maintained by a variable mixture of prudence, common decency, informal pressure, and (where not criminalized) investments in means of self-defence.

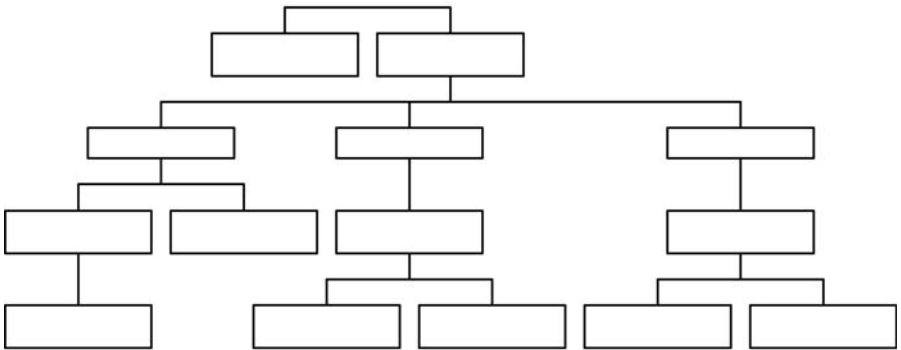


Figure 5.4 A social order or society

²⁶ For this reason, Hayek (in Hayek, “The Confusion of Language in Political Thought”) preferred “nomarchy” to “nomocracy.”

²⁷ Historically, the demise of teleocratic central planning in the last quarter of the twentieth century was not followed by the catalytic order of conviviality (the free market in the libertarian sense) but by more or less nomocratic forms of socialism (“the mixed economy,” “the third way,” “the active welfare state”).

Significant differences

To appreciate the differences between a social and a convivial order, we can draw a diagrammatic representation of a social order (see Figure 5.4).

Students of legal systems, business administration, public administration, and social systems in general, are familiar with this type of organigram. From the family to the state, from the small entrepreneurial firm to the large corporation, the army or the church, every society can be represented by a more or less complex variation of the diagram. Indeed, a society is a system of social positions, each with its proper function, role, duties or entitlements—its proper “legal competence.”

A representation of the convivial order differs markedly from a social organigram. The figure gives us a snapshot of multifarious relations among many persons. Some of those relations are affective, others professional or commercial; some are fleeting, others durable; and so on and so forth. In the convivial order there is no formally fixed hierarchy of pre-defined positions, roles or functions. The fact that some people are more prominent or influential than others does not entail any difference in their status under the laws of conviviality.

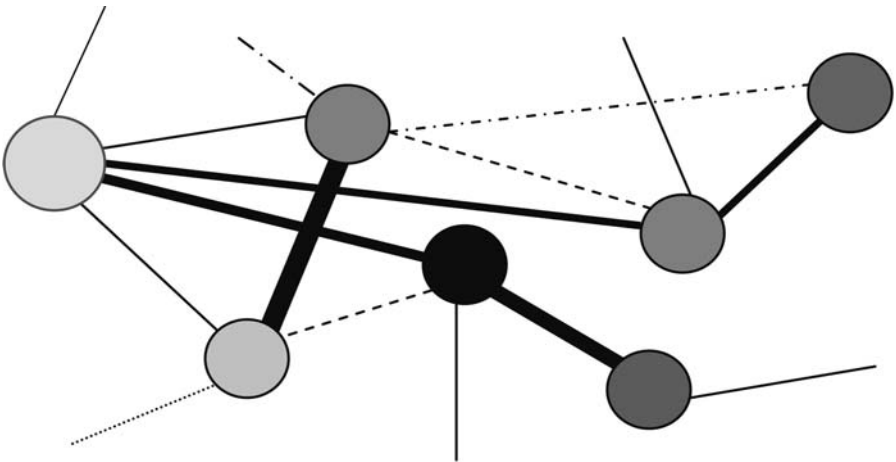


Figure 5.5 The convivial order

Natural persons participate in a society as performers of one or more social functions or roles, as occupants of one or more social positions, each of which has a socially defined utility function attached to it. Moreover, as participants in a society they move in a world that is characterized by clearly defined positions, rewards, and punishments, and hence more or less fixed relations between actions and consequences. Thus, like the players of a game, they are inclined, indeed expected, to have a strictly utilitarian attitude towards decision-making. However, unless they are fully socialized, having internalized their “social identity,” there is no guarantee that they will abstain from seeking to use their position for purposes that are not part of, or may be at odds with, their social function. That is why societal

organizers face the familiar problems of monitoring and controlling people to make them observe their “social responsibilities.” Apart from the societal organizers, the people in a society are no more than human resources, which—like other sorts of resources—have to be managed in the service of the goals set for the organization. In their endeavors to control the “human factor,” societal organizers may well try to eliminate it altogether, for example by training animals, or introducing machinery and computers. Where elimination is not possible they will resort to indoctrination or set up systems of incentives, rewards and punishments, or rigorous and easily monitored step-by-step procedures and ergonomic micro-management to provide motivation and to ensure efficiency. Human resources management is an integral part of social existence.

In a convivial order, in contrast, people appear only as themselves, doing whatever they do under their own personal responsibility. There is nothing like a social responsibility in the convivial order. No society takes the blame or appropriates the praise for any individual person’s acts and no person can get away with any kind of mischief merely by noting that he is only doing his job. While one person may agree to assume a larger or smaller part of the responsibilities and liabilities of another, every act remains someone’s responsibility.²⁸ In contrast, many societies have systems for passing on social responsibility that lead to nowhere, for example by placing ultimate responsibility with an inaccessible deity, an anonymous “public” or “people,” or an abstraction such as “society itself.” Such arrangements are inconceivable in a convivial order, where there is no corporate veil and responsibility is necessarily personal, not diluted by organization. Indeed, people may be held responsible—asked to justify themselves—by anybody, even a complete stranger, who is affected by their words or actions. Hence, to maintain themselves in the convivial order, people have to acquire an ethics of responsibility rather than an ability to prove that they are maximizing some “given” utility function.

Among other significant differences between a society and a convivial order, we note the conditions of membership. A society necessarily has clear boundaries that separate its members from non-members because it is essentially an organization of men and resources that aims at some unique common goal or set of goals, which it tries to achieve by suitably co-ordinated collective or common action. To reach those goals, a society develops a strategy, assigns tasks and allocates resources to its officers and members.

All societies must work out the problem of securing enough income to pay for their expenses, and many face the additional problem of distributing a part or the whole of the social income among the society itself, its ruling members and its “rank and file.” A society does all of those things according to its customary, constitutional, statutory or legal rules, although contingency measures and the dictates of crisis management occasionally override their application. In any case, it must know who is a member of the society and who is not; what the members do and contribute and on what conditions they participate in social action. Formal and exclusive membership is a necessary condition of social existence.

²⁸ For a discussion of the implications of this for so-called “limited liability corporations,” see Frank van Dun, *Personal Freedom versus Corporate Liberties* (London, 2006, forthcoming).

A convivial order has no membership in that sense. It does not organize any collective or common action; it does not generate, let alone distribute, any social income. People can live convivially without being card-carrying members of the same club or association, without engaging in common pursuits or having a common leader, director, or governor. Whereas in a nomocracy such as a soccer game or a state's private sector, people need some sort of certificate of registration or license to be permitted to play, they need no such thing in a convivial order. Conviviality requires no papers.

Elements of Order: Lex and Ius

Societies or social orders and convivial orders differ in their constitutive relations of order. Social orders essentially are *lex*-based or *legal* orders. The term “lex” refers to the Latin verb “legere” [to choose; to pick]. It denotes a relationship in which a person holds a position that entitles him to choose or pick others to do what he commands them to do. Its original meaning was the act of calling men to arms or to report for military duty.²⁹ Later, “lex” came to denote any general command issued by a politically organized society, one that is capable of enforcing obedience to its commands by military force. Eventually, the word acquired the meaning of a directive or rule of conduct that is generally accepted within a given society as being applicable and enforceable in some way by the social authorities, even if the society is not political. Calling a legal order “a social order” serves to highlight the fact that acceptance of and obedience to the legal rules is to a large extent a matter of habit or custom.³⁰

Thus, a social order implies the existence of a system of rules that define positions of “authority” or “command” to which other positions are subordinated. It is customary to personify such positions and to refer to them as to artificial persons, for example “ruler,” “legislator,” “director,” “rector,” “senate,” “general assembly,” “secretary,” “subject,” “employee,” “servant,” “private citizen.” It is no more a matter of empirical science to determine what those social personages can or cannot do than it is an empirical question what the King, the Queen or a Knight in chess can or cannot do. To answer such questions, one should consult the appropriate legal texts or rulebooks, or people (*legists*) that possess expert knowledge of the applicable rules. Of course, one should take care to consult the right books and experts. A Queen in chess is not the same thing as a Queen in bridge; the rules defining the French Presidency do not define the American Presidency; and what a Belgian citizen can or cannot do may differ widely from the legal competence of an Austrian citizen. Every society, whatever its size, form or function, has its own

²⁹ “Lex” is related to “dilectus”, (military) mobilization—confer the Roman “legions.”

³⁰ “Societas” is related to “sequi” [to follow]: a society involves people who follow the same rules. In the representation of the solutions of the problem of interpersonal conflict, we see the *lex*-relation most clearly in the unity-solution, where A occupies the position of the legislator and B the position of the subject. In the consensus-solution, both A and B occupy the legislative position but only in so far as they are representatives of the consensus that supposedly defines the social order.

legal system,³¹ which supplies the criteria for determining whether an act is legal or illegal. Maintaining social order, therefore, is largely a matter of preventing or suppressing illegal activity, or else of changing the rules to legalize activities that, for one reason or another, are deemed acceptable by the current social authorities.

In contrast to social orders, the convivial order is *ius*-based. The word “*ius*” refers to the Latin verb “*iurare*,” which means to swear; to speak solemnly; to commit oneself toward others. The *ius*-relation implies no positions of authority or command, but direct personal contacts resulting in agreements, covenants and contracts, in mutual commitments, obligations or *iura*. Strictly speaking, the *ius*-relation can exist only between natural persons, as they are the only persons that are naturally capable of independent speech and action. It does not hold between a natural person and something that is not a person. In particular, it does not hold between social positions.³² Unlike the *lex*-relation, the *ius*-relation holds between persons who need not be members or subjects of the same society. It holds between persons who are independent of one another, at least in the sense of not being related to one another as a superior to an inferior or as subjects of the same superior in any social organization.³³

What natural persons can or cannot do is not defined by any set of legal rules. It is defined by their nature, which we have to accept as “a given” and to study accordingly. Moreover, we do not have to know any legal rules to determine which acts are injurious to natural persons or which acts are infringements of the order of conviviality among such persons. To make such determinations, we must study what really happened, what real people really did to one another, taking into account their mutual commitments and obligations—their *iura*. In short, we must study the world as *jurists*, not as *legists*, because the objective here is to determine whether an act was just (in accordance with *ius*), not whether it was legal or illegal in some society. Admittedly, *iura* can be as varied and diverse as legal systems are, but compared to the myriad of forms, sizes and functions of social entities human persons are remarkably similar beings.

³¹ Here we can see why legal positivists—for whom “law” denotes the legal system of a (state-dominated) society—must end up with empty-shell characterizations of “law,” such as Kelsen’s “dynamic system of norms that derive their validity from a single presupposed merely formal Grundnorm” [approximately foundational norm] and Hart’s “union of primary and secondary rules.” As for substance, “[positive] law can be anything,” “there is no logical connection between law and justice,” and so on.

³² By extension and analogy, it can be applied also to any two personified objects, such as mutually independent societies, provided that these are represented or operated by natural persons.

³³ Referring to the types of order discussed in part I: the *ius*-relation most clearly finds a place in the property-solution. Neither A nor B having any say or authority over the other, any interaction between them must be justified in terms of their mutual respect, consent and contractual obligations. There is no other lawful way in which either of them could gain access to the means controlled by the other to reach ends that are beyond the powers embodied in his own means. Theoretically, we also could subsume the relations between A and B in the abundance-solution under the *ius*-relation, but there would be no point in doing so. Neither A nor B could gain anything from taking on obligations in a world without scarcity.

The jurist as such is not concerned with legal rules but with rules of law. The latter, in the strict sense, are deductions from the conditions that constitute the convivial order of beings of the same natural kind. Thus, they are implied in the ius- or speech-relation itself, which requires the speakers to be “free and equal” in their exchanges of questions and answers, arguments and counter-arguments, proposals and counter-proposals, in order to communicate to one another what their commitments are. Obviously, physical intimidation and threats, lies and deliberately misleading utterances, and the like, defeat the purpose of entering into a speech-relation. One who engages in such things places himself outside the law because he willfully upsets the order of ius-based interaction by failing to deal with another as a free and equal person. In short, he is a criminal, one who does not respect the relevant distinctions (*discrimina*) that define conviviality.

In a wider sense, the concept of a rule of law also covers rules of justice, “technical determinations” of just and efficient ways to maintain or to restore the convivial order in a given historical context, where linguistic and other conventions enter into the understanding of human actions. One can easily recognize here the basic intuition of the theory of natural law—before it was derailed by attempts to derive the constitution of an ideal society from nature—that the fundamental patterns of order, the natural laws, of human relations are implicit in the rational nature of the physical human animal: its capacity of speech (*ratio*, *logos*) and its ability to act in accordance with such rationally undertaken commitments.

The study of “legal systems” and the “legal persons” they define is poles apart, with respect to its object as well as its methods, from the study of the ius-based convivial order among natural persons. The “law” (*leges*) of the legal positivists can be anything whatsoever, but the jurists’ law, the ius-based order of conviviality, is in its principles the same always and everywhere. The same act may be legal in one society and illegal in another; but we need no legal reference to say that it is just, or unjust. Likewise for distributive justice: it primarily concerns a distribution of burdens or benefits according to principles on which the parties had agreed as a ius established among free and equal persons, regardless of any socially imposed rules. With respect to distributions within a social setting, “distributive justice” stands for a distribution based on an appreciation of merit (which necessarily must be relative to some task or purpose). In contrast, social justice—the satisfaction of every member’s wants by society, according to a socially defined ranking of either wants or membership status—is independent of agreement or merit. It brings to mind the Marxian illusion that we all can and are entitled to do and have what we want while society takes care of production.³⁴

Conviviality, Natural Law, and Justice

From the above considerations, we can induce the basic structure of law.³⁵ It is an interpersonal order that is ius-based. It comprises at least two independent and

³⁴ See note 10 above.

³⁵ The argument and a detailed analysis can be found in “The Logic of Law,” <http://allserv.rug.ac.be/~frvandun/Texts/Articles/LogicOfLaw.djvu>.

autonomous³⁶ persons. Paradigmatically, they are natural persons, each of them exercising legislative power over his own property—the means of action, which may be material things or non-autonomous persons, that belong to him. If we assume the existence of only one autonomous person, the formal structure of law is reduced to a lex-based order. Simple as it is, the schematic representation of the ius-based interpersonal order has many interesting properties, but this is not the place for a detailed formal analysis.

From a philosophical point of view, the analysis is of interest primarily when we consider how human persons fit into the scheme, leaving aside all kinds of artificial and supernatural persons and piercing through the “corporate veil” of social constructions. At least at the moment of first contact, before either one has had a chance to do anything to the other, two natural persons can stand only in the ius-relation to one another. They are, at that moment, two independent (free) persons of the same natural kind, neither one being subordinated to the other. Of course, in this case, *ex hypothesi*, there can be no subordination in consequence of some pre-existing *iura* or of some previous injustice committed by one of them against the other. They are in a Lockean “state of nature,” which is the convivial order by another name. Their relation is according to the natural law. In terms of a once current definition of law, it is a relation characterized by freedom and equality.³⁷ Law is a condition of freedom among likes, that is rational agents of the same natural kind.

Justice, or *ius-titia*, is that which is instrumental for bringing about or maintaining the condition of *ius*. It comprises all actions that effectively aim at keeping human relations within the order of speech among free and equal persons. Thus, its main function is to prevent disorder or confusion from affecting the convivial order of natural persons. Injustice is first of all the result of not respecting another natural person as a free and equal person, for example by confusing him with something that is not a person at all but, say, a material object, animal, or a social construct. Other significant types of injustice result from confusing one natural person with another, especially when such confusion leads to rewarding or praising, punishing or blaming, one person for the words or actions of another. Such confusions, whether deliberate or not, whether rectifiable or not, betray an inability to abide by the conditions of conviviality.

Thus, with respect to the convivial order, “justice” has a clear and unambiguous objective meaning. Jasay rightly criticized the efforts of political and social theorists to appropriate the term “justice” while obfuscating its true meaning with various attempts to define justice as “something else.”³⁸ Obviously, justice has no place in the legal-positivistic view that “law” is the legal system of one or another society. Maintaining social order or upholding the prevailing conditions of legality has no logical or other necessary connection with maintaining the *ius*-based order of

³⁶ On the technical meaning of “autonomy” in this context, see the text referenced in note 35.

³⁷ For my reservations about the use of “equality” in this context, see the paper cited in note 2.

³⁸ Jasay, “Justice as something else,” which is the pivotal text in his beautiful collection of essays: *Justice and Its Surroundings* (Indianapolis, Ind., 2002).

conviviality. Who will deny that “There is no logical connection between *lex* and justice” sounds more plausible than “There is no logical connection between *ius* and justice?”

Conflicting Orders: Liberalism and Socialism

The convivial order requires no social organization, only friendly, peaceful interpersonal relations. In that sense, it is a universal natural condition, the existence of which we can identify whenever and wherever there are contacts between people. In the same way we can identify its “negation,” which is war, or disorder or confusion in human affairs. Like that between life and death, the difference between convivial order and war comes, as it were, with the very nature of *homo sapiens* and his world. In contrast, societies are local, temporary and contingent constructions. There is no such thing as natural society. Nevertheless, awareness of the net advantages of cooperation and organization leads people to adopt a social mode of existence, to form or join one or more societies on the expectation that they will improve their quality of life or their chances of achieving cherished goals. This raises questions about the compatibility of social and convivial orders.

A convivial order conceivably may disappear when too many individuals start making war on one another, although it is difficult to see how such criminality could become infectious without being socially organized. As the word is used at present, war is pre-eminently a social phenomenon in that it involves high degrees of social organization and mobilization. Indeed, societies may be outlaws from the point of view of conviviality because of the way in which they treat their members or outsiders or both. Many societies thrive by perfecting the art of disturbing the conditions of conviviality by invasive actions of lesser or greater magnitude, from occasional raids to legalizing crimes or making lawful activity illegal³⁹ to all-out war. Although societies can be formed and operated on principles that are compatible with the convivial order, social orders are not necessarily compatible with the convivial order.⁴⁰

To some extent, all societies put the convivial order at risk. They imply some degree of hierarchical organization and mobilization—a concentration of power over men and resources that they can use for their particular social purposes. Moreover,

³⁹ Prominent examples are the “underground economy” and other “victimless crimes.”

⁴⁰ “Society” is not the same as “community.” The latter term denotes a categorization of people with some common property or relation: locality, nationality, language, occupation, religion, and so on. Thus we have local, national, linguistic, religious, artistic, cultural, academic, criminal and many other communities. There is even a human community, a community of the living, and a community of the dead. Members of a society usually have a community of interests, but the community of people with a common interest need not be socially organized. Indeed, they may be only dimly aware of one another’s existence. Community leaders typically are strong personalities, not occupants of some predefined position—but many such leaders aspire to organize or “socialize” their community. A community has no “collective decision-rules.” It need be no more than a segment or aspect of the convivial order. It is not a type of order distinct from either the convivial or the social order.

societies tend to subvert the attitude of freedom among likes that characterizes conviviality. They offer rewards not just in the form of the accomplishment of their purpose or an occasional bonus or token of appreciation. They also offer differentiated social positions, which carry different sets of powers, privileges, immunities, perks of office, or financial benefits. Unlike the convivial order, where the concept does not even make sense, societies offer “career opportunities” and feed particular ambitions and rivalries regarding social position and rank. On the other hand, societies may languish, perish even, when they cannot adequately control the human factor. An atmosphere of either conviviality or war may pervade the social structure; the members may deal with one another as free and equal persons or alternatively as enemies. The social enterprise becomes pointless as the convivial attitude of live and let live or its warlike antithesis takes root to the detriment of social efficiency.

When there is incompatibility between social and convivial order, the question arises which type of order is more basic or worthy of respect than the other is. With regard to this question, classical liberals and philosophical socialists take radically opposed positions.

Philosophical socialists assert that social order trumps the natural law of freedom among likes. They focus on social orders, in which people occupy positions and perform roles and functions in the pursuit of some social goal. Consequently, efficiency in the pursuit of that goal trumps interpersonal justice, even—especially—if the goal is called “social justice.” For a socialist, human individuals are social resources or recipients of social benefits, in any case socially constructed “legal persons” with socially defined claims (“rights”) and duties. Hence, philosophical socialists face the task of socializing human beings to make them internalize the demands of society. In contrast, for a classical liberal, societies are human constructs, and human nature and natural conviviality trump social order. His task is to humanize societies to make them compatible with the natural law of conviviality. The main thrust of Jasay’s work is that it is vain to expect the state to be of any help in that task. However, neither his nor anybody else’s critiques appear able to stop the relentless drive towards displacement of convivial modes of interaction by social forms that has characterized so much of recent history. If being reduced to a mere placeholder in a scheme of social organization—a resource to be managed—is the true mark of servitude then we are now very close to reaching the goal of what Aldous Huxley, not too long ago, called the “most important Manhattan Projects of the future ... vast government-sponsored enquiries into what the politicians and the participating scientists will call “the problem of happiness”—in other words, the problem of making people love their servitude.”⁴¹

Natural Law and its Politically Motivated Denial

A person’s freedom under the natural law comprises any action that is compatible with the natural law of conviviality. It includes taking on obligations towards other persons and by implication entering into society with them provided the society in question is itself compatible with natural law. It does not include coercing others into

⁴¹ Aldous Huxley, *Brave New World* (New York, 1953), p. xii (foreword).

submission either to him or to a society of which he is a member. It does not include coercing other persons who are in society with him, except to enforce in the agreed manner the rules according to which they had consented⁴² to behave and to act. Nor does it include coercing others who are in society with him by taking anything from them that they had not agreed to invest in that society. In justice, withholding the benefits of membership is the only proper way in which to enforce social rules and regulations. The ultimate sanction is expulsion if that option has not been foreclosed at the constitutional level. Most societies can live with those limitations, but political societies, states in particular, obviously do not. Consequently, proponents of political social orders face the problem of justifying the very existence of political societies—the problem of debunking natural law.

Logically promising strategies for addressing that problem involve the rejection of freedom or equality, either of which is a necessary condition of natural law. Such rejections have been based on one of two arguments: one is that the condition (freedom or equality) is a true but undesirable and possibly dangerous state of affairs; the other is that the condition is no more than an illusion. Thus, Plato insisted that politics must resort to “a shameful lie.” All citizens must be taught that they are children of their country (and therefore brothers and sisters), but also that they are by divine ordinance destined individually for unequal social ranks.⁴³ That indoctrination is necessary to ensure that they remain unaware of their natural condition and to make them accept social inequality. Similarly, Hobbes argued that equality was the root of all the evils of the “natural condition of mankind”⁴⁴ and that only an absolute political inequality⁴⁵ offered any hope of peaceful co-existence. Aristotle, on the other hand, went to great lengths to prove that social position is merely a reflection if not a fulfillment of natural endowment. The doctrine of “the slave by nature” was only the most telling illustration of his belief in natural inequality. For Aristotle, the freedom of the elite of noble citizens rested on their command over the lesser breeds of men. The natural inequality among human beings was his justifying ground of the socially necessary hierarchy and its division of human beings into free citizens and unfree subjects.

Until far into the eighteenth century, most attacks on natural law (in the sense of order among natural persons) were indeed attacks on equality. Later, the focus of the attacks shifted to freedom. Rousseau maintained that he could justify the fact that, although they are born free, people everywhere are in chains.⁴⁶ Natural freedom is a fact, but it also is dangerous to human existence; that is why it should be replaced with civil liberty, which is obtained when every citizen becomes one with all the other citizens and therefore with the state. Civil liberty, then, requires the transformation of the human being from a natural, independent person into an artificial or “moral”

⁴² Obviously, “consent” does not refer to something outside the ius-relation. It refers to consent by a free rational agent, not to coerced or fraudulently obtained acceptance of conditions.

⁴³ Plato, *The Republic*, Book 3, 413c–415c.

⁴⁴ Hobbes, p. (Part I, chapter 13).

⁴⁵ Hobbes, p. (Part II, chapter 17).

⁴⁶ Rousseau, Book 1, chapter 1.

person, the citizen. The latter is everything a natural human being is not. Above all, the citizen is only a part of a larger whole, and a part that is impotent without the assistance of the rest.⁴⁷ A person’s natural freedom, his capacity for independent action and thought, must be eliminated if a state is to be legitimate and equality is to be instituted. Of course, that equality is no longer a qualitative sameness or likeness of natural kind, but a quantitative equality of rank and power in political society. Karl Marx went one giant step further by arguing that the *particular* individual’s freedom is an illusion—a reflection of his false consciousness. It will remain so until that individual is transformed into a true species-being and as a *universal* individual absorbs in himself the whole of humanity. Only then human society will become a universal society without differentiation of class or rank—a society of equals.

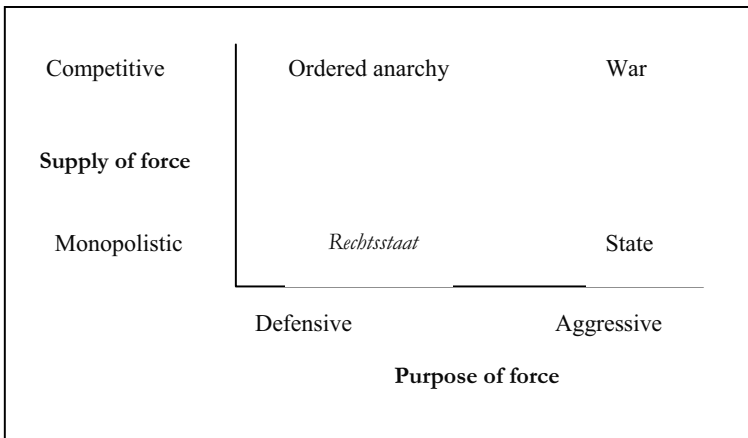


Figure 5.6 Purpose of force

The vigorous currents of egalitarian and collectivist thought in the twentieth century and the strident rhetoric of “solidarity” indicate the enduring popularity of that mereological conception of the human person as an integral and dependent part of a larger whole.⁴⁸ So does the conception of his liberty as equal participation in the “democratic self-determination” of that whole. It obviously does not bear any resemblance to a person’s freedom within the natural law. As far as a seemingly overwhelming majority of Western intellectuals is concerned, the idea of justice as freedom among likes holds no attraction at all. Despite Anthony de Jasay’s demonstrations of its vacuity, even many “liberals” cannot break free from the modern conception of liberty and equality as nomocratic legal constructs that must be democratically validated, regulated and enforced.

⁴⁷ Rousseau, Book 2, chapter 7.

⁴⁸ On the interpretation of those mereological ideas as reflecting a religious paradigm shift, see Frank van Dun, “Natural Law, Liberalism, and Christianity,” *Journal of Libertarian Studies*, 15/3(Summer 2001): pp. 1–36.

Natural Order, the Problem of Adequate Defence

The peculiar problem of the natural law theorist is the vulnerability of the property-resolution that we noted earlier. To put it differently, it is the problem of the adequate defence of every person against aggression and coercion—in particular against organized aggression and coercion, against aggressive and coercive societies. Statistically, in a man-to-man confrontation, the defender stands at least an equal chance against the attacker. Against an organized attack, he is nearly helpless unless he can organize an adequate force in defence of his property. However, it is in the nature of things that defensive force is reactive, organized to be effective against known threats. The initiative lies with the aggressors. Innovative aggressive techniques and organizations, against which no adequate defence has yet been developed, provide a window of opportunity for aggressors.⁴⁹

We can approach the problem of the instability of the convivial order by considering Figure 5.6. It represents the types of outcome that we can expect from different regimes concerning the availability of organized force. Each regime is characterized by a position on the organizational dimension (from monopolistic to competitive supply of force) and by the prevalence of force used for either defensive or aggressive purposes.

Under a regime where the defensive use of force prevails and where defensive force is supplied competitively (that is, where people actually can choose with whom they will contract for defence), the likely outcome is “ordered anarchy.”⁵⁰ Such a regime is the individualist-anarchist’s ideal of a pure rule of law. A competitive supply of adequate defensive force may give a person all the assurance he needs, but it is vulnerable to innovative aggression. Moreover, competitive rivalries among organized forces may degenerate into war, the same outcome as under a regime of competing suppliers of aggressive force.⁵¹ In any case, it may not be easy for an individual to switch at short notice to another supplier of defensive force if he gets into a conflict with his current supplier and the latter does not want to let him go. Which other supplier will be willing to take on an organized force merely to gain a customer, who so far has not yet made a single payment or contribution?

⁴⁹ Politically noteworthy examples are the invention of firearms and the organization of standing armies towards the end of the middle ages, and the development of powerful techniques of “rational administration” and of vast public bureaucracies and police forces in the nineteenth and twentieth centuries.

⁵⁰ See for example Jasay’s essays in *Against Politics*, especially “Self-contradictory contractarianism,” and “Conventions: some thoughts on the economics of ordered anarchy.”

⁵¹ Just as there are individual rogues, so there may be rogues among the suppliers of organized force. If history shows one thing, it is that protection rackets can be very lucrative, durable and eventually successful in securing territorial monopolies of force. The development of a system of territorial monopolies may result in a sort of international ordered anarchy, in a war, or in the creation of a larger monopolistic political society. Most modern states are a “unification” of diverse small, often non-political societies. The contemporary tendency towards interstate co-operation and the formation of supranational political entities (and pressure groups) moves in the same direction.

The logical opposite of the rule of law is the police state.⁵² It is a monopoly of force engaging in organized aggression possibly against outsiders but in any case against its subjects to raise revenue and to force them to implement its policies (which to some degree may be paternalistic, “for the good of the subjects”). Defensive force supplied monopolistically incorporates its “clients” willy-nilly into a single defensive organization (as in a *Rechtsstaat*). However, if a person is dependent on one supplier of defensive force, he is virtually at the latter’s mercy and may end up as his subject. There is little he can do against that organization, whether it sticks largely to a defensive function or—as according to Anthony de Jasay it is wont to do—proves itself a budding police state. In any case, the individual will find himself involved with an organized society specializing in the use of force and consequently with its political life.

In virtually every society there is a significant amount of politics. There are people jockeying for position, trying to make a career, quarrelling over rewards and disciplinary measures and the distribution of the social income. Almost everybody will use all sorts of pressure and influence (perhaps fraud and occasionally violence and force) to sway its officials’ decisions or to build coalitions. In societies where the use of force is monopolized, those activities are likely to be far more intense than in other social contexts. That is because in such political societies the stakes are not limited to what people are willing to pay but extend to what they can be made to pay, short of driving them to open revolt or other persistent illegal activity.

Amazingly, many people continue to believe that the risk of abuse of power can be averted by defining rules for its proper use. That belief was characteristic of nineteenth-century political liberalism and its commitment to a formal constitution: some exercises of power are simply “not done,” regardless of the observance of formal and procedural niceties, because they are incompatible with the requirements of justice, and consequently fall outside the range of things to which people may be presumed to agree. However, as Rousseau had already pointed out, the “real” constitutional consensus is “not graven on tablets of marble or brass, but on the hearts of the citizens.”⁵³ His problem was that citizens as such—being no more than artificial persons defined by the legal and constitutional rules of society—have no heart. Human beings do; hence, they must be cajoled into identifying as perfectly as possible with the role of the citizen they are supposed to perform. This was Rousseau’s substantial political point: either politics is successful indoctrination of the ideology of citizenship or it is no more than the usual clash of particular interests. That leaves us with the question: “Who is supposed to do the engraving? Who should supply the constitutional ideology?” Where there is no consensus on the answer to these

⁵² I use the term “police state” here in its original meaning of a state organized to mobilize men and resources for the purpose of implementing its external and internal (social) policies.

⁵³ J.-J. Rousseau, *The Social Contract*, trans. G. D. H. Cole (London, 1993), Book 2, chapter 12. As Joseph Servan de Gerbey put it, “An imbecilic despot may be able to constrain slaves with chains of iron; but a true politician binds them more effectively with the chains of their own ideas . . . [T]he soft matter of their brains is the firm basis of the mightiest Empires.” My translation from the quote in L. Jerphagnon, *Le divin César; Etude sur le pouvoir dans la Rome impériale* (Paris; 1991), p. 1.

questions, the “real constitutional power” is probably the most obstinately contested scarce resource in the political arena. That is particularly true when the consensus is not the living soul of a homogeneous local community but some presumed thing that must again and again be discovered by the ritual of complex procedures of social decision-making with unpredictable outcomes. As Jasay has argued, “It is a strange supposition that politics goes on within constitutional constraints, but that the constraints themselves are somehow above politics, determining it without being determined by it like any other product of collective decision-making.”⁵⁴

“Rational Choice” in the Convivial Order and in Political Society

Which Game shall We Play?

In a political society, individuals continually face the familiar dilemma of “asking what I can do for my country” or “asking what my country can do for me.” We may expect that the second alternative would end up as the dominant strategy for most people. In a politically developed society, filled to the brim with vote-seeking politicians, pressure groups, lobbys, consumer advocates and consultants, that expectation is eminently reasonable. The “good citizens” are sure to get the “sucker’s payoff.” However, the outcome of almost everybody trying to become a rent-seeker and a tax-consumer is likely to be what Anthony de Jasay called “the churning society.”⁵⁵ The irony of this “game” is that unless there are people choosing the second strategy the others will get no answer to the question, what they can do for their country. The country asks nothing but what it is made to ask by those who are in charge of its vocal organs. The obvious way in which to interpret J. F. Kennedy’s call “Ask not what your country can do for you, ask what you can do for your country” is “Don’t tell us what to do, we’ll tell you.”

Do individuals prefer living in a country that asks nothing to living in a churning society? If they do, political society puts them in a classic prisoners’ dilemma. However, it is one that is likely to maintain its character even if it is played an indefinite number of times. Indeed, the benefits generated by those who do not ask what their country can do for them often can be appropriated by those who are continuously looking for new answers to that question. It is not part of the game that the “good citizens” can securely accumulate the gains (if any) from their public-spirited actions in any round. On the contrary, those gains become part of the stakes in the next round. That is why in politics the key players never tire of exhorting their less sophisticated fellows to ever higher degrees of good citizenship. Indeed, the “good citizen” must be thoroughly naïve if he believes that his politically active fellow citizens will leave him free to invest his resources, which he did not spent on rent-seeking, and to walk away with the payoff. The same is true if he believes that the politically active citizens will solve the political prisoners’ dilemma by enforcing “good citizen” behavior on themselves. Their role in public life is to translate into policy what they and their clients ask their country to do for them.

⁵⁴ Anthony de Jasay, “The rule of forces, the force of rules,” in Anthony de Jasay, *Against Politics* (London; 1997), p. 137.

⁵⁵ Anthony de Jasay, *The State*.

There is, then, a significant difference between prisoners' dilemmas in a convivial order and in a political society. In a convivial order, the co-operative strategy in a game G that prima facie looks like a prisoners' dilemma usually has opportunity costs in the form of benefits forgone by not participating in other games. The co-operative option may imply making a contribution to the production of a particular "public good." However, making that contribution entails that fewer resources are available for investment in the production of other goods, be they private or public. On the other hand, the option of not contributing to the public good that is at stake in G keeps those resources available for other uses. When the benefits forgone are entered, as they should be, in the calculation of the payoffs for co-operative action, then G may turn out not to be a dilemma of any kind. "Non-co-operation in G" often is a misnomer for co-operation in any number of other games. Looking at G as if it were the only game in town misses the point of living in a convivial order, where people usually can choose which games they will play. It follows that there may be far less prisoners' dilemmas in a convivial order than the literature suggests. It also follows that enforcing co-operation in a game such as G, on the hypothesis that it is a prisoners' dilemma, may result in a significant loss of utility—even if the subjects are indifferent between being coerced and being asked politely to contribute. In a political society, on the other hand, the games of politics are not optional. The benefits forgone by adopting the "co-operative" strategy of asking what you can do for your country are the benefits that come from asking what it can do for you. If such a game looks like a prisoners' dilemma, it does so because it probably is one. Eventually, even the "good citizens" will become wise to the realities of politics.

Of course, the standard application of the prisoners' dilemma in political theory is to prove that people in a convivial order cannot solve the problem of the production of public goods. Anthony de Jasay has done more to dispel that myth than anybody else has. Organized societies, in particular political societies, produce their own prisoners' dilemmas. If the argument above is sound, they are of a more perverse character than such dilemmas are likely to be in a convivial order.

An Encounter in the Woods

Anthony de Jasay also has pointed out, pertinently, that we often have reason to rejoice when some groups do not succeed in solving their public goods problem either through "rational negotiation" or because they understand the benefits of co-operation in an indefinitely repeated prisoners' dilemma super-game.⁵⁶ For

⁵⁶ Or because they are "constrained maximisers," as David Gauthier, *Morals by Agreement* (Oxford, 1986) would have it. On the fallacy involved in that "solution" of the prisoners' dilemma, see Anthony de Jasay, *Against Politics*, pp. 26–7. Michael Taylor, *Anarchy and Cooperation* (New York; 1976) introduced the prisoners' dilemma supergame. However, it is a completely static analysis. Before the first round starts, each player is supposed to choose a strategy that will determine his move in every succeeding round (no matter what his circumstances may be in a particular round, no matter which other "games" might come to his attention in the mean time). That is perfect for playing computer tournaments (Robert Axelrod, *The Evolution of Co-operation* (New York, 1984)), but not particularly illuminating for analysing the historical existence of the species.

themselves, rival gangs could probably reach a Pareto-superior outcome, relative to the usual gang war, by co-operating in setting up and maintaining a consensus-based syndicate or uniting into a single commonwealth of gangsters. The question is, do we want them to succeed and to become more efficient in looting us? Hobbes's answer, of course, was that we should want that commonwealth if we did not have it already. That answer still carries enormous prestige, especially among those who have substituted the sovereign legislative power of a democratic republic for the original Hobbesian absolute monarch.

Underlying Hobbes's answer, there is the assumption that if there might be one real psychopath at loose in the world, the rational course for every other person would be to act like a psychopath. After all, he might be the next person coming up the road—so better beat him at his own game by striking first. In any case, the next person coming up the road is likely to think that you are that psychopath—and that again is reason enough to strike him down first. If we pursue that kind of reasoning, we get a good view of the sort of world Hobbes held to be inevitable if there were no state, but also of what Leibniz referred to as Hobbes's fundamental fallacy.⁵⁷

Let us simply ask, what will happen if two strangers, each of them carrying a sword and some valuables, meet on a narrow path in the middle of a dense forest? Put the question to a dozen novelists, and you will get at least twelve different stories. However, when we put it to a twentieth-century academic, he is likely to insist that the scene be interpreted as a prisoners' dilemma illustrating life in Hobbes's "Naturall Condition of Mankind".

Table 5.1 **Hobbesian encounters**

		B	
		Disarm	Attack
A	Disarm	Guaranteed Peace	Defeat
	Attack	Defeat	Battle

Hobbesian encounters

A conventional representation of the scene as such a dilemma is given in the table above. The Hobbesian thesis is that the men have no rational option but to attack one another, given that there is no effective police power to safeguard each traveler from an attack by the other. For each of them, the dominant "strategy" is to attack the other, no matter what the other's intentions might be. A battle between them is then the inevitable outcome—the equilibrium-solution of the game-theoretical

⁵⁷ See note 18 above.

representation of their encounter. It is, of course, a Pareto-inferior outcome relative to the outcome that would have resulted if each of them had laid down his sword. That we are dealing with a dilemma becomes clear once we note the assumed (and indeed reasonable) preference orderings of the travellers:

Victory > Guaranteed Peace > Battle > Defeat

Lest we think that this story has an unavoidably bloody outcome, we should note that Hobbes himself pointed the way out of the dilemma—indeed, out of the misery of the natural condition of mankind. A “nice” bloodless solution is likely when one of the travelers realizes in time that he is no match for the other, throws his weapons down and offers to become the other’s faithful servant. He thereby puts himself at the mercy of the stronger one, but then he has at least a chance that the other accepts his offer and, being able to enforce his will, agrees to let him live. Let us assume that the other does not disappoint him. The scene ends with both of them walking away as a small company, their forces united. The next man they meet sees that he is no match for the two of them and joins their little band. Before long, not only no solitary traveler but also no small company of travelers will dare to resist the group. All will make haste to join it, flattering its leader with the solemn declaration that they have no trust in those that do not trust him. The virgin forest gives birth to a sovereign and his state. The rest is politics and, as Hobbes would have it, comfort, convenience, and commodious living for all.⁵⁸

Let us return to our question, “What will the travelers do?” This time we put it, say, to a seasoned trapper who has had many encounters with strangers in the woods. “What normally happens when I run into a stranger in the woods,” he answers, “is that we approach one another, watching the other’s every move, holding one hand close to our weapon but taking good care not to do anything provocative. In short, we are on our guard. That’s how we survive.”

Each traveler now has three strategies: “Disarm,” “Be vigilant,” and “Attack.” We must consider, therefore, nine possible combinations of strategies. In addition to the four outcomes that we know already from the Hobbesian interpretation, there are five new ones of three different types. (1) One traveler is vigilant while the other disarms—the result being that one is strong and the other weak. (2) One of them attacks while the other remains vigilant—the encounter turns into a confrontation between an aggressor and a defender. (3) Both remain vigilant, making as it were an armed peace as they walk by each other. That is a far more complicated scheme than the Hobbesian one. We may think of it as depicting encounters in the Lockean “state of nature” where every person “hath a Right to punish the Offender, and be Executioner of the Law of Nature.”⁵⁹

⁵⁸ The same outcome could be assured even when the parties are approximately equal in strength prior to the battle. It is in the nature of combat that a single blow can upset that balance and force one party to unconditional surrender and submission (Hobbes, p. Part 2, chapter 20).

⁵⁹ John Locke, *Second Treatise of Government*, Chapter II, par. 8, in fine. Locke’s state of nature was not a “state of war.” It was, arguably, something very close to the middle road of “Armed peace.”

Table 5.2 Lockean encounters

B			
A	Disarm	Be vigilant	Attack
Disarm	Guaranteed Peace	Strength Weakness	Victory Defeat
Be vigilant	Weakness Strength	Armed Peace	Aggression Defence
Attack	Defeat Victory	Defence Aggression	Battle

Lockean encounters

There is no obviously reasonable order of preference among the various possible outcomes, even if we leave the preference ranking of the outcomes of the first Hobbesian representation as they were. However, there are preference rankings that do not affect the Hobbesian outcome. For example, any ranking that satisfies the following conditions leaves us with “Battle” as the equilibrium outcome:

- Victory > Strength > Guaranteed peace
- Aggression > Armed peace > Weakness
- Battle > Defence > Defeat

Assuming, reasonably, that “Guaranteed peace” or even “Armed peace” is preferred to “Battle,” the equilibrium-outcome is still Pareto-inferior—no escape from the Hobbesian dilemma here! Note, however, that it is not evidently reasonable to prefer being an aggressor to enjoying an armed peace. Nor is it evidently reasonable to prefer to rush into an open battle rather than to take a defensive position and try to hold it.⁶⁰ Let us suppose that the preference rankings satisfy the following conditions

- Victory > Strength > Guaranteed peace
- Armed peace > Aggression > Weakness
- Defence > Battle > Defeat

⁶⁰ It might be rational to act as an aggressor if there were some assurance that aggression pays, but that it does is no law of nature. See Anthony de Jasay, *Against Politics*, p. 199.

Then the equilibrium-outcome is “Armed peace” (exactly as the trapper told us to expect). We still might have a dilemma if “Guaranteed peace” is preferred to “Armed peace”—but that would be a dilemma of an entirely different sort than the Hobbesian one. In fact, in the setting of our story, there is no obvious reason to prefer “Guaranteed peace” to “Armed peace” since the former involves losing one’s weapons. Thus, there are no *a priori* reasons why “Armed peace” should be Pareto-inferior. Hobbes, not one to let facts get in the way of theory, circumvented this result by defining “Armed peace” to be a manifestation of war.⁶¹ With no more to go on than one of his innovative definitions, Hobbes made it appear as if life under an armed peace is just as “solitary, poore, nasty, brutish and short” as it is in an actual war-zone. No wonder Leibniz was unimpressed.⁶²

Of course, we should not attach too much weight to game-theoretical models. “Modeling” the human world is a tricky business. Moreover, models are cheap. With a little ingenuity we can make them produce any desired result. In any case, real situations do not come with labels like “This is a prisoners’ dilemma” attached to them. The mere fact that one does not see people in a convivial order produce what one has determined for oneself to be a public good, is no indication that those people are trapped in such a dilemma. They may have other priorities. What else can we expect in a world of endemic plurality, diversity and scarcity?

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⁶¹ See his definition of war (quoted in the text to note 17above). Hobbes assumed that “Attack” in any case dominates “Be vigilant”: “there is no way for any man to secure himselfe, so reasonable, as Anticipation; that is ... to master the persons of all men he can” (Hobbes, Part I, chapter 13).

⁶² Locke also was unimpressed. Hobbes had maintained that only a fully assured peace is not a state of war. However, he also had maintained that the *pax victoris* that results from the unconditional submission of many to one is really the only way to achieve a *victoria pacis*. However, as Locke noted, the *pax victoris* need mean no more than the end of actual fighting; in other respects, it still is war by another name. Locke, for example chapter 11, para. 137.

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Chapter 6

Against Politics, for “Ordered Anarchy”¹

Gerard Radnitzky

Introductory Remarks

For the first time the political philosophy of libertarianism and of classical liberalism has gotten a solid base in logic and epistemology. For many Jasay’s book will be a revelation (as James Buchanan remarked about Jasay’s first book *The State*²). *It would be impudent to attempt to give an exposition of the contents of this rich and tightly-argued book. Thus I will try to give the flavor of it in order to wet your appetite for reading it.* *Against Politics* is a collection of articles published between 1989 and 1996 around a common theme: the political philosophy of government and “ordered anarchy.” It makes use of the rational-choice method. The essays fit together as chapters of an integrated work. “Before resorting to politics” and “Conventions” form the center.³ The synoptic “Introduction” concisely summarizes the contents.⁴ Part I convincingly criticizes statism, including the minimalist variety, Part II proffers Jasay’s own politico-economic theories. Jasay incorporates many of the insights of Austrian Economics and its successors in the U.S.A., while eschewing the Misesian apriorism in epistemology (which in my view is untenable).⁵ The work has a solid basis in epistemology and semantics, and its logic is impeccable.

The Philosophical Groundplan

Jasay’s Image of Man and Society

Man’s knowing capacity is seen in accord with “Critical Rationalism”: namely, emphasis on fallibilism (while recognizing that intellectual progress is nonetheless possible), stressing that decisions have to be made under uncertainty and with a limited knowledge base, and taking into account that social actions have also unintended consequences. Only individuals can act (ontological individualism). Man strives to better his lot and makes at least implicitly cost-benefit-assays whenever he deliberates; he reacts to a changing physical and social environment and a changing

¹ A Discussion of Anthony de Jasay’s *Against Politics—on Government, Anarchy, and Order* (London, 1997).

² Anthony de Jasay, *The State* (Oxford, 1985).

³ Jasay, *Against Politics—On Government, Anarchy, and Order*, chapters eight and nine.

⁴ *Ibid.*, pp. 4–7.

⁵ G. Radnitzky “Reply to Hoppe—On apriorism in Austrian Economics,” in: G. Radnitzky and H. Bouillon (eds), *Values and the Social Order*, vol. 1: *Values and Society* (3 vols, Avebury: Aldershot 1995).

knowledge base. Like in scientific research, in social life there is no guarantee of success.

Epistemology and Ethics

In epistemology a clear distinction is made between statements (sentences with descriptive function and hence with truth value) and judgments. Consequently Jasay's meta-ethics is non-cognitivist: a sentence formulating a genuine value judgment ("value judgment" for short) has no truth value, since it has no empirical content of information. ("Truth" is defined in terms of the correspondence between the content of information of a descriptive sentence to facts.) A genuine value judgment can only have "validity" relative to a particular value system or system of norms. It is logically impossible to deduce a value judgment or norm from a set of descriptive sentences. Jasay adopts the *subjective value theory* of Austrian Economics: since value judgments are in principle subjective, aggregating utilities is logically impossible. Consistent with ontological individualism, he adopts methodological individualism: whenever the problem requires it, we must be able to reduce sentences using holistic parlance (talking about such entities as society, government, and so on) to statements about the actions of individuals. In ethics Jasay voices a strong preference for the ideal of the free society, the presumption of liberty, property, and innocence.⁶ However, in contrast to libertarians like Mises, Rothbard, Hoppe, he provides a legitimating argument in favor of freedom, property, and innocence in terms of logic.

The Concept of Politics

Politics is Redistributive

Ideal typically, social action occurs either in the context of a voluntary social order or in a coercive order. The prototype of a voluntary order is exchange, the market; the choice example of a coercive order is the state. The state is the last (highest) instance of power, against which there is no appeal to another instance. It is a territorial monopolist in violence, and it declares its violence to be "legitimate." The absence of voluntariness is not a defining characteristic. The state would be the state even if the social contract were a tenable theory. (In chapter 1 Jasay shows that this is not the case.⁷) The market is based on individual choice, whereas politics by definition is collective decision. "Collective decision" is short for non-unanimous decision. The expression "politics" signifies such decisions. Jasay puts forth the thesis: "All nonunanimous politics—and unanimous politics would of course be redundant—is redistributive."⁸ Only a minor part of redistribution is explicit transfers. Subsidies and other protective measures, such as regulations and various privileges have redistributive consequences; besides material and financial values, positions,

⁶ Jasay, *Against Politics—On Government, Anarchy, and Order*, pp. 158–71.

⁷ *Ibid.*

⁸ *Ibid.*, p. 154.

privileges, prestige, and so on are redistributed. That politics is redistributive is particularly clear when the democratic method of decision-making is being used. “If much of this (contractarian) reasoning is baseless, and the state is simply an enforcing mechanism to enable a winning coalition to exploit the residual losing coalition without recourse to violence, the delusions of necessity and convenience are of course an aid to the efficiency of the process.”⁹

The Moral Problem of Politics as Such

In politics some decide for all, that means some override the preferences of others and dispose of the resources of others. Even the domain (what kind of alternatives there are), the borders between the realm of the collective versus the private, and by what meta rules (rules for rule-making, the constitution), are decided by collective choice. That mechanism is claimed to serve some putative “Common Good,” a highly problematic concept,¹⁰ if only because what the “Common Good” is, is revealed by the same mechanism, it is chosen collectively. However, “No basic institution chosen collectively can be, and remain, intrinsically better than collective choice, ‘the thing itself.’”¹¹ State coercion is used to impose the will of some on all, including on those who would reject it if they could. This is the moral problem of politics, any politics. Jasay’s target is not the content (favoring Peter over Paul), nor the method (democratic or otherwise); it is not that politics is dishonest, corrupt or that power is abused, lack of efficiency, or that perverse results are produced. These things avert suspicion from the “Thing itself”—witness the motto. *Politics as such is the target of the book.*

Criticism The customary “liberal” arguments for the state are decisively debunked. The Hobbesian “Prisoners’ Dilemma” expresses the problem of private contractors in the “state of nature”: how to make contracts credible (because enforceable). Jasay presents a knock-down argument against contractarianism: If contracts would require an enforcer—and according to contractarian theory a “last” enforcer can be created only by a social contract—then that contract too would need an enforcer, and so on *ad infinitum*.¹² Contractarian arguments simply assume away the principal-agent problem.¹³ There is no contractual exit from the state of nature.¹⁴ “Non-rejectability” arguments involve either an infinite regress or circular reasoning. There is a striking analogy between (a) the dilemma of contractarianism in political philosophy and (b) the “justificationist” dilemma in German epistemology. In (b) either the (descriptive) statement remains without ground (*unbegründet*) or infinite regress or circle. The only way out is to abandon the quest for certainty; truth remains a guiding principle, but the methods for ascertaining the truth of a particular statement

⁹ Ibid., p. 2.

¹⁰ Ibid., pp. 69f.

¹¹ Ibid., p. 3.

¹² Ibid., p. 5.

¹³ Ibid., p. 19.

¹⁴ Ibid., p. 22.

are fallible in principle.¹⁵ In (a) freedom remains the guiding principle, but there is no guarantee that a particular action be successful, help us to approximate the aim. Likewise “monarchist” arguments and constitutionalism are destroyed. They put a false problem: to find rules such that they create incentives for politicians to stick to the mandate of the “social contract.” They falsely assume that constitutional politics differs radically from ordinary politics. The real problem is not to design a constitution of liberty, but “to find the conditions under which a constitution of liberty would be likely to be adopted, respected and maintained for long enough to do any good.”¹⁶ The constitution is but a chastity belt whose keys are always within reach.¹⁷ “States are an imposition, sometimes useful, sometimes a millstone, always costly, never legitimate, and never a necessity for binding agreements.”¹⁸ The problem of collective action has not been solved. Hence, we should examine alternatives: the guiding maxim is that, if politics at all, then make the domain of politics as small as possible; examine ordered anarchy, self-enforcing voluntary social orders.

Emergent solutions—towards an ordered anarchy Promising is the repeated games approach to anarchy: institutions that support cooperation are seen as equilibria (conventions, norms, laws), second-order orders supporting a first order evolve spontaneously. People expect to have long (and prosperous) relationships with the same groups of people. There are overlapping groups. Reputation is offered to guarantee future behavior. Organized methods to economize on the costs of gathering information and voluntary social orders arise. Medieval Europe’s “Law Merchant,” off-shore banking, private arbitration courts are based on self-enforcing, relational contracts and exemplify equilibrium institutions, sets of rules obeyed because everyone finds it in his interest to obey. In the daily games of life, even today we live in states, but at the same time partly outside states. The libertarian model for private security production can be applied also to the production of external security.¹⁹ Space limitations prevent me from elaborating the theme of chapter 9.²⁰

The Presumption in Favor of Liberty

The Problem Situation

The key ideas of “strict” liberalism,²¹ freedom, and property are conceptually inseparable, because freedom, property, and individuality cannot be conceived

¹⁵ G. Radnitzky, “In defense of self-applicable critical rationalism,” in: G. Radnitzky and W. W. Bartley III (eds), *Evolutionary Epistemology, Theory of Rationality, and the Sociology of Knowledge* (LaSalle, IL, 1987).

¹⁶ Jasay, *Against Politics—On Government, Anarchy, and Order*, p.53.

¹⁷ *Ibid.*, p. 3.

¹⁸ *Ibid.*, p. 36.

¹⁹ *Ibid.*, pp. 182f.

²⁰ Jasay, *Against Politics—On Government, Anarchy, and Order*.

²¹ A. de Jasay, *Choice, Contract, Consent: A Restatement of Liberalism* (London, 1991).

as unrelated entities; hence also in their empirical exemplification they are intertwined.

The State of the Problem in the Literature

In the literature, legitimizing arguments for positions in political philosophy usually make recourse to some Natural Law doctrine. To John Locke the theistic version of the doctrine was available. Today "ultimate legitimizers" (God Father, Mother Nature, or some holistic, fictitious entity like "the Society" or "the People") have lost their authority, at least for serious thinkers.²² Upon closer look, Rothbard's ostensibly natural-law arguments for the central tenets of libertarianism turn out to be pragmatic: the right to self-ownership helps man to realize his vital interests.

Within the wing of property-right anarchists prominent thinkers like Mises and Rothbard adopt and adapt ideas of a modern branch of German idealism, of "justificationist philosophy" (*Begründungsphilosophie*). They legitimize the central tenets of their philosophy by "praxeology," a theory of action, which is conceived as *a priori valid*, because deducible from the "logical structure of the human mind." Mises uses Kant's doctrine of the Synthetic Apriori, of propositions which assert something about reality, and the truth of which is known *a priori*, that is, independent of experience.²³ Critical Rationalists emphasize that men possess many genetic *a priori*s, but rightly reject the idea of a descriptive sentence with respect to which truth claims are independent of empirical testing, independent of the test of experience. In Mises's thought the result is a mix of an admirable political philosophy and a deplorable position in epistemology.²⁴

Hayek, as a typical classical liberal, was ambivalent: he wanted to accord to freedom and property final value (he called them "taboos"), but he thought that it was not possible to entertain that position without losing one's intellectual integrity. Thus, *à contre coeur*, he took a consequentialist position with respect to freedom, assigning instrumental value to it.²⁵

²² This happened in the same way in which the quest for "ultimate justifiers," that is, of the truth claims with reference to a particular descriptive statement had to be abandoned, because they relentlessly lead to either a circle, or an infinite regress, or an arbitrary stopping point (see, for instance, G. Radnitzky, "In defense of self-applicable critical rationalism" on self-applicable critical rationalism).

²³ Popper once told me that in conversation with von Mises in Vienna both avoided the theme of "a priori valid" in order to avoid a heated quarrel.

²⁴ For example, L. A. Mises, *The Ultimate Foundation of Economic Science* (1962; Kansas City, 1978), p. 42. For instance, if it were true, as Mises believes, that the theorems of money theory could be deduced from the concept of money, money theory would be empty of content of empirical information, hence could not explain/predict anything (Radnitzky, "Reply to Hoppe—On apriorism in Austrian Economics," p. 194).

²⁵ For example, F. A. Hayek, *The Constitution of Liberty* (Chicago, IL, 1960), p. 50 and especially 85. For an overview see also G. Radnitzky, "Hayek's political philosophy—A critical assessment," *Journal des Economistes et des Etudes Humaines*, 9 (1999): 389-433, section 3.1.

The Presumption in Favor of Liberty (Property and Innocence)

Jasay, too, wishes to eschew value judgments (such as “I prefer a free society over an unfree one”), and thus he tried to base his arguments for liberty solely on descriptive sentences.²⁶

An argument in favor of something that is recommended because it is judged to be valuable may be either (a) an argument whose premises have recourse to a final value, an intrinsic value, or (b) it may be based on an instrumental value-consequentialist, arguing that something is valuable because it is instrumental in bringing about consequences which are evaluated as valuable *per se*. A sentence, that is, a conjunction formulating a consequentialist argument is a descriptive sentence, that is, a sentence the truth-value of which is subject to empirical testing. It has only the form of a value judgment. Such an argument (type b) is provisional or, more accurately, it is incomplete. It presupposes a final value, because unless it does so, it can only lead to an infinite regress or a circle. To make it complete, to get a proper argument (a), the value judgment expressing the final value has to be made explicit. A final value by definition need not and cannot be justified. It is an arbitrary stopping point. Given subjective value theory, such a stopping point would be just that: arbitrary. Hence Jasay must require that his argument be valid in force of logic, “valid” in the sense of logically sound, and hence he must require that it not have recourse to a (genuine) value judgment. His attempt to produce an argument in favor of liberty, namely that feasible actions which pending a valid objection must be treated as legitimate, is novel and extremely important. Hence, I will try to reconstruct it here.

The argument An individual has a basket of feasible acts, his option space. This set can be divided into two subsets: the set of acts *admissible* in society *S* (at time *t*) and the set of acts inadmissible in *S*. Let us assume that *x* claims that act *A* is admissible, that is, there are *no objections* to his performing *A*, and that *x*'s claim is opposed by an individual *y*. *Where is it rational (for the law makers) to place the burden of proof—on the potential actor or on the objector?* (Problem P). The possible objections consist of laws and conventions in good working order. (Concrete cases have of course to be subsumed under the *type* cases described in the laws or implied in the conventions.) There are two clear-cut cases: (i) The list of objections considered relevant in *S* is explicit, hence finite; and (ii) The list is “undenumerably” large (denumerably infinite), open, a fuzzy set. Type (ii) cases are probably the only ones which matter in real-life situations. With respect to the list of objections (for instance, harming others) even in the context of law the expression “harm” allows interpretation, likewise “breach of contract.” Cases have to be subsumed under specific laws, most laws turn out to be twistable to some extent, and in addition to laws the list of inadmissible actions in practice includes conventions, customs, and so on, the breach of which leads to informal sanctions like, for example, ostracism.

²⁶ The argument is adumbrated in Jasay, *Against Politics—On Government, Anarchy, and Order*, p. 161 and sketched in A de Jasay, “Justice,” in Peter Newman (ed.), *The New Palgrave Dictionary on Economics and the Law*, vol. 2 (London, 1998), pp. 402 ff.

In cases of type (i) the problem P (where to place the burden of proof) is a matter of *efficiency*²⁷—in practice cost-benefit assays, higher/lower transaction costs to achieve a given purpose. The longer the list, the more costly it is for the actor to prove his case, that is, to falsify the objector's claim. By contrast, unless he is acting frivolously, the potential objector has in mind a particular item on the list of objections. Hence for him the costs of verifying his claim are negligible.²⁸

In cases of type (ii) problem P is a matter of *logic and epistemology*, the asymmetry between verifiability and falsifiability is decisive. The objector's claim can be *verified*, whereas it is *logically impossible to falsify* the objector's claim. Hence it would be unreasonable (to say the least) to place the burden of proof on the actor. Moreover, placing the burden of proof on the actor has a built-in invitation to object to proposed courses of action because objections cost little. The result is that "extravagant claims of harms and rights by third parties get leverage and bargaining power," the litigating society.²⁹

In the type (i) case we assume that the denumerably finite list is consistent. Unless an inconsistency has been deduced we are entitled to do so—this is good enough for mundane purposes.³⁰ With respect to type (ii) it should be remembered that laws are twistable. Hence the consistency of the system may be doubted. When a glaring inconsistency has been shown, attempts are made to improve the system.

In summary, Jasay's argument in favor of liberty (property, and innocence) is incontrovertible. It does not have recourse to any (genuine) value judgment, that is, to a sentence that is subjective and hence cannot have a truth-value. It is *a matter of logic*. Does an argument in favor of liberty presuppose a preference for liberty? No. Constructing an argument is an exercise in logic. That it comments and recommends liberty is merely its illocutionary force.

Jasay's argument entails the request to any rational being, in particular to legislators, not to request (in sincerity) what is logically impossible (like falsifying the objector's claim that there is an obstacle to my doing x , when the list of obstacles is denumerably infinite or *de facto* inconsistent). This has nothing to do with value judgments: the logically impossible is literally "unthinkable," since thinking and logic are two sides of the same coin. "Ought implies Can" is a descriptive statement.

The set of actions admissible in society S (legal positivism) has an interesting subset: the set of objections valid in a Free Society, that is, the list of actions inadmissible in a

²⁷ In this context the concept of efficiency is unproblematic. In economics "efficiency" is dependent on tastes and distribution of income. Hence the concept cannot simply be imported from physical theory.

²⁸ The reverse case would be a society that operates on the maxim "Everything is forbidden that is not explicitly allowed." In such a society the problem P does not arise, since it is simply presumed that the actor always carries the burden of proof.

²⁹ Product liability risk, medical malpractice risk, and frivolous litigation represent the greatest deadweight cost to the American economy.

³⁰ Jasay, *Against Politics—On Government, Anarchy, and Order*, p. 162. It would be a degenerating problem shift here to problematize the concept of "denumerably finite." Of course, in order to count a set we need a counting procedure and, hence, a unit must be defined. Since the list is not axiomatized, the question of completeness and decidability (Gödel theorem) does not arise. Hence, I regard both objections as irrelevant.

Free Society. Hence, for the friend of freedom the theoretical test would be to match the objection at hand on the list of valid objections.

Everybody, even a seasoned political philosopher can learn from Jasay's book, and the clarity and conciseness of his style makes reading it a pleasurable experience.

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PART IV
Limits of Politics

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Chapter 7

Beliefs as Institution-specific Rationalized Self Interest^{1*}

Bruce L. Benson

“Always remember one thing, Lucky Eddie... VIKINGS ARE THE CHOSEN PEOPLE!” says Hagar the Horrible. Lucky Eddie asks “Who chose us?” and Hagar responds, “WE DID!”²

This reminds me, to some extent, of the hearing when Clarence Thomas and Anita Hill were both testifying under oath. Now, in some rational way, they could not have both been telling the truth, since they had directly different accounts of a shared set of facts. ... [W]hen I heard both of them testify, what I believed after it was over, I believe that they both thought they were telling the truth.³

[People] may ... picture themselves as meritorious, feeling themselves guilty of no such offenses as they see others burdened with; nor do they ever inquire whether ... they would not have practiced similar vices, had not ... circumstances of time and place ... , kept them out of the way of these vices. This dishonesty, by which we humbug ourselves and which thwarts the establishment of true moral disposition in us, extends itself outwardly also to the falsehood and deception of others.⁴

^{1*} This paper was prepared for inclusion in a collection of essays dedicated to the political philosopher Anthony de Jasay. It draws freely from Bruce L. Benson, “Endogenous Morality” (Florida State University Working Paper, 2002). An earlier version of that paper was discussed in a March 2001 Liberty Fund Colloquium organized by Terry Anderson. Comments from that discussion led to substantial improvements in the analysis, so I want to thank the Colloquium participants, including Terry, David Brady, Randall Calvert, Marcus Cole, Heidi Hurd, Gary Libecap, Kevin McCabe, Dean Lueck, and Vernon Smith, as well as others who have commented on versions of the paper, and particularly Kevin Reffett, Randy Holcombe, Andy Rutten, Birgir Runolfsson, Stefan Voight, David Schmitz, Bob Cooter, Viktor Vanberg, Iljoong Kim, Hartmut Kliemt and Karen Vaughn (who discussed an early version presented at the American Economic Association meetings, January 3, 1999) for their suggestions. Finally, I thank the editor and anonymous referees for the *Journal of Economic Behavior and Organization* for their comments and suggestions on “Endogenous Morality,” which are currently being taken into account in a revision of the manuscript for resubmission, thus leading to a substantial differentiation between it and this paper.

² Hagar cartoon strip by Chris Browne, *Tallahassee Democrat*, January 13, 1999, page 5D.

³ President of the United States, William J. Clinton, Transcript of Testimony to the Grand Jury, 1998 (CBS Worldwide Inc., <http://cbsnews.excite.com/media/excite-index.html>).

⁴ Philosopher Immanuel Kant, *Religion Within the Limits of Reason Alone*, T. M. Green and H. H. Hudson (trans.) (New York, 1960), p. 16.

As someone who has spent the better part of his life behind bars, I've never run into a guilty criminal. To hear them tell it, everyone but themselves is to blame for making them commit the crime: their mother, the victim, society itself.⁵

[T]he commonest weakness of our [human] race is our ability to rationalize our most selfish purposes.⁶

Frank⁷ argues that because it is difficult (that is costly) for humans to pretend beliefs that are not actually adopted, it follows that if acting as if certain beliefs are real is desirable then it is rational to adopt them. This suggests that a belief system is adopted that reduces the psychological costs of taking actions in particular situations, even though the same behavior would violate their conscience in different situations. If beliefs do reflect such rational cost-benefit considerations, it follows that what most people (although not most moral philosophers) believe constitutes moral behavior depends at least partly on the situation in which they find themselves, including the institutional setting in which the situation arises. That is, drawing upon the preceding quotes, individuals “rationalize” their own “selfish” behavior, given the “circumstances of time and place,” so in their own minds they are “telling the truth,” not subject to “blame,” “meritorious,” and perhaps even morally superior (“the chosen people”). Furthermore, because people rationalize their behavior as moral by adopting beliefs which reduce the costs (psychic as well as tangible) of achieving their selfish objectives, the beliefs that arise in different institutional environments should be predictable. In this light, the primary purpose of the following presentation is to build upon work by Anthony de Jasay⁸ (1997) and others who have explored the incentives that arise under alternative institutional arrangements in order to provide the foundations of a positive analysis of the determinants of beliefs about behavior that people consider to be “moral.”⁹ The analysis is based on the fundamental assumptions of microeconomics— (1) scarcity, (2) methodological individualism, and (3) rationality—while relying on the fundamental principles of comparative

⁵ Bank robber Gary Bornman, serving a seven year sentence in the Marianna Florida Federal Correctional Institute, letter to the editor, *Tallahassee Democrat* (February 24, 1995), p. 10A.

⁶ Science fiction author Robert Heinlein, *The Star Beast* (New York, 1954), p. 219.

⁷ Frank, R., *Passion Within Reasons: The Strategic Control of the Emotions* (New York, 1988),

⁸ Jasay, A. de, *Against Politics: on Government, Anarchy, and Order* (London, 1997).

⁹ For example R. C. Ellickson, *Order Without Law: How Neighbors Settle Disputes* (Cambridge, MA, 1991) and by the same author “Property in Land,” *Yale Law Journal*, 102 (1993): 1315–400. See also V. J. Vanberg, and R. D. Congleton, “Rationality, Morality and Exit,” *American Political Science Review*, 86 (1992): 418–31. Also confer the following three articles by Benson: “Are Public Goods Really Common Pools: Considerations of the Evolution of Policing and Highways in England,” *Economic Inquiry*, 32 (1994): 249–71; “Emerging from the Hobbesian Jungle: Might Takes and Makes Rights,” *Constitutional Political Economy*, 5 (1994): 129–58; and “An Economic Theory of the Evolution of Governance and the Emergence of the State,” *Review of Austrian Economics*, 12 (1999): 131–60. Finally, see also Ridley, M., *The Origins of Virtue: Human Instincts and the Evolution of Cooperation* (New York, 1996).

advantage and opportunity costs. These assumptions are brought to bear in the context of an uncertain world with transactions costs impeding coordination and motivation, and beliefs evolve, at least in part, to reduce such costs. However, some individuals develop comparative advantages in violence, so cooperative norms may coordinate joint production of plunder or extortion too. When extortion is institutionalized (as it is in the state or the mafia), rules are developed by one group and imposed on another, as Jasay makes clear, but such organized appropriation also affects the beliefs of individuals who benefit from transfers and those who lose.

The first Section contends that the desire to expand wealth in the face of scarcity underlies the evolution of rules, including the norms that individuals choose to believe are moral. Moral beliefs that evolve in a community with institutions that support voluntary interactions to expand wealth are explored in the second section. It is in this setting that beliefs in the advantages of cooperation, concerns for fairness, sympathy and benevolence are most likely to be adopted. Section three focuses on moral beliefs that emerge under institutions that support coercive wealth transfer incentives. The moral beliefs implied by the preceding quotes tend to arise in this setting. The fourth and final section concludes by explaining different moral beliefs for a single individual due to simultaneous involvement in numerous institutionalized groups, some of which encourage voluntary interaction (generally within the group), some of which facilitate involuntary transfers (generally from outside the group), and some of which do both.

Scarcity, Wealth Seeking, Rules, Property Rights, and the Evolution of Beliefs

Norms

“Rules” are behavioral patterns that other individuals expect a person to adopt and follow in the context of various interdependent activities and actions. The rules one individual is expected to follow influence the choices made by other individuals: like prices, rules coordinate and motivate interdependent behavior. While the most obvious rules to many people may be “positive laws” created by states, there are many other types of rules that guide behavior (for example, habits, conventions, traditions, customs, norms). Indeed, these other types of rules may be much more important guides to behavior than positive laws are.¹⁰ This is relevant in the context of this discussion because even though beliefs regarding what is moral may be codified as “law,” they need not be. In fact, such beliefs tend to arise, particularly initially, as “norms” which do not require explicit codification or backing by coercive threats to induce recognition. As Nee suggests, “Norms are implicit or explicit rules or expected behavior that embody the interests and preferences of members of a close-knit group or community.”¹¹ Thus, norms are widely shared beliefs adopted by individuals in interactions within a group of individuals linked in a multi-dimensional web of ongoing, mutually advantageous interactions.

¹⁰ Ellickson, *Order Without Law: How Neighbors Settle Disputes*.

¹¹ V. Nee, “Norms and Networks in Economic and Organizational Performance,” *American Economic Review Papers and Proceedings*, 88 (May 1998): 85–9.

Rules are generally not necessary if there are no conflicts to avoid or resolve, and as Hume emphasizes, the primary source of conflict between individuals is scarcity.¹² Thus, the incentives created by scarcity underlie the evolution of rules.¹³ Rules to coordinate competition over the allocation of scarce resources and the wealth produced by them (for example, to create incentives to compete through markets or through political institutions rather than through violence) establish the obligations that underlie the property rights to those resources and their products, as well as the procedures through which such property rights can be created, attenuated, and transferred. Wealth can expand through cooperative interaction, including team production (for instance, of goods, protection, mutual insurance, social activities), as well as the division of labor and voluntary exchange (of goods, but also of support, friendship, loyalty, etc.). Such voluntary cooperation requires trust, of course, so as explained below, rules that encourage ethical behavior tend to evolve in order to encourage participation in such positive-sum games. In such situations, adopting rules can also reduce decision-making, bargaining and enforcement costs. After all, rational individuals are not able to use conscious reason to evaluate every option in the array of available alternatives, because there are significant limits on abilities to reason and absorb knowledge.¹⁴ This means that rational individuals often find it beneficial to voluntarily develop and conform to rules, including “internalized” norms (that is, beliefs about what is moral), to guide their actions in an unthinking (uncalculating) way.

A second method of wealth enhancement for an individual involves taking wealth produced by others through the use of force and/or guile. Rules to facilitate extortion of involuntary transfers can also be institutionalized. Indeed, some rules discriminate in favor of a group of powerful individuals and are coercively imposed on others who clearly do not share the same values. Such rules are intended to transfer wealth. Their design and enforcement typically involves cooperative efforts by those with power, of course, and these cooperative processes are often governed by group norms (shared beliefs) within the dominant group. Importantly, such rules are rarely able to completely dictate the targeted behavior because the group being imposed upon does not share the values (indeed, they develop opposition norms, as explained below) and they are able to resist (shirk, avoid taxes, exit, etc.), at least to a degree, because knowledge is incomplete for the rule makers and policing is imperfect.¹⁵ Nonetheless, such designed rules do *influence* behavior (and beliefs, as contended below). Deliberate efforts to impose rules create incentives to find and

¹² D. Hume, *An Inquiry Concerning the Principles of Morals*, ed. C. W. Hendel (1751; Indianapolis, 1957).

¹³ Benson, “Emerging from the Hobbesian Jungle: Might Takes and Makes Rights,” *Constitutional Political Economy*, 5 (1994): 129–58 and by the same author “An Economic Theory of the Evolution of Governance and the Emergence of the State,” *Review of Austrian Economics*, 12 (1999): 131–60.

¹⁴ G. P. O’Driscoll and M. J. Rizzo, *The Economics of Time and Ignorance* (Oxford, 1985), pp. 119–22.

¹⁵ F. A. Hayek, *Law, Legislation, and Liberty*, Vol. 1: *Rules and Order* (2 Vols, Chicago, 1973); and B. Benson, “Regulation, More Regulation, Partial Deregulation, and Reregulation: The Dynamics of a Rent-Seeking Society,” *Advances in Austrian Economics* 8 (2005):107–46.

exploit uncontrolled margins in order to avoid the full consequences of those rules,¹⁶ and in this context, the search for ways to avoid the rules also can significantly alter the path of the spontaneous evolution of norms.¹⁷ Therefore, a positive analysis of the evolution of beliefs regarding what is moral must account for the influence of institutions which facilitate cooperation and wealth expansion as well as those that are part of a wealth transfer process.

State of Nature

In order to analyze the evolution of beliefs and consider some of its consequences, let us begin with the thought experiment so common in political philosophy¹⁸ and constitutional economics.¹⁹ Imagine the Hobbesian “state of nature” wherein no cooperative interaction occurs. Further assume, as in Benson, that while there is considerable uncertainty, and therefore high transactions costs, decisions are *not* made behind the Rawlsian “veil of ignorance.”²⁰ Thus, in the spirit of Jasay, the focus is on the rules and institutions that emerge assuming that rational individuals recognize alternatives and anticipate potential but uncertain outcomes.²¹

Competition over the use of scarce property can take different forms depending on the rules that exist, but in the absence of rules, unilateral efforts to capture exclusive benefits of an asset (turn a property claim into actual ownership) require that an individual back a claim with a sufficiently strong threat of violence to induce others to abandon their conflicting claims. Since several individuals are likely to have similar incentives with regard to any particular scarce resource, competition through violence could consume vast amounts of resources as each invests in an effort to exclude others. The competition for scarce resources is multi-sided, however, and any group of individuals may reduce the costs of conflict by voluntarily recognizing some subset of each others’ claims.²² In fact, anthropological evidence rejects Hobbes’s (1651) “war of all-against-all” at the individual level, as cooperative orders characterize relationships within small close-knit groups.²³ While

¹⁶ For example, see S. N. S. Cheung, “A Theory of Price Control,” *Journal of Law and Economics*, 17 (1974): 53–72; and Benson, “Regulation, More Regulation, Partial Deregulation, and Reregulation: The Dynamics of a Rent-Seeking Society.”

¹⁷ Benson, “Endogenous Morality”; and Nee, “Norms and Networks in Economic and Organizational Performance.”

¹⁸ T. Hobbes, *Leviathan* (1651; London, 1962); J. Locke, *Two Treatises of Government*, ed. Peter Laslett (1690; Cambridge, 1963); and J. Rawls, *A Theory of Justice* (Cambridge, MA, 1971).

¹⁹ J. M. Buchanan, *The Limits of Liberty* (Chicago, 1975).

²⁰ Benson, “Emerging from the Hobbesian Jungle: Might Takes and Makes Rights.”

²¹ Jasay, pp. 198–9.

²² V. J. Vanberg, and J. M. Buchanan, “Rational Choice and Moral Order,” in J. H. Nichols, Jr. and C. Wright (eds), *From Political Economy to Economics And Back?* (San Francisco, 1990).

²³ Confer R. C. Ellickson, “Property in Land,” *Yale Law Journal*, 102 (1993): 1315–400 and Ridley. Where no one has a comparative advantage in violence, individuals can contract to recognize a relatively equal initial distribution of private property rights, perhaps based

cooperation dominates within primitive groups, *inter-group* conflict also appears to be a dominant characteristic of human history.²⁴ Therefore, even though the norms of a spontaneously evolving cooperative order are considered before turning to the beliefs that arise under institutionalized extortion, it must be emphasized that these two developments often are simultaneous, and each can influence the evolution of the other, as suggested below.

Cooperation, Property Rights, and the Evolution of Beliefs

Moral Behavior as a Rational Strategy

It is widely recognized that game theory and experimentation demonstrates that cooperation can arise through repeated interactions which create both a willingness to cooperate and a potential to punish non-cooperative behavior through strategies like tit-for-tat.²⁵ A threatened sanction such as tit-for-tat is relevant because of the recognition of *positive* long-term benefits of remaining on good terms with the other party. Such reciprocity has implications for moral behavior because it means that an individual can face an immediate choice of bearing costs (for example, by living up to a promise or recognizing another person's property rights) without an

on a rule of first possession, as suggested below (for property rights based on a rule of first possession, see J. Umbeck, *A Theory of Property Rights with Applications to the California Gold Rush* (Ames, Iowa, 1981); and by the same author, "Might Makes Right: A Theory of the Foundation and Initial Distribution of Property Rights," *Economic Inquiry*, 19 (1981): 38–59). Given the option of employing violence, however, an "agreement ... must ration to each individual as much wealth as he could [expect to] have through the use of his own force" (Umbeck, "Might Makes Right: A Theory of the Foundation and Initial Distribution of Property Rights," p. 40). If the agreement stems from an initial situation involving highly asymmetric capacities for violence, the individual(s) with a comparative advantage can claim property rights and wealth that others have previously claimed or produced. Indeed, a continuum of property rights arrangements is theoretically possible, ranging from slavery through situations involving a large degree of extortion and concentration of property rights, to modest taxes for individuals who could also produce effective violence if pressed, to a system of voluntary recognition and joint protection of private property rights with no coercive authority (Benson, "An Economic Theory of the Evolution of Governance and the Emergence of the State;" and Jasay, pp. 47, 79–80). All such systems can "naturally" evolve under different circumstances, and as explained below, moral behavior varies as a result.

²⁴ Ridley, pp. 152–69, 189–93.

²⁵ This also holds true for other strategies (Ridley, pp. 53–84). See R. Axelrod, *The Evolution of Cooperation* (New York, 1984); and see Ridley (pp. 53–84) for a review of many of the developments in the literature subsequent to Axelrod. There also are conditions that can produce a cooperative solution even in a one-period game (see for example, S. Skaperdas, "Cooperation, Conflict, and Power in the Absence of Property Rights," *American Economic Review*, 82 (1992): 720–39; and R. Rider, "War Pillage, and Markets," *Public Choice*, 75 (1993): 149–56).

immediate gain, in expectation of future reciprocal behavior by someone else. As Taylor suggests,

Each individual act in a system of reciprocity is *usually* characterized by a combination of what one might call short-term altruism and long-term self-interest: I help you out now in the (possibly vague, uncertain and uncalculating) expectation that you will help me out in the future. Reciprocity is made up of a series of acts each of which is short-run altruism (benefiting others at a cost to the altruist) but which together *typically* make every participant better off.²⁶

Because the long-term reciprocal response is uncertain, a repeated-game situation does not guarantee unconditional cooperation in the form of “short-term altruism.” The dominant strategy still depends on expected payoffs, frequency of interaction, time horizons, and other considerations.²⁷ Additional incentives for cooperation and for short-term altruistic behavior arise, however.

Vanberg and Congleton explain that most forms of interaction are not actually characterized by the typical game-theoretic models because they assume that the individuals must play.²⁸ In reality, however, people often have an “exit” option,²⁹ and the exit threat can be more powerful than strategies like tit-for-tat under some circumstances. Specifically, Vanberg and Congleton explain that “In practice, the net benefits of exit depend on the availability of alternatives (or more specifically, on the expected payoffs from those alternatives), whether such alternatives exist in the form of potential interactions with other players or in solitary activity.”³⁰ Thus, the exit threat becomes credible when each individual is involved in several different games with different players, in part because the same benefits of cooperation may be available from alternative (competitive) sources. And of course, even in a very primitive setting individuals are involved in at least one “community” as described by Taylor, wherein “the relations between members are *direct* and ... *many-sided*.”³¹ In fact, as a society becomes more complex individuals actually “interact in several ‘small groups’ whose membership may be partly overlapping, partly different. Thus, each small group is open to other small groups and memberships are intermingled at the edges.”³²

Vanberg and Congleton suggest that one strategy that can be adopted, given a credible exit option, is unconditional cooperation until or unless noncooperative behavior is confronted, and some form of explicit punishment of the non-cooperative player as exit occurs.³³ They label this strategy “retributive morality,” and the

²⁶ M. Taylor, *Community, Anarchy and Liberty* (Cambridge, 1982), p. 28.

²⁷ Ridley, pp. 74–5.

²⁸ Vanberg and Congleton, “Rationality, Morality and Exit,” p. 420.

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ Taylor, pp. 26–30. Also see M. J. Bailey, “Approximate Optimality of Aboriginal Property Rights,” *Journal of Law and Economics*, 35 (April 1992): 183–98; Ellickson, “Property in Land”; and Jasay, pp. 204–9.

³² Jasay, p. 129.

³³ Vanberg and Congleton, “Rationality, Morality and Exit,” p. 421.

“blood-feuds” of primitive and medieval societies provide examples. However, the fact is that retributive morality or the blood feud played a much less significant role in primitive and medieval societies than is popularly perceived.³⁴ After all, such violence is risky, and there is an even better strategy. Given the availability of competitive alternatives, all members of the community have a refuse-to-play option, and therefore they may cut off all relationships with someone that they know has been untrustworthy in dealings with anyone else in the group. Thus, to the extent that information, or “truthful negative gossip,”³⁵ can travel from one game to another, the negative consequences on reputation can limit the non-cooperative player’s ability to enter into other games. Since, as Jasay (1997: 207, 210) notes, most interactions take place between individuals involved in a “complex and dense web of communication in which it is both easy to send and profitable to receive information about prospective players,”³⁶ and wherein “information is ‘cheap’ to send and ‘cheap’ to obtain [in part because people] ... delight to spread and to listen to gossip,”³⁷ there actually is a low cost option to retributive morality: unconditional cooperation whenever an individual chooses to enter into some form of interaction, along with the spread of information about any noncooperative behavior. Vanberg and Congleton refer to this response as “prudent morality,” and given that reputation information spreads quickly within a group, the consequences of retributive and prudent morality become quite similar.³⁸ If everyone spontaneously responds to information, the noncooperative individual is excluded from all interaction with any member of the community. Such spontaneous social ostracism can be a very significant punishment.³⁹

Ridley notes that “Moral sentiments . . . are problem-solving devices [that evolve] . . . to make highly social creatures effective at using social relations [by] . . . settling the conflict between short-term expediency and long-term prudence in favor of the latter.”⁴⁰ Many widely shared moral beliefs (sentiments) are simply commonly adopted behavioral strategies that apply for all interactions of particular types within a close-knit group. Others are expected to be followed by all members of a group because obeying these norms produce positive externalities within the group.⁴¹ One example, the ostracism sanction, is suggested above. Investments in

³⁴ B. L. Benson, “An Evolutionary Contractarian View of Primitive Law: The Institutions and Incentives Arising Under Customary American Indian Law,” *Review of Austrian Economics*, 5 (1991): 65–89; and Benson, “Are Public Goods Really Common Pools: Considerations of the Evolution of Policing and Highways in England.”

³⁵ Ellickson, *Order Without Law: How Neighbors Settle Disputes*, pp. 180–82.

³⁶ Jasay, p. 207.

³⁷ *Ibid.*, p.210.

³⁸ Note that the exit option combined with multi-sided, multi-dimensional reputation effects can mitigate the consequences of asymmetries in power discussed above. The relatively weak individuals in an evolving close knit group might well be relatively strong when backed by an ostracism threat (Ridley, p. 160).

³⁹ See Jasay (pp. 28–36) for similar conclusions reached through a different theoretical argument.

⁴⁰ Riley, p. 132.

⁴¹ Vanberg and Buchanan, “Rational Choice and Moral Order,” p. 115.

communication mechanisms can substitute for investments in the tools of personal violence, and since communication within close-knit groups is cheap, resources will be left over to devote to wealth production.⁴² Norms like “inform your neighbors about individuals who violate trust rules” evolve and as individuals begin avoiding interactions with noncooperative players such behavior comes to be expected, so norms like “do not cooperate with individuals who behave in a non-cooperative fashion with someone else” arise. As members of the community conform with such norms, expectations of *automatic* expulsion for a breach of a community norm develops. Thus, the production of information and automatic boycott create benefits for everyone in the group by deterring non-cooperative behavior, even though they arise out of individual self interest. Ostracism has always been a primary obligation in primitive societies (Benson 1991) and in other cooperative groups (for instance, commercial societies).⁴³

Property Rights and Beliefs

Since the primary source of conflict is scarcity,⁴⁴ group-wide norms will focus on property allocation issues. No one really knows how cooperation norms and property rights actually emerged for the first time, of course, since both predate recorded history. A number of possible theoretical scenarios can be imagined, but let us focus on one that has an empirical basis,⁴⁵ in order to illustrate how some of the types of moral behavior that can arise as property rights are established within an evolving community. Assume that initially, productive resources are abundant relative to potential claimants. Also assume that individuals do not have

⁴² Jasay, p. 210; also see R. A. Posner, “A Theory of Primitive Society, With Special Reference to Law,” *Journal of Law and Economics* 23 (1980): 1–53.

⁴³ For ostracism in primitive societies see Benson, “An Evolutionary Contractarian View of Primitive Law: The Institutions and Incentives Arising Under Customary American Indian Law.” For ostracism in other cooperative groups see the following three articles by B. L. Benson: “The Spontaneous Evolution of Commercial Law,” *Southern Economic Journal*, 55 (1989): 644–61; “Customary Law as a Social Contract: International Commercial Law”; and “An Exploration of the Impact of Modern Arbitration Statutes on the Development of Arbitration in the United States,” *Journal of Law, Economics, & Organization*, 11 (1995): 479–501.

⁴⁴ Hume.

⁴⁵ The scenario outlined below is consistent with what happened in many areas of the American West where contractual associations such as mining camps, land clubs, and cattlemen’s associations formed to support claims of the members and exclude outsiders (T. L. Anderson and P. J. Hill, “An American Experiment in Anarcho-Capitalism: the Not So Wild, Wild West,” *Journal of Liberation Studies*, 3 (1979): 9–29; Umbeck, *A Theory of Property Rights with Applications to the California Gold Rush*; and by the same author “Might Makes Right: A Theory of the Foundation and Initial Distribution of Property Rights”). Similar arrangements arose in medieval Iceland (D. Friedman, “Private Creation and Enforcement of Law: A Historical Case,” *Journal of Legal Studies*, 8 (March 1979): 399–415 and B. T. R. Solvason, “Ordered Anarchy, State, and Rent-Seeking: The Icelandic Commonwealth, 930–1264”, (Ph.D. diss., George Mason University, 1991)).

a comparative advantage in violence (a reasonable assumption in most primitive settings before technological advances in violence have occurred). Therefore, individuals are likely to prefer to avoid conflict by claiming resources that are not yet claimed, as long as unclaimed productive parcels exist (note that they do not have to be equally productive since the expected benefits of a less productive but undisputed asset may be greater than the expected benefits of more productive but disputed property, given the probability of losing in a violent confrontation). Thus, each party tacitly recognizes previously existing claims. This suggests that neighbors are not necessarily hostile towards one another from the outset, so various repeated-game social and economic relationships may also develop relatively easily. A multilateral web of such relationships may evolve and a “community” may form before scarcity of productive resources becomes a problem and conflicting claims arise. Indeed, it is likely that people will be members of a community before many claims of this kind are made (for instance, with discovery of technologies for agriculture, the individuals in an already-cooperative nomadic hunter-gatherer community may claim adjoining parcels of land in the same area and explicitly recognize each other’s claims). As more people make claims in the area, however, resources ultimately become scarce and new entrants may attempt to institute conflicting claims (that is, take property already claimed). Existing claimants now have a strong common interest in maintaining first-possession claims, and some experience with at least tacit, and probably explicit, recognition of those claims. At a minimum, they have already tacitly agreed not to attack one another, and by building upon that cooperative relationship they may join together in a “confederacy” as a protection association in order to exclude new entrants from taking any of their possessions.⁴⁶ We can only speculate about prehistoric events of this kind, but as Ellickson notes,

There is abundant evidence that a ... group need not make a conscious decision to establish private property rights in land [and other resources]. People who repeatedly interact can generate institutions through communication, monitoring, and sanctioning. ... Contrary to Hobbes and Locke, a property system can get going without an initial conclave.⁴⁷

After all, as Hayek explains,

The understanding that “good fences make good neighbors”, that is, that man can use their own knowledge in the pursuit of their own ends without colliding with each other only if clear boundaries can be drawn between their respective domains of free action, is the basis on which all known civilization has grown. Property, in the wide sense in which it is used to include not only material things ... is the only solution men have yet discovered to the problem of reconciling individual freedom with the absence of conflict.⁴⁸

Indeed, the primary goal of such agreements may be to obtain non-material wealth in the form of “peace” or security, but of course, material wealth is also likely to be enhanced for everyone involved in such trust relationships. If property rights are

⁴⁶ Jasay, pp. 198–9.

⁴⁷ Ellickson, “Property in Land,” p. 1366. Also see Bailey, “Approximate Optimality of Aboriginal Property Rights.”

⁴⁸ Hayek, vol.1, p. 107.

made relatively more secure and relatively more private, time horizons lengthen and incentives to use the property for production increase. Private property means that the owner's use of the owned asset in pursuit of his interests is unhindered as long as that pursuit does not impinge on someone else's rights. That is, an individual's freedom to act is coupled with a norm establishing an obligation or a responsibility to respect other people's right to do the same thing. And in order to make all community members' claims more secure, additional norms like "watch out for your neighbors and their property" and "inform everyone when a rights violation occurs" arise. After all, transaction costs of possessing property include the devotion of resources to theft prevention, and high transactions costs for an individual imply that protection will not be completely effective. The empirical fact is that one joint product of cooperative clusters is policing (watching to prevent theft, and cooperation in pursuit when a theft occurs).⁴⁹

The discussion, to this point, suggests that private property tends to emerge spontaneously as individuals pursue their self interests, and as Jasay notes, a demonstration

that on full reflection it is reasonable to expect private property to emerge, and to prevail over the temptations that threaten it, as a product of the same robust incentives that we could, perhaps a little hastily, expect to provoke, not respect for property, but theft, robbery, dispossession, and default instead. This result, let me add, owes nothing to decency, sympathy, a sense of fairness, and a desire for mutual accommodation. Such motives, residing in our better nature, are almost certainly important in human conduct, but it seems to me gratifying that we can find an explanation that is at least coherent whether or not it is right, for a crucial institution of the social order, property, from the most elementary assumptions of rationality, without having recourse to any special motivation springing, not from human nature *tout court*, but from our better nature.⁵⁰

But the argument can be taken still further. The fact is that the same institutional environment that leads to the emergence of property rights also creates incentives for "decency" to be a dominant behavior, and for people to act as if they have "sympathy" for others, "a sense of fairness," and a "desire for mutual accommodation." To see this, let us consider some of the other norms that also arise in order to make property rights more secure.

Sharing Norms, Mutual Insurance and Benevolence

The earliest forms of cooperation probably did not involve individualized private property, of course. Group ownership of things like hunting territories⁵¹ and "sharing norms" or "equality norms" for the proceeds from a successful hunt⁵² were common.

⁴⁹ Benson, "An Evolutionary Contractarian View of Primitive Law: The Institutions and Incentives Arising Under Customary American Indian Law;" and, by the same author, "Are Public Goods Really Common Pools: Considerations of the Evolution of Policing and Highways in England."

⁵⁰ Jasay, pp. 201–2.

⁵¹ Bailey, "Approximate Optimality of Aboriginal Property Rights".

⁵² Ridley, pp. 105–17.

These norms were quite rational, enhancing the incentives to cooperate in joint production and serving as a form of insurance.⁵³ While one individual or hunting party might not be successful another was likely to be, so sharing was a mutual insurance arrangement that reduced everyone's risk of going hungry. Essentially, sharing norms are examples of short-term altruism motivated by repeated-dealing reciprocities. Such "insurance" also gives rise to moral hazard, of course, and there were incentives to free ride, as Ridley explains, so cooperation might not materialize without rules that undermine such incentives. Such rules also arose. The strong norms regarding sharing were reinforced by taboos against free riding and other activities (for example, hoarding) that might create incentives for hunters in the group to shirk. Thus, an understanding of such cooperation requires more than a recognition of potential benefits. The development of such norms, *and* of the institutions that instill incentives to recognize them, must also be considered.

As the benefits of individualizing property rights arose, such rights also were recognized. Hunters tended to own hunting tools, for example, and with domestication of animals for hunting (dogs, horses), individual private property rights were recognized for them as well.⁵⁴ With advances in agricultural technology, individualized private property rights to land also evolved.⁵⁵ Future events can lead to predictable changes in the opportunity cost of cooperation that can reduce incentives to respect such private property, however. This means that members of a cooperative group have incentives to attempt to insure against the consequences of such changes. One way to encourage people to continue to recognize the cooperatively-produced property rights system even when circumstances change is to develop mutual insurance arrangements that provide aid to individuals who find themselves to be at significant risk as a consequence of mistakes, unanticipated natural disasters, or general bad luck. That is, apparent altruistic behavior in the form of voluntary wealth transfers can be made by rational self-interested individuals in order to induce others who find themselves in distress to continue to behave in predictable ways over the long term. Johnsen's analysis of the potlatch system of the Southern Kwakiutl Indians provides an insightful example. Johnsen explains that

[i]n order to provide the incentives of would-be encroachers to recognize exclusive property rights, and thus to prevent violence, those Kwakiutl kinship groups whose fishing seasons were relatively successful transferred wealth through the potlatch system to those groups whose seasons were not successful. ... Although potlatching thereby served as a form of insurance, the relevant constraint in its adoption and survival was the cost of enforcing exclusive property rights rather than simple risk aversion.⁵⁶

⁵³ R. A. Posner, "A Theory of Primitive Society, With Special Reference to Law," *Journal of Law and Economics* 23 (1980): 1–53.

⁵⁴ Benson, "An Evolutionary Contractarian View of Primitive Law: The Institutions and Incentives Arising Under Customary American Indian Law."

⁵⁵ Ellickson, "Property in Land," and Bailey, "Approximate Optimality of Aboriginal Property Rights."

⁵⁶ D. B. Johnsen, "The Formation and Protection of Property Rights Among the Southern Kwakiutl Indians," *Journal of Legal Studies*, 15 (1986): 41–68, p. 42.

If the flow of payments is always in the same direction this could be analogous to a tax induced by the threat of violence, of course, but such transfers can arise due to expected reciprocities. Members of one Kwakiutl kinship group may have a poor salmon harvest in one year, and therefore receive a transfer, but the next year the other group could have the poor harvest so the transfer goes in the opposite direction. Thus, voluntary mutual insurance is a more appropriate description. Not surprisingly, “gift exchanges” and “potlatching” have been common practices all over the world, naturally evolving from the sharing norms of hunter-gatherer communities.⁵⁷

Actually, individuals need not anticipate reciprocal treatment in the future to voluntarily establish a transfer arrangement. As a cooperative group develops and property rights are increasingly privatized, for instance, everyone may recognize that some individuals are likely to gain considerable wealth while others may not enjoy the same kinds of gains. Thus, a class of relatively poor people can be expected to develop, and their opportunity cost of living up to promises to respect others’ property rights will be low. Indeed, without help, they could be forced into thievery to survive. Recognition of this possibility implies that the transactions cost of property rights protection can be expected to rise in the future. An arrangement that pays the destitute before they violate others’ rights may therefore be a low cost alternative to reacting after a violation through retributive or prudent morality. Solvason discusses such an arrangement in medieval Iceland, for instance, which provided for those who suffered due to uncontrollable events.⁵⁸ The members of neighborhood groups helped rebuild and restore property destroyed by fire, orphans or individuals who were destitute were taken in by others who were able to provide for them, those without property but able to work were given work by those wealthy enough to employ others’ labor, and revenues were even collected and pooled to provide for the poor directly. This kind of arrangement might be based on bilateral reciprocities as in potlatching, but as a group evolves and expands they may become group-wide norms as the broader community takes on several functions that traditionally had been performed by more narrowly focused groups.⁵⁹ Thus, while free-rider incentives often are countered with ostracism threats, a private property rights system creates long time horizons and incentives to adopt moral behavior that emphasizes benevolence. Indeed, Hazlitt suggests that “The conduct we call moral is the conduct we consider likely to lead to the most satisfactory situation *in the long run*.”⁶⁰ Such insurance arrangements mean that even those who may find themselves in desperate situations know that recovery is possible, so they have relatively strong incentives to adopt longer time horizons, respect property rights and behave cooperatively within the community that supports them in times of distress.

Generosity on the part of the wealthy, which reduces threats to their property, is not unique to primitive societies. Commercial societies have, throughout history, generated

⁵⁷ Ridley, pp. 114–24.

⁵⁸ Solvason, p. 72.

⁵⁹ For instance, by families under kinship-based norms, neighboring clans, and so on (Solvason, pp. 34–5).

⁶⁰ H. Hazlitt, *The Foundations of Morality* (Irvington-on-Hudson, NY, 1964), p. 354.

considerable wealth, for instance, relative to other less commercial societies,⁶¹ and as noted above and explained below, close knit commercial communities have much in common with the primitive communities discussed here. Indeed, “For all the protestations of Karl Marx and Max Weber, the simple idea of gains from trade lies at the heart of both the modern and the ancient economy”⁶² and therefore, “the origin of the market, with all its capacity to exchange goods of different kinds, exploit the division of labour and provide a hedge against dependence on one good, may lie in the reciprocal food-sharing arrangements of a hunter-gatherer band.”⁶³ For instance, from his study of the social, legal and economic relationships among the Yurok, Hupa, and other Northern California Indians before European influence, Goldsmidt concludes that these Indians had “a culture which reflects in surprising degree certain structural and ethical characteristics of emergent capitalistic Europe,”⁶⁴ and as a consequence, they were “a busy and creative people ... [and] poverty was not found here.”⁶⁵ Furthermore, an examination of the emergence of commerce in the medieval period,⁶⁶ as well as the relationships in modern international commercial communities⁶⁷ and within domestic trade associations⁶⁸ reveals that they are ruled by modern versions of the same kinds of norms (ethics, morality) and institutions that develop in primitive societies.⁶⁹ And in this context, Wesson explains that in Holland of the seventeenth century,

The Dutch liked to consider their material prosperity as proof of their virtue. Perhaps it was, for the Dutch were credited with such traits as cleanliness, stolidity, patriotism, modesty and straightforwardness ... They seemed particularly immune to bribery. Honesty was one secret of their commercial success. Incidentally, no other people provided so amply for their poor as the mercantile Dutch.⁷⁰

The same was true of England of the eighteenth century, where “commerce in open markets” required dealings on the basis of “equality, according to recognized rules and by mutual consent” so the merchants were “famed for honesty”; but in

⁶¹ R. G. Wesson, *State Systems: International Pluralism, Politics, and Culture* (New York, 1978).

⁶² Ridley, p. 199.

⁶³ *Ibid.*, p. 114.

⁶⁴ W. Goldsmidt, “Ethics and the Structure of Society: An Ethnological Contribution to the Sociology of Knowledge,” *American Anthropologist*, 53 (October/December, 1951): 506–24, p. 506.

⁶⁵ *Ibid.*, pp. 513–14.

⁶⁶ Benson, “The Spontaneous Evolution of Commercial Law.”

⁶⁷ Benson, “Customary Law as a Social Contract: International Commercial Law.”

⁶⁸ Benson, “An Exploration of the Impact of Modern Arbitration Statutes on the Development of Arbitration in the United States.”

⁶⁹ In the Italian commercial cities of the thirteenth to the fifteenth centuries, for instance, “actions were judged by success and gentlemen were judged by appearance and worth, not pedigree. Men were not born noble or made noble by a sovereign but ennobled themselves by industry, intelligence, and skill” (Wesson, p. 160). Wealthy Italian merchants dressed modestly but gave lavishly to public projects (Wesson 1978, pp. 162–3).

⁷⁰ *Ibid.*, p. 173.

“seeking security for property and person, freedom to produce and enjoy wealth,” they were also characterized as “generous, sober, and charitable.”⁷¹

Entrepreneurship and Honor: Additional Reasons for Benevolence Norms

Tribal and clan organizations generally have strong norms regarding loyalty and respect for leaders but only if the person aspiring to a leadership position have specific characteristics. Consider a leader (“big man”) among the Kapauku Papuans of West New Guinea, who essentially acted as a nexus of the voluntary relationships that dominated Kapauku life. The first important characteristic was that he had to be a *tonowi*: “an individual who has a great amount of cowrie-shell money, extensive credit, several wives, approximately twenty pigs, a reasonably large house, and many cultivated fields.”⁷² The wealth accumulated by an individual within a Kapauku community almost always depended on that individual’s work effort and skill, and his ability to cooperate with others. Therefore, anyone who acquired sufficient property to be a *tonowi* was likely to be a mature, skilled individual with considerable physical ability and intellectual experience, and perhaps more important, someone who had a history of cooperative behavior. He deserved respect. This was not unique to the Kapauka Pauans, as those who gain wealth in close-knit communities are generally held in very high regard.⁷³

Not all *tonowi* achieved respect that would attract substantial numbers of others outside his own family to regularly rely upon him as leader.⁷⁴ Long-term leadership required that gains from entrepreneurial activities and innovations be dispersed. Thus, a self-interested entrepreneur within a close-knit community rationally would pursue activities that benefited others in the group and generously spread the wealth. Innovations that may generate relatively large returns for the entrepreneur can also be accepted by the group if the entrepreneur generously disperses the benefits in the form of gifts. Indeed, in primitive societies, the honor of being recognized as a leader is often “purchased” through public displays of generosity demonstrated at occasions such as marriages and in connection with disputes, in the form of “gifts” on behalf of the leader’s followers in order to secure good marriages or buy peace among disputants. For instance, among the Kapauku, “The way in which capital is acquired and how it is used make a great difference; the natives favor rich candidates who are generous and honest. These two attributes are greatly valued by the culture.”⁷⁵ The honor of being recognized as a *maagodo tonowi* (a “really rich man”) and therefore a leader was “purchased” through such displays of generosity, since such a leader could expect to benefit in the future through greater opportunities for exchanges and reciprocal obligations of loyalty.

⁷¹ Ibid, pp. 197, 199.

⁷² L. Pospisil, *Anthropology of Law: A Comparative Theory* (New York, 1971), p. 67.

⁷³ Benson, “An Evolutionary Contractarian View of Primitive Law: The Institutions and Incentives Arising Under Customary American Indian Law”; and Pospisil.

⁷⁴ Pospisil, p. 67.

⁷⁵ Ibid.

Another source of prestige for entrepreneurial leaders can be skill and bravery in battles against external enemies,⁷⁶ as emphasized in the next section, since one potential source of wealth, for both leaders and followers, is the productive efforts of individuals in other groups. However, even these leaders typically had to display generosity within their own communities. Among the Comanche of nineteenth-century America, for instance, disputes were generally resolved through negotiation, but in situations where an imbalance of bargaining power existed, there was an alternative: “Men whose status was so low that on the personal and kinship basis they were, in effect, without status were still guaranteed protection under the Comanche law. . . . There was the institution of *champion-at-law*.”⁷⁷ The champion-at-law was generally a “war chief” who served to represent a damage claim in the bargaining process and, if need be, in physical combat. There were no payments to convince a warrior to act as a champion. The prestige purchased by giving such support to others seems to have provided sufficient incentives, however. Hoebel concludes that “The institutional capitalization of these factors is an amazing piece of social engineering,” but norms associated with obtaining and maintaining honor are common among close-knit groups, and one way to do so is in the context of dispute resolution.⁷⁸ Third party mediation or arbitration often develops in close-knit groups, for instance, and entrepreneurs such as *tonowi* typically offer to help resolve disputes and provide advice free of charge.⁷⁹ “Fair” non-violent dispute resolution is attractive to community members because it avoids the spillover costs associated with violence dispute resolution, and it is attractive to the “suppliers” of such dispute resolution even when they are not explicitly paid, because it enhances their prestige. In other words, both generous gift and advice giving (for instance, dispute resolution) serve as signals that the individual is successful, cooperative and trustworthy, and therefore an attractive partner for joint ventures and trade. As Ridley puts it, such acts “scream out ‘I am an altruist; trust me.’”⁸⁰ And in fact, while such behavior can be explained as purely self-interested, leaders probably believe that their motivations are altruistic.

Natural Law, Natural Altruism, or Self-Interest and Rationalized Beliefs?

The discussion up to this point, based on game theory and property rights literatures, simply suggests that much of the behavior often seen as moral (for example, trustworthiness, cooperation, sharing, charity) can be quite rational for self-interested individuals under the particular circumstances that produce private property. Perhaps moral beliefs are actually irrelevant then? Yet, individuals often explain their actions

⁷⁶ Benson, “An Evolutionary Contractarian View of Primitive Law: The Institutions and Incentives Arising Under Customary American Indian Law”; and Ridley, p. 166.

⁷⁷ E. A. Hoebel, “Law-Ways of the Comanche Indians,” in P. Bohannon (ed.), *Law and Warfare* (Garden City, NY, 1967).

⁷⁸ *Ibid.*, p. 200.

⁷⁹ Pospisil, and Benson, “An Evolutionary Contractarian View of Primitive Law: The Institutions and Incentives Arising Under Customary American Indian Law.”

⁸⁰ Ridley, p. 138.

in moral terms, suggesting that moral beliefs must be important. Furthermore, “Conformist” behavior within groups is a widely observed phenomenon,⁸¹ and such conformist behavior need not reflect the ongoing (case-by-case) rational calculation implied by game theory. In particular, the internalization of norms by adopting them as “beliefs” allows individuals to avoid the high cost of calculating expected outcomes in every situation.⁸²

As noted above, significant limits on abilities to reason and to absorb knowledge means that individuals are not able to use conscious reason to evaluate every particular option in the array of alternatives that are available, so rational individuals will often find it beneficial to voluntarily conform to rules, including norms, in an almost unthinking way. For instance, religious beliefs and beliefs about ancestors or a combination of the two play important roles in some (although certainly not all) systems of group-specific norms, and in a world of uncertainty and high transactions costs, this is a rational development.⁸³ Such beliefs can be a low cost means of communicating and conforming to behavioral rules without having to actually invest time and effort in repeatedly calculating precisely what the costs and benefits of such behavior are. In a primitive society, where knowledge is very scarce and uncertainty is very significant, the adjudication of disputes tends to be highly ritualized or regularized, for instance, as North observes,⁸⁴ so that individual choices are structured in ways that mitigate the effects of uncertainty. In this context, Burkett explains that one of the benefits of religion in primitive (and medieval) societies was to reduce the cost of delineating property rights and enforcing contracts through the belief in oaths.⁸⁵ Violation of oaths was expected to result in retribution from the gods, so believers had strong incentives to live up to their promises. The same can be said for the general belief in the validity of trial by ordeal in medieval Europe where strong religious beliefs that the righteous would be saved while the immoral would be punished created incentives to behave honestly.⁸⁶ Holcombe suggests that “The

⁸¹ Ibid., pp. 181–93.

⁸² An uncalculating conformity to expected behavioral norms may also be rational in part because observing how others behave in a particular situation is a source of accumulated information (Ridley, p. 184).

⁸³ R. G. Holcombe, “The Role of Fiction in Society” (Florida State University Working Paper, 1992).

⁸⁴ D. C. North, *Institutions, Institutional Change and Economic Performance* (Cambridge, 1990), p. 23. Also see Pospisil, and Benson, “An Evolutionary Contractarian View of Primitive Law: The Institutions and Incentives Arising Under Customary American Indian Law.”

⁸⁵ W. Burkett, *Creation of the Sacred: Tracks of Biology in Early Religions* (Cambridge, MA, 1996).

⁸⁶ Many people see religious institutions as the source of moral rules. However, as Hazlitt explains, morality “and the nature of our duties and obligations, have no necessary dependence on any theological doctrine or religious belief” (Hazlitt, p. 358). Rather, they reflect the universal objective of wealth enhancement. This does not mean that religious institutions are irrelevant, of course, since they too can reduce transactions costs within a community. As a system of rules evolve spontaneously within a group, for instance, group members may not fully recognize the importance of their function for facilitating voluntary

people who accept fictions could see with little trouble that they are in fact not true, but people still behave as if they are true because such behavior serves a larger social purpose,⁸⁷ but recall Frank's argument⁸⁷ that it is difficult for humans to pretend that they believe something that they actually do not, so if acting as if such beliefs are real is desirable then it is rational to actually adopt the belief and not question them. As McCloskey concludes from a telling anecdote related by a woman at a cocktail party whose roofer, at his own instigation, had redone a bad roof for free:

A reputation for fair dealing is necessary for a roofer whose trade is limited to a town with a population of fifty thousand. One bad roof and he is finished in Iowa City, and so he practices virtue with care. By now he would not put on a bad roof even if he could get away with it, and *he behaves like a growing child internalizing virtues once forced upon him*.⁸⁸

Thus, this norm and the beliefs that support it are rationally internalized as part of the belief system that this individual, in a particular institutional environment, has found to be beneficial.

The contention that beliefs about moral norms are rationalizations of behavior that supports the accumulation of wealth does not imply that such norms are irrelevant. It does not imply, for instance, that individuals never violate norms because they simply adopt new ones to justify such violations. Indeed, norms are not likely to be as flexible or as readily changeable as game-theory models based on rational calculations seem to imply. Once beliefs are established and used to dictate behavior in an uncalculating way, they may be quite inflexible even in the face of conflicting conditions. Conditions may have to change quite dramatically before an individual will reevaluate established beliefs, since the costs of such a reevaluation and establishment of new norms might be quite high.

Attempting to change a norm that applies generally to everyone in a close-knit community can be particularly costly since others in the community may not recognize the benefits of doing so, and as a consequence, the norm will be backed

interaction, instead attributing the results to some mystical source. Similarly, behavior that leads to undesirable consequences might become a religious taboo. As Mises notes, "Where people did not know how to seek the relation of cause and effect, they looked for a teleological interpretation. They invented deities and devils to whose purposeful action certain phenomena were ascribed. A god emitted lightning and thunder. Another god, angry about some acts of man, killed the offenders" (L. Mises, *Theory and History: An Interpretation of Social and Economic Evolution* (1957; Auburn, AL, 1985), p. 240). In other words, mythology and religion functions can interact with economic functions, perhaps providing important sanctions against non-cooperative behavior (for instance, excommunication) and sources of dispute resolution (for example, when individuals cannot decide how to resolve a dispute and avoid violence they might call upon a super-human arbitrator through a trial by ordeal). On the other hand, religious institutions can also be used for political purposes, as explained below.

⁸⁷ Holcombe, "The Role of Fiction in Society," p. 1.

⁸⁸ D. McCloskey, "Bourgeois Virtue," *American Scholar*, 63 (Spring 1994): 177–91, p. 182 (emphasis added).

by potential community sanctions. After all, for an obligation to achieve the status of a community-wide norm or generally shared moral sentiment, it must be widely recognized and accepted by the individuals in the affected group. The result is analogous to a unanimity (or consensus) rule for collective decision-making.⁸⁹ A unanimity rule implies that if individuals expect a rule to be biased against them, to fail to support decisions that will enhance their chances for wealth production, or to generate greater personal costs than personal benefits, it is not adopted. Indeed, if individuals are risk averse they will be reluctant to adopt new norms, and that combined with a unanimity rule, suggests that the evolution process for community wide norms tends to be quite “conservative,” guarding against mistakes. Once such a norm is adopted and backed by community sanctions, modifying or eliminating it can be difficult if other members of the community are not convinced that the change is desirable. Thus, a new unbiased rule that could enhance wealth for members of the community may not be adopted until the gains become widely recognized.

Indeed, individuals may resist changes in institutions that would be desirable if they were fully informed, because the behavior required under the institution changes conflicts with established beliefs. Once it becomes apparent that existing norms are in significant conflict with an individual’s interests, however, so that the individual must either violate the norm or repeatedly forgo obvious benefits or incur obvious costs, an individual will face a moral dilemma as she/he is forced to question the validity of existing beliefs. The impetus for rationalizing new norms arises and a process of change should begin. Thus, the rationalization of norms does not imply that all norms are always “rational” when considered in the light of full information or immediate circumstances. Rather, the argument is that such norms had a rational basis when they were initially adopted, and when they evolve, the direction of evolution can be predicted by assuming rational self-interest. If individuals follow the Golden Rule in their dealings with other members of the community, internalizing beliefs in and conforming to norms of cooperation, honesty, and generosity, they do so because it was in their interests to adopt such beliefs when they did so. Such behavior may persist even as conditions change in ways discussed in the third section below, creating very different institutions and incentives, but as Jasay suggests, such behavior is “living off the accumulation of moral and material reserves mostly squired away during their earlier private interlude.”⁹⁰

There are other potential explanations for such beliefs, of course. If some natural law, or natural morality, is universally recognized because of reason, the dictates of a god, or genetic “hard-wiring” through natural selection of cooperative behavioral traits, people could fulfill promises, respect other peoples’ rights, and in general, feel sympathy, kindness, consideration for others, without the rational self-interested preferences suggested above. Similarly, much of the behavior predicted above might also be predicted by assuming altruistic motives drive behavior rather than narrow self-interest. If the same beliefs can be explained by assuming natural law, unrestricted altruism, or rationalization in the face of personal self-interest, does it

⁸⁹ Benson, “An Economic Theory of the Evolution of Governance and the Emergence of the State.”

⁹⁰ Jasay, p. 59.

really matter what the true motivation is? Yes. After all, if self interest in preserving a private property arrangement is even a significant part of the motivation for various moral norms, then it follows that preventing the evolution of or undermining the stability of private property rights will also prevent the evolution of or undermine the development of such norms. A theory of moral behavior based on an assumption of altruism alone, or of some sort of hard-wired natural law, implies that the institutional environment does not matter. But there are reasons to expect that institutions do matter. For instance, much more voluntary “charity” appears to be targeted at individuals in identifiable communities than at other communities, and while a pure altruist would not require recognition for his gifts, the fact is that many gifts are “repaid” by public recognition, enhancing an individual’s prestige. More significantly, to the degree that individuals adopt cooperative behavior consistent with the Golden Rule and philosophers’ concepts of morality, they appear to do so only under certain circumstances in their interactions with only selected other individuals. Wesson points out, for instance, that the Renaissance Italian merchants were reliable in commerce and generous to their communities, but that they also practiced in the “intrigue and faithlessness recommended by Machiavelli” when it came to political matters.⁹¹ In order to understand such apparently immoral behavior on the part of individuals who apparently adopted moral behavior in many non-political activities, we must consider the conflicting incentives that arise when an individual’s wealth can be expanded through voluntary cooperation or involuntary transfer.

Coercion and the Evolution of Beliefs to Rationalize Inter-group Redistribution

No community evolves in complete isolation. Nonetheless, close-knit groups tend to remain relatively small, and all humans distinguish between group members and outsiders.⁹² Krebs and Denton explain that humans quickly classify others as members or non-members of their own group, and that all non-members tend to be viewed as being alike.⁹³ Indeed, they are perceived as enemies. And of course, intra-group conflict has been an almost ubiquitous characteristic of human history.

Group Loyalty and Inter-group Relationships

Since a key function of close-knit groups, at least initially, is to establish and secure private property rights, and such rights are insecure if outsiders are able to “invade” and take the property, one joint product of a cooperative group is likely to be mutual

⁹¹ Wesson, p. 161.

⁹² D. E. Brown, *Human Universals* (New York, 1991), p. 136.

⁹³ D. L. Krebs and K. Denton, “Social Illusions and Self-Deception: The Evolution of Biases in Person Perception,” in J. A. Simpson and D. T. Kenrick (eds), *Evolutionary Social Psychology* (Mahwah, NJ, 1997).

defense.⁹⁴ In fact, an external enemy can strengthen group cohesion,⁹⁵ leading some to actually suggest that moral norms are important because they enable groups to be sufficiently united to deter their enemies, not because they allow people to create order (coordination) within their groups.⁹⁶ Clearly, norms that support the production of mutual defense against enemies evolve, and an important part of an individual's belief system will be "a concept of them and us" (for instance, tribalism, patriotism) where individuals are expected to aid in the defense of the "community." A more plausible scenario than Alexander's, however, is that these mutual-defense norms simply evolve along with intra-group norms of cooperation (for example, prudent morality, generosity, mutual insurance) as part of the overall objective of securing property rights in order to enhance individual wealth. And as suggested above, one source of prestige for leaders is skill and bravery in defense *or* in aggression against enemies. After all, a potential source of wealth, for both leaders and followers, is wealth created by individuals in other groups, if it can be taken.⁹⁷

⁹⁴ Jasay, p. 199 and Benson, "An Economic Theory of the Evolution of Governance and the Emergence of the State."

⁹⁵ Wesson, p. 184 and Ridley, p. 174.

⁹⁶ R. D. Alexander, *The Biology of Moral Systems* (New York, 1987).

⁹⁷ Other neighboring communities may compete for the same scarce resources but they also may offer opportunities for mutually advantageous cooperation. Thus, cooperative arrangements can and often do evolve between members of different groups, perhaps leading them to combine. Alternatively, since group affiliation mechanisms can be quite flexible, individuals can belong to more than one group as a society evolves beyond the close-knit primitive groups that have been the focus of the preceding discussion (Jasay, p. 129). That is, groups need not formally "merge" and accept an entirely common set of rules governing all types of interaction. Individuals only have to expect each other to recognize a common set of rules pertaining to the type of interactions (for instance, trade) that evolve. Indeed, a "jurisdictional hierarchy" often tends to arise wherein each localized group has its own norms for intra-group relationships, with a separate and possibly different set of rules applying for those who establish intergroup relations and form a separate functionally focused group (Brown, p. 136; Pospisil; Benson, "An Evolutionary Contractarian View of Primitive Law: The Institutions and Incentives Arising Under Customary American Indian Law"). The commercial communities of international trade provide an example of functionally rather than geographically based groups whose members often belong to other communities too. Even in primitive societies, entrepreneurs establish extensive trade networks that cross community boundaries, however (Goldsmid, "Ethics and the Structure of Society: An Ethnological Contribution to the Sociology of Knowledge"; Benson, "An Evolutionary Contractarian View of Primitive Law: The Institutions and Incentives Arising Under Customary American Indian Law"; Ridley, pp. 195–211), essentially forming a trading community distinct from the local communities, but as such arrangements evolve they also have to be accompanied by various rules to function effectively (Benson, "An Evolutionary Contractarian View of Primitive Law: The Institutions and Incentives Arising Under Customary American Indian Law"; Benson, "The Spontaneous Evolution of Commercial Law"; and by the same author "An Economic Theory of the Evolution of Governance and the Emergence of the State"). The trading community will have a more narrowly focused set of norms because the interactions between its members are more narrowly focused. Trade is not the only function that can facilitate the formation of other geographically dispersed but functionally focused communities consisting of members of various geographically localized and often functionally extensive communities.

In order to consider the consequences of this method of wealth enhancement, note that as wealth accumulates and some individuals prove to be less productive than others, these individuals may perceive that they have significant comparative advantage in violence. One group may rely on hunting, for instance, and while the improvements in technologies for hunting resulting from specialization (for instance, the dart thrower) can enhance wealth in the short run, the long-run effect can be quite different. Many migratory animal populations were hunted into extinction by primitive groups because ownership could not be established until an animal was killed.⁹⁸ As scarce huntable resources are depleted the group's members might accumulate relatively less wealth compared to members of another group claiming relatively fertile land and settling into agricultural production. However, because the members of the group relying more on hunting than on agriculture also develop new tools for killing animals and other inputs to hunting (for example, horses, ships) that can also be superior technology for warfare, and become skilled in the use of those inputs, they develop a comparative advantage in violence. Therefore, an entrepreneurial leader skilled in violence and especially in organizing joint production of violence, may expect that an attractive way to gain property rights and wealth is through organized aggression against another community. He may persuade members of his community to act as a "firm" for the joint production of plunder. Not surprisingly, many historical examples of organized plunder involve cooperative communities with established internal trust relationships such as those described above (for example, Apache, Vikings).⁹⁹ Such raiding was probably legitimized in the minds of the raiders by the "us-against-them" beliefs that arise in the context of the morality of group loyalty discussed above. After all, given the belief that some other group is made up of enemies, such aggression can easily be rationalized—"the best defense is a good offense"—particularly when the expected gains in wealth exceed the expected costs. Indeed, members of a group are likely to rationalize such raiding through beliefs in the moral superiority of their group, as implied by the first quote at the beginning of this paper. Rosenberg and Birdzell (1986: 94) note, for instance, that during and after the middle ages, in the Mediterranean "Differences of religion

Religion can provide similar incentives, for instance, as can the need for defense against a common enemy. In other words, cooperation is one potential solution to inter-group conflict too, although the transactions costs of such cooperation are obviously relatively high, so inter-group conflict can also be expected.

⁹⁸ Ridley, pp. 227–47.

⁹⁹ A comparative advantage need not result in complete specialization, of course. Indeed, if there are different margins along which individuals can adjust to expand their wealth, they are expected to do so as long as anticipated benefits exceed anticipated costs. Thus, for instance, Jones asks "When does a pirate become a trader? When he sells his booty to a community too strong for him to attack, or to his own folk, as the Vikings did with the proceeds of their North Sea pillaging" (E. L. Jones, *The European Miracle: Environments, Economies, and Geopolitics in the History of Europe and Asia* (Cambridge, 1981), p. 88). Similarly, Rosenberg and Birdzell note that "The history of commerce in the Mediterranean, both during and after the Middle Ages, is to a considerable degree a history of trading combined with raiding and freebooting" (N. Rosenberg and L. E. Birdzell Jr., *How the West Grew Rich: The Economic Transformation of the Industrial World* (New York, 1986), p. 94).

between the Moslems and Christians furnished a pretext for mutual depredations. . . . It legitimized the pirates by renaming them privateers."¹⁰⁰

Many other examples exist as well. The internal order of the commercial communities that dominated many of the cities in ancient Greece and late-medieval/early-modern Europe depended on cooperation created through trust, for instance,¹⁰¹ but one of the most important "commodities" traded in both periods was slaves.¹⁰² The Greeks often sent their own ships on raids to capture slaves, while the Dutch and British created markets for slaves that encouraged others to actually capture them. No doubt, many slave traders felt morally superior to those who were being enslaved, perhaps even rationalizing their behavior because they were "improving the lot of the savages" by civilizing them and giving them an opportunity to improve their living conditions (whether true or not).

Extortion.

Raiding for plunder and slaves may produce relatively small returns compared to the wealth that might be extorted over time if productive people are allowed to continue to combine their productive efforts with the resources they control in exchange for continuous payments of "protection money" (tribute, taxes). Therefore, an entrepreneurial leader (for instance, war chief) may advocate invasion and occupation of the territory of another community, intending to tax those who are conquered as they continue to create wealth. The most successful examples of protection rackets by modern organized crime typically involve kinship or ethnic "communities" that have strong internal trust relationships supported by recognized norms of behavior, for instance,¹⁰³ although the territories controlled by such efforts are often relatively small (for example, a few blocks of a city, part of the Island of Sicily). Much larger scale protection rackets exist, however. Oppenheimer contends that the origins of the earliest states trace to precisely this situation, for example, as nomadic hunting and/or herding communities from the relatively unfertile mountains, deserts, or sea coasts, invaded and subjugated those who had settled in fertile valleys, setting up "protection rackets."¹⁰⁴ Many historians and political theorists also characterize the earliest states (for instance, in Egypt, Mesopotamia, and China) in this fashion.¹⁰⁵ Those communities that are clearly weaker have incentives to submit rather than fight,¹⁰⁶ and pay tribute. The "consent" of the governed is achieved through duress.¹⁰⁷

¹⁰⁰ Rosenberg and Birdzell, p. 94.

¹⁰¹ E. W. Fox, *History in Geographic Perspective: The Other France* (New York, 1971), pp. 37–9, 65–6; Benson, "The Spontaneous Evolution of Commercial Law."

¹⁰² Fox, pp. 35–6, 62–3.

¹⁰³ For example, see D. Gambetta, *The Sicilian Mafia: The Business of Private Protection* (Cambridge, MA, 1993), pp. 57–8.

¹⁰⁴ F. Oppenheimer, *The State: Its History and Development Viewed Sociologically*, trans. John M. Gitterman (1908; Indianapolis, 1914).

¹⁰⁵ M. Levi, *Of Rule and Revenue* (Berkeley, 1988), p. 11; Jasay, pp. 14, 208.

¹⁰⁶ Jasay, p. 79.

¹⁰⁷ Benson, "Are Public Goods Really Common Pools: Considerations of the Evolution of Policing and Highways in England" and by the same author "An Economic Theory of the

Indeed, Carneiro notes that successful creation of relatively permanent states of this type occurred where exit by those being subjugated was very difficult due to the surrounding hostile environment (for example, deserts, mountains, other hostile communities).¹⁰⁸ A vital institutional objective of an entrepreneurial extortionist must be to erect barriers to exit from the extortionist game (that is, establish a “monopoly in violence” over the subjugated territory): “For the real tyrant, hardly any measure of security is more pressing than to raise barriers, psychological and political, to fence in his realm.”¹⁰⁹ After all, if a potential target for extortion can turn to another organization specialized in the sale of true protection, to an alliance of cooperative groups that jointly produces defense, or to another protection racket which will fight for control,¹¹⁰ then the extortionist’s ability to extract tribute is significantly limited. The regimes of many dictatorships of the twentieth century clearly fall into the same classification as these early states.¹¹¹ Some of the strongest evidence of the institutional determinants of beliefs arises when one group successfully achieves dominance over another, as the moral norms that apply in both groups tend to change.¹¹²

When a group that uses cooperative procedures to maintain internal order also acts as an organized protection racket, there is “honor among thieves,” but the same moral rules clearly do not apply in interactions between the conquerors and their subjects. Indeed, as a “class system” is created and maintained through coercion, “law” in the form of discriminatory rules mandated by the extortionist at the “top” and imposed downward becomes necessary.¹¹³ The entrepreneur in extortion is no longer simply a “leader” who achieves his position through persuasion. He must become a “ruler” (rule maker and enforcer) who continues to persuade supporters to work within the extortionist organization while also coercing tribute from those who have been conquered. Such discriminatory rules are likely to be rationalized by the conquerors, however, as natural extensions of their community norms and the view that those who are conquered are morally inferior.

Resistance to discriminatory rules can be quite strong. Indeed, organized revolt is possible as numerous weak individuals form a cooperative group to take property rights from the powerful individual and his support group.¹¹⁴ Thus, the internal dynamics

Evolution of Governance and the Emergence of the State.” Also see Jasay, p. 133.

¹⁰⁸ R. L. Carneiro, “A Theory of the Origin of the State,” *Science*, 169 (1970): 733–8.

¹⁰⁹ Wesson, p. 190.

¹¹⁰ Gambetta, p. 31.

¹¹¹ And even the institutions of modern democracies can be traced to such initial conditions (Levi, Benson, “An Economic Theory of the Evolution of Governance and the Emergence of the State”).

¹¹² Benson, “Endogenous Morality.”

¹¹³ Benson, “Emerging from the Hobbesian Jungle: Might Takes and Makes Rights.”

¹¹⁴ Opportunistic breaches of promises in cooperative clusters are also possible, of course, but since everyone is likely to be relatively better off in such a community than they would be if the cooperation breaks down, individuals are relatively less likely to breach. A slave or someone subject to heavy extortion could well be better off in a state of nature, given that the master is successfully overthrown, and the status quo is clearly relatively undesirable. Thus, the incentives to find a way to successfully breach are relatively strong.

of the transfer system appears to be relatively unstable.¹¹⁵ Other groups outside the ruler's jurisdiction may also pose significant threats to the ruler, or they may see the ruler as a significant threat to them and mount a preemptory offensive against him as a defensive tactic, suggesting that there are external sources of instability as well. There are ways to reduce such instability (namely, insure against disruption of the newly imposed property rights system), however, and rulers have strong incentives to exploit them: "They choose among the feasible set of options, and they can act to change that feasible set. . . . [T]hey must interact with constituents, agents, and the representatives of other polities. To achieve their ends, they must coerce and bargain, develop their resources, and, often, alter their constraints".¹¹⁶ The kinds of institutional developments which arise are discussed in Levi, Holcombe, and Benson so they are not detailed here.¹¹⁷ However, many of these institutions have implications for the evolution of beliefs about what constitutes moral behavior, so let us consider a few examples.

Bureaucratic Norms

Part of the extortionist organization will become specialized in policing and punishment in order to induce compliance with discriminatory rules and reduce internal instability.¹¹⁸ Instituting rules such as standardized weights and measures, monopolization of money to standardize the measurement of taxable value, developing land surveys and records of title, conducting population censuses, and so on, also all tend to lower measurement and monitoring costs, so bureaucratic institutions tend to multiply.¹¹⁹ For these organizations to fulfill their functions, cooperation in production and exchange (for instance, of information and support) is necessary. Initially they are likely to consist of members of the close-knit group (for example, tribe, mafia family) that was successful in subjugation, but if the territory and/or population under control is large enough more employees will be recruited into the bureaucracy. New cooperative arrangements will be required.

The cooperation that develops in bureaucracies tends to be within spontaneously-evolving "informal networks" that serve as the non-market institutions of exchange

¹¹⁵ Levi, p. 44; Jasay, pp. 83–6.

¹¹⁶ Levi, p. 11.

¹¹⁷ Holcombe, *The Economic Foundations of Government* (New York, 1994) and Benson, "An Economic Theory of the Evolution of Governance and the Emergence of the State."

¹¹⁸ By spreading information, those who employ a comparative advantage in violence can develop a reputation for doing so. Such a reputation can be quite valuable as increasingly, the threat of violence alone may be sufficient to extort transfers; actual violent acts may become unnecessary. Therefore, the extortionist ruler invests heavily in policing and "punishment" to deter opposition (Gambetta, p. 46; Levi, p. 70). Both the punishment and policing will generally be conducted in a highly visible way (for example, hangings and mutilations, uniforms, special weapons), although some of the members of the extortionist organization are also likely to specialize in "spying" on subjects and in investigation of potential non-compliance (Gambetta, pp. 37–8), since uncertainty can also be a deterrent.

¹¹⁹ Levi, p. 29.

through which individuals from the ruling elite, politically influential individuals and organizations, and members of the bureaucracies cooperate in order to obtain information and benefits from each other, and to circumvent various administrative rigidities that inevitably characterize bureaucratic organizations.¹²⁰ Informal arrangements within bureaucracies have to be built on trust,¹²¹ of course, so behavior in these networks can be quite “moral” in the senses discussed above—behavior based on honesty, generosity, cooperation, and group loyalty. Indeed, Tullock emphasizes the importance of the almost unconscious influence of “cultural environment” in these networks and suggests that

As a result of his indoctrination in a native cultural pattern, the individual simply will not realize that there may exist alternative ways of doing things. This unconscious cultural indoctrination will tend to be reinforced by rational considerations. In order to be successful, the politician must be trusted. ... He must become an organization man.¹²²

The informal networks bind an individual to behavior expected by others within his network, although not to behavior demanded by people outside the network.¹²³ For example, Tullock explains that a successful bureaucrat must be loyal to his immediate superior even if it means frustrating the desires of someone higher up in a bureaucratic hierarchy.¹²⁴ Superiors may rationally expect to be treated with respect by subordinated, and feel morally justified in expecting considerable deference, as suggested by the issues discussed in the second quote at the beginning of this paper (Clarence Thomas’s belief that he had done nothing wrong in pursuing certain favors from his subordinate). Such loyalty is valued even by those higher up, to such degree that when they look for people to promote to positions immediately below them (for instance, to replace someone who has been frustrating their desires) they often promote those who were strongly loyal to a direct superior (even if the person was frustrating their desires). This suggests that loyalty and cooperative behavior towards other individuals tends to be turned off and on as changes in job assignments create new loyalties and end old ones, perhaps explaining the other aspect of the second quote (Anita Hill’s willingness to testify against Justice Thomas when they were no longer in the bureaucratic relationship that they had been in, even though she did not raise such charges when they were in that relationship). Norms are institution specific, not individual specific.

The primary purpose of many bureaucratic institutions is to take wealth from some and transfer it to others.¹²⁵ In order to do so “in good conscience” the members

¹²⁰ A. Breton and R. Wintrobe, *The Logic of Bureaucratic Control* (Cambridge, 1982), pp. 78–7, 99–106.

¹²¹ G. Tullock, *The Politics of Bureaucracy* (Washington, D.C., 1965), p. 37.

¹²² *Ibid.*

¹²³ *Ibid.*

¹²⁴ *Ibid.*, pp. 38–40.

¹²⁵ The development of specialists in policing and collections can create principle/agent problems as these individuals will be in a position to skim relatively large shares of the revenues and/or accept bribes to reduce the amount taken from some who are being extorted (Levi, p. 14). Therefore the ruler is likely to doubt the credibility of his own organization members’

of the bureaucracies are likely to develop beliefs that justify their actions. Thus, for instance, in the “bureaucratic feudalism” that developed in China, Rosenberg and Birdzell note that “A class of scholar-bureaucrats held classical learning in high esteem and, at the same time, cultivated a contempt for material goals or acquisition” through productive and commercial means, but the authors follow that observation with the parenthetic: “Not that these values dictated an ascetic life-style to the mandarins themselves.”¹²⁶ By developing beliefs that the pursuit of “private interests” is contemptuous, the bureaucrats can easily rationalize their expropriation of the wealth created by such pursuits, and their consumption of substantial benefits purchased with that wealth. They also probably rationalize the activities of their bureaucracy as serving some “public good,” of course, making such takings even more justifiable. As Breton and Wintrobe explain, “One need not assume Machiavellian behavior, deceit, or dishonesty on the part of bureaucrats, because in all likelihood the pursuit of their own interest will be, as it is for everyone else, veiled in a self-perception of dedication and altruism.”¹²⁷

Aristocratic Norms

The extortionist/ruler may be able to reduce the threat posed by other powers using the types of strategies employed by entrepreneurial leaders within cooperative communities, but in this case they apply in a different perhaps less close-knit network. As Ridley notes, for instance, lavish gift giving was widely practiced among European monarchs,¹²⁸ and similarly, Gambetta explains that “acts of generosity are among the preferred means of advertising” for mafia leaders. The purpose of such gifts is to create “an unspecified debt whose settlement is postponed,”¹²⁹ but the nature of the debt is well understood. It is one of loyalty to the giver—a debt of “honor.” A mafia leader is referred to as a “man of honor,” for instance,¹³⁰ and Gambetta explains that “creating lasting bonds”¹³¹ constitutes the usual organizational method of the mafia. Essentially, some of the extorted wealth is transferred to potentially powerful individuals in *exchange* for an agreement to recognize (“honor”) the extortionist’s jurisdictional claims (that is, not to oppose his extortion efforts directed at others). If the relative power of a ruler and the potential rival is quite similar, such exchanges may produce a non-aggression alliance by recognizing each others’ jurisdictions. In other words, the extortionist leaders cooperate by agreeing to direct their power against others rather than against each other. Each honors the other as an equal

commitments to cooperate. In order to maintain such relationships, various innovations in organization can be anticipated, but various norms regarding loyalty are still likely to evolve (Benson, “An Economic Theory of the Evolution of Governance and the Emergence of the State”).

¹²⁶ Rosenberg and Birdzell, p. 88.

¹²⁷ Breton and Wintrobe, p. 152.

¹²⁸ Ridley, p. 123.

¹²⁹ Gambetta, p. 47.

¹³⁰ *Ibid.*, p. 111 and elsewhere.

¹³¹ *Ibid.*, p. 54.

while viewing those who have been subjugated as inferior. Gambetta quotes mafiosi Antonino Colderone, to indicate the inflated self-image that such a system creates:

You will forgive me if I make this distinction between mafia and common criminals, but it really matters to me. It matters to all mafiosi. It is important. We are mafiosi, the others are ordinary men. We are men of honor. And not so much because we have taken an oath, but because we are the “elite” of the underworld. We are far superior to common criminals.¹³²

Such attitudes also characterize the aristocracy of a feudal monarchy who are, in their minds, morally superior to commoners.

When one extortionist organization is relatively powerful but perhaps not powerful enough to be assured of victory, it is rational for the weaker rival to agree to “honor” the ruler and accept certain obligations in interacting with the strongest rival (for example, as between feudal kings and their powerful “vassals”—barons, earls, etc.) while retaining a good deal of power within his jurisdiction. The person with less power is, in a sense, a subject of the person with more power, but they are near equals. A hierarchical cartel of political elites is created. Such Lord and vassal relationships place strong emphasis on courtesy, loyalty, obedience, bravery, and honor. These characteristics become norms defining rights and duties that are adopted by those who are powerful enough to be in a position to trade for mutual support, as in the feudal relationships in much of Europe during the medieval period. They are not unique to medieval Europe, however. Early Confucianism in the semi-feudal age in China, and the Zen philosophy in feudal Japan both involved strong norms of this type.¹³³ Indeed, the “ethical code” in Japan included “an acute sense of honor, which when sullied could only be assuaged by revenge or by *seppuku* (or *hara-kiri*, suicide through disemboweling).”¹³⁴ Such “mythical beliefs” also characterize the mafia, where mafiosi set themselves up to be “radically different from everyone else” (for instance, honorable, loyal, generous) in an effort to “induce blind loyalty rather than trust.”¹³⁵

An individual who may have enough power to resist the extortionist might not actually have his own jurisdiction for extortion, of course. He may simply agree to be subjected to the extortionist’s protection racket as long as he is relatively free to pursue his own objectives and does not have to pay much in the way of protection. Indeed, the extortionist may offer to use his institutions of violence to grant to and even protect property rights claimed by such an individual. In this way that individual can gain protection from other potential extortionists in exchange for pledges of loyalty and support, and perhaps some tribute. Indeed, as Jasay suggests, “the equilibrium strategy of the subjects will be, not to resist, but to obey, adjust, and profit from opportunities for parasitic conduct that coalition forming

¹³² Ibid., p. 46.

¹³³ E. O. Reischauer, “Japanese Feudalism,” in R. Colbourn (ed.), *Feudalism in History* (Princeton, 1956), pp. 42–3.

¹³⁴ Ibid., p. 43.

¹³⁵ Gambetta, p. 46.

with the sovereign at the expense of the rest of society may offer.”¹³⁶ As a result, the “protection racket” can involve a mix of rules supporting extortion of the weak and protection of the relatively powerful. In the mafia, for instance, a potentially “powerful customer is always treated with respect.”¹³⁷ Gambetta quotes a mafioso describing such a relationship:

With regard to the nature of these relationships, I must stress that they cannot be explained as the result of coercion. Those who cooperate expect certain advantages. True, one cannot expect these relationships to be on an equal footing, as it is always clear that one of the parties is a man of honor; yet the other party makes himself available.¹³⁸

Despite the emphasis on loyalty and honor in relationships between the political elite, these relationships actually can be quite fragile if they are conceived of as applying between individuals rather than characterizing a particular institutional environment. Loyalty will appear to be quite powerful as long as the distribution of power is stable, but if the ruler appears to be weakening, or if the holdings of some member of the aristocratic cartel appear to be vulnerable to takeover, loyalties can quickly change. Gambetta suggests, for instance that “loyalty and friendship—key terms in the mafia lexicon—are, as it were, killed by inflation: everyone is invited to betray everyone else, and friendship never stands in the way of commercial gain.”¹³⁹ Collusive agreements can keep such activities in check, but “honor” must be earned by vigilantly maintaining positions of relative power. In this same vein, Tullock contends that because someone who conforms strictly to a cooperative moral code in a political environment has fewer options available in competing for the attention of those with power to grant privileges, budgets, and so on (rulers as well as superiors in bureaucratic agencies, legislators, etc.): “the man who is a success in most political systems has had to cut corners, to lie, or at least to distort the truth, and to engage in some back stabbing.”¹⁴⁰ Thus, Tullock proposes that understanding the behavior of successful political actors (including higher level bureaucrats) requires understanding the “behavior of an intelligent, ambitious, and somewhat unscrupulous man in an organizational hierarchy.”¹⁴¹ But if Tullock is correct, other members of the political community are also likely to be “somewhat unscrupulous” in their relationships with successful politicians because they recognize that the promises and claims made by these politicians are not always credible (that is, they depend on the perceived political power of the other party). Thus, the unscrupulous behavior can be rationalized as the “right thing to do” under the circumstances. The behavior that former President Clinton is attempting to justify with the second quote listed at the beginning of this paper clearly falls into this category. Given the reputation for opportunistic takings that virtually everyone with political power has, however, “political intrigue” in the form of constant maneuvering by various powerful groups

¹³⁶ Jasay, p. 28.

¹³⁷ Gambetta, p. 165.

¹³⁸ *Ibid.*, 21.

¹³⁹ *Ibid.*, p. 24.

¹⁴⁰ Tullock, *The Politics of Bureaucracy*, p. 31.

¹⁴¹ *Ibid.*, p. 26.

in an effort to gain some advantage, shifting alliances of convenience, “corruption” and so on, is likely to be a better characterization of behavior in such an environment than morality involving unconditional loyalty to a particular individual. Loyalty will be to those with power as long as they can maintain their power, but when a new power arises, loyalty can quickly shift and be just as strong (or tenuous) as it was under the previous ruler. As suggested above, behavior is dictated by the institutions of power.

Class Norms

The us-against-them tribalism of inter-community rivalry tends to be replaced by a “class” morality when one group is conquered by another. The members of the “upper classes” initially consists of those who are part of the extortionist’s group (for instance, the war-chief’s clan or tribe, the “royal family” and household in a monarchy), but it expands to include those with sufficient political power to obtain privileges and protection from the ruler (for example, the aristocratic elite, and other groups discussed below such as religious leaders and politically powerful merchants) and perhaps those who sell their services to the extortionist organization (for instance, bureaucrats, at least at the upper levels of the bureaucratic organizations). Rationalizing their “us-against-them” beliefs can lead to a class morality wherein members of each class tend to respect and cooperate with their fellow members, while feeling morally justified in treating members of the other class differently.

Wesson notes that “the real or supposed benefits of superior position make for a mentality of privilege and . . . makes the inequality of elite and masses more acceptable. Superiority has to acknowledge no need for improvement.”¹⁴² The elite look down upon the masses and find their feelings of superiority justified. After all, those subject to extortion recognize that much of the wealth they produce will be appropriated and that upward mobility is extremely unlikely, so they do not have incentives to be very productive. As Wesson notes, for instance, after Italian commercial cities fell directly or indirectly under the control of Spain in the sixteenth century, the “reduction of independence and importance brought a spirit of immobility, indolence, and conformism; . . . commerce and manufacturing slowly sank in an atmosphere of sloth and lethargy, as Italy became a supplier of raw materials for more progressive lands.”¹⁴³ Thus, the privileged classes tend to see the

¹⁴² Wesson, p. 203.

¹⁴³ *Ibid.*, p. 167. Similarly, while they were not conquered by a foreign power, the Dutch waged three wars against the English in the seventeenth century and two more against France in the early eighteenth century, and they faced increasing protectionist practices by the governments whose citizens had been the customers for Dutch traders. The result was increasingly heavy tax burdens imposed by a much more powerful and corrupt government wherein advantages could be gained more easily through politics than commerce (*ibid.* p. 174). This “drained the economy of its energy and innovative capacity. Not only did trade decline, but also shipbuilding, textile production, fishing, and agriculture. . . . Many industries expired without a fight. In 1670 the Dutch considered themselves superior to the British in energy and ability as well as in capital and material resources. In 1779 a Leiden clothier complained of the general lack of initiative among Dutch industrialists, a deep-rooted aversion to experimenting

“lower classes,” the politically disenfranchised, as “lazy and unwilling to contribute to the public good,” and their views are borne out because of the incentives that have been created. This justifies the imposition of rules (for instance, vagrancy laws, prohibition) intended to “reform” their behavior, as well as involuntary relocation (for example, transportation to colonies) when the needs for cheap labor dictate it or when their numbers become large and threatening. For instance, Hobbes, the supporter of the monarchy, writes that the able-bodied poor

are to be forced to work. ... The multitude of poor, and strong people still increasing, they are to be transplanted into Countries not sufficiently inhabited: where nevertheless, they are not to exterminate those they find there; but constrain them to inhabit closer together, and not range a great deal of ground, to snatch what they find.¹⁴⁴

The third quote listed at the beginning of this paper suggests that this view can be rationalized as a belief in the moral superiority of the upper classes. Those with power also have relatively secure property rights so cooperative behavior, living up to promises, and other types of ethical behavior between upper class individuals may be relatively likely. Ostracism threats can be extremely powerful, so prudent morality may dominate interaction within the privileged classes, at least outside the political arena. This gives them more reason to feel morally superior, since insecure property rights and short time horizons among those who remain disenfranchised (or relatively disenfranchised) mean that intra-class cooperation for those groups may be much less likely than it is for the upper class.

Rent Seeking and the Rationalization of Theft

North suggests that a ruler does not simply want to create a monopoly in violence; he will also “attempt to act like a discriminating monopolist, separating each group of constituents and devising property rights for each so as to maximize . . . revenue.”¹⁴⁵ Indeed, the extortionist also has incentives to redistribute wealth as the relative power of subgroups within his sphere of influence changes, much as a consensual system’s mutual insurance arrangements do when the incentives to cooperate change.¹⁴⁶

with new methods” (C. P. Kindleberger, *Economic Response: Comparative Studies in Trade, Finance, and Growth* (Cambridge, MA, 1978), p. 141).

¹⁴⁴ Hobbes, p. 387.

¹⁴⁵ D. C. North, *Structure and Change in Economic History* (New York, 1981), p. 230. Also see Levi, pp. 10–14 and Jasay, p. 28.

¹⁴⁶ While mutual insurance arrangements in the cooperative systems described above tend to transfer to the temporarily disadvantaged who may have relatively weak incentives to respect property rights, extortion-based systems tend to transfer to those who are becoming powerful, as they have weaker incentives to respect the extortionist’s claim to sovereignty. Of course, there is a potential danger that the disadvantaged will organize effectively and revolt, so some transfers also may flow in their direction if they are perceived as a developing threat. In a relative sense, however, transfers to the powerful will actually dominate, and transfers to the disadvantaged will predominantly flow from others who are not expected to become powerful (the powerless are excluded from any bargaining (Levi, p. 11)).

Given the incentives to use transfers as a low cost mechanism of insuring against competition, members of sub-groups have incentives to compete for favorable treatment from the extortionist.¹⁴⁷ Tullock stresses that theft and involuntary wealth transfers through the political arena (monopoly franchises, protective tariffs, taxes and transfer payments) have identical economic implications: wealth is dissipated in this competition as individuals invest resources in an effort to benefit from redistributions while others invest to prevent them.¹⁴⁸ They also have similar implications for beliefs about what is moral. Benefactors who openly condone the process can not acknowledge an obligation to respect other people's property rights. They could simply recognize that their activities are immoral, but a lower cost option is to rationalize their behavior as moral. Thus, they not only claim but probably believe that they have the "right" to take property from others through political action.¹⁴⁹ Modern manifestations of such beliefs include "rights" or "entitlements" to public education, medical care, social security, disaster relief, farm subsidies, jobs protected from competition, limits on neighbor's uses of their land through zoning laws, and so on, all of which require taking wealth from someone else.

Little wonder that those who do not have the political power necessary to gain benefits from such rent-seeking transfers adopt a similar attitude toward property rights and easily turn to theft. Seeing those in the upper classes (for instance, those who gain wealth through political action) as elitists and snobs, they feel morally vindicated when they can take advantage of someone in that class (for example, steal from them, shirk in work done for them). Indeed, people with wealth may be seen, rightly in many cases, as "enemies" who simply obtain wealth at the expense of others.¹⁵⁰ Since the transactions costs of determining how a person actually gained

¹⁴⁷ In this setting a relevant group (or groups) for most individuals is not simply the "class" of politically powerful as a whole, but rather, the sub-group (or groups) that best represents their interests within that class that is competing with other groups in the rent-seeking game. The extortionist also encourages such "rent-seeking" competition (Levi, p. 12), since by keeping sub-groups divided into adversarial political camps the possibility of a strong coalition forming to overthrow his rule is reduced.

¹⁴⁸ G. Tullock, "The Welfare Costs of Tariffs, Monopolies and Theft," *Western Economic Journal*, 5 (1967): 224–32. The typical economic explanation of political actions is that individuals are seeking private benefits, but Kau and Rubin suggest that there is a large ideological component to the political process as well (J. B. Kau and P. H. Rubin, "Self Interest, Ideology and Logrolling in Congressional Voting," *Journal of Law and Economics*, 22 (October 1979): 365–84). However, if beliefs about what is moral are rationalizations of self interests, then this ideological component is not at all surprising.

¹⁴⁹ The ruler has incentives to take advantage of these incentives in an effort to legitimize a claim to sovereignty and undermine opposition. He can claim that the same morality which underlies voluntary transfers also underlies and justifies involuntary transfers: "transfers are desirable in order to aid the poor, or the elderly poor, or the family (for instance, family farms), etc." even though most actual transfers go to the politically powerful who have become relatively wealthy.

¹⁵⁰ Seeing the success enjoyed by effective political groups, members of the lower classes are likely to both despise and envy them. Envy suggests that the "lower classes" have incentives to emulate the upper classes by attempting to organize and pursue political power. As methods of doing so are discovered, more groups may enter the rent-seeking competition

wealth are high, the tendency will be to view all wealth with suspicion, and the wealthy are likely to be popularly perceived as attractive targets for future reverse transfers or theft as individuals attempt to get back what they feel is “rightly theirs.” Such actions can be rationalized, as indicated by the fourth quote listed at the beginning of this paper. Those without political influence often believe that they are actually victims themselves and that their thefts and other “crimes” are easily rationalized in their own minds as morally justified.

Opposition Norms

Jasay notes that respect for rules is different than obedience to rules. Obedience to transfer rules requires enforcement, but the transactions costs of coercive control mean that some interactions between the targeted victims of extortionists and some of their wealth will remain outside even the most powerful extortionist organization’s control.¹⁵¹ Indeed, Nee explains that “opposition norms” inevitably evolve as the incentives created by formal institutions and sanctions are weak relative to the incentives to pursue conflicting interests.¹⁵² An accepted “norm” of behavior for many people subject to extortion may be that “breaking the coercively-imposed rule is OK if you can get away with it” (for example, a “moral obligation” supporting tax evasion and avoidance may be widely adopted). For instance, as European governments attempted to establish control over maritime trade in order to tax it, and granted franchises for numerous trading monopolies between 1500 and 1800, the “average merchant and seaman” responded with piracy and smuggling, and a substantial part of maritime commerce was carried out in violation of the laws of some nation-state.¹⁵³ Furthermore, the middle and even the upper classes willingly wore, drank, and ate smuggled goods.¹⁵⁴ Smith describes the moral implications of such illegal trade, beginning with a characterization of the typical smuggler as

a person who, though no doubt highly blameable for violating the laws of his country, is frequently incapable of violating those of natural justice, and would have been, in every respect an excellent citizen, had not the laws of his country made that a crime which nature never meant to be so. In those corrupted governments where there is at least a general suspicion of much unnecessary expense, and great misapplication of the public revenue, the laws which guard it are little respected. Not many people are scrupulous about smuggling, when, without perjury, they can find any easy and safe opportunity of doing so. To pretend to have any scruple about buying smuggled goods, though a manifest encouragement to the violation of the revenue laws, and to the perjury which almost

(B. L. Benson, “Rent Seeking from a Property Rights Perspective,” *Southern Economic Journal*, 51 (October, 1984): 388–400). Thus, the political process further undermines the security of property rights as they are increasingly subject to change as the ruler reacts to changing political conditions. That is, wealth is increasingly treated as a common pool, subject to rent-seeking competition, rather than as private property. See Jasay (pp. 82–8) for similar conclusions arrived at with a different model.

¹⁵¹ Jasay, p. 99.

¹⁵² Nee, “Norms and Networks in Economic and Organizational Performance,” p. 88.

¹⁵³ Rosenberg and Birdzell, pp. 92–6.

¹⁵⁴ *Ibid.*, p. 93.

always attends it, would in most countries be regarded as one of these pedantic pieces of hypocrisy which, instead of gaining credit with any body, serves only to expose the person who affects to practice them, to the suspicion of being a greater knave than most of his neighbours. By this indulgence of the public, the smuggler is often encouraged to continue a trade which he is thus taught to consider as in some measure innocent; and when the severity of the revenue laws is ready to fall upon him, he is frequently disposed to defend with violence, what he has been accustomed to regard as just property.¹⁵⁵

Indeed, many smugglers were highly respected members of their communities (for example, John Hancock).

Taylor notes that the basic cooperative means of maintaining social order still exist, even in the most modern system of centralized authoritarian rule, although they may exist in “atrophied and attenuated forms.”¹⁵⁶ Numerous examples of centralized coercive systems can be cited where “parallel” predominately cooperative systems of norms and institutions actually dominate many and at times even most interactions.¹⁵⁷ As economic activities are moved “underground” in order to produce wealth within the domestic economy and protect the wealth that is created, cooperative groups’ arrangements are likely to persist, but the fact that they must avoid detection and/or measurement will tend to alter their characteristics relative to an unhindered voluntary community. De Soto’s detailed analysis of the “informal” sector in Peru is particularly revealing in this regard, as he explains that the “squatter communities” are very well organized, that members respect each others’ property claims, cooperate to enforce rules of behavior, and so on. Nonetheless, the existence of a coercive ruler raises transactions costs for such groups. For instance, ostracism is less effective when property rights are tenuous due to the threat posed by the extortionist, making time horizons short and reputations less valuable. If prudent morality is ineffective the victim may opt for retributive morality. Cooperative clusters may still aid the victim in the “illegal vigilante” exaction of retribution, of course. Under such circumstances, a considerable amount of “crime” may be “undertaken to exercise social control.”¹⁵⁸ Furthermore, since commitment making tends to be chilled, retributive morality may not even be able to support cooperation in many situations where it could under other circumstances.

Moving underground is not the only possibility, however. If the relevant group member’s wealth is mobile so they can interact across the jurisdictions of different authorities, inter-jurisdictional competition to attract their wealth production is

¹⁵⁵ A. Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, ed. E. Cannan (1776; New York, 1937), p. 898.

¹⁵⁶ Taylor, p. 65. Also see Jasay, pp. 4, 35–6.

¹⁵⁷ For instance, H. De Soto, *The Other Path: The Invisible Revolution in the Third World* (New York, 1998); Ellickson, *Order Without Law: How Neighbors Settle Disputes*; Benson, “The Spontaneous Evolution of Commercial Law;” and by the same author “An Exploration of the Impact of Modern Arbitration Statutes on the Development of Arbitration in the United States.” Also confer Nee, “Norms and Networks in Economic and Organizational Performance,” p. 88.

¹⁵⁸ Ellickson, R. C., *Order Without Law: How Neighbors Settle Disputes*, p. 213. Also see de Soto.

likely. Thus, for instance, under the most successful imperial dynasties in China, a large portion of the Chinese merchant community became involved in Indian Ocean trade as “one of the most advanced entrepreneurial groups in Asia was forced to operate outside the reach of the state system and to create its own self-protection.”¹⁵⁹ Similarly, the international merchant community of medieval Western Europe established its own commercial law, *lex mercatoria* or the “Law Merchant,” consisting of rapidly evolving customary norms, and disputes were resolved in the merchants’ own courts.¹⁶⁰ Strong incentives to cooperate through exchange, to live up to promises, to respect one another’s property rights, and to supported an unbiased and fair dispute resolution system arose because of positive benefits associated with repeated dealing reciprocities and reputation effects, and because of the potential for ostracism. Modern international commercial law remains as a largely voluntarily produced and enforced system of spontaneously evolving norms,¹⁶¹ despite many attempts by various coercive governments (some supported by politically powerful merchants seeking special privileges) to subjugate it over the centuries.¹⁶² Indeed, as Hayek explains,

The growth of the purpose-independent rules of conduct which can produce a spontaneous order will ... often have taken place in conflict with the aims of the rulers who tended to try to turn their domain into an organization proper. It is in the *ius gentium*, the law merchant, and the practices of the ports and fairs that we must chiefly seek the steps in the evolution of law which ultimately made an open society possible.¹⁶³

Not only is trust, honesty and cooperation vital to the functioning of competitive markets, but through history, it has been the international merchant community that has probably been the most successful at resisting the political forces that undermine the incentives for such behavior.

Nationalism, Patriotism, and Other “Public Good” Norms

Since the transfer process must have losers, there will always be potential opposition, and the ruler also has incentives to undermine the disruptions and discord that such opposition might cause. Therefore, as Levi explains, rulers attempt to instill incentives and beliefs that lead to “quasi-voluntary compliance.”¹⁶⁴ For instance, rulers often have taken advantage of religious beliefs by claiming to be a god or to rule through “divine right.” And “[w]hen rulers are viewed as gods, or ordained to be legitimate by gods, it is difficult for mortals to question their legitimacy.”¹⁶⁵ In order

¹⁵⁹ K. N. Chaudhuri, *Trade and Civilization in the Indian Ocean: An Economic History of the Rise of Islam to 1750* (Cambridge, 1985), p. 208.

¹⁶⁰ Benson, “The Spontaneous Evolution of Commercial Law.”

¹⁶¹ B. L. Benson, “Customary Law as a Social Contract: International Commercial Law,” *Constitutional Political Economy*, 2 (Winter 1992): 1–27.

¹⁶² Benson, “The Spontaneous Evolution of Commercial Law.”

¹⁶³ Hayek, vol. 1, pp. 81–2.

¹⁶⁴ Levi, pp. 52–70.

¹⁶⁵ Holcombe, *The Economic Foundations of Government*, p. 160.

to make such claims, the ruler often must bargain with religious leaders to obtain their explicit recognition of the alleged divine status. Such a bargain may result in special privileges and wealth transfers for these leaders that are comparable to the treatment of individuals who have a considerable level of military power (church leaders were often treated on a par with barons in medieval England, for instance), and/or in the use of the ruler's coercive power to support the establishment of a single religion within his jurisdiction.¹⁶⁶ Thus, people may be forced to act as if they believe the ruler's designated religion whether they do or not, but it may be quite rational to actually adopt this belief as well, for reasons suggested above.

Another legitimization tactic for rulers is to create the belief that only he can provide, vital "services" to everyone in the jurisdiction. One obvious "public good" is defense against outside threats. In fact, the ruler will have to defend the territory against outside threats in order to maintain power and protect the source of his income, but if the ruler can convince the populace that these outside threats will treat them much more harshly than his organization does, he may be able to legitimize some transfer payments to "purchase" defense.¹⁶⁷ This is a very real possibility, since these outsiders may not expect to be able to maintain power over a distant jurisdiction and therefore their time horizon may be shorter, making plunder relatively more attractive than extortion—the implications of a ruler's time horizon is discussed in more detail below. In addition, "Discontents may be diverted to a foreign cause, internal divisions may be overridden, and the common emergency justifies extraordinary discipline and demands."¹⁶⁸ Indeed, the ruler actually has incentives to create an outside threat even if one does not exist. Foreign wars may be efforts to expand the ruler's domain, but even when rulers do not expect to win such wars, they have been manufactured and maintained as a way to legitimize protection money or reduce domestic opposition.¹⁶⁹ If successful, such legitimization creates widespread norms like "nationalism" and "patriotism" that tend to increase quasi-voluntary compliance. Such legitimization tactics are apparently successful in many cases since national government revenues grow dramatically during wars and they

¹⁶⁶ As with other efforts to retain control, of course, such special status creates a potential rival for power, so the relationship between the ruler and the religious organization is often similar to the relationship between a ruler and his military/policing bureaucracy or a leader and a parliament (Benson, "An Economic Theory of the Evolution of Governance and the Emergence of the State"): one reflecting both rivalry and cooperation.

¹⁶⁷ Holcombe, *The Economic Foundations of Government*, p. 160. There are a number of such services beyond those discussed here. The provision of roads may in fact benefit many people, for instance, although their primary purpose may be somewhat different. Roads serve important functions for the movement of military and policing personnel in order to maintain internal order and defenses against outside threats. In addition, they facilitate the ongoing redistribution process by lowering the costs of obtaining information about changes in the relative power of the sub-groups in order to discriminate among them, and of bargaining with those groups by connecting the ruler's central location with the outlying locations of his potential rivals (Levi 1988: 28).

¹⁶⁸ Wesson, p. 187.

¹⁶⁹ Fox, p. 52; Levi, p. 43.

do not shrink back to their prewar levels,¹⁷⁰ perhaps in part because the ruler finds a new threat before the quasi-voluntary compliance diminishes.

Rulers are likely to rationalize their takings in their own minds as well, by identifying and opposing such threats. Fox points out that “Even the Kings seem to have seen themselves largely as defenders of order”¹⁷¹ for instance. And while the population in general does not have to consider everything that a ruler and his organization does to be legitimate, if some activities are seen as legitimate the costs of enforcing compliance are reduced.¹⁷² Indeed, subjects have incentives to explicitly recognize the legitimacy of such claims as expressions of “concern for the community gives the citizens a better claim to a share in the state.”¹⁷³ Wallerstein notes, for instance, that individuals “have two ways of affecting [economic policies]. ... They may operate within the political structure of the state or they may operate against the structure of the state in what might be called antinational activity. Patriotism is a calculation.”¹⁷⁴ For those who find their best options within the political environment, patriotism is likely to be internalized as a moral norm.¹⁷⁵

Wealth must be produced for it to be transferred, and private property rights create the strongest possible incentives for long-term wealth creation. Therefore, the extortionist faces a trade off. Large levels of extortion in the short-term, reduce productivity, wealth creation, and the potential for transfers over the long run. The actual degree of transfers in any period, therefore, depends in part on the ruler’s time horizon.¹⁷⁶ If the ruler is relatively short sighted, perhaps because there are significant competitive threats to his claim of sovereignty, property rights become very insecure as high levels of transfers can be expected. However, a long time horizon implies the present value of potential future transfers are higher, so property rights will be relatively secure in order to stimulate wealth production.¹⁷⁷ This creates incentives

¹⁷⁰ R. Higgs, *Crisis and Leviathan: Critical Episodes in the Growth of American Government* (New York, 1987).

¹⁷¹ Fox, p. 31.

¹⁷² Holcombe, *The Economic Foundations of Government*, p. 159.

¹⁷³ Wesson, p. 186.

¹⁷⁴ I. Wallerstein, “France: A Special Case? A World-System Perspective,” in E. D. Genovese and L. Hochberg (eds), *Geographic Perspectives in History* (New York, 1989), p. 147.

¹⁷⁵ An alternative to foreign conflicts is for an extortionist to focus on threats that are ongoing and undefeatable, but that also are not likely to be able to defeat the ruler. Internal threats, real or manufactured, can serve this purpose. It is not at all unusual for modern rulers to describe never-ending campaigns against crime, drugs, poverty, and other internal problems in the same terms that they describe external threats, for instance, in an effort to create the “moral equivalent of a war.” Furthermore, the advent of politicized extortion means that crime and poverty both become more likely (as suggested above) and the provision of both policing and welfare may be seen as “public goods.” Other even more sinister examples of such internal “threats” can also be cited (for instance, numerous examples of religious or ethnic persecution such as Hitler’s manufacturing of the threat posed by the Jews).

¹⁷⁶ Levi, pp. 13, 32–3; Gambetta, p. 33; Holcombe, *The Economic Foundations of Government*, p. 112.

¹⁷⁷ Since the ruler must claim authority as a law maker in order to impose the discriminatory laws that produce wealth transfers, another obvious service is the provision

for even those who clearly are net losers to accept the extortionist's legitimization claims and adopt quasi-voluntary compliance in order to lengthen the extortionist's time horizon. That is, while they want to resist the takings whenever possible, they also have incentives to recognize and even explicitly promise (pledge) to honor and obey the sovereign. In this light, recognizing a "dynasty"¹⁷⁸ or strongly supporting an incumbent's repeated reappointment (or reelection), may be very rational when exit costs are high. People rationalize acceptance of such actions because they realize that there is little that they can do anyway, and they may in fact be better off by accepting them. Thus, even though some claims by rulers may be obvious fictions (for example, divine rights), they may be "accepted as fact for convenience" because they facilitate an implied improvement in the "agreement" between a ruler and the ruled.¹⁷⁹ Acceptance of these fictions and their accompanying norms of loyalty is not unlike conformity with norms in a cooperative group where the costs of taking calculated action in every case may be high.¹⁸⁰

Conclusions: Situational Beliefs

All of the examples cited in section three illustrate the final quote that begins this paper. If individuals' perceptions of morality are not rationalizations of self-interests, then the kinds of behavior we observe in politicized societies should not exist, unless in fact, morality is simply irrelevant. However, the fact that individuals often justify their behavior in moral terms suggests that, at the very least, they believe that morality is important to those who observe their actions. But they probably also believe that their actions are morally justified. In closing let us reinforce this argument by considering the fact that individuals apparently adopt different moral norms depending on the situation that they are in. For example, the merchant communities praised above for being the most effective group at maintaining a moral environment

of law, including law enforcement. Indeed, the ruler also should recognize that selectively supporting rules that originated within cooperative institutions provides a low cost mechanism for facilitating cooperation in wealth creation that he can then expropriate.

¹⁷⁸ For instance, a royal family in a kingdom, family succession in the mafia (Gambetta, p. 59), the "right" of the boss in a "political machine" to select his successor.

¹⁷⁹ Holcombe, *The Economic Foundations of Government*, pp. 170–71.

¹⁸⁰ *Ibid.*, p. 171. In this context, however, Mises explains, political actors "have been eager to falsify historical evidence and to misrepresent the course of events. The endeavors to mislead posterity about what really happened and to substitute a fabrication for a faithful recording ... were often prompted by the desire to justify the their own or their party's actions from the point of view of the moral code of those whose support or at least neutrality they were eager to win" (Mises, pp. 291–2). Indeed, tactics of misrepresentation and falsification of information are common in political institutions (Breton and Wintrobe, p. 39), as they raise the transactions costs for those who might attempt to obtain bargaining power to oppose the ruler (or use existing bargaining power) if true information was available. And as just suggested, those subject to extortion may also be relatively successful if they do not question such misleading information. Of course, those in power also probably believe they are telling the truth when they offer interpretations of history and facts that confuse and mislead, or that falsification is justified in order to achieve their perception of the "public good."

characterized by honesty and cooperation in the face of political power (and earlier, for also being the source of considerable benevolence and generosity) are also susceptible to the incentives to take wealth, and they also tend to have considerable bargaining power in the political arena because they can threaten to exit.¹⁸¹ Therefore, rulers have incentives to grant merchants special privileges (wealth transfers) within their domains, perhaps in exchange for a portion of the transferred wealth (for instance, franchise fee, tax, campaign contributions), or perhaps with no charges since a business located within a jurisdiction can generate more wealth production on the part of relatively immobile resources that are inputs to or complements of the merchants' enterprises. Not surprisingly, merchants virtually always take advantage of rulers' coercive powers to obtain wealth transfers within political jurisdictions, often becoming one of the most privileged political classes. Medieval mercantilism was a system dominated by merchants dealing with kings to restrict competition in favor of domestic monopolies and guilds, and that system has a firm hold within many of today's economies.¹⁸² In fact, in every political jurisdiction, economic regulations limit competition and generate rents for politically influential businesses.¹⁸³ These merchants appear to be adopting different moral norms in different situations, rent seeking where it pays, and behaving cooperatively and benevolently where it is likely to generate more profitable outcomes. Modern merchants often belong to trade associations that facilitate trade¹⁸⁴ and simultaneously lobby for privileges such as import limits and licensing restrictions that protect them from competitive entry. Similarly, a modern corporation has plants that produce new wealth sold through voluntary exchange, and other "plants" (lobbying offices) that pursue protection from competition and other political privileges. It is not "economic power" that undermines incentives to cooperate through voluntary exchange and contracting, however; it is political power. After all, business groups are not the only organizations that successfully operate in both the economic and the political sphere.¹⁸⁵ The fact

¹⁸¹ Smith, p. 395; Wesson, p. 195; Jones, p. 86; and Benson, "The Spontaneous Evolution of Commercial Law."

¹⁸² De Soto.

¹⁸³ G. Stigler, "The Theory of Economic Regulation," *Bell Journal of Economics and Management Sciences*, 1 (1971): 3–21.

¹⁸⁴ For example, by supporting ethical business behavior with communication channels, arbitration services, ostracism threats, etc. (Benson, "An Exploration of the Impact of Modern Arbitration Statutes on the Development of Arbitration in the United States").

¹⁸⁵ Vanberg and Congleton suggest that, "contrary to a common perception, markets are not parasitic on moral attitudes that have to rely, for their nourishment, on other social settings. Instead, the more the essential features of markets (coordination by voluntary contract) is applicable, the more the market reinforces the virtues of honest behavior that in turn, make them work effectively" (Vanberg and Congleton, "Rationality, Morality and Exit," p. 429; also see McCloskey, "Bourgeois Virtue"). And yet, "business" is widely mistrusted and despised as greedy profit-seekers who cannot be trusted. To the degree that merchants gain advantages through the political process, such views are probably warranted, and since it is very difficult to distinguish between businesses that only gain wealth through production and exchange and those which depend on subsidies, limits on entry, price supports, import tariffs or quotas, government contracts, etc., a general distrust is probably quite rational. Of course,

is that when sufficient bargaining power is accumulated to make rent seeking an option, individuals will tend to simultaneously pursue both economic and political means of wealth enhancement, but individuals probably rationalize their actions in both political and economic arenas as moral. Thus, they are adopting different moral norms for different types of interactions. If not, they are choosing to selectively violate the moral norms of cooperation because they are simultaneously pursuing wealth through economic and political means, and the psychological costs of such “immoral” behavior would appear to be very high.

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the same people who despise “business” also probably trust many of the local businesses that they regularly deal with, particularly if they are “small” (bigness may well be correlated with political power and privilege, after all).

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Chapter 8

Why Government?

Randall G. Holcombe

The title of this paper is intended to pose two questions: why do we have government, and why should we have government? The answer to the first question points directly to the answer of the second. To answer the first question by looking at the facts, governments actually come into being because some people conquer others and rule over them by force. The answer to the second question is that people may be able to preemptively design a government that is able to protect them from aggressors who want to rule over them, and the government they design may be less oppressive than a government that is imposed on them by outside aggressors. Having given a short answer to both of the questions posed by the paper's title, the remainder of the paper offers a more detailed discussion of those answers, and addresses some possible objections to them.

Why Do Governments Exist?

As a matter of fact, governments are imposed on people by force, and maintain their power over people by force. Sometimes foreign invaders take over territory and rule over the people who live there; more commonly, people already subject to one government overthrow it and establish a new government in its place. As Jasay notes, "Anarchy, if historical precedent is to be taken as conclusive, does not survive."¹ In the anarchy described by Hobbes, life was a war of all against all, and was nasty, brutish, and short.² The strong would be able to overpower the weak, taking everything they had, but even the strong would not prosper in Hobbesian anarchy, because there would be little for them to take. Nobody would produce things that they knew would just be taken from them by others more powerful. Even in a setting more orderly than Hobbesian anarchy, predation would have a limited payoff, because people who have accumulated assets that could be stolen will forcibly resist those who try to take them. The use of force is costly to the predators as well as to their victims. The predators would be better off if they could merely threaten the use of force and have the victims tender their property. This is, in fact, the economic foundation of government. But successful predation of this type requires a particular type of institutional arrangement.

If the strong take from the weak, and the weak know that anything they produce will be taken from them, they will not be very productive. In this situation, the two can strike a bargain, if the strong can assure the weak they will limit what they take.

¹ Anthony de Jasay, *Social Contract, Free Ride: A Study of the Public Goods Problem* (Oxford, 1989), p. 217.

² Thomas Hobbes, *Leviathan*. (1651; New York, 1950).

If the strong could make a credible promise to take, say, only one-third of the weak's output, both the strong and the weak could be better off, with the weak getting to keep two-thirds of their output rather than nothing, and the strong getting one-third of the output of the weak in addition to whatever they could produce themselves. Being assured that the more they produce the more they will be able to consume, the weak now have an incentive to be productive, laying the foundation for ever-increasing well-being for both the strong and the weak. At this point the weak but productive people can be called citizens and the strong who appropriate some of the citizens' incomes can be called their government.

The story only just begins at this point, because a world with many people will contain other predators, and the wealthier the citizens become the more tempting they become as targets for other predators. Citizens are the source of the government's income, so the government has an incentive to see that its citizens maintain their productivity, and has an incentive to protect them from other predators for purely selfish reasons. Governments protect their citizens by producing national defense, police, and courts, because by doing so they are protecting their source of income from competing predators. Citizens also are better off with this protection, which is paid for by the share of their income appropriated by government. The foundation of all governments is this exchange of protection for tribute, which provides the benefit of revenue to the government and the benefit of protection to its citizens.³

All governments are not created equal, and as Levi notes, the shorter the government's time horizon, the greater its incentive for predation.⁴ If the government's time horizon is short enough, and the citizens' wealth accumulated from past productivity is large enough, governments may have an incentive to be exceptionally predatory. Starting from a Hobbesian state of nature, government has little incentive to be exceptionally predatory, because there is little to take and it can gain more from nurturing the productivity of its citizens. If this arrangement has been successful and a society has become wealthy, this provides an incentive to an outside predator with a short time horizon to appropriate the accumulated wealth rather than to nurture its continued production, much as Genghis Khan did in his thirteenth-century conquest of much of Asia and the Middle East. In a nation of substantial wealth, a predator may see little chance of taking over and ruling for a prolonged period, so has an incentive to rule by force and plunder as much as possible in a short time.

At the beginning of the twenty-first century, every place on Earth has a government of some sort overseeing it. While there may have been examples in the past of orderly anarchy, government has always arisen to displace it, and modern technology in weapons, communication, and transportation, makes it increasingly easy for groups to establish themselves as rulers over others by force. In the places closest to anarchy, like Somalia, Bosnia, and Afghanistan in the 1990s, life more closely resembles Hobbes's description of anarchy than the orderly anarchy described by Rothbard.⁵

³ Whether other arrangements might be even more beneficial to citizens will be addressed below. The point here is that citizens do benefit from the protection that government provides.

⁴ Margaret Levi, *Of Rule and Revenue* (Berkeley, 1988).

⁵ Murray N. Rothbard, *For a New Liberty* (New York, 1973).

Government is inevitable. Where it does not exist predators will attempt to organize and establish one, because it is profitable to do so. Even where government does exist, predators have the incentive to—and frequently attempt to—displace the existing government to establish their own. In areas where governments are weak, such as Moscow in the 1990s, Mafias arise to fill the void, exchanging protection for tribute, and threatening harm to those who do not pay. But competition among rival gangs is costly for all. Rival gangs mean citizens cannot be guaranteed protection, and resources the gangs use to compete with one another eats into their total take. If one Mafia group were able to monopolize an area and establish itself as the only group that was able to collect tribute from its citizens, that group would become the government.

A defining feature of government, Yeager notes, is that it forces people to comply with its rules.⁶ No matter how much one agrees with one's government, government's actions are founded on the threat of force, not on the result of agreement. If governments can convince people that they are acting in their citizens' interests, then compliance will be cheaper to enforce, which is why governments have the incentive to establish institutions that persuade people that government actions further the people's interests.⁷ However, widespread voluntary compliance does not negate the fact that governments use force against those who do not comply. The government's power to coerce gives it the potential to be extremely predatory, with the incentive for predation muted to the degree that the government views itself as permanent. It is more profitable to continue taking a share of a growing flow of citizen income than to plunder extensively, taking away both the citizens' means and incentives for future productivity. Banditry means continually having to move on to find new sources of plunder, whereas government means staying in one place and receiving a continual flow of income.⁸ Governments can generate more income than banditry for two reasons, then. First, government can remain in one geographic location and continue to take, rather than taking sporadically and moving on. Second, a stable government encourages productivity, so over time there will be increasingly more to take. Governments exist because some people have the incentive to establish them by force, to rule over citizens by force, and to gain income by forcing citizens to pay them.

⁶ Leland B. Yeager, "Rights, Contract, and Utility in Policy Analysis," *Cato Journal*, 5/1 (Summer 1985): 259–94.

⁷ For arguments along these lines see, for examples: Douglass C. North, *Structure and Change in Economic History* (New York, 1981) and by the same author, "Ideology and Political/Economic Institutions," *Cato Journal*, 8 (Spring–Summer 1988): 15–28. Also see Murray Edelman, *The Symbolic Uses of Politics* (Urbana, 1964) and Randall G. Holcombe, "A Theory of the Theory of Public Goods," *Review of Austrian Economics*, 10/1 (1997): 1–22.

⁸ Dan Usher, *The Welfare Economics of Market, Voting, and Predation* (Ann Arbor, 1992) nicely analyzes the two cases, and shows the fragility of the concept of limited government. See also Buchanan, who notes the problems of establishing a government strong enough to protect people's rights, but with power limited so that it does not violate them (James M. Buchanan, *The Limits of Liberty: Between Anarchy and Leviathan* (Chicago, 1975)).

Rationales for Government

Governments actually do exist because they are imposed on people by force. However, there are many arguments that rationalize the existence of government by concluding that citizens are better off with them. The fundamental rationale given for government is that it overcomes a prisoners' dilemma problem and allows people to cooperate for their mutual benefit. Hobbes argued that without being forced to abide by the state's rules, people would find themselves in a prisoners' dilemma in which the individually rational choice was to behave non-cooperatively even though everyone would be better off if they were forced to cooperate. As Jasay notes, this same argument now applies to the modern theory of public goods.⁹ Public goods theory argues that everyone is better off if they agree to be coerced by government. Government forces people to pay to prevent an undersupply due to free-riding.

From an economist's vantage point, this rationale for government is distinctly unsatisfying for a reason that is not often recognized. It supposes that the problem is created by citizens who will not act to further the public interest, yet the solution requires those in government to act in the public interest. People who work for government are assumed to act altruistically for the benefit of people outside the government who refuse to act altruistically. Is it reasonable to assume that those in government set aside their self-interest and act altruistically to benefit citizens who will only act selfishly? As Jasay notes, if government is necessary to oversee people's behavior and enforce mutually advantageous arrangements, who will oversee the overseers?¹⁰ Can we really base our hopes for overcoming a problem of social organization on the assumption that people who work for the government are more altruistic than those who do not?

One must be suspicious of any rationale for government that suggests that those in government place the interests of citizens above their own interests. The Hobbesian rationale for government, after all, is that people will act in their own interests rather than in the interests of the group, and there is no reason to think that the people who constitute the government would be any more altruistic than the people they govern. Government, as an institution, may act to further the public interest, but only if those in government find it in their own interests to behave in a way that benefits the public interest. Rationales for government that suggest that without government certain problems may emerge must therefore be rejected as incomplete unless they demonstrate how government institutions actually can solve those problems, as Buchanan notes.¹¹ This means, first, that public sector institutions contain incentives for those in government to solve those problems, and second, that government actually has the capability to solve those problems. Within this

⁹ Anthony de Jasay, *The State* (New York, 1985).

¹⁰ Anthony de Jasay, *Against Politics: On Government, Anarchy, and Order* (London, 1997). Some possible answers are that in a democracy, the citizens oversee their governments, or that a system of checks and balances creates a government that can police itself. Jasay offers a critique of these ideas (*Ibid.*, p. 23).

¹¹ James M. Buchanan, "Public Finance and Public Choice," *National Tax Journal*, 28 (December 1975): 383–94.

framework, the public goods, externalities, and social contractarian rationales for government will be considered.

Public Goods: The Case of National Defense

Why does government produce national defense? The public goods argument is that it does so to help overcome the free rider problem. Citizens will act selfishly and free ride by not paying their taxes for national defense, so those in government act in the public interest to provide a public good and overcome a problem caused by the narrow self-interested behavior of citizens. Government produces national defense because people in government act altruistically even as citizens act selfishly, according to the public goods theory. The previous section notes that this argument is distinctly unsatisfying because it assumes different fundamental behavior for people in the private sector and people in the public sector.

The earlier discussion about the nature of government offers another answer: the government produces national defense because it is in the best interest of those in government to protect its citizens, who are the source of the government's income. It is also in the best interest of citizens to have their property protected. Although they might prefer to receive protection without paying tribute, or might prefer to hire their own protection services, they are better off paying their taxes and having government protection than not paying taxes and not having protection. People will be forced to pay taxes, so they have no choice in this matter. In exchange, they get protection provided by the government, which benefits citizens but is produced by the government because it protects the government's source of income. This exchange model of government, developed more fully in one of my books, depicts everyone acting in their own self-interest, so is more satisfying from an economic standpoint than the public goods theory that posits an altruistic government.¹² Government produces national defense because it is in the interest of those in government to do so, not because those in government want to do a good deed to overcome a free rider problem.

Libertarian anarchists might argue that citizens would be even better off without government, using protection firms they hire. This argument will be considered further below, but the point here is more narrow. Citizens do benefit from the protection government provides, even though they have no choice because government forces them to accept its services and pay for them; and government does have an incentive to provide that protection for selfish reasons, to protect its own income. This exchange model of government thus explains why government produces national defense completely in terms of the self interests of all parties involved, in contrast to the public goods theory of national defense.

¹² Randall G. Holcombe, *The Economic Foundations of Government* (New York, 1994).

The Public Goods Rationale for Government

The same line of reasoning used in the previous section should be able to be extended to all government production. Government produces goods not for altruistic reasons, but because those in government benefit from government production. A simple argument would be that in general, producers benefit from producing goods that they offer to consumers, but a more complete answer would focus on the characteristics of government output to explain why government produces some types of goods but not others. Jasay insightfully analyzes the public goods rationale for government to explain why government produces “public goods.”¹³

According to the economist’s definition, public goods have the twin features of non-excludability and jointness in consumption. Jasay (1989: 130) notes that almost any good is excludable at some cost, and notes that the costs of exclusion for many goods provided by government would be no higher than for those provided in the private sector. One could easily exclude and charge admission for education, health care, parks, and highways, for example, and the existence of private schools, hospitals, parks (such as Disney World), and toll roads shows the feasibility of exclusion. Public goods are non-excludable, Jasay argues, not because exclusion is infeasible but because there is a public demand for unfettered access.

Once a good is made non-excludable due to public demand, a sufficient quantity must be provided that the consumption of one person does not crowd out the consumption of others, Jasay argues.¹⁴ If this does not happen, congestion resulting from competition for the good will erode the benefits to everyone. The solution is to provide enough so that everyone gets all they want without reducing the consumption of others. A highway with free access but with insufficient capacity to serve all of the traffic that wants free access results in gridlock, and the congestion reduces the value of the good to all users. One solution would be to ration its use using tolls, but this would be an exclusionary device, and as Jasay argues, people are not excluded from goods like roads because there is a public demand for them to be freely available to all. To avoid congestion, then, the more common solution is to add lanes to try to make its use non-rivalrous.

This line of reasoning argues that goods become non-excludable because of popular demand, and then become joint in consumption because they became non-excludable and enough is produced so that no user’s consumption prevents another from consuming. The result will be inefficiently high levels of production from the standpoint of economic analysis—too many lanes on the highway; health care provided beyond the point of cost-effectiveness—but this is the result of the collective choice to provide goods without exclusion.

This analysis focuses on the theoretical public goods argument, but there is a more practical reason for rejecting the public goods rationale for government: the market produces public goods very successfully. Perhaps the best example of a pure public good is microcomputer software. Microcomputer software has both of the public goods characteristics of jointness in consumption and non-excludability.

¹³ Jasay, *Social Contract, Free Ride: A Study of the Public Goods Problem*.

¹⁴ *Ibid.*, p. 159.

It is a joint consumption good because once software is written for one person, it can be easily copied and used by everyone. One person who has a program on his computer can allow another person to copy it; then she has it too. Programs can be copied endlessly once written. Software companies try to stop this behavior, but the fact that it is so widespread also demonstrates that the software is non-excludable. It is difficult to prevent non-payers from using the good. Yet despite the fact that microcomputer software so closely fits the economic definition of a public good, the market supplies this public good very effectively, and at the beginning of the twenty-first century the richest man in the world—Bill Gates—made his fortune by selling a public good. Experience shows that markets can produce public goods very effectively.¹⁵

The public goods rationale for government falls short on several grounds. From a theoretical standpoint, the goods that government produces are non-excludable and joint in consumption because the government has made them that way, not because of any characteristics inherent in the goods. From an empirical standpoint, non-excludable joint consumption goods are produced very successfully by the market, demonstrating that government is not necessary to solve the public goods problem. This is not to argue that government should produce nothing: there may be a rationale for government production, but if there is, both theory and experience show that the public goods argument does not justify government.

The Externalities Rationale for Government

Another rationale for government is that it is needed to control externalities: problems that arise when the actions of some people impose costs on others.¹⁶ As Ronald Coase demonstrated, externalities arise because property rights are poorly defined or enforced.¹⁷ The solution is straightforward: define and enforce property rights. At the beginning of the twenty-first century, government is the most common enforcer of property rights, perhaps making government appear to be the natural institution for dealing with externalities. Even with government asserting its power, there are substantial private alternatives to the government enforcement of property rights.

Within a nation's borders, government is the enforcer of last resort, but as Benson notes, for international transactions there is no government to oversee the

¹⁵ This example is discussed within the traditional public goods framework by Randall G. Holcombe, *Public Finance: Government Revenues and Expenditures in the United States Economy* (Minneapolis, 1996), pp. 110–12.

¹⁶ This section considers only negative externalities, which is the case when the behavior of some people creates a cost for others. A more complete analysis would also look at positive externalities, which are created when some people produce benefits that others can enjoy without charge. The extreme example of a positive externality is a public good, considered in the previous section, so the discussion on public goods applies largely as it stands to all positive externalities. Positive externalities do not violate anyone's rights, so the analysis of negative externalities considered here would not apply to positive externalities.

¹⁷ Ronald H. Coase, "The Problem of Social Cost," *Journal of Law and Economics*, 3 (October 1960): 1–44.

activity.¹⁸ Nevertheless, there is a well-developed body of commercial law that spontaneously emerged, and that applies to international transactions. International trade continues, apparently unfettered by the fact that there is no one government overseeing and enforcing the contracts. International commercial law shows how law can work without government. Even when transactions are wholly within one nation, parties will often specify in their contracts that any disputes will be settled by private arbitration rather than by going to the government's courts. People choose to pay to settle their differences privately rather than use the government's courts at no charge because they believe that they will get better results through private arbitration. Government is not necessary to create law or to enforce contracts.

With many externalities, problems arise between noncontracting parties. For example, soot from a manufacturing plant may foul the air of a nearby residential subdivision. One effective solution in cases like this is to apply the well-established common law doctrine of nuisance to prevent one party from creating a nuisance that violates the rights of another. Over the centuries, activities that constitute a nuisance have been clearly defined by common law, which Berman and Benson note predates the government's administration of the law.¹⁹ But the law of nuisance, taken over by government courts centuries ago, has been substantially eroded by statutory law in the twentieth century. Now, legislation trumps the law of nuisance, and many other common law doctrines.

For example, in the nineteenth century a company that wanted to build a cement plant next to a residential subdivision would have been prevented from doing so by the law of nuisance, but in the twentieth century zoning laws have replaced the law of nuisance in cases like this. With zoning, when people in the neighborhood argue that the cement plant would be a nuisance, the company defends its right to locate there by noting that the area is zoned for industrial use. The advantage of the law of nuisance is that nobody has the right to create a nuisance for others, and the law can be invoked any time a nuisance exists. Thus, if the cement plant began as an unobtrusive business that was causing no problems for its neighbors, it could peacefully coexist with them; but if at a later date that same plant began spewing dust on its neighbors and generating objectionable noise, the law of nuisance could be invoked at that point. With zoning, if the land's zoning allowed the cement plant, its neighbors would have little recourse, because the law would allow that activity on the land. The common law doctrine of nuisance is a superior method of internalizing externalities, and it can be applied without government. Government statutes and regulations can actually encourage the creation of externalities, as this illustration shows.

A real-world example may help to illustrate how statutory law has crowded out the common law doctrine of nuisance. In the late 1990s, former Florida Governor Claude Kirk sued some Florida sugar growers for creating a nuisance by polluting the

¹⁸ Bruce L. Benson, "The Spontaneous Evolution of Commercial Law," *Southern Economic Journal*, 55/3 (January 1989): 644–61.

¹⁹ Bruce L. Benson, *The Enterprise of Law: Justice Without the State* (San Francisco, 1990) and Harold J. Berman, *Law and Revolution: The Formation of Western Legal Tradition* (Cambridge, 1983).

Everglades with fertilizers and other agricultural runoff. The suit was dismissed by the court, with the argument that the sugar farmers' activities were regulated by both the state's department of environmental protection and its department of agriculture. The sugar farmers had a right to undertake those activities as long as they complied with the relevant regulations. This is a specific example of the law of nuisance being replaced by statutory law, and shows how government statutes and regulations can encourage externalities. Statutes are not necessary to control the nuisance; the common law doctrine of nuisance can be applied to control such externalities, and this example shows how government law can interfere with individuals' attempts to control externalities.²⁰

The government controls most aspects of both statutory and common law today, but as Coase noted, if transactions costs are low enough, such externalities can be controlled through private bargains among the affected parties.²¹ Foldvary explains how transactions costs can be lowered and such bargains can take place as private arrangements, without government, even with large groups of people.²² Individuals can contractually agree to control nuisances among themselves with organizations like the neighborhood associations that are common today. These associations can bargain as a single unit with other organizations to keep transactions costs low. To return to the earlier example, it would not be a matter of many homeowners trying to negotiate with a factory owner to control a nuisance, which would result in high transactions costs, but rather a matter of one neighborhood association bargaining with another property owner, keeping transactions costs low and facilitating effective exchange.

The larger point is that there are contractual alternatives to government control of externalities, so government is not necessary to internalize externalities. While many writers have taken different approaches to the issues, Foldvary, Benson, and Friedman, for example, have shown how law can exist without government, how property rights can be defined, and how externalities can be internalized through private arrangements.²³ Externalities problems can be solved effectively without government, and even with government in existence, private solutions are often used because they are preferred to government solutions when people have a choice. Indeed, government regulations often facilitate the generation of externalities, because they can permit the creation of externalities that are protected by law. The existence of externalities is not a reason why government is necessary, or even beneficial.

²⁰ In 2001 the Florida Supreme Court upheld the lower court's ruling that the case should be determined by administrative agencies rather than by heard in the courts. See *Flo-Sun Inc, et al. v. Kirk, et al.* SC95044 and SC95045, decided 29 March 2001.

²¹ Coase, "The Problem of Social Cost."

²² Fred Foldvary, *Public Goods and Private Communities: The Market Provision of Social Services* (Brookfield, VT, 1994).

²³ Benson, *The Enterprise of Law: Justice Without the State* and David Friedman, *The Machinery of Freedom: Guide to a Radical Capitalism* (2nd edn, La Salle, Illinois, 1989).

The Social Contractarian Rationale for Government

A broader rationale for government is the social contractarian rationale, which suggests that people are better off with government because governmental institutions allow citizens to peacefully coexist and avoid the problems that would be inherent in anarchy. This idea goes back at least to Hobbes and finds more modern defenders in Rawls and Buchanan.²⁴ It encompasses the public goods argument, the externalities argument, and more, by concluding that people are better off if they all agree to the terms of a social contract that allows government to force them to comply with the contract's terms. The government must force people to abide by the contract's terms because people have an incentive to act noncooperatively, which creates a prisoners' dilemma situation. Everybody would be better off if they would agree to be coerced into abiding by the provisions of the social contract, the argument goes.

Jasay has offered extensive and insightful analyses of the social contract theory of the state which show the problems with the concept.²⁵ But in the present context, it is worth noting how the social contract model applies to the question of "Why Government?" The social contract model addresses the issue of why we should have a government, but not why we actually do have one. As Yeager forcefully points out, no matter how much people like their government, government was not created because citizens agreed to it.²⁶ Government is forced upon its citizens, and if people decide they do not want to comply with government's edicts, the government will use force against them. Even if people like their government, they did not agree to it.²⁷

The social contract theory obviously does not answer the question of why we do have government, and also falls short as a theory of why we should have government. It argues that because of a prisoners' dilemma setting, everyone would be better off if they agree to be coerced by government, suggesting that government overcomes the prisoners' dilemma setting and produces a Pareto improvement. As a normative theory about the desirability of government, the theory falls short in at least two ways. First, it ignores the ways in which private arrangements can overcome the prisoners' dilemma nature of social interaction; and second, it bases its normative conclusions on the properties of unanimous consent, yet government never operates according to a unanimity rule.

Jasay, along with Rothbard, Foldvary, and many others, have shown how private arrangements can overcome the prisoners' dilemma problem.²⁸ Some of these ideas

²⁴ John Rawls, *A Theory of Justice* (Cambridge, MA, 1971) and Buchanan, *The Limits of Liberty: Between Anarchy and Leviathan*.

²⁵ Jasay, *The State*; Jasay, *Social Contract, Free Ride: A Study of the Public Goods Problem*; and by the same author *Against Politics: On Government, Anarchy, and Order*.

²⁶ Yeager, "Rights, Contract, and Utility in Policy Analysis."

²⁷ However, Berman notes that when Europe was emerging from feudalism and cities were being formed from around 1050–1150 AD, all the residents of the city would sometimes gather at together and verbally affirm their agreement to abide by the city's rules. Berman suggests that these historical events could have provided the foundation for the development of the social contract theory.

²⁸ Jasay, *The State*.

were discussed in the previous section, but the broad conclusion is that people have an incentive to contractually agree to cooperate without the force of government. The coercion inherent in government action is not necessary to overcome social prisoners' dilemma situations because people benefit from designing and participating voluntarily in such arrangements. Yet even if this were not the case, government does not act according to the principle of unanimity that underlies the social contract theory of the state.

The social contract theory is based on the idea that citizens have agreed to the terms of the contract, when in fact, they obviously have not. Most citizens were born in nations where government claimed its jurisdiction over them regardless of whether they agreed. They were never asked, because government does not give individuals the choice of opting out of its control. Thus, one of the challenges that the social contract theory of the state has faced is trying to develop an argument that conceptually, people are in agreement with the social contract when in fact they have not agreed. Rawls uses the device of conceptual agreement from behind a veil of ignorance, and Buchanan uses a similar device of hypothetical renegotiation of the contract from anarchy.²⁹ Viewed most charitably, these devices might be seen as arguments that people should agree to the social contract, but they are not arguments that people actually did agree. This is a problem because in a society of more than just a few people, surely there would be some dissenters, and if so, the argument that there is a social contract that represents a Pareto improvement over some alternative arrangement is lost.

There is another problem, perhaps more serious, with applying the social contract theory of the state to the type of state that exists at the beginning of the twenty-first century. Much of what modern states do is, by deliberate design, to use force to transfer resources from one subset of the population to another. A major theme of Jasay is that this is an unavoidable feature of democratic government.³⁰ For those in government to remain in power, they must win the support of voters, which they do by allocating any discretionary income that might go to the state toward buying political support.³¹ Ideally, one might envision a benevolent government that works for the cooperative benefit of all of its citizens by overcoming a prisoners' dilemma problem; in fact, as I discuss elsewhere, modern democratic states use their resources to try to retain their power by taking from some to give to others.³² While the social contract theory of the state is grounded on a normative foundation of unanimous agreement and Pareto improvements, the modern democratic state operates by forcibly extracting resources from some for the benefit of others.

Buchanan and Tullock explain how people might unanimously agree to a less-than-unanimous decision rule, opening the door for majoritarian decisions

²⁹ Buchanan, *The Limits of Liberty: Between Anarchy and Leviathan*.

³⁰ Jasay, *The State*.

³¹ *Ibid.*, pp. 10–11.

³² Randall G. Holcombe, "Political Entrepreneurship and the Democratic Allocation of Economic Resources," *Review of Austrian Economics*, 15/2,3 (June 2002): 143–59.

to be judged optimal.³³ Yet other work by those scholars offers an effective counterargument to the notion that resource allocation by democratic governments is a Pareto improvement.³⁴ Modern democracies are based more on consent than other forms of government, so the social contract theory that is inapplicable to modern democracies is even more inapplicable to other forms of government. The social contract theory of the state cannot justify the types of governments that rule at the beginning of the twenty-first century.

Theories of Government

Governments exist because some people have forcibly taken over others, and rule them by force. None of the rationales for government just discussed are at odds with this fact; rather, they are rationales that try to justify the existence of government by arguing that citizens are better off because they are subject to the government's power. Each of these theories has been critiqued on its specific problems, but there are two general problems that might be noted because they apply to many justifications for government.

Many justifications for government assume that people outside the government act against the public interest but people inside the government set aside their own interests to act in the public interest. This justification for government action falls short on several counts. First, a careful analysis shows that people's own interests are largely congruent with the public interest anyway, and that they have an incentive to write contracts and enter into agreements that enhance the public welfare. People do not need to be forced to act in the public interest: they have private incentives to do so, as Axelrod illustrates.³⁵ Second, it should be apparent when stated this way that people in the public sector have the same motivations for putting their own interests ahead of the public interest as do people in the private sector. Not only do people in the public sector have the same motivations for self-interested action, they have a greater ability to act against the public interest, because they can force people to act as they dictate rather than having to rely on their voluntary cooperation.

As Adam Smith noted, individuals in the private sector pursuing their own self-interests are led by an invisible hand to do what is best for the whole society.³⁶ In the public sector, decision-makers are using resources forcibly taken from some, rather than voluntarily tendered as in the private sector; and they are able to coerce people to follow their mandates, rather than having to convince people to voluntarily agree to transact with them. Recourse to the use of force in the public sector means that there is no invisible hand in the public sector pulling people acting in their own self-interests to further the public good. Theories justifying state action that assume that

³³ James M. Buchanan and Gordon Tullock, *The Calculus of Consent* (Ann Arbor, 1962).

³⁴ See for instance, James M. Buchanan, "Politics, Policy, and the Pigouvian Margins," *Economica* new series, 29 (February 1962): 17–28; and Gordon Tullock, "The Welfare Costs of Tariffs, Monopolies, and Theft," *Western Economic Journal*, 5 (June 1967): 224–32.

³⁵ Robert Axelrod, *The Evolution of Cooperation* (New York, 1984).

³⁶ Adam Smith, *The Wealth of Nations* (1776; New York, 1937).

people in the public sector act in the public interest while people in the private sector act against the public interest should not be taken seriously, yet all economic theories of government interaction fall into this category.

The second general problem with theories of government is that they are based on some notion of the consent of the governed. The previous section took a critical look at the social contract theory of the state, which is especially egregious in this regard because it is based on some concept of unanimous agreement to state action. However, a weaker version of this is the justification that in a democracy, people have agreed to the government's actions because they participate—or have the right to participate—in elections. Because voters made a democratic choice to elect a particular set of leaders, those leaders are therefore acting in the public interest.

Stated this way, the argument obviously fails, yet as Edelman notes, governments are designed so that an aura of legitimacy is conferred to their leaders by governmental institutions. Constitutional democracies establish the powers of the government's leaders, and by voting, people symbolically agree with the governmental process, and collectively choose who may exercise the constitutional powers of government. Even if one disagrees with the government's actions in specific cases, political participation confers the aura of agreement. Everyone has a say in choosing their leaders, and for people in the minority, the election merely demonstrates that most people do not share their views. This is why high voter turnout is critical to the legitimacy of a democracy, and why democratic leaders always urge everyone to exercise their right to vote. Through the act of voting, people demonstrate their agreement with the democratic process, even if they do not agree with the specific outcome. Individual dissenters are marginalized by the argument that the government's decisions have been legitimized by the actions of the majority. There is a broad public choice literature explaining how a government elected by a majority can use force to favor individual interests over the general public interest, as I discuss in more detail elsewhere,³⁷ so the argument that government acts in the public interest because people have agreed to it, either through some hypothetical social contract or through some actual democratic process, does not hold up.

The past several sections have analyzed the most common arguments justifying the state, and have found that all of them have serious problems. Arguments based on public goods and externalities fail to take into account non-governmental arrangements that have shown superior results in practice, and that have strong theoretical arguments in their support. Arguments based on the consent of the governed are based on hypothetical conditions that do not exist in practice, and that Jasay persuasively argues could not exist in practice, because of the very nature of government.³⁸ When examining every individual activity of the state, each could be undertaken more productively by the private sector. This naturally points toward the question of whether people would be better off with no government at all.

³⁷ Holcombe, "Political Entrepreneurship and the Democratic Allocation of Economic Resources."

³⁸ Jasay, *The State*.

Anarchy as an Alternative to Government

Libertarian anarchists have offered persuasive arguments that private contractual arrangements could more effectively undertake all of the functions now undertaken by government. Rothbard and Friedman have made a good general case for the efficacy of the market to provide everything government does, Benson persuasively argues the benefits of private law over government law,³⁹ Foldvary shows how private communities can provide their own public goods at any scale, and there is a substantial academic literature on the inefficiencies of government production and regulation. But the efficacy of the private sector relative to the public sector does not necessarily imply that people would be better off eliminating their governments entirely. Even with a productive and orderly anarchy, there remains a substantial incentive for predatory groups to try to take over such a society and rule it by force.

In fact, government does not exist because it can do certain things better than the private sector. It exists because it was created by force and imposed on its citizens. Whether government is better at undertaking some functions than the private sector is irrelevant, and whether government might be necessary to undertake certain activities is also irrelevant to the question of why government actually exists. Government exists because some people have imposed it on others by force.

This conclusion is an old one. Jasay quotes Hume as observing that governments “arise from quarrels, not among men of the same society, but among those of different societies.”⁴⁰ Jasay then affirms Hume’s observation, saying “An anarchistic society may not be well equipped to resist military conquest by a command-directed one.”⁴¹ The problem with orderly anarchy is not that there are certain things that only government can do, or that there are some things the government can achieve more effectively than private arrangements. Rather, it is that predatory groups have the incentive and the power to take over others and rule them by force, making government inevitable. While this conclusion could be debated,⁴² the historical fact is that government rule has established itself everywhere.

Anarchy is not a realistic alternative because without government, predatory thugs will organize themselves into Mafias that can more efficiently plunder from productive citizens. They will offer citizens protection from other predators, but will prey on those who do not contract with them. If these Mafias can establish a monopoly in a particular geographic area, they will become the government, providing protection for tribute just as any government does. This provides an outline of the argument as to why anarchy cannot survive in theory, but perhaps a stronger leg to stand on is that in fact, governments have taken over every area on Earth and are, in fact, ruling those areas by force.

³⁹ Benson, *The Enterprise of Law: Justice Without the State*.

⁴⁰ Jasay, *Against Politics: On Government, Anarchy, and Order*, p. 200.

⁴¹ *Ibid.*

⁴² Rothbard would dispute this, but Robert Nozick, *Anarchy, State, and Utopia* (New York, 1974) presents an argument similar to the one offered here.

Why Should People Establish Government?

The most commonly-offered rationales for government do not justify its existence. People do not need governments to produce public goods, or to control externalities, or to overcome prisoners' dilemma problems so they can cooperate for their mutual advantage. The answer to why people should have a government follows directly from the answer to why people actually do have governments. Governments exist because some people had the power to create them to rule over others by force. The coercive nature of government means that it has the potential to be predatory to the point of extracting almost all of the benefits of the division of labor. Adam Smith noted the remarkable productivity that is the result of specialization and the division of labor, and as David Landes notes, nations that have established institutions to foster this productivity have continued to increase their prosperity.⁴³ Some forms of government are better than others. Government is not needed to produce prosperity, but the creation of a limited government is desirable to prevent citizens from being exploited by more predatory governments.

Disorganized banditry will produce a Hobbesian anarchy, where life is nasty, brutish, and short. Nobody is very well-off in such a setting, because nobody has an incentive to be very productive. Even the most ruthless predators in an unproductive society will not fare well, because there will be little for them to steal. If the predators are able to organize, they may become little Mafias that can offer their clients some protection. This will create a more productive society, and more income for both the predators and for those on whom they prey. If they become even better organized, they can establish themselves as a state. Predators have every incentive to move from being bandits to being states, because bandits do not guarantee themselves a long-term flow of income from predation, and because if banditry is rampant, people have little incentive to be productive. States agree to limit their take and to protect their citizens in order to provide an incentive for citizens to be productive. Citizens gain from this arrangement, and predators also benefit from organizing into states rather than remaining bandits.

Nozick described this process in more benign terms, as protection agencies establish monopolies and evolve into a minimal state, but the evolutionary process is the same. Nozick's protective firms are profit-maximizing Mafias with a happy face, and the evolution of those protective firms into a minimal state follows the process just described. The evolution of predatory bandits into Mafias, and into governments may be inevitable, and if it is not inevitable it is desirable, because governments have an incentive to be less predatory than bandits. Bandits are not the only threat to citizens of a stateless society: other states pose a threat too. Citizens would benefit from some institutional mechanism to prevent them from being taken over by a predatory gang. They can do this by preemptively establishing their own limited government. The advantage to citizens of preemptively establishing a limited government is that such a government is created on terms determined by the citizens who create it, not on the terms forced upon them by predators.

⁴³ David S. Landes, *The Wealth and Poverty of Nations: Why Some Are So Rich, and Others So Poor* (New York, 1998).

People should establish a government to protect themselves from the very high probability that without one, they will be taken over by a predatory government with characteristics more undesirable than a government they might create themselves. The fundamental role of any government is the exchange of protection for tribute, which benefits both those in government and its citizens. The protection of the state's citizens and their property makes the whole society more productive, so more is available for everyone. The state can take its payment and still leave citizens better off than if they received no protection. A major issue then becomes how much of the increased productivity goes to the state and how much remains for the benefit of its citizens.

If a group of outside predators establishes itself as a government, it will have every reason to keep most of the surplus for itself. The most basic reason is that the people in the predatory group will care more about their own welfare than the welfare of the people they have taken over. Another reason is that in many cases, the conquered group resists takeover by the predators, creating ill will between the conquerors and the conquered. Yet another reason, as Levi notes, is that the conquering group may have a limited time horizon. Having established themselves as a government through force, they will be rightly concerned that another group of predators may try to oust them. This will be especially true if the rulers are unpopular with the citizens so rulers cannot count on citizens to support them. Governments imposed on people from the outside are likely to be especially predatory.

Citizens can avoid this excessive predation by preemptively establishing their own government. A government created by the citizens themselves can be designed to produce the protection citizens desire while returning the bulk of the surplus to the citizens rather than allowing the state to retain it. This parallels the establishment of the United States government. The Declaration of Independence is largely a list of grievances against the King of England, but the colonists did not intend to substitute anarchy for the existing government; rather, they sought to design a limited government that would protect the rights of its citizens. Because it was designed by and approved by the citizens, it was a less predatory government than would have existed had a government been imposed on them from the outside by force.⁴⁴

In hindsight, some of the checks on government power surely have not worked as effectively as the American founders hoped. Even so, the United States government protects the liberty of its citizens more effectively than most of the world's governments. Undoubtedly, the government could be less predatory, and could do a better job of protecting the liberty of its citizens. With this in mind, the founders envisioned periodic amendment and even replacement of the Constitution. Herein lies some potential value in the social contract theory of the state. As noted earlier, the social contract theory cannot be viewed as answering the questions of why we do have government, or why we should have government. But it does offer some insights into how citizens could design constitutional rules to enhance the welfare of

⁴⁴ The government was established and approved by an elite group of citizens, as Beard notes, perhaps favoring monied and landed interests over other citizens (Charles A. Beard, *An Economic Interpretation of the Constitution of the United States* (New York, 1913)).

a government's citizens, and experience shows that refining the design of government can help control its predatory impulses.

If people should establish governments to protect themselves from being taken over by governments more predatory than the ones they could create, this opens two more questions, which will be only superficially addressed here. The first is how people should design their governments to effectively protect their rights without violating them. The second, and related, question is whether it is really possible to create a limited government.

Much has been written on the topic of the optimal design of government, and a full answer would require more space than is available here. The short answer is that governmental institutions need to be organized so those in government have the incentive to protect the rights of citizens, not prey on them. This may be created through checks and balances among governmental units,⁴⁵ and through popular oversight and democratic selection of government officials. Furthermore, there may be no final answer to the question, because any innovations in government designed to protect the rights of individuals may be followed by offsetting innovations by those who want to use government for predatory purposes. The preservation of liberty is a never-ending challenge. However, some governments are better than others. If people want better government, there is good reason to examine the question of how to design and improve governmental institutions.

The related question of whether it is really possible to create a limited government is more straightforward. Once created, governments tend to expand their powers, as Higgs and Holcombe note, so citizens creating a limited government to try to protect themselves from leviathan may be laying the foundation for future government oppression.⁴⁶ This issue is addressed in part in the previous section. Anarchy does not appear to be a feasible alternative, so the only liberty-preserving option is to create a limited government. Furthermore, although the limited government created in the United States in 1776 has expanded far beyond what its creators could have envisioned, it is still among the freest places on Earth. While it may not be possible to arrive at any libertarian ideal, it is possible to work toward that ideal, and it is possible to design institutions that can preserve liberty more effectively over the long term than the alternative of being taken over by a predatory group of outsiders.

Government is not necessary to produce public goods or to correct externalities or to get people to cooperate for the public good. All of the activities undertaken in the public sector can be more effectively undertaken voluntarily by the private sector. However, history shows that without government—or even with a weak government—people run a substantial risk of being taken over and ruled by an excessively oppressive and predatory government. People should establish

⁴⁵ The idea of checks and balances suggests the three branches of the U.S. federal government, but in a federal system one level of government can check another. For example, federal law enforcement officials may uncover predatory actions by state and local law enforcement officials, creating more of an incentive to play by the rules.

⁴⁶ Robert Higgs, *Crisis and Leviathan: Critical Episodes in the Growth of American Government* (New York, 1987) and Randall G. Holcombe, *From Liberty to Democracy: The Transformation of American Government* (Ann Arbor, 2002).

government to protect themselves from the high probability that if they do not, they will be taken over and ruled by a predatory group that will be much worse for citizens than a government they design themselves.

Conclusion

Jasay asks whether limited government is possible, and conjectures that

... limited government is only possible in conjunction with unreasoning acceptance, by significant parts of society, of certain metaphysical propositions. ... Reason, if it is supreme, will never propose or durably accept limits to its own scope. It will want to use the power of collective choice whenever it finds, or believes to have found, a chance to bring about some improvement...⁴⁷

If Jasay's conjecture is correct, the hope of limited government lies with its advocates. If the reason that Jasay refers to is based on the ideas of Milton Friedman, or Friedrich Hayek—or Anthony de Jasay—it will produce a more limited government than if it is based on the ideas of Karl Marx or John Maynard Keynes. Keynes argued that "... the ideas of economists and political philosophers are more powerful than is commonly understood. Indeed the world is ruled by little else."⁴⁸ Keynes appears prophetic in his own case, and much of twentieth century history may have been affected by the powerful ideas of Karl Marx and his followers. But the end of the twentieth century saw an increasing visibility in the advocates for limited government, such as Hayek, Friedman, and Jasay. Perhaps those ideas, further developed by their followers and passed into the realm of the general public will turn the tide in favor of greater limits on governmental power and increased liberty.

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⁴⁷ Jasay, *Against Politics: On Government, Anarchy, and Order*, p. 61 (chapter 2).

⁴⁸ John Maynard Keynes, *General Theory of Employment, Interest and Money* (London, 1936).

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Chapter 9

Constitutional Optimism and Skepticism in Buchanan and Jasay

Hartmut Kliemt

Introduction

Ever since James M. Buchanan came across Anthony de Jasay's "The State"¹ he has praised the book and recommended it to others. That Buchanan would like the approach is not surprising since there are striking similarities between "The State" and "The Power to Tax".² In "The State" as well as in "The Power to Tax" the state is conceived as an actor pursuing the sole aim of maximizing its power of extracting rents from its citizens. But whereas Buchanan uses the assumption of a rent-maximizing state as basis of a purely conceptual exercise it expresses an essentially true statement about the human condition in state-governed societies for Jasay. However pessimistic on the surface, at heart Buchanan's view of constitutional democracy remains fundamentally optimistic whereas Jasay's is pessimistic throughout. Even though Buchanan like Jasay cannot but look at many of the recent developments of constitutional democracy with contempt he conceives it as capable and as worthy of reform while in Jasay's eyes the whole enterprise of constitutional democracy is beyond repair or at least eventually doomed to end in populism and worse.

Buchanan's way out of the "present constitutional democratic mess" is constitutional reform. He aims at imposing suitable constitutional constraints on the rent-seeking powers of the state while Jasay deems such efforts at improvement as rather futile. He is entirely skeptic that constitutional constraints can put limits on government action "from the inside" or by way of specifying the "form" of government. Since the first best alternative of anarchy seems out of reach Jasay clearly opts for his second-best solution of restraining the state externally. He is of the opinion that this can be accomplished best by treating the state—in particular when we are addressing the public—strictly as foe and never as friend, as an instrument of "them" (the governing) rather than of "us" (the governed). For him the tendency of modern democratic political thought to conceptualize the state as "our" rather than "their" instrument is at root of the most threatening developments in western legal

¹ Anthony de Jasay, *The State* (1985; Indianapolis, 1999).

² H. Geoffrey Brennan and James M. Buchanan, *The Power to Tax. Analytical Foundations of a Fiscal Constitution* (New York, 1980). Like other works of Buchanan this one can be found in James M. Buchanan, *The Collected Works of James M. Buchanan*, 20 Vols, Indianapolis, 1999–2001.

orders. Any effort that might let the state appear less dangerous is itself dangerous in Jasay's eyes. In his adversarial view of the relationship between citizen and state the only protection of citizens is never to let their guards down.

Where Buchanan appeals to "us" or the constituency of a constitutional democracy to find better ways of self-government Jasay treats the very idea of *self*-government with contempt. He thinks that the citizens cannot govern and be governed at the same time. Jasay appeals to the governed to oppose and thereby to restrain those who govern. Antagonism to rather than participation in the process of government is his recommended method of restraint. Buchanan on the other hand, though he seeks to impose constraints on government, tends to think about those constraints in terms on self-imposed constitutional rules that can improve government from the inside rather than in terms of organized "external" resistance. For Jasay the state or "the thing itself" is an incurable disease while Buchanan thinks that the state can be cured from its deficiencies to an extent that can make state intervention desirable. Pareto superior moves that are accessible only if we use the state in the right way do exist and Buchanan tries to give his advice how we could and should make these moves.

In this paper "constitutional optimism" and "constitutional pessimism," respectively refer to systematic philosophical positions as tentatively characterized by the aforementioned basic tenets rather than to personal attitudes. The theories of James M. Buchanan will serve as my paradigm of constitutional optimism while Anthony de Jasay's will form my model of constitutional pessimism. My aims are, however, not exegetic. I will not care too much about being true to the two authors in every detail or to corroborate each and every claim by a citation but rather use them—as I do in other contexts as well—as inspiration. In my *stylized* account I will start with constitutional optimism and then turn to constitutional pessimism. In the fourth section (Keeping the balance?) I will tentatively indicate what the implications of such views might be and where they may lead us philosophically and politically while in the final section Hume will have a final word, though an inconclusive one.

Varieties of Constitutional Optimism in Buchanan

Buchanan's constitutional optimism is embodied in several aspects of his work. In particular it expresses itself in *optimism concerning constitutional content*, *optimism concerning constitutional effectiveness*, and *optimism concerning "democratic constitutional religion."*

Buchanan's Optimism Concerning Constitutional Content

Buchanan assumes that reasonable individuals will come to an agreement on reasonable constitutional proposals. It is not completely clear whether beyond conceivable agreement of the citizens there is an independent criterion of reasonableness in Buchanan's and related theories. But it seems fair to take Buchanan at his word that—at least in fundamental constitutional matters—"beyond agreement there is no way to go" and ascribe to him the view that agreement *per se* has "right-making" characteristics. This view is radical in that it assumes, albeit implicitly, not only that

ethical non-cognitivism is true or that right and wrong in matters political cannot be known like right and wrong in scientific matters but also that agreement is sufficient to render the content of agreement legitimate.

If a democratic body reaches agreement on some rule then this is different from the finding of a jury. Other than in the case of a jury there is no assumption that “truth is out there” and should be sought. Moreover, if agreement is reached on some purely normative content concerning only those who consent freely and without suffering from deliberate deception then the agreement cannot be deemed “erroneous” in some meaningful sense of that term. In Buchanan’s view of the matter there simply is no independent standard by which the content of agreement could be criticized as an error. Should all be agreed on some normative matter then there cannot be a meaningful external criticism of the agreement.

An extreme example may serve as an illustration of the far-reaching consequences of such a view: Suppose that individuals have formed a “suicide club.” If they after careful deliberation are all agreed to kill themselves jointly in a specific way and if this way does not have serious external effects on others outside the group there is not much that an economist as economist could object since “on ends he must remain silent.”³ The external advisor could offer some advice as far as the means of bringing about death are concerned. Should people decide on killing themselves by an act of drinking it would presumably not be a frightfully good idea to drink masses of mineral water. An external advisor could criticize that the club-members chose the wrong means for their purposes. But he could not criticize their choice of purpose *per se*. At least if all members of the club gave their informed consent to commit suicide in some specified way and if they did so on some far away island what could one object to the aim of ending life? Unlike a jury the members of the club cannot err about their ultimate aims as expressed in their agreement (assuming that they gave their assent freely and without being deceived into it).

In fundamental political matters agreement is not agreement on something that is right or wrong independently of the agreement. But although Buchanan rejects conceptualizing democratic agreement along the same lines as jury decisions his optimism is in some respects nevertheless akin to assumptions as expressed in jury theorems. In particular he is more or less of the opinion that in matters political good common sense is really so common that it is hard to fool majorities into fundamentally flawed views of the workings of social systems. In his eyes experts do not have any comparative advantage over the majority of people if that majority acts in agreement. In Buchanan’s eyes it would be elitist to assume that somebody else would know better than the citizens themselves. With respect to ends this is in Buchanan’s framework obvious—after all, as far as ends are concerned, there is in the proper sense of that term nothing to “know” anyway. But as far as the choice of means is concerned—and much of constitutional choice is about institutional means—it is not obvious that the common people know and understand things as well as their advisors. Buchanan seems to assume here that the democratic citizenry at large is in principle able to recognize and willing to follow good constitutional

³ Lionel Robbins, *An Essay on the Nature and Significance of Economic Science* (2nd edn, London, 1935).

advice and therefore will tend to agree on good constitutions as long as appropriate circumstances of decision making prevail.

In sum, for Buchanan, citizens endorse in general reasonable prescriptive and predictive views of the (political) world. They can at least conceivably reach unanimous agreement on all Pareto superior moves if given sufficient time and resources to engage in deliberation and discussion. Moreover such unanimous agreement is sufficient to render its content morally and politically legitimate.

Buchanan's Optimism Concerning Constitutional Effectiveness

Buchanan clearly endorses also an *optimism concerning constitutional effectiveness*. In short, constitutions matter. They exert a causal influence on the world. If there is a written constitution what is written into it makes a difference. How “we” would alter or amend the text of the constitution can change the course of our fate. Most importantly, changing their constitution societies as a whole can—at least to some extent—commit to future courses of action—and they do so by engaging “constitutional commitments.”

Constitutional commitments may be absolute or relative. Relative ones just make the constitutional pursuit of certain alternatives more attractive and of others more costly. Absolute constitutional commitments (try to) cut off alternatives completely in the sense of ruling them out as unconstitutional. The absolute commitments on which I shall focus here specify that certain rules of the constitution cannot be changed in accordance with the constitution. The “rules of rule change” as embodied in the constitution itself preclude this.⁴ Paradigm examples of that genre are articles 88 of the Danish or 79 (3) of the German constitution. Both state that certain other clauses of the very same constitution cannot be changed constitutionally. So as long as individuals intend to bring about constitutional changes only according to the constitution and as long as the articles 88 or 79 (3) remain in place there is no constitutional way of giving up those other constitutional clauses.

Of course, one might ask whether 88 or 79 (3) could not be changed constitutionally so as to remove them as constitutional obstacles to constitutional change. But this is a valid objection only if individuals would regard ordinary rules as alterable without requiring a rule of rule change that specifies the terms of alteration. If they, as seems highly plausible, implicitly interpret constitutional rules as unalterable by deliberate or intentional decisions unless the possibility of alteration is explicitly stated then 88 Danish and 79 (3) German constitution, respectively, can do the trick their founders expected them to do. The articles see to it that with respect to certain constitutional clauses no constitutional power to alter the constitution is constitutionally created. To put it otherwise, that power is not conferred on law-makers by the constitution. Therefore there is a sense in which “we” can impose absolute constitutional limits on constitutional powers.⁵

⁴ On the role of the rule of rule change see Herbert L. A. Hart, *The Concept of Law* (Oxford, 1961), p. 41. On an instructive game of rule change see “nomic” in Douglas R. Hofstadter, *Metamagical Themas* (New York, 1985).

⁵ On this issue confer the following: Peter Suber, *The Paradox of Self-Amendment* (New York, 1990); E. Gárzon-Valdés, “Die gesetzliche Begrenzung des staatlichen Souveräns,” *Archiv für Rechts- und Sozialphilosophie*, 68/4 (1983): 431–47; N. Hoerster, “On Alf Ross’s

More generally speaking constitutional norms serve as basic “power-conferring rules.” They specify the powers that individuals according to the constitution can exercise. It is obvious that constitutional rules—if they can create powers at all—by specifying constitutional powers and bestowing them on individuals can at the same time do both, create and limit powers.⁶ The powerful are powerful because there are sufficiently many sufficiently influential individuals who are willing to follow constitutional rules that single them out as authorized to give orders or to enact new rules (as has been very clearly seen in Hume, “Of the first principles of government”). In that sense the powerful are powerful because they are obeyed. Vice versa, the powerful are obeyed also because they are powerful. If for instance some person X is powerful because some loyal troops execute the orders of that person (out of habit or other motives) then another person Y will tend to obey X because X is powerful. But in the latter case the power of X is also based on the obedience of the troops due to their acceptance of certain power conferring rules. These rules create that power because the troops use them as standards guiding their behavior. Moreover, as long as troops or other individuals follow their leaders because of rules that specify that and to what extent they should follow them the inclination to obey is also limited by the power-conferring rules themselves.

These are elementary philosophy of law insights that seem to support the view that constitutions do play a role in the power game in society. With respect to social statics it is obvious that constitutions are effective to some extent. But Buchanan’s optimism extends to constitutional dynamics. And this is a much more demanding assumption. For, the presence of rules of rule change or amendment, that is norms to alter norms, by which “we” enact new constitutional rules must quite obviously weaken the constraining effects of the constitution. If new rules can be enacted according to power-conferring rules new power-conferring rules can be created and thereby new powers. Likewise old powers can be eroded and abolished by constitutional alterations.

Buchanan is aware of this problem. But he does not believe that the possibility of “self-amendment” would completely erode the constitution’s ability to constrain. (Self-) Constraint is possible even though self-amendment can dynamically lead almost anywhere. More specifically, for Buchanan, it matters not only in a static sense but rather in a dynamic one, too, whether we have a three quarters, two thirds majority or simple majority requirement, whether or not requirements like the principle of generality of norms apply⁸ or whether or not constitutional constraints

Alleged Puzzle in Constitutional Law,” *Mind*, 81 (1972): 422–6; H. Kliemt, 1978, “Can There be Any Constitutional Limits to Constitutional Powers,” *Social Science Review*, 4: 99–108 ; J. Raz, “Professor A. Ross and Some Legal Puzzles,” *Mind*, 81 (1972): 415–21; and A. Ross, “On Self-Reference and a Puzzle in Constitutional Law,” *Mind* 78 (1969): 1–24.

⁶ See again Hart, and very instructively Norman Barry, *An Introduction to Modern Political Theory* (London and Basingstoke, 1981).

⁷ In: David Hume, *Essays. Moral, Political and Literary* (1777; Indianapolis, 1985), p.32.

⁸ See on this James M. Buchanan and Roger Congleton, *Politics by Principle, Not Interest: Towards Nondiscriminatory Democracy* (New York, 1998). Also confer Chaim Perelman, *Über die Gerechtigkeit*, vol. 45 of Beck’schen Schwarzen Reihe (München, 1967).

like the balanced budget requirement are imposed. Like Ulysses can choose to be bound to the mast or to constrain himself by this measure “we” can utilize the constitution to bind and to constrain our future selves.⁹

In sum, Buchanan is well aware that people could always act contrary to what is written into the constitution but from his point of view it makes a behavioral difference what is written into it. He is an optimist concerning the control of our constitutional fate by constitutional means. Of course, how effective constitutions will be depends on the power distribution in society. But power in society is not independent of the constitution. It is affected by it as well as by the institutions that are responsible to make the constitution effective while—like stones in a Roman arch—themselves being supported by the constitution.

Buchanan’s Optimism Concerning “Democratic Constitutional Religion”

If the preceding Humean and Hartian view of the role of power-conferring rules is adopted there must be individuals who due to some kind of intrinsic motivation are willing to follow the precepts of rules or of the constitution. They must be willing to use the rules as standards or guides of action that “make” actions right or wrong rather than merely predicting consequences of actions. The classics would have said that those individuals obey the constitution because they are of the *opinion* that they should since it is “on opinion only that government is founded”.¹⁰ Now, if opinions supporting government must be derived from non-governmental experiences then all the well-known concerns about a possible erosion of values by the anonymous interaction in large government sponsored groups will creep up. Whether large government sponsored markets can create the virtues on which they themselves must rely has been contested by foes of capitalism again and again. Though this argument against capitalism does not seem particularly convincing the same issue comes up again in case of democracy and democratic virtues with perhaps some more plausibility.¹¹ In the ongoing game of life constitutional values would be eroded if the interaction itself would not re-enforce its own rules. The opinions

⁹ See on this as a foundational issue of constitutional political economy in general H. Geoffrey Brennan and Hartmut Kliemt 1990, “Logo Logic,” *Journal of Constitutional Political Economy*, 1, /1, pp. 125–7.

¹⁰ Hume, p. 32.

¹¹ On this discussion see Michael Baumann, *Der Markt der Tugend: Einheit der Gesellschaftswissenschaften* (Tübingen, 1996). There is also an English version available: *The Market of Virtue*, vol. 60 of Law and Philosophy Library (Dordrecht, 2002). For a formal, evolutionary game model approach confer the following three articles: Werner Güth and Hartmut Kliemt, “Competition or Co-operation: On the Evolutionary Economics of Trust, Exploitation and Moral Attitudes,” *Metroeconomica*, 45 (1994): 155–87; Werner Güth and Hartmut Kliemt, “Evolutionarily Stable Co-operative Commitments,” *Theory and Decision*, 49 (2000): 197–221; and Werner Güth, Hartmut Kliemt, and Bezalel Peleg, “Co-evolution of Preferences and Information in Simple Game of Trust,” *German Economic Review*, 1 (1999): pp. 83–110.

For a simulation approach confer the following two articles: R. Schüssler, *Kooperation unter Egoisten* (München, 1990) and Viktor J Vanberg and Roger Congleton, “Rationality,

supporting the constitution must be created endogenously and thus to some extent by the constitution itself while the constitution is only in existence because it is supported by “opinion” (and, for that matter, “virtue”).

More specifically, in case of a written constitution there must be sufficiently many sufficiently influential individuals (as Marsilius¹² already had it) who follow the constitutional text as they understand it if the constitution is to prevail. By using it as a standard and guide they let the text exert some influence on social and political life in the range to which the constitution applies. But it is also the felt beneficial effect on social life that can induce individuals to be of the opinion that the constitutional rules deserve to be followed. Moreover, for the constitution to be sustained the beliefs or opinions supporting allegiance to the constitution must be supported by the constitutional experience while at the same time that experience could not emerge without the appropriate opinions being in place. Again it is helpful to think of the Roman arch in which each stone is in its place only because the other one is. To put it slightly otherwise rules *and* opinions must jointly form a kind of equilibrium solution to the “game of constitutional life” if the constitution is to be maintained over any extended period of time.

Let us call an equilibrium of the previously sketched kind a “constitutional belief equilibrium” and the belief part of that system a “constitutional religion” as opposed to the rule part which may be called the “constitutional rules.” It is a most interesting issue whether a constitutional belief equilibrium can sustain a *democratic* constitutional religion. As far as this is concerned Buchanan is again an optimist. He believes that a broadly democratic outlook can go along with the maintenance of constitutional constraints. The opinion that legitimacy is bestowed on rules by creating them in majoritarian voting procedures is in itself not necessarily implying that in the end unconstrained majoritarian rule will result. To put it slightly otherwise Buchanan is of the opinion that rule of law and majoritarian democratic religion can over the long haul not only co-exist but even mutually support each other in constitutional belief equilibrium.

The belief that optimism concerning democratic constitutional religion is justified is in itself part of the constitutional religion of our time. At least we are not anymore used to challenge the opinion that democracy and democratic legitimacy are desirable. The view that the very belief in democratic legitimacy and the “right making characteristics of agreement” can be harmful for the rule of law and the ability of the constitution to serve as a constraint is quite alien to present Western constitutional thought. But there are some dissenters, skeptics or even pessimists in this regard. Such a skeptical and even pessimistic view is paradigmatically incorporated in Anthony de Jasay’s work to which I shall now turn.¹³

Morality and Exit,” *American Political Science Review*, 86 (1992): 418–31; Vanberg and Congleton (1992).

¹² Marsilius, *Defensor Pacis* (1324; New York, 2001).

¹³ Works by Anthony de Jasay on which I shall rely here are: *Social Contract – Free Ride* (Oxford, 1989); *The State: “On Redistribution,” Advances in Austrian Economics*, 2 (1995): 169–94; “Justice as Something Else,” *The Cato Journal*, 16 (1996): 161–73; *Choice, Contract, Consent: A Restatement of Liberalism*, vol. 30 of Hobart Paper Back (London,

Varieties of Constitutional Skepticism in Jasay

More often than not Anthony de Jasay dismisses constitutional controversies as quite irrelevant. He argues for *pessimism concerning constitutional content*, *pessimism concerning constitutional effectiveness*, and *pessimism concerning “democratic constitutional religion”*. It seems, however, clear that constitutions matter to some extent. They exert some influence on how social life unfolds. Still what that influence exactly amounts to is unclear. Unless we make more precise what the possible effects of constitutions might conceivably be we do not know much about the several possible forms of pessimism. So let us try first to state some relevant issues somewhat more precisely.

Jasay’s Pessimism Concerning Constitutional Effectiveness

Assume that at a given time t the rules of the game of social life can be split in a constitutional part C_t containing man made constitutional rules, other artifacts A_t or rules of the game that could be otherwise would people behave otherwise and, finally, the “non-constitutional or natural rules of the game” G_t that would not be otherwise if human actors acted otherwise.¹⁴ Assume further that the triple (A_t, C_t, G_t) characterizes interaction as a completely specified game in the sense of modern game theory; that is the preferences as well as probability distributions over nature’s (fictitious or real) moves all are specified as rules of the game.

If constitutions make a difference for behavioral outcomes then for some $C_t, C_t', C_t \neq C_t'$ there must be different outcomes at least for some A_t, G_t . That (A_t, C_t, G_t) and (A_t, C_t', G_t) can be behaviorally different at some time t for some $C_t, C_t', C_t \neq C_t'$ seems obvious. A more interesting question emerges if we restrict attention to equilibria. Then constitutions make a difference if (A_t, C_t, G_t) and (A_t, C_t', G_t) have different equilibrium solution sets at some time t for some $C_t, C_t', C_t \neq C_t'$. If this were not the case then the equilibria of the fully specified games should completely depend on the rules (A_t, G_t) . In other words if constitutions would not matter at all then at all times t the equilibrium results of (A_t, C_t, G_t) would be predictable once (A_t, G_t) is known. But again this seems too extreme. Hardly anybody could seriously deny some effects of C_t, C_t' on the results of interaction at some time t . Even Anthony de Jasay would not deny that. At least in day-to-day politics which constitutional rules we have is clearly of some importance. Whether at some time t there is a democratic voting mechanism in place or not makes a difference over the short run. Therefore any substantial divergence of opinion must be related to the fact that constitutions themselves can change dynamically through time. Seen in this light the issue is whether a constitution can keep society over the long haul from converging to a *long run equilibrium* as determined by (A_t, G_t) and possibly G_t alone.

1991); *Against Politics: On Government Anarchy and Order*, vol. 7 of Routledge, *Studies in Social and Political Thought* (London and New York, 1997).

¹⁴ See on Jasay’s partly diverging views on such matters in particular: “On Redistribution,” *Advances in Austrian Economics*, 2 (1995): 169–94.

Reframing constitutional skepticism as a thesis about the dynamics of constitutional development over the long haul we cannot dismiss it as outrageously off the mark. Quite to the contrary, the view that with respect to the fundamentals of politics G_t is of overwhelming importance has been maintained by many scholars. Montesquieu's views on the influences of climate on political order as well as those of Eric Jones's on the topography of Europe as conducive to the emergence of interstate competition and the evolution of free Western constitutions are of this type.¹⁵ Likewise the Marxist view that (A_t, G_t) is decisive for the development of a society would also fit if C_t is taken to contain only constitutional political rules in the more technical sense while property rights and so on are contained in A_t . (If we take it that only G_t is fixed over the long haul as G while A_t and C_t develop through time we would have $(A_t, C_t, G_t) = (A_t, C_t, G)$.)

Such a view would not imply that the (out of equilibrium) development path of, say (A_t, C_t, G) and (A_t, C'_t, G) , $C_t \neq C'_t$, would be independent of C_t, C'_t . But the thesis that such systems would all in the end dynamically converge towards political outcomes that are characterized by the same kind of equilibria cannot be dismissed. There are no decisive experiences that could answer the related "grand questions" definitely. But once the problem is stated in more precise terms as a question about the limiting stable states of systems (A_t, C_t, G_t) that unfold through time, it seems quite clear that there are so many varieties of skepticism and optimism with respect to constitutional effectiveness that there is almost a continuum of views. As far as the efficacy of changes in C is concerned the difference between the constitutional optimist and the constitutional pessimist will be a matter of degree then. Brought about at time t , for instance by an external shock, how long will the constitution C_t lead the dynamics away from its long run equilibrium?

The pessimist will think in shorter the optimist in longer terms here. Moreover, the pessimist can draw attention to the experience of the former communist regimes with "paper constitutions" that had no institutional impact while the optimist will point out that the Western experience shows that once certain institutions are in place constitutions matter. In a stable setting of independent institutions, in particular constitutional courts, the constitution is of some importance. For the words of the constitution matter to the courts even if they have the power of (re-)interpretation.

So in the short run under an existing stable institutional structure constitutions do matter. Still, Jasay does not believe that constitutional means will be effective in the long run. Why that is so becomes clearer if we turn to his pessimism concerning democratic constitutional religion.

Jasay's Skepticism Concerning "Democratic Constitutional Religion"

It is not widely acknowledged that of all modern political philosophers Hobbes was about the first to point out the central role of conviction systems or opinion in the daily power game: "... the power of the mighty hath no foundation but in the opinion

¹⁵ See E. L. Jones, *The European miracle* (Cambridge, 1981). For a related view confer Nathan Rosenberg and L. E. Birdzell Jr., *How the West Grew Rich: The Economic Transformation of the Industrial World* (New York, 1986).

and belief of the people . . .”¹⁶ More generally speaking it is wrong to assume that Hobbes thought beliefs do not matter. Likewise it is not true that Jasay thinks that beliefs do not matter. Beliefs can have effects on social reality. If people endorse democratic beliefs this can indeed have some devastating effects on the viability of restrained government. Also Jasay believes that the acceptance of certain principles in the population at large can restrain government if these “opinions” adopt the form of “taboos” or absolute “do nots.”

The crucial point for Jasay is that beliefs in the legitimacy of democratic decision-making do not amount to taboos that restrict the exertion of power. Quite to the contrary, once the belief in the legitimacy of majoritarian rule takes hold any system of rules seems doomed in Jasay’s eyes. It will inevitably tend to converge towards a state of affairs that maximizes payoff for that majority coalition that stands to gain most from redistribution because in a process of offers and counter offers opportunity seeking individuals will seek and find that equilibrium.

The belief in majoritarian legitimacy is subversive for any restraint on the exertion of power in society. This is so because it assigns a fundamental justificatory role to agreement. Therefore, in particular all liberal theories that seek to base the legitimacy of collective decision-making and thus coercion on some form of agreement will put all restraints on collective choice at risk. Even unanimous agreement is doubtful if it is assumed to have right-making characteristics. For in that case what is right could conceivably be changed and be substituted by an alternative that is right as well. For instance if for a while all are agreed that A should be the norm they can decide on non-A to be “right” afterwards. Nobody would think of this possibility if it comes to taboos. Real taboos are beyond agreement or disagreement. Thus, even though it may well be that the content of taboos is conventional in some sense (it could conceivably be otherwise) it is also true that taboos are not perceived as something that can be altered arbitrarily in decisions.

In short, there is no rule of rule change for taboos. They are like the aforementioned articles 79 (3) and 88 without being deliberately put beyond alteration. A taboo is different in status and social role from agreement in a way that moves it closer to natural facts of the world than to conventions. “Knowledge” of a taboo or at least the taboo may not be a matter of reason alone but knowledge of the taboo is knowledge of something perceived as unalterable.

A comparison between taboos and other accepted “truths” might make this clearer. On the one hand, it would be absurd to say that all scientists agree that claim X is true but could make non-X true by their agreement. This shows that in science agreement is indicative rather than constitutive of the truth. The truth is seen as completely independent of what humans do or do not. On the other hand, it makes sense to say that the social contract is X *because* all agreed on X and that it would be constitutive for non-X to hold if all agreed on the negation of X. A taboo is an intermediate case. Agreement is not perceived as being constitutive for it to hold. But it is also embodied in social practices rather than holding independently of what human individuals might do.

¹⁶ Thomas Hobbes, *Behemoth or The Long Parliament* (1682; Chicago, 1990), p. 16.

A genuine taboo that would tell people that certain things are beyond their agreement could conceivably restrain the potential scope of government. Such a constitutional (civil) religion might allow for some kind of limited government. But once the notion of agreement as *constitutive* for “right and wrong” in matters political is introduced there is no restraint on conceivable agreement anymore. This could not do much harm as long as unanimity were required. In view of the hold out problems of our world full unanimity is possible only in some fictitious world and has to be given up for pragmatic reasons. Yet once full unanimity is substituted by some majoritarian rule or other with less than full consent coercion on a broader scale becomes viable.

Politics becomes particularly dangerous in Jasay’s eyes if it is backed up by a democratic constitutional religion that, first, frames agreement as constitutive for right and wrong in matters political and, second, bestows legitimacy of (unanimous) agreement on less than unanimous agreement. Buchanan’s and Tullock’s *Calculus of Consent* is an exercise of that kind.¹⁷ It renders acts of coercion seemingly more agreeable by looking at them as if being the outcome of some deeper conceivable agreement. So this book is albeit mostly implicitly the target of Jasay’s critique.

Jasay certainly acknowledges that laying out “the logical foundations of constitutional democracy” in the *Calculus* is an admirable exercise of economic logic as applied to public choice. But this exercise, insists he, does not change the coercive nature of all genuine collective choice. Moreover, concealing that coercive nature in a democratic constitutional religion that insists on the distinction between forms of coercion that are acceptable because they could conceivably be the outcome of agreement and forms of coercion that are not is dangerous in Jasay’s eyes.

In particular the constitutional democratic view that it is “us” who impose rules on “ourselves” by centralized rule enactment in a democratic state is rejected by Jasay. Under such a democratic conviction system the very existence of a rule of rule change makes constitutional constraint extremely precarious. Since new rules can constitutionally be enacted and since there are almost no constitutional taboos—or at least the aforementioned articles 88 Danish and 79 (3) German constitution—a democratic constitution becomes, with Anthony de Jasay’s words, “a chastity belt to which the lady holds the key.” With a democratic constitutional religion the rule of rule change will be utilized such that in the last resort the constitution can and will be manipulated to the advantage of particular interests. If due to a democratic constitutional religion the legitimacy of majoritarian decisions goes more or less unchallenged in a political system then the system will almost regardless of the initial constitution converge to a “churning state” engaged in the most massive forms of redistribution.

Jasay’s Pessimism Concerning Constitutional Content

Anthony de Jasay does not believe that constitutional measures can in fact prevent that the churning state will eventually emerge if majoritarian constitutional religion

¹⁷ James M. Buchanan and Gordon Tullock, *The Calculus of Consent* (Ann Arbor, 1962). Also in: James M. Buchanan, *The Collected Works of James M. Buchanan*.

along with majoritarian rules of decision-making are in place. As far as written constitutions do matter at all their content will dynamically be adapted to serve the interests of particular groups. The constraints imposed by unwritten principles by moral ideals as prevalent in philosophy and embodied to some extent in moral discourse will not do either. For instance, Jasay is very pessimistic with respect to the possibility that moral principles of generalization might help to restrain democratic politics. He does not believe that the veil of uncertainty and related means of inducing agreement at least conceptually or in theory will do in practice. Fixing constitutional content is, after all, politics and as such subject to all the processes of rent-seeking that characterize politics in general democratic and democratic constitutional politics in particular.¹⁸

The “rule of submission” contained in democratic constitutional belief systematically misrepresents majority rule in a way that makes it even more dangerous than without such an ideology. According to democratic ideology majority decisions are not simply representing the interests of the majority but carry special moral weight as indirectly authorized by the public at large. Whereas Buchanan thinks that norms of mutual respect can be established in public discourse such as to constrain special interest politics Jasay does not deem this a viable option. It may well be that particular interests cannot come forward openly in a well-organized modern democracy. In that regard norms of generalization and even traces of practical social contractarianism are felt in practical politics. But even if in this sense notions of unanimity or at least the interest of all are not merely theoretical but rather practical options Jasay does not believe that they will impose real constraints on what can constitutionally be written into a constitution and a legal order. Quite to the contrary in the end the democratic ideology will make life easier for particular interests since they can present the particular as expressing the general will. The system will eventually converge towards a long run equilibrium as predicted by a power structure in society that is more fundamental than the surface structure of the constitution.

Keeping the Balance?

Who is right – the optimist or the pessimist? I think that this is an open question. It is one of Jasay’s great merits to insist and to demonstrate that this question has not been settled once and for all by the enlightenment and its aftermath. Rules of rule change in the sphere of law and notions of agreement and contract in the sphere of opinion may involve some grave risks. In this regard Jasay’s points are well taken. On the other hand, sometimes he seems to over-state certain points.

For instance, even if a constitution with a majority or super-majority rule of rule change is like a chastity belt to which the lady happens to hold the key in some sense this does not imply that it is useless. As in the case of the chastity belt itself it may matter how swiftly things can be done. In the charming scene of the lady it may

¹⁸ See on rent-seeking: Charles K. Rowley, Robert D. Tollison, and Gordon Tullock, *The Political Economy of Rent-Seeking* (Boston, Dordrecht, Lancaster, 1988) and Gordon Tullock, “Rent seeking,” in C. Rowley (ed.), *Property rights and the limits of democracy* (Hants, 1993).

matter for final outcomes whether the key is dangling from the bedpost ready for instant use or whether it must be retrieved from the basement or a bank safe where it is stored away. If there is no instant gratification of her desire, if the lady cannot give in immediately to the temptations of the moment she may have some second thoughts preventing her from following her immediate inclinations. In short, if time and delay do matter in our personal lives why not in politics?

For instance we know quite a bit about preference reversals due to time-inconsistencies brought about by non-exponential discounting and the like.¹⁹ We know about these problems but we also know that cooling off we may be much more inclined to follow generalized interests than the exigencies of a moment. From a distance we may decide quite differently than under immediate and direct impressions and temptations.

I suppose that even constitutional pessimists like Jasay—except for some unguarded moments of frustration with the rough and tumble of western democratic politics—would not seriously doubt that constitutions can have some impact on day to day politics. The real issue is about long run prospects and about whether or not democratic political systems could conceivably reform themselves with democratic means. In view of the mechanisms of modern democratic politics we might be inclined to become very pessimistic about the prospects of constitutional reform of constitutional democracy. To restrain government and to prevent the decline of the polity towards a limiting state that serves the short run interest of the median voter and nothing else may be a task for Sisyphos yet a thinker like Buchanan would insist that it is worth trying, that the only way to make the world a better place is to act upon the hypothesis that it in fact can be made so and to act according to some vision of the good life. As Kant who insisted that it is our obligation to act upon the “transcendental” presumption that a morally good life is possible, Buchanan would think that we are under a moral obligation to approach the world as if it could be made a better place. Jasay on the other hand is clearly of the opinion that the only service that intellectual critics like he can render to improve politics is disillusionment about the long run perspectives of democratic politics. We can make the world a better place only by pointing out deficiencies and nothing is more risky than to be too forgiving and too optimistic.

The Final Word

Let me end with an extended citation of the political philosopher who had the deepest insights in the mechanisms of politics I am aware of. Whether that be a reason for constitutional optimism or pessimism seems an open question. But it seems beyond doubt to me that this passage from Hume’s essays sums up what we can say “of the first principles of government” (as laid out in Hume’s fourth essay²⁰):

¹⁹ See for instance: George Ainslee, *Picoeconomics* (Cambridge, 1992); Jon Elster, *Ulysses and the Sirens* (Cambridge, 1979); Jon Elster, *Sour Grapes* (Cambridge, 1983); and by the same author, *The Multiple Self* (Cambridge, 1987).

²⁰ Hume, *Essays. Moral Political and Literary*.

Nothing appears more surprizing to those, who consider human affairs with a philosophical eye, than the easiness with which the many are governed by the few; and the implicit submission, with which men resign their own sentiments and passions to those of their rulers. When we enquire by what means this wonder is effected, we shall find, that, as FORCE is always on the side of the governed, the governors have nothing to support them but opinion. It is therefore, on opinion only that government is founded; and this maxim extends to the most despotic and most military governments, as well as to the most free and most popular. The sultan of EGYPT, or the emperor of ROME, might drive his harmless subjects, like brute beasts, against their sentiments and inclination: But he must, at least, have led his *mamelukes*, or *praetorian bands*, like men, by their opinion.

Opinion is of two kinds, to wit, opinion of INTEREST, and opinion of RIGHT. By opinion of interest, I chiefly understand the sense of the general advantage which is reaped from government; together with the persuasion, that the particular government, which is established, is equally advantageous with any other that could easily be settled. When this opinion prevails among the generality of a state, or among those who have the force in their hands, it gives great security to any government.

Right is of two kinds, right to POWER and right to PROPERTY.

Anthony de Jasay, the pessimist, does not believe that the right to property will be respected by democratic politics as something beyond politics. Buchanan as constitutional optimist thinks that property rights can be respected by a democratic state and thus politically be put beyond day-to-day politics. Buchanan is optimistic that redistribution on the level of the constitution can be kept apart from redistribution in day-to-day politics and therefore may be a Pareto superior move whereas Jasay is pessimistic in that regard. It does not take pessimism to come to the conclusion that an intellectual resolution is impossible here. It does not take optimism to expect that the intellectually inspiring controversy between the constitutional optimists and the pessimists will go one for times to come and will continue to render deep insights in the “*conditio humana*.”

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PART V
Conclusion

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Chapter 10

Anthony de Jasay—A Salute

IMD Little

I have known Tony Jasay intermittently for 50 years after his arrival at Nuffield College, Oxford in 1955. His passage from Hungary where he was born in 1925 to Oxford was unusual. I have never asked him about his early life and my only sources have been a very slim file in Nuffield College, and a brief biography found on the Internet. I did not want to probe further. Tony might want to write his own autobiography, like many octogenarians.

The history of Hungary before he left at the age of 23 suggests that he may not have had a very tranquil or rewarding educational background. The biography mentions Tony taking a degree in agriculture. It does not sound as if he attended one of the prestigious gymnasia in Budapest, whose pupils, a generation earlier, included an amazing array of Nobel laureates and other intellectual stars. I do not know whether these schools continued to thrive in the war years when Hungary, under the dictator Horthy, was part of the Axis.

In 1944 the Germans made a last stand in Budapest against the advancing Russians, and the city was largely destroyed. Hungary became a satellite communist state. Tony reportedly worked as a freelance journalist, an activity that resulted in his escaping to Austria in 1948, together with his wife Valerie. I have no information on how they supported themselves there before emigrating to Australia in 1950. Why Australia? The destination of Perth suggests to me that there was not much choice.

I recall Tony telling me that he had a routine clerical job in Perth while working part time for a BA at the University of Western Australia. This he obtained, also winning a postgraduate studentship. Meanwhile, he had had the courage and enterprise to send an article he had written to Sir Dennis Robertson at Cambridge who was most impressed by its quality, especially given its unpromising provenance. Sir Dennis knew about Nuffield College studentships and wrote to the Warden suggesting Jasay as a strong candidate. The college would not elect students without an interview, and Tony's Australian studentship can scarcely have been enough to justify a speculative trip. But Tony was always prepared to take serious risks. Anyway, he came and was elected. We were impressed not only by his economics but also by the fact that he spoke excellent English, interestingly with no trace of an Australian accent. He and Valerie, together with their young son, took up residence in Oxford in 1955.

His proposed research was in the area of money and banking behavior. More generally, he thought that the analysis of firms' behavior ran too much in terms of flows rather than stocks. Balance sheets were as important as profit and loss accounts. I believe his university supervisor was Sir John Hicks; any supervisory role I had was avuncular rather than intellectual.

After two years he was selected for a research fellowship for five years. During these years at Nuffield he published a dozen articles in leading journals, mostly on macroeconomic monetary policy. But they were not focused enough for a doctoral thesis. A doctorate was not a prime goal for him, nor at that time a career necessity. Anyway, at the end of the period, around 1961, he was looking for an Oxford college fellowship in economics. He was twice turned down, the college preferring a candidate who was, in my opinion, distinctly inferior. I surmised that his further chances were slim. Thomas Balogh was a force in Oxford at the time, and would almost certainly be consulted about a young Hungarian economist whom he would have considered to be unforgivably right wing. Tony gave up the quest for an academic appointment. Typically, only the best was good enough, and that was an Oxford or Cambridge fellowship (I do not remember whether he tried Cambridge).

He had for some time been interested in monetary management, and would certainly have preferred a good position in the City to teaching in a second-rate university. However, nothing suitable seemed to be on offer in London, and so he joined Alexanders, a small merchant bank in Paris, in 1962. I lost touch with him until I went to work for the OECD from 1965–67.

Tony was still married to Valerie, but they separated while I was still in Paris and Isabelle appeared on the scene. Sometime in the late 1960s Valerie and Tony divorced and he married Isabelle. In the long period from 1967–84, I and my wife saw relatively little of the Jasays. We stayed with them occasionally, and they with us, but I am very vague about dates. Tony left Alexanders and set up on his own, running what would now be called a hedge fund. I am not sure whether he had any clients other than himself. He had a strategy, dealing in derivatives, which was potentially highly profitable but also very dangerous. Not very surprisingly he made a lot of money, but then lost most of it. He was a risk addict, an attitude which has also, I believe, characterized his writing on political philosophy.

For a few years after leaving Alexanders, Tony continued to be based in Paris. But later they moved permanently to the very attractive property in Normandy which Isabelle had inherited, and Tony worked from there. He and Isabelle also produced a new family, a daughter and a son.

I guess it was in Normandy, probably in 1983, that I first saw drafts of *The State*. I was amazed. Nothing in Tony's background, or in my chats with him over the years, presaged the production of a profound work of political philosophy. Its most startling and important sentence is the first: "What would you do if *you* were the state?" I expressed surprise that political theorists had almost totally failed to think of politics from this point of view. But Tony assured me that this was the case. The question asked led him to break away from obsession with the social contract, an idea which had dominated political theory since Hobbes, and to explain the continuous growth of government and collective decision-making. Democratic procedures may contain the seeds of their own demise; neither they nor constitutions are any guarantee against autocracy and tyranny.

I was also impressed with the multilingual erudition and historical knowledge shown in his demolition of contract theories from Hobbes, through Locke, Rousseau, Marx and Mill, to Hayek and Rawls. How was this possible from his country seat, especially as his personal library was very modest? Unconvincingly he explained

that he had had occasion to make a short social visit back to Australia, and that it was remarkable how much one could read in a week if there was absolutely nothing else to do.

The State was no flash in the pan. It has been followed by 20 years of books and articles. The most positive title for this oeuvre might be “In Praise of Anarchy,” or more negatively “Towards a Minimal State.” Very wisely he never says exactly how minimal. There is no design for Utopia. History has been and always will be incompatible with a state set in stone. In his quest to combat the insidious encroachment of government, Tony treats one to a profound and much needed clarification of the meaning of all the important concepts of moral and political philosophy—rights, wrongs, and obligations; freedom and liberty; justice, fairness and equality; contracts and conventions. I have learned a lot from him: for instance, that “wrongs” is a more useful concept than “rights”; that rights must be conferred; that freedom is not a right; that justice is about protecting freedoms.

I think Tony believes that philosophy should be mainly, if not exclusively, about clarifying confusions that arise from the careless use of, or deliberate misuse of, language. There are echoes here of Gilbert Ryle (“systematically misleading expressions”), and even of Wittgenstein’s later philosophy. It is therefore not surprising that one of his main objects of attack has been the egalitarian contractarian theory of social justice dominant in political philosophy since Rawls’s *A Theory of Justice*. Inequality may be undesirable, but it is not unjust. To claim that justice has anything to do with equality is to seek influence by misusing language. It is similar to dictators describing their regimes as peoples’ democracies. Tony’s writings should have killed the concept of social justice. Ironically, only a few weeks ago Oxford University announced the creation of a center for the study of social justice, thus protecting its reputation as the home of lost causes.

Tony is as deeply opposed to utilitarianism as he is to contractarianism. It is an invitation to governments to meddle and tinker; making changes for which the supporting welfare judgments have no objective basis, being essentially value judgments which have no truth values.

I have much sympathy with this position, but believe it is too rigid. Although there are no agreed criteria to determine the truth of a statement about the welfare of the people, nevertheless facts are relevant. A welfare claim could be absurd, or convincing. I do not think more is needed for it to make sense to believe that a government’s aim should be utilitarian. If I have to renounce a two-valued logic to maintain this, so be it.

Tony’s continuing publications in the past ten years could be distilled into another important book. But his eyesight has deteriorated seriously over this period, and he may not now be able to undertake a book-length work. He can read only a page or two an hour. Writing is also handicapped because he cannot glance to see what he wrote a paragraph or so earlier, as I think most writers habitually do. Nevertheless, he travels to conferences, conducts seminars, and writes articles. I have been impressed by the courage and fortitude with which he surmounts this handicap, there being no sign of any deterioration in the extraordinary clarity and incisiveness of his work. Long may it continue.

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