Coercion, Authority, and Democracy

by

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Author's Declaration

I hereby declare that I am the sole author of this thesis. This is a true copy of the thesis, including any required final revisions, as accepted by my examiners.

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Abstract

As a classical liberal, or libertarian, I am concerned to advance liberty and minimize coercion. Indeed on this view liberty just is the absence of coercion or costs imposed on others. In order to better understand the notion of coercion I discuss Robert Nozick's classic essay on the subject as well as more recent contributions. I then address the question of whether law is coercive, and respond to Edmundson and others who think that it isn't. Assuming that the law is in fact coercive, there is still a question,as with all coercive acts, as to whether that coercion is justified. Edmundson thinks that this places a special burden on the state of justifying its existence, whereas it simply places the same burden on the state as anyone else. What I reject is the longstanding doctrine of *Staatsräson*, namely that the state is not subject to the same moral rules as its subjects. With respect to the relation of morality to law, Edmundson thought that another of the fallacies of which philosophical anarchists were guilty was that of assuming that there was a sphere of morality where law had no business. On the contrary, our concern is with spheres of law which appear to have little to do with morality, which is to say laws against wrongs of the *malum prohibitum* variety, as opposed to wrongs which are *malum in se*.

I then turn to a matter with which Edmundson begins his study, namely how it is that states acquire the authority to do what they do, namely coerce their subjects. While the fact that the philosopher's stone of political obligation has proved rather elusive may mean that a legitimate state lacks the authority to demand obedience pure and simple, Edmundson contends that it can at the very least demand that we do not interfere in the administration of justice. I argue that this attempt to sidestep the justification of the authority of the state fails and that we seem in the end to be having to take the state's word for it that we must do X on pain of penalty P. Nor, as I go on to argue, is it any help to appeal to democracy to remedy a failed justification of the authority of the state. There either is a moral justification of state coercion in order to prevent harm to innocent subjects, or there isn't, and this holds,if it does, not only at the level of individuals, but also at the level of the state, regardless of its constitutional form.

After concluding that the attempts of Edmundson and others to refute the anarchic turn in recent political philosophy have failed, it would seem that the withering away of the state foreseen in Marx's eschatology is not as improbable as maybe it once appeared.

Acknowledgements

One of the benefits of leaving it till later in life to set down some thoughts about the state is that one has a chance to listen to many eminent people who in some way or another have influenced what I have had to say here. It also means that the list could be very long indeed, so I shall be rather selective in those that I mention. At least one predates my arrival in Canada 40 years ago, namely, Julius Stone who lectured at Sydney on "States, Men and International Justice." A decade later, I was fortunate enough to be offered a SSHRC fellowship at Oxford where I heard Ron Dworkin and Charles Taylor on liberalism, John Mackie on Rawls, John Rawls himself on Sidgwick, and first learnt something about prisoners' dilemmas from Derek Parfitt. Dinner meetings of the Univ. Bentham Society gave me the opportunity to meet such luminaries as A.J. Ayer, Elizabeth Anscombe, Gareth Evans, John Finnis and Saul Kripke.

In more recent years I have attended many interesting gatherings held under the auspices of the Social Philosophy and Policy Center at Bowling Green State, notably "Natural Rights Liberalism from Locke to Nozick." I was also grateful to have the opportunity to discuss the proposal for the present work at the Austrian Scholars Conference at the Mises Institute in 2005. I have also benefited from discussions with visiting scholars in the Waterloo Philosophy Department such as Daniel Shapiro, John Kekes and Russell Hardin. Indeed I am grateful to the Department for their help and encouragement when I decided to use my retirement to pick up from where I had left off many years ago.

Special thanks are due to my supervisor, Jan Narveson, who in his own retirement still sets a pace I have a lot of trouble keeping up with. I have been greatly influenced by his work both in Philosophy and chamber music, where his celebrated series offers some of the best music to be heard anywhere. Thanks also to fellow student, Ethan Wilding, who helped me overcome my rudimentary computer skills; and to my readers Jack Sanders, Brian Orend and Colin Farrelly, who had to contend with a longer than average essay. Finally, my ever patient family who tolerated the various research episodes I managed to fit in to my teaching career.

Contents

Chapter 1

Introduction

In this thesis I argue that the state is a coercive order and that much of its use of coercion is unjustified. Many assume that the first claim that the state is coercive is quite uncontroversial. However, William Edmundson, to whose work much of my discussion is directed, denies this claim, holding that it is one of the fallacies to which those like me, who favour some version of anarchism, are prone. Nor is Edmundson alone in rejecting the coerciveness of the state. Following Raz who thought it important not to assimilate the question of the authority of the state to that of the justification of coercion, Green also denied that the state was essentially coercive, asserting rather that what was distinctive about the state was "its comprehensive claim to legitimate authority"[1988, 151], which he in turn rejected.

As John Lucas once pointed out, coercion itself is a rather difficult notion [1985,56], so I devote a fair bit of Chapter 1 to an exploration of it. As a basis for this discussion I use what many have characterized as Nozick's classic article, [1997]. which as it turned out served as the prolegomenon to his much celebrated later work. In the latter part of the chapter I take up Edmundson's rejection of the thesis that the law is coercive. While I have little quarrel with his rather brief account of coercion, I fail to see why it cannot apply to law, and in fact argue that it does.

Edmundson distinguishes two sorts of law, *malum in se* or those things which morally we would likely prohibit, and *malum prohibitum* or those which are illegal merely by dint of the fact that a legislature has seen fit to prohibit them. Indeed it is the latter group which clearly illustrate the coerciveness of law, since but for the law they would not be proscribed, and as Edmundson puts it, it is widely thought that "until the state carries its burden of justifying them, they are presumptively illegitimate" [1998, 110]. We of course think that the burden of proof rests with the state to show that coercion is justified in this second class of cases, which we will argue it fails to do.

In Chapter 2, having argued that the state is coercive, we then address the question of the state's authority to wield the coercive power it does. Such authority has often been thought to derive from consent of one sort or another. Although Green

thinks this the most promising of the reasons typically offered for acknowledging the authority of the state "the fact that there seems no compulsive account of its validity also means that it is not a general justification" [1988, 158, 185]. Others such as Hart and Rawls have tried to derive an obligation to the state from a principle of fairness, such that if others have submitted to authority in some sort of collective enterprise then one is obliged to do likewise. Again it is far from clear how the decision of some to accept a particular authority as legitimate in any way commits me to do likewise.

Given that a doctrine of political obligation does not appear to be immediately forthcoming–indeed the main question about it still appears to be much as Simmons thought it was a generation ago, namely whether there is any such thing [1979,3] — Edmundson decides to lower the bar from an obligation to obey to an obligation not to interfere in the lawful administration of the state. Even if our political overlords would be satisfied with a duty of non-interference, it is still not obvious why they are justified in demanding even that much. Edmundson thinks that there are good reasons for acceding to authority, or at least not interfering in its proper exercise, though in general it seems we just have to take the legislators' word for it that they struck the right compromise [1998,66]. Edmundson considers traffic laws a good example of the coordination achieved by people obeying stop lights and traffic cops, though even he has difficulty in believing that we have a duty to come to a definite stop at a stop sign in the desert with no other traffic in sight. Another issue raised by coordination is the fact that most of those that matter appear to have arisen spontaneously where needed and thus antedated their being legalized.

One of the issues that goes to the heart of the supposed authority of the state is the power to raise taxes to enable the state to do the good that it claims to be doing for us. Whereas Athenian citizens were exempt from taxes, and while the Romans reserved them for conquered peoples, modern states consider them to be a privilege of citizenship.We argue with Nozick that they are on a par with forced labour [1974, 169]and reject the claim that the supposed need for public goods in any way justifies such takings. Indeed, the ever expanding public domain is evidence first and foremost of official empire building, and, rather than providing much needed benefits to the populace, brings all the shortages and inertia we have tended to associate with centrally planned economies. In the case of state-provided medicine, for example, it should come as no surprise that even in major urban centres 20% or more of the Canadian population do not have a family physician, there are lengthy waiting times for surgery, or that Canada has only 60% of the advanced diagnostic imaging capacity of the average OECD country. Considerations of efficiency aside, there is simply no justification for monopoly provision of health, education, welfare or any of the other industries which the modern state has taken under its wing.

After addressing the main arguments latterly adduced in support of the state, including the need for law and order and to prevent our succumbing to prisoner's dilemmas, we turn in Chapter 3 to the question as to whether democracy might be pressed into service to provide the missing explanatory link. We argue again that it also fails to underwrite the authority of the state, for reasons in addition to the

inability of consent theories to provide any such warrant. In our view democracy is a rather superfluous sideshow which mostly serves to divert attention from the fact that the emperor is standing on the tribune wearing nothing but a laurel wreath. If democracy has been thought at times to be more than just a circus for the entertainment of the masses, it is because it has often been conflated in the popular imagination with freedom, notably the so-called freedom to elect our rulers. According to Rose Wilder Lane, lurking behind the notion of free elections is the "ancient Old World superstition" that "to control himself, an individual must control the government that controls him" Of course, as Lane goes on to point out, it really isn't possible for me to control my controllers so instead I get a vote, a majority of which will control the state which controls everybody. If I happen to be in the minority, as most of us are on some issue most of the time, this is a sacrifice I should be prepared to make "to the pagan God Demos, The Greatest Number" The notion of a majority often proves to be "a delusion" because what amounts to a casting vote breaks the tie. I wasn't just in recent years where a small number of votes decided the Presidential election; Lane reminds us that also happened in 1916 where the outcome changed when a few more votes trickled in from California. The myth that "individuals can control a Government that can control individuals" encourages the false belief that "Government is an Authority controlling men and responsible for their welfare" [1993, 208-212]. If there were any way to guarantee freedom it would be by narrowly limiting what governments are authorized to do, since as Jasay observes "the threat to people's liberty and property can just as well come from the sovereign people as from the sovereign king. The danger, then, lies in sovereign power and not in the character of the tenant who holds it" [1998, 208-209].

Not that we are attributing any great love of liberty to Joe the plumber — Mencken warned against that years ago [1926, 44-45, 147]. What interests the average Joe, as Jasay puts it, is which policy will give him the most money and take away the least [ibid., 218]. Of course it is always possible that once having voted, the state will actually take from Joe to give to Mary,[1] or that he will find himself falling victim to one of the myriad ways in which the sovereign state manages to coerce its subjects, such as being fined for plumbing without a licence, which is to say that licenced plumber John has been granted monopoly privileges at Joe's expense.

In conclusion I discuss the third of what Edmundson considers a fallacy typical of the reigning anarchist orthodoxy in political philosophy, namely the view that there is a sphere of morality where the law has no business. No doubt this has an anarchic ring about it, and while the Wolfenden Report may have made noises like this, it is not a view that I wish to spend a lot of time on. More interesting than the possibility of what Edmundson calls "delegalized morality" is what I call

[1] As Jasay again reminds us: "Neither the state nor its competitors have any money to offer which does not already belong to somebody in civil society. Neither can, therefore, offer to civil society a total net sum greater than zero. Yet each can offer to give some people some money by taking away at least that much from others" [ibid., 219].

"demoralized legality", or the *malum prohibitum*, law for law's sake, type of legislation, which serves other ends than what is independently morally wrong. While even under a more libertarian dispensation an individual may continue to enlist others to enforce his justice claims, we see no reason to rule out self-help, any more than present laws rule out self defence. The Criminal Code allows us in the case of an unprovoked attack to repel force by force provided that the force used is no more than is necessary to enable us to defend ourselves.

However, when it comes to its own actions, as typified by the *malum prohibitum* laws, which, Edmundson admits, constitute the bulk of modern legislation, the state has no compunction about exceeding the limits set by self-help and instead of merely coercing the coercers of the innocent, helps itself to coercing the innocent on a grand scale, which of course it is entirely unjustified in doing. Indeed its ability to do so gives new meaning to Anscombe's claim that "civil society is the bearer of rights of coercion not possibly existent among men without a government" [1981,147]. For this reason writers like Anscombe and Nozick will have difficulty in showing how state coercion differs from that of the Mafia, even though they remain convinced that there is a difference. Anscombe thinks we need governments, and our need is what confers authority on them to employ norms not available to ordinary mortals. The only problem with what amounts to the doctrine of *Staatsr'ason* is that it makes it hard to distinguish the Nazi state from supposedly just states, something Edmundson and Dworkin thought it important to do.

Anscombe also seems to have overlooked the fact that the agreement to grant authority to our would be overlords has to be worked out in the state of nature. The question then arises whether the contract with the agent authority is self-enforcing. If it isn't, then we will need a meta-agent to enforce the initial contract, and a meta-meta agent to see the agent below him performs as per the contract, which is no doubt what Juvenal was asking in his famous question. On the other hand if contracts are self-enforcing, it isn't clear why we need an authority in the first place, since as Green pointed out, it may be harder to produce than many of the goods which supposedly cannot be produced without it [1988,149].

In fact as Cuzán argued, government does not get into an infinite regress of meta-agents but acts as a "political anarchy, an anarchy inside power" [1979, 153]. To the extent that government operates under rules, they are mostly written by its operatives with little or no third party oversight, and more often than not deals are worked out anarchically behind closed doors. Such anarchic relations also extend to many at the fringes of government, such as gangsters hired by the CIA and police departments [ibid., 158]. Of course relations between sovereign states have traditionally been anarchic, as Oye points out: "Nations dwell in perpetual anarchy, for no central authority poses limits on the pursuit of sovereign interests" [1986,1]. Indeed, if we are wondering what the face of ordered anarchy looks like, and most of us are not interested in the disordered variety, we need look no further than the acts of the sovereign state. And if the sovereign by definition does not require an enforcer, it is far from obvious why the sovereign individual does either.

Chapter 2

Coercion

In this chapter I would first like to explore the notion of coercion, since one of the steps towards maximizing liberty is to ensure that transactions between individuals are free and not coerced, or at the very least,one should attempt to reduce its harmful effects [cf. Hayek, 1978,12]. Some writers such as Viminitz think that coercion is a vacuous notion along with notions such as liberty and equality, socialist and capitalist. In particular he claims that any attempt to produce a non-normative definition of coercion is likely to be vacuous [Viminitz 2001]. Narveson, on the other hand, rightly denies Viminitz's claim about the vacuity of coercion, arguing that we can indeed reach some agreement about the sorts of activities which are properly described as coercive, and how it is, for example, that coercion differs from force. According to Narveson there are three ways in which I may acquire goods in someone else's possession: (a) I may persuade him to exchange the item for something I have, such as the requisite amount of coin of the realm; (b) I may kill him and take what I want; (c) I may threaten to make him much worse off if he doesn't hand over the goods. It is only (c) which is properly described as coercion, while (a) is what we'd rather have people resort to, as opposed to either (b) or (c) [Narveson,2001].

Commentators such as Hayek, again, would concede that coercion, like liberty, is a difficult concept, but that *pace* Viminitz, it is possible to decide what we are or are not talking about, before we tackle the question as to what if anything is wrong with it. Hayek notes further that we may be compelled by circumstances to do X, but it takes another human being to coerce us into doing X; indeed we are coerced where we reluctantly serve the will of another,rather than do as we would have preferred. However,Hayek cautions us against thinking that the victim does not actually choose a course of action, as would be the case if he were forced to point the gun and squeeze the trigger. To be coerced is to choose what one would rather not have chosen [Hayek,1978,133-134].

As undesirable as coercion may often be, particularly when it gets in the way of an individual's most effectively contributing to society [op.cit. 134], Hayek argues that, contrary to what passes as received wisdom, market transactions are generally

not coercive. Even in the case of a supposedly essential service, withholding such a service is not to be considered coercive, particularly if a competitive market can supply an alternative source. In the case of a monopoly provider, the service would need to be essential for the necessities of life, for the conditions under which the supplier agrees to provide it to be possibly considered coercive. Hayek notes, of course, that the monopoly supplier par excellence is the state, a fact which led Trotsky to remark that the old dictum about having to work in order to eat had been superseded by the need to obey in order to eat [ibid., 137].

For Hayek the paradigm cases of coercion are likely to be found at the hands of conquerors, or resulting from various protection rackets, including those presided over by a state.Nor is coercion confined to arm's length transactions, since various intimate relationships are known to also provide fertile grounds.But other than perhaps ensuring that such relationships are voluntary, any more vigorous attempt at regulation might lead to even greater coercion [ibid.,137-8]. Although in Hayek's view coercion admits of degrees, from an extreme such as a master slave relationship to the one-off instance of threatening harm, it does not include all cases where our actions may cause others to diverge from a preferred course of action.As Hayek puts it, "Coercion implies both the threat of inflicting harm and the intention thereby to bring about certain conduct" [ibid.,134].

2.1 Nozick on coercion

Almost a decade later, in what Wertheimer has characterized as a "seminal article," Nozick picks up from where Hayek left off in the exploration of what would or would not properly count as a case of coercion. Nozick's article is, as he puts it, "intended as a preliminary to a longer study of liberty,whose major concerns will be the reasons which justify making someone unfree to perform an action, and the reason why making someone unfree to perform an action needs justifying" ["Coercion" 1969; reprinted in *Socratic Puzzles* [1997,15].[1]

Nozick offers the following list of the necessary and sufficient conditions for A to be said to have coerced B:

1. P threatens and knows he is doing so.
2. P's threat undermines Q's doing A, such that A is less desirable or eligible for A.
3. P intends to threaten Q, and the threatened punishment must worsen Q's doing A, a view shared by both P and Q.

[1]The longer study mentioned would turn out to be *Anarchy State and Utopia* [1974]. Whereas Hayek tended to equate liberty with the absence of coercion, Nozick thought that while the two notions were connected, it was important to note cases where P could be said to have restricted Q's freedom to do A without it being equally correct to say that P had coerced Q into not doing A [1997, 15]

4. Q does not do A.

5. Q gives P's threat as part of the reason for not doing A.

6. Q knows that P has threatened to do C if Q does A.

7. Q believes that, and P believes that Q believes that, P's doing C would leave Q worse off, having done A, than if Q didn't do A, and P didn't bring about C.

As well as covering most of the standard cases of coercion, such conditions will help clarify some of the non-central cases, such as those where, for example, P is mistakenly thought by Q to have uttered a threat, or where the supposed threat is better construed as a warning, as in the case of the mother who says she would have a heart attack, if her son were to do A.

2.1.1 Threats v. Offers

Although many have seen employment relationships as typically coercive, like Hayek, Nozick considers it the exception rather than the rule that employment or salary proposals amount to threats, which is to say that a prospective employee is not normally coerced [1997,24]. Thus Nozick suggests a rule of thumb for distinguishing threats from offers: if what P proposes worsens the outcome of Q's doing A, then it is a threat, whereas if P's action improves Q's outcome then it is an offer. The background against which we supposedly measure changes in Q's outcome is what Nozick calls the normal course of events, which is the way Q's universe would have unfolded absent P's intervention.Nozick also understands the normal course of events to include the fact that others will continue to act morally as they have done in the past.Nozick presents the following harder cases as a way of testing his rule of thumb:

2.1.2 The drug addict

(a) P is Q's usual supplier of drugs, but today he refuses to sell them to Q for the usual price of $20, telling Q that he can have them for nothing iff he beats up R.

(b) P is a stranger who has been observing Q, and knows that Q is a drug addict. Both know that Q's usual supplier of drugs was arrested this morning and that P had nothing to do with his arrest. P says that he will give Q drugs iff Q beats up R.

Nozick considers (a) to be a threat to withhold drugs if Q does not perform the required beating. It is a threat because Q would prefer the status quo, or as Nozick

would have it, the normal course of events, where he received drugs in exchange for money, rather than now having to act as P's enforcer. On the other hand Nozick regards (b) as an offer, rather than a case of coercion by threat, even though Q might again feel he had little choice but to comply. Here P is not withholding drugs he would have supplied in the normal course of events, since he has hitherto had no dealings with Q, though is making overtures in that direction.

If it remains unclear as to whether a proposal is a threat or an offer, this may have to do with the fact that the notion of the normal course of events is itself unclear, since it is supposed to address the case where P does not intervene as well as that where morality requires that he does. Nozick admits that there may indeed be disagreement about the normal course of events, or baseline from which to distinguish threats from offers [ibid.,26].[2]

2.1.3 The drowning man

Nozick's other celebrated test case concerns a drowning man Q and the conditions under which P is prepared to help rescue him: Q is in the water far from shore, nearing the end of his energy, and P approaches in his boat. Both know that there is no other hope of rescue around, and P apparently knows that Q is honest and will keep his promises. P proposes that he will use his boat to bring Q back to shore if and only if Q promises to pay P $10,000 within three days of reaching shore [ibid.,26-27].

The question then is whether the conditions under which P will rescue Q constitute an offer to rescue Q or a threat to let him drown if he refuses to meet P's terms. If the normal course of events is that Q would drown without P's intervention, then P is offering to save Q, even though Q may consider P's "salvage" fee exorbitant, and/or well beyond his means to pay. However, if the normal course of events is thought to imply that anyone who is able without assuming undue risk to effect a rescue of a fellow human being in peril on the sea would "normally" do so, then to demand compensation could be seen as a threat, if the victim is unwilling or unable to pay the cost.

Nozick thinks that most observers would probably agree that under such circumstances P was morally obliged to render whatever assistance he could, which is to say that to demand payment is to threaten to let Q drown. This also puts a different spin on the normal course of events understood as the baseline or status quo where Q is prior to P's proposed intervention. Nozick now speaks of the morally expected course of events, as opposed to the normal course of events, to reflect the fact that Q expects that P will now do the right or charitable thing, namely rescue Q.

As to why Q would consider it reasonable to expect that P would do his duty, we could reply that P might do so in the hope that others would do likewise for

[2]For a clearer characterization of a baseline, see Narveson [2001,3]

him in similar circumstances.[3] If indeed we all benefit by living in a society where the virtue of charity is practised, it does seem a little mean spirited of P to demand payment for helping Q in his hour of need. However, perhaps P is a paid up subscriber to TANSTAAFL, and would fully expect to put cash on the barrel-head should he ever need rescuing.[4] In fact he might even find such an alternative preferable to Good Samaritan laws which attempt to legislate charity.On the other hand, while Nozick thinks it clear that Q can here expect P to exercise the virtue of charity,he can imagine cases where Q's moral credit is sufficiently diminished for him to be left to the mercy of the waves [ibid.,27].

2.1.4 A fair price?

In a footnote to the drowning man case Nozick pursues the question of the extent to which price might be a factor in determining whether P's proposal constitutes a threat or an offer. Here we are asked to consider the case where P's practising his violin disturbs his neighbor Q. The cost of getting P to take his practising elsewhere for a year is somewhere between $500, the minimum P would require to do so, and $2000, the maximum Q would be prepared to pay to have P do so. Nozick is inclined to say that payments at the low end constitute offers, while those at the high end are more likely threats, though he admits such intuitions may be hard to justify in the absence of a theory of fair pricing, if indeed any such a theory is possible [ibid., 1997,339n.28].[5] Undeterred by the lack of a theory, Hayek held that a price increase by a monopoly supplier of water in the desert was obviously coercive [1978, 136], a view rejected by Rothbard, who argued that the owner of a scarce resource was free to dispose of it as he pleased. Indeed, Rothbard thought it impossible to tell at what point a contract ceased to be fair or reasonable, and could be considered coercive [2002, 221].

On the other hand, Coase thought that bargaining offered the best route to a mutually satisfactory solution [1988,99], and was certainly preferable to that of the courts, who typically found in favour of one of the parties at the expense of the other.In his discussion of Sturges v. Bridgman, where a doctor's practice is affected by noise from an adjoining confectionery business, Coase favours an agreement where the confectioner would compensate the doctor for the nuisance, at a level which would not render his operation unprofitable, but greater than the cost of solutions the doctor might consider, such as renovation or moving.Their ability to strike a bargain, as Coase saw it, "depends essentially on whether the whether the continued use of the machinery adds more to the confectioner's income than it subtracts from the doctor's" [ibid.,106]. If, as Coase suggests, parties intent on bargaining in good faith can agree on a price,we are dealing with a mutually beneficial offer rather than a threat.

[3] cf. Narveson [1988,264]

[4] "there ain't no such thing as a free lunch":cf. Gwartney & Stroup [1993, 6]

[5] cf.Sowell [2000,133]

Rothbard also raises the matter of Sturges v. Bridgman, but rejects Coase's view that property rights are less important than determining which solution produces the greater social product. According to Rothbard, Coase's approach ignores the subjective nature of costs, and under the guise of supposedly *wertfrei* social science, imports an ethical norm of efficiency in order to determine mythical "social transaction costs." [1997,123-125,141-142]. No doubt much of so called public policy is founded on the belief that Coasean determinations of social efficiency are possible, an example of which are takings under eminent domain, where governments claim the right to seize property so as to put it to more efficient uses than the individual owners. Not only do such interventions raise questions about the coherence of social efficiency, but also about the state's competence to make such determinations.

The difficulties which Rothbard rightly sees in summing individual costs to arrive at a total social product are not meant to preclude other notions of a social good, by which societies, or institutions within societies, might be compared with one another. In a more Pareto-efficient society, for example, as Narveson has noted, people are able to get on with their lives, relatively free from costs imposed by others [2002, 82]. Indeed, Sturges v. Bridgman or Nozick's musical nuisance presented contexts where people could be said to be impeded in their pursuits by the impositions of others. In Pareto terms some people have improved their lots at the expense of others, in which case some offset or compensation might be called for. Unlike Coase's no-fault scheme of social efficiency, a libertarian regime attempts to settle such questions by reference to its basic doctrines of freedom of the individual and that individual's right to own property or to homestead. Rothbard reminds us that homesteading did not come to an end in the 19th century, but that such a notion may still be of service in deciding who is imposing on whom, or who is trespassing on whose property. For example, if we buy a house in a new development near a long established airport, although excessive noise is a form of aggression, the airport may be considered to have homesteaded an easement or prescriptive property right to X amount of noise [ibid.,145-146]. While the ancient doctrine of prescription may have much to recommend it, the courts did not allow the fact that the doctor in Sturges v. Bridgman had come to a pre-existing nuisance to stand in the way of his being granted the relief sought.[6]

Let us return to Nozick's concern as to whether a proposal to take one's nuisance elsewhere for consideration was an offer or a threat. He was inclined to think that if consideration or the price for which A buys B's promise to perform were at the high end of the scale it might be more of a threat, as might a hefty salvage fee for the man in peril on the sea. If two individuals cannot reach a mutually satisfactory agreement, perhaps because one or the other considers it coercive, or because A thinks it unjust he should have to pay for B to take his nuisance elsewhere, or

[6]cf. Coase [1988, 105]. However there are other cases where the courts have acknowledged the doctrine of prescription, such as Bass v. Gregory, also discussed by Coase and Rothbard. Brubaker [1995,246]. mentions a Canadian case where the court again found for the plaintiff despite his having come to a nuisance.

because B believes he is entitled to Rothbard's prescriptive easement, either or both may seek third party intervention, ranging from simple mediation to more complex forms of arbitration. Such interventions proceed under widely different rules and range from the less costly and coercive to the much more costly and coercive at the litigation end. The decision handed down in Sturges v. Bridgman doubtless not only imposed the usual legal costs, but also substantial economic costs of mitigating the nuisance from which the doctor sought relief, to say nothing of further threats pursuant to non-compliance. Some have denied that the state is a coercive order as the practice of such tribunals would suggest. We shall have more to say about that later in the chapter. As to what it is, if anything, that confers authority on the state to coerce its residents we shall take up in the next chapter.

2.1.5 Nozick's slave case

Having examined the extent to which threats can bring about changes in the normal or expected course of events, Nozick takes up the question as to whether the normal course of events might itself under some circumstances be threatening or coercive. He asks us to consider the case of the master who beats his slave for good measure every morning, but offers to refrain from doing so the next day, provided the slave accedes to a particular request. Nozick suggests that such a proposal amounts to a threat rather than an offer, a verdict he claims we arrive at by attending to the morally expected rather than the normal course of events [1997,27]. Moreover, with respect to both the slave and addict cases, Nozick holds that the normal course of events diverges from the morally expected one. The slave would supposedly prefer the morally expected course of events where he is not beaten, and as most would argue as well, a situation where he is not a slave in the first place, though this particular deliverance of morality does not appear to be currently on offer. However, since we are not told what the master wants his slave to do for him in lieu of a beating, the proposed change in the course of events may or may not be preferable to the customary one.

However,the addict would prefer to continue the relatively uncomplicated purchase of his drugs, rather than beat up someone else instead, which is to say, according to Nozick, that the addict prefers the normal to the morally expected course of events. By "morally expected" I take it that he means that peddling drugs is immoral, in which case if morality gained the upper hand, the addict might be out of luck, but being an addict he prefers to continue to get his drugs and under the conditions to which to which he has become accustomed. To the extent that the pusher is proposing to disrupt that practice, his proposal at least from the addict's perspective, can be considered a threat.

By way of response to Nozick, there does seem to be something rather arbitrary about deciding whether the supposed dictates of morality or of customary practice, assuming reasonable inferences can be drawn in either case, should act as

the backdrop against which a given proposal can be seen as a threat or an offer. Nozick argues that when the two diverge, we should run with the preferences of the recipient [ibid.,28]. assuming, it would appear, that there is some way of knowing what the recipient prefers in a given instance. On the other hand Wertheimer, for example, is inclined to place less faith in the sorts of intuitions on which Nozick relies, and disagrees that when the morally expected course of events differs from the normal or statistical course, the proper baseline is the one that the recipient B prefers [1987,211-212].

Wertheimer proposes 3 different ways of setting B's baseline: (1) the statistical test, where what is "normal" in society determines whether A is making an offer or a threat; (2) the moral test, where there is a clear moral expectation that A will perform or refrain from performing a certain act; and (3) the phenomenological test, which is what B rightly or wrongly believes A is likely or morally expected to do [ibid., 207].[7] Wertheimer believes that any one of the three methods of determining B's baseline can help us find a right answer to the question as to whether A's proposal is a threat or an offer, but that, Nozick notwithstanding, "we need not assume that only one of these baselines is legitimate or that there must be a principle for determining which test takes precedence when their results diverge" [ibid.,212].

In his drug addict case, Nozick claimed that P was threatening to deprive Q of his drugs if Q did not beat up Y. According to what Wertheimer calls the statistical test or Nozick's normal or expected course of events, P's proposal was a threat, a threat, that is, to disrupt Q's normal supply, though when we apply Nozick's moral test, it counts as an offer, since morally one ought to discourage the use of drugs [1997,28]. But as Wertheimer reminds us, what morality requires may not be all that clear, since Q might claim, for example, that he has a moral right to P's continued assistance. If that is the case, there is also the question as to whether the terms of the assistance can be varied without the proposal becoming a threat rather than an offer [ibid.,210].

Indeed, Wertheimer does claim that Q has "a reasonable expectation" that P will not hike his prices, or if he does, will not exceed the going rate, which is to say that P's offer amounts to a threat [ibid.,210]. But while Q may reasonably hope that drug prices will remain stable, it isn't clear what sort of duty Q's expectation imposes on P to keep them that way, such that not doing so constitutes gouging or a threat. Wertheimer seems to acknowledge that drug selling is a rather skewed case, since by definition the buyer is precluded from a free exchange because of his habit. Thus such a proposal may be a "poorer offer," rather than a threat [ibid.].[8]

[7]See also Feinberg [1984,225]

[8]Rothbard reminds us that the illegal nature of black markets predisposes them to lower efficiency,poorer service, and higher prices, where any attempt at price control is only likely to benefit the monopoly supplier. 2001,786-787

2.1.6 Blackmail

Nozick considers blackmail to be a classic example of offers that have a coercive ring about them. He supports its prohibition on the grounds that it is an "unproductive" exchange, since doing so would not deny any benefit to the victim, who would be just as well off if the blackmailer had never made an offer in the first place [1974,85]While Nozick did not want to rule out all transactions for the purpose of non-disclosure, he thought the need to avoid a protection racket imposed strict limits on compensation. Rothbard, on the other hand, found any such strictures incompatible with the functioning of a free market; taking money in exchange for silence does not involve threats to person or property [2001,443,n.49]. As to Nozick's claim that such exchanges do not make the buyer better off, Rothbard replies that the purpose of the exchange is rather to prevent his being made worse off, a service the buyer seems ready to pay for [1977,53].[9]

Nozick nevertheless allows as productive an agreement reached with a neighbour to forego erecting an unsightly structure, provided that the neighbour's intention of doing so is genuine and not feigned, for otherwise it would be a case of offering consideration for nothing [1974,85]. But, perhaps it is somewhat arbitrary to make the seller's *mens rea* a test of productivity, in order to head off a possible market in abstentions, analogous to those in indulgences in earlier centuries. Interestingly, Epstein also thinks the law is right to prohibit blackmail because of the "bargaining complications" it shares, for example, with cases of private necessity, such as that of Nozick's drug addict. Courts have found that a ship's need to escape peril on the sea may override a dock owner's right to exclude,and have limited the compensation owed under private necessity or salvage,as Epstein puts it, "preventing the gameplaying that parties might otherwise engage in,given the large bargaining range" [1993,56]. While we agree with Epstein that "The libertarian norms against force and fraud do not require any assistance to persons in peril" [2003,100,101], one might expect legal scrutiny of Nozick's drowning man case to set similar limits to any fees demanded by the rescuer.

2.1.7 Threats/Warnings

Before taking up what he considered to be examples of less central cases of coercion under the rubric of threats/offers, Nozick briefly explored the distinction between threats and warnings, suggesting that a mother who reminded her son that his proposed action might give her a heart attack, was best construed as a non-threatening warning, if only because the mother lacked the ability to produce such symptoms on demand [1997,21]. Nozick returns to this distinction towards the end of his discussion in order to clarify the point at which an employer's response to a union membership drive ceases being a warning and becomes a threat.Here again Nozick

[9]Similarly Rothbard holds that there is no justification for the tort prohibition on defamation since an attack on one's reputation is not an invasion of person or property [2001,157,443]

appeals to his notion of the normal course of events, which in this case is largely a function of the employer's expected behaviour in the face of a successful union vote. As noted above, Nozick also sets store by the employer's *mens rea* as a test of whether his proposal amounts to a threat or not. While he does not appear to think that the employer is obliged to stay in business if the union wins, [1997,341,n.38]. Nozick does think that the employer has a moral duty to be forthright about his real intentions, and not make a strategic announcement about a possible plant closing which does not reflect his considered preferences.

While there is some jurisprudence which lends support Nozick's finding that in some cases the employer's behaviour threatens rather than warns the union [1997,342,n.42], *pace*Nozick and the courts, it is far from obvious who is threatening whom, when a union declares its intention to sign up members in a hitherto non-union environment. From the employer's point of view, in the normal course of events he would continue doing business in the way he had done prior to the arrival of the union, an option which will no longer be available if the union vote carries.[10] However,Nozick seems all too ready to concede the higher moral ground to the unions, while other writers have noted that unions are no strangers to coercion, both of their own members as well as employers.[11] The prime underwriter of such coercion is of course the state, without whose laws unions could not have wielded the power that they do, and, according to one estimate, cost the U.S.economy $50 trillion over the past half century.[12]

Nozick concludes that while not all ways of influencing people's decisions are coercive,it is characteristic of a threat that one feels that one is doing the bidding of someone else rather than what one might have chosen to do, absent the threat. Indeed the rational individual typically welcomes offers and rejects threats, or in terms of the status quo,is willing to move from the pre-offer to the offer, but not from the pre-threat to the threat [1997,41]. Q can be considered to have been coerced into not doing A where "Q's whole reason for not doing A is to avoid or lessen the likelihood of P's threatened consequence"; on the other hand Q has not been coerced, where "P's threatened consequence is not part of Q's reason for not doing A" [ibid.,44].

2.1.8 Rhodes on Coercion

Rhodes's more recent account [2000]. in a sense picks up from where Nozick's leaves off, seeing coercion largely as a matter of separating threats from offers. Rather than Nozick's approach of generating a list of symptoms for diagnosing the presence of coercion Rhodes suggests rephrasing proposals involving either threats or offers

[10]Other analyses of the normal course of events in terms of the *status quo ante bellum*cannot be counted on to help us decide whose *status quo* is paramount,that of the union or that of the employer; cf. Narveson [2001].

[11]see Olson 1965,71

[12]Woods [2004,150];see also Hospers [1971,174,178-80]; Rothbard [1995, 136-138]; Henderson [2002,109]

into conjoined conditional form:if Q does A, then result R will follow & if Q does not do A, then result R will not follow.The algorithm rules then tell us to construe a proposal where the first conditional is an offer and the second is neutral (i.e. result R will simply not occur) as an offer, while if the first is a threat, flowed by a neutral proposal, the total proposal is a threat. If the first conjoined conditional is an offer, while the second is a threat, according to Rhodes we have a mixed proposal, where neither offer nor threat predominate [2000,372].

By way of illustration Rhodes asks us to consider a case where Quincy offers Paul $15 for trimming a tree limb, the consequence of Paul's not taking up the offer being that he doesn't get the $15. Applying the algorithm reveals this proposal to indeed be an offer, contrary to a supposed tendency, on the part of some at least, to construe such a proposal as a threat not to pay Paul unless he does the work. On the other hand, the case where Quincy holds a gun to Paul's head and demands his wallet permits of the following conditional: If Paul surrenders the wallet, then Quincy will not kill Paul, and if Paul does not surrender the wallet, then Quincy will kill Paul. Since the first conditional is neutral while the second is a threat, the proposal constitutes a threat. However, in the face of what has long been seen as the paradigm case of coercion,[13] Rhodes's procedure borders on the redundant.Further, construing the first conditional as "neutral" seems a bit of a stretch, since it is contingent upon Paul's giving up his wallet, something he would probably rather not do.

In the last variation on this theme, Quincy offers Paul a 10% cut to launder some of his mob money, though it's not really an offer because Quincy will kill Paul if he doesn't do so. This time Rhodes's decision machine cranks out the verdict that the proposal is mixed, i.e., both offer and threat, though it would appear to me, given the company that Quincy keeps, that it is mostly a threat. Indeed, as Nozick pointed out, in contexts where people are known to resort to violence, one doesn't have to utter a direct threat for it to be one: "In many situations the infliction of violence is well understood by many parties to be a threat of further infliction of violence if there is non-compliance. Nothing need be said" [ibid., 20].

In connection with the earlier tree-trimming case, Rhodes noted that the reason it was an offer and not a threat is that Paul would supposedly not perceive any threat or harm associated with Quincy's offer. It is of course anybody's guess what someone like Nozick's partially described rational man, which, as he sardonically remarked, stopped short of including most of us, [ibid.,39]. would or would not perceive under any given circumstances. He may well perceive what he has insufficient grounds to, or fail to perceive what most others would agree there were abundant grounds to. Such difficulties notwithstanding, Rhodes declares that: "it is the agent's beliefs about what is the case that motivates his choice of action or non-action rather than what actually is the case" [2000,372].

As for the two cases which Nozick used to illustrate the less straightforward instances of coercion, Rhodes agrees with Nozick in the case of the slave,and disagrees

[13]cf. Hart [1961,19]

in the case of the drug addict.Whereas in the slave case Nozick used what he called the morally expected course of events to decide that the master's proposal not to beat the slave was in fact a threat, Rhodes resolves it into its underlying conditionals: a. If the slave does the specified action, then the master will not beat the slave and does nothing; b. if the slave does not perform the action, then the master beats the slave. Given that the first condition is neutral, while the second is a threat, it is the second which carries the day, which is to say that the proposal is a threat. With respect to the drug dealer, P, who wishes to vary the conditions under which Q gets his supply, such that in lieu of paying cash, Q assaults R on P's behalf, P is also considered by Nozick to be threatening Q, while Rhodes's conditional decision procedure yields the result that the drug case is an offer [2000,374].[14]

Again, if Nozick is right that such cases are less central to a theory of coercion,[15] the fact that he and Rhodes differ as to the coerciveness of a proposal need not be particularly worrisome. Their failure to agree in the drug case, for example, will no doubt be due in part to their rather different approaches. Nozick allows for moral considerations to form part of the baseline for determining whether an proposal is coercive, while Rhodes eschews baselines, holding that threat avoidance behaviour may be sufficient to establish coercion quite independently of intention;[16] questions of morality only enter into the subsequent justification of coercion.[17] So even if different analyses of supposed instances of coercion don't always produce the same result, particularly in hard cases, there is substantial agreement among those of a generally liberal temperament that coercion is to be avoided wherever possible, and at the very least requires justification.[18] William Edmundson,the legal theorist, to whose views we shall be turning in the next section, is no exception, though we shall take issue with his view that the state is not coercive.

[14]Nozick might have also been prepared to consider a similar verdict if the terms were made more favourable to Q, such as by providing him with better quality drugs in return for beating up R [1997,25]

[15]Nozick provides a further list of principles which might show how such non-central cases relate to the central ones, leading to a recursive definition for "P coerces Q into doing A" [1977,22]; both the slave and addict cases are outliers to the extent that they feature incompetent market participants: cf. Epstein [1997,82]

[16]Nozick insists in his original conditions that both P and Q must be aware that P intends to threaten Q, allowing that Q may be mistaken about being threatened, and is therefore not coerced [1977,17-19]

[17]Narveson agrees that the case for coercion is to be made out independently of its justification, but employs the the pre-proposal situation as a baseline for deciding whether the proposal constitutes a worsening of the status quo [2001,3].

[18]cf. Skoble [2008,28-29]

2.2 Edmundson and the supposed non-coerciveness of the state.

Having surveyed some of the questions relating to coercion in general,let us now address Edmundson's treatment of coercion in particular, where his aim is to deny the view that the state and its laws are coercive. He admits to having somewhat of a task ahead of him, since the assumption that the law is coercive is now largely taken as uncontroversial [1998,73]. My view that this is as it should be is not confined to old liberals like myself but shared with the latter day variety, such as Rawls, who states that "political power is always coercive power backed by the government's use of sanctions" [1993,136].

Of the various contexts which may give rise to questions of coercion, Edmundson finds his attention drawn to one where coercion is appealed to in the context of a demand for explanation of particular conduct, [1993,78]. such as that of the celebrated highwayman, which goes back at least to Hobbes [1909, 107].[19] Edmundson contrasts the coerciveness of the highwayman with that of the state, which in enacting a statute against highway robbery, coerces the citizenry from resorting to coercion by threat of incarceration. He notes that, according to some, the state's coercion in the latter instance demands justification, in somewhat the same way that the highwayman's coercion did.

2.2.1 Plea bargains and coercion

Edmundson reviews Wertheimer's two-pronged analysis of coercion claims, at least as the courts have tended to see them, into joint choice and proposal conditions, somewhat reminiscent of Rhodes's analysis. For it to be a case of coercion on Wertheimer's view, the proposal must be wrongful, and the coercee must have had little or no choice about going along with it: "A coerces B to do X if and only if (1) A's proposal creates a choice situation for B such that B has no reasonable alternative but to do X and (2) it is wrong for A to make such a proposal to B" [1987,172]. In order to test this analysis of the legal view of coercion Edmundson selects a case where a defendant agrees to a plea of homicide in order to avoid the death penalty, but later seeks to overturn his conviction on the grounds that he was coerced. The defendant facing the death penalty may well have had as little choice as the traveler under threat from the highwayman, but the second prong of Wertheimer's analysis requires us to settle the moral status of the proposal. According to law the district attorney is entitled to trade the death penalty for a guilty plea, which is to say the defendant has not been coerced, but if you consider capital punishment morally wrong, as Edmundson does, then the proposal is coercive.

By way of brief comment on Edmundson's assessment of this homicide case, one might have expected someone who did not favour the thesis that the law was

[19] cf, Jasay,1991,19

coercive, not to find that it was coercive in this case either, thus supporting Supreme Court jurisprudence to the effect that plea bargains are not inherently coercive but voluntary agreements liable to enforcement. We might also ask how such a case would fare at the hands of other accounts of coercion discussed earlier, namely those of Nozick and Rhodes. Nozick's slave and drug addict cases show that it can be more difficult to settle questions of coercion which take place within morally problematic contexts such as slavery or drug addiction. As already noted, Nozick seems to have thought that in both cases the proposal was more of a threat than an offer and therefore coercive. As for the plea bargain case, I suspect that Nozick might have been inclined to agree with Edmundson that it was also coercive, given that the defendant, at least in retrospect, saw it to be so, and given Nozick's presumption in favour of the recipient's preferences in such cases [1997, 28]. Nozick would probably have also agreed with Edmundson that "the wrongfulness of the District Attorney's declared unilateral plan shapes our view of its coerciveness" [1998, 80]. Rhodes on the other hand thought it possible to determine the coerciveness of a proposal independently of any moral judgment about it. We saw above that Rhodes's biconditional decision procedure suggested that the proposal to have the drug addict perform an additional service for his drugs was not coercive, whereas the master's offer not to beat his slave in return for such service was coercive. Putting the homicide case into the two conditionals required by Rhodes's analysis, we have: (1) If the defendant pleads guilty to homicide, then the DA will not seek the death penalty and does nothing; (2) If the defendant does not plead guilty to homicide, then the DA will seek the death penalty. The first conditional is then neutral in Rhodes's terms, and the second is a threat, which is to say that the proposal as a whole is a threat, or coercive. Thus Rhodes would arrive at a similar conclusion to Edmundson, and probably Nozick, though without incorporating at the outset views about the wrongfulness of the DA's proposal.

Edmundson contends that the plea bargain case raises questions about a matter which loomed large in Nozick's account of coercion, namely the recipient's moral baseline which Edmundson characterizes as "the moral rights and entitlements against which we must judge A's proposal" [ibid.]. Indeed, as we saw, Nozick distinguished the morally expected course of events which supposedly reflected B's moral rights from the so-called normal course of events, and which was the background or baseline against which we measure whether A's proposal constitutes an improvement in, or worsening of B's lot. When the moral course of events diverges from the normal course of events, as it did in Nozick's slave and addict cases, the recipient's preference will be a guide as to which course of events represents for him an offer or a threat.

In order to clarify the importance of the moral baseline, Edmundson cites two further cases; first, where A proposes for a significant sum to help B overcome some transportation problems which would otherwise result in a huge loss for B. Edmundson finds that this is a case of hard bargaining, as opposed to coercion, since "A's carrying out A's unilateral plan will leave B no worse off than B had a moral right to be" [1998,81]. He contrasts this case with an earlier one where a

company which had contracted to supply gears to another company attempts to change the terms of the contract mid-stream, thus coercing the second company, since these components were crucial for it to meet its own contractual obligations.

2.2.2 Sea rescue and coercion

Edmundson's version of the sea rescue case largely parallels that of Nozick, who also specified that both P and Q were aware that Q's only hope was to accept P's proposal. Under these circumstances, Nozick's concern is whether P's proposal constitutes an offer to rescue Q, or a threat to let him drown, if he does not agree to P's terms. Nozick's "normal course of events" is the baseline from which he makes just such a determination, but as we noted earlier it seems more reasonable to equate the baseline with the status quo ante, ante, that is, any proposal by P. From such a baseline it would seem easier to determine whether P's proposal is likely to improve Q's situation or worsen it. As we pointed out,the notion of the normal course of events is itself quite unclear. Q, being in the dire straits he is, would, in at least one obvious sense of the normal course of events, drown. Now that P has happened upon the scene, Q's chances of rescue have improved substantially, especially if Q can count on P's doing what would be normal and moral under such circumstances, namely effect a rescue if that can be done without P's endangering his own life. Indeed, in this case Nozick considers that the normal thing to do is the morally expected thing, namely to rescue Q, in which case demanding payment is wrong and amounts to a threat to let Q drown.

Edmundson agrees that part of what makes the sea rescue case difficult is that it is not clear whether the baseline for judging P's proposal[20] includes a duty to be a good Samaritan. Indeed the problem of deciding which duties are included in the moral baseline appears to prevent Edmundson's attempting to offer any final resolution of the sea rescue case, consoling himself with the fact that Nozick has similarly avoided doing so. However, as I suggested earlier, Nozick does tell us that most readers are likely to believe that exacting a high price from a drowning man is a threat.[21]

Although Rhodes does not discuss the sea rescue case, we should perhaps see whether he could offer us a more definitive verdict than Edmundson, who contents himself with the rather lame observation that any conclusion will be a function of the facts and one's moral convictions. As we saw, Rhodes did discuss Nozick's drug addict and slave cases, rejecting Nozick's finding of coercion in the former, but agreeing in the latter that the master's proposal not to beat his slave was a threat. The sea rescue case comes closer to the addict case, which Rhodes resolved into two conditionals:

[20]Or as Edmundson calls it, P's "declared unilateral plan" [1998,81]

[21]Nozick suggests that one way to turn it into an offer would be for Q to be the sort of moral monster who deserves to drown [1997, 27]

If addict does base deed, then dealer gives addict drugs. (=offer)
If addict does not do base deed, then dealer does not give addict drugs. (=neutral)

According to Rhodes's analysis the combination of offer+neutral=offer. The sea rescue case could be similarly analyzed:

If A pays B a huge sum, A will rescue B. (=offer)
If A does not pay B a huge sum, A will not rescue B. (=neutral)

So it seems that applying Rhodes's analysis to this case would again overturn Nozick's verdict, since like the drug addict case, it would be an offer not a threat. If Rhodes's findings differ from those of Nozick, at least in the drug addict case, and as I have suggested, also in the sea rescue case, Rhodes believes this may have to do with the tendency of theorists like Nozick to include background threats such as those of drug withdrawal, or being beaten, as a baseline from which to determine whether a proposal is a threat or an offer, rather than correctly focusing on the relevant conditionals, as in Rhodes's model [2000,375].

Nozick is not the only theorist to think that we need some sort of baseline in order to decide whether the proposal constitutes an improvement or a worsening of the status quo, which is to say, whether it amounts to a threat or an offer[22]. As Wertheimer also noted, the verdict we reach may further depend on the perspective from which we assess the baseline. Wertheimer's statistical test focuses on what is normal in a given society, which might include longstanding customs about rescue at sea. The moral test would attempt to decide whether Q has a moral right to be rescued by P, and if so, P's proposal is a threat [1987, 218]. Wertheimer's phenomenological test refers to Q's preferences, which could rest on the mistaken belief that P has a duty of rescue.[23]

Further, with respect to P's duties in cases of private necessity and what Q may have a right to expect, Epstein thinks it instructive to note that customs about rescue at sea have led to admiralty courts refusing to enforce salvage contracts where salvors have taken advantage of those in distress to drive a hard bargain [1993,55]. Thus Nozick may be right to hold that proposal to charge a substantial rescue fee is coercive. On the other hand Epstein does not favour enforcing a duty of easy rescue. Most people are willing, often to the point of futility,to come to the aid of others, while compulsion may only result in people leaving the scene to escape liability [2003,100].[24]

As we saw, Edmundson does not offer any verdict about whether or not there

[22]cf. Narveson, [2001]

[23]P's "declared unilateral plan" may rest on the belief that he is entitled to exploit his position as a monopoly carrier.

[24]Similarly, Epstein considers that tort jurisprudence may offer hope for resolving trolley problems; strict liability will prompt the trolley driver to ensure that his vehicle is in proper working order and to take evasive action to reduce loss of life [ibid.,101-102].

is a duty of rescue in the celebrated sea rescue case. However, he does propose a conclusion in his opening chapter on coercion which he thinks many will find repugnant, namely that the law is not in fact coercive. He is led to this view by two cases considered earlier in the chapter, namely the highway robbery case and the robbery statute which provides for imprisonment upon conviction. While Edmundson agrees that highway robbery is obviously coercive, in that it is immoral, he denies that the statute threatening sanctions is also coercive [1998,82].[25] But of course coercive proposals are not simply those that propose immoral acts. Threats which do seem necessary for coercion may or may not involve something immoral, though they do introduce departures from the way events might have been expected to unfold in the absence of the threat. According to Nozick such a course of events might on occasion be the normal one or on the other hand the morally expected one. However, contrary to Edmundson, we can still hold that the state acts coercively in threatening the robber with punishment, but does not automatically act immorally in doing so.This not to say that all uses of state coercion can be excused under the same rubric as its attempts to prevent robbery.

Edmundson, of course, remains convinced that the cases he has presented are a serious embarrassment for the view that the law is coercive, one of the "anarchical fallacies" to which unfortunately not only anarchists are susceptible, but also "ACLU liberals, cultural conservatives, middle-of-the-roaders, free-marketeers, libertarians, and Marxists" [1998, 3]. As a working definition of coercion, Edmundson offers the following: "Coercion marks the involvement of one person's (or group's) will with another's by means of a communication to the coercee that an otherwise absent consequence will be attached to the coercee's conduct in case the coercee does not comply" [1998, 86]. While there is nothing particularly remarkable about such a definition, there is nothing in it which would rule out the coerciveness of law, something which Edmundson is supposedly anxious to do.

Although Edmundson thinks that the coerciveness of law tends to be assumed rather than argued for, he cites an argument by Bayles to the effect that a legal prohibition of some action is coercive since it results in our not performing an action we might have performed prior to the enactment of the prohibition. However, Edmundson considers this a bad argument "because it assumes that whatever makes an alternative less desirable is coercive" But it is not altogether clear what Edmundson's objection amounts to; coercive acts are those where P makes certain alternatives less desirable for Q. On the other hand, as Nozick remarked: "the notion of coercion isn't so wide as to encompass all bringing about of actions by the bringing about of difference in relative position" Nozick thought that some ways of getting someone to do something were coercive, namely threats, while others were not, namely offers [1997,37-38]. Though Nozick's point may not quite be what Edmundson had in mind either, since in his opinion,like many other eminent theorists, "Nozick capitalizes on the popular view that the law is coercive" [1998,89].

[25]Edmundson claims that the threat embodied in the robbery statute is no more coercive than if the traveller were to repel the attempted robbery with his own weapon. Our view is that both self defence and the statute involve coercion which may well be justified.

Edmundson's possible allies

In addition to Nozick, Edmundson includes people such as Hart, Rawls and Dworkin among the "philosophers and legal theorists too numerous to mention" who share the popular understanding that the law is coercive, a thesis which Edmundson insists will not stand up to serious reflection. In order to illustrate the broad nature of this attack on law he cites MacCormick's claim that: "The very existence of a standing body of law defining offences and appointing penalties to offenders marks in itself an intrinsic coercive feature of state societies. To have penalties of any kind is to subject ourselves all and sundry to standing threats aimed at securing our compliance with law for fear of the consequences of non-compliance" [1982,243]. If we took this characterization at face value we might assume that MacCormick is a proponent of the coerciveness of law, whereas in fact it turns out that he is not, but rather holds a view similar to that of Edmundson.

Indeed, with respect to "the widely held view that positive legal orders are not merely systems of operative social norms, but are also uniquely and distinctively coercive systems" [ibid.,236], MacCormick's aim is to show that it is false. In order to do that, he first examines civil law proceedings to see in what sense they might be considered coercive. He admits that at least at the sentencing stage, coercion may well be evident when the defendant is ordered to prison or has his property seized under a bench warrant, though he claims that such coercion is in the background as opposed to being constitutive of legal orders [ibid., 238]Rather it is typical of a civil law doctrine that it provide for reparation when rights are infringed, and as such may give rise to disputes requiring authoritative settlement.

Similarly, in the case of criminal law, MacCormick claims that while coercion is often present, it is not essential [ibid., 241]. Although he agrees that states are not voluntary associations,one can imagine a world where defaulters might not have to be coerced into accepting penalties,just as happens with club members [ibid., 242]. MacCormick's point seems to be that if the law is coercive, as it invariably appears to be, it is only contingently, and not necessarily, so [ibid.,244]. Perhaps, then, it is not surprising that Edmundson did not lean more heavily on MacCormick for support since what sounded at the outset like a strong denial of the coerciveness of law proves on closer inspection difficult to distinguish from qualified assent.

However, given that deniers of legal coercion seem to be a distinct minority, it should be noted that Morris also appears to share MacCormick's view that coercion is not essential to the definition of the state and its laws and that we can imagine an ideal state whose citizens are only too happy to obey its just laws, with the result that coercion is not necessary. We could of course concede the conceptual point, since MacCormick and Morris are not the only ones to imagine that the coercive state as we know it might in the fullness of time wither away. Morris understandably does not want to make too much out of what we might or might not conceive, but claims to be more concerned to determine the extent to which laws are correctly described as coercive, even as a matter of contingent fact [2003,13]. According to Morris, it was Hart's critique of Austin which drew attention to fatal flaws in

the latter's account of law as "coercive commands of a sovereign" Hart did indeed question whether laws command or threaten in the way a gunman does, when he orders his victim to hand over his money, or else. He thought that while penal statutes came closest to the coercive model, they did not entirely fit the notion of orders given to others because legislators were also subject to their provisions [1961, 25,48]. Of course the fact that politicians are liable to be hoist by their own petard need not imply that laws are any less coercive, as perhaps noted in Hart's reference to the "coercive framework of the law" [1961, 48]. While Hart certainly thought that the notion of law as threats issued by a sovereign was largely limited in its explanatory power to the fairy-tale kingdom of Rex, it nevertheless serves as a salutory reminder to the proverbial man in the Clapham omnibus, that his non-compliance could result in arrest and imprisonment [1961,60].

Moreover, a legal system as we know it will for Hart be characterized by primary rules such as those restricting force and fraud, along with secondary rules which tell us how the former "may conclusively be ascertained, introduced, eliminated, varied and the fact of their violation conclusively determined" [1961,92]. Hart may well be providing a more subtle and nuanced account of the coerciveness of a legal system than Austin, but law is still very much in the business of telling us what we or some official must do [1961,113]. Again, Hart reminds us in the first sentence of his Preface that his aim was "to further the understanding of law, coercion and morality" [1961,v], while in his penultimate chapter, "Law and Morals," Hart speaks of the forebearances common to law and morality, which consist, for example, of prohibitions on violence towards others. While most will "co-operate voluntarily in a coercive system," sanctions will be required "for the coercion of those who would then try to obtain the advantages of the system without submitting to its obligations" [161,193] Any doubts that Edmundson was right to place Hart in the camp of those who subscribe to the coerciveness of law should be set aside by Hart's later verdict that "the use of legal coercion by any society calls for justification as something prima facie objectionable" [1963,20], and to which we,of course, are entirely sympathetic.

However, Morris claims that his particular concern is with "the centrality of coercion" something he takes to be evident in Rawls's observation that "political power is always coercive power backed by the government's use of sanctions" [1993,136]. Morris responds to Rawls that law may be coercive but isn't always so, for example, the legal duties of officials [2003,17]. Again it isn't clear why such laws would count as examples of laws not backed by sanctions, since the duties of officials, like any other legally imposed obligations, are at least in theory subject to enforcement.[26] Morris thinks that in emphasizing the extent to which liberal states rely upon force and sanctions, we may overlook other resources at their disposal, of which the principal one is authority, about which we shall have more to say in the following chapter. States may also lead their citizens to modify their behaviour

[26]Whether or not officials are actually sanctioned for their dereliction of duty is another question. Milke suggests that much bureaucratic malfeasance passes "under the public radar" [2006,123]

by taxes and licensing, exemptions for charity[27] or recognition for public service [2003,23]. Such a view echoes MacCormick's claim that many government inducements are non-coercive, or "built into the social structure of state societies, rather than by pain and penalties alone" [1982, 246].

Although the state may have various ways of ensuring compliance, as Morris and MacCormick suggest, that does nothing to diminish the coerciveness of its orders. Those orders may ensure compliance without the use of force, but the threat of force is never far away, and such threats are coercive. Non-compliance may very well be met with various levels of force, as someone who attempts to ignore a tax assessment, or practise medicine without a licence may very soon discover. Nevertheless, Morris insists that the state is often in the business of offering the proverbial carrot rather than a stick, a view for which he finds support in Mill. But while Mill allows that government might provide advice and information, rather than issuing commands and penalties, this is something it rarely does, if for no other reason than that Mill thinks it improbable that government should prove a useful repository of knowledge [1970, 305,317].

While Mill thought that government did not necessarily meddle, nor did it trust that goods could be reliably supplied privately, it often set up a parallel arrangement, which eventually crowded out individual initiative. Thus, as Holcombe comments, the libraries once built by Carnegie are now supplied by government [2000, 259]. Seldon argues in a similar vein that the welfare state was primarily a political contrivance serving the state and its employees rather than, as is often thought, a rescue service for the working classes adrift on the sea of the Industrial Revolution. By the early 20th century most workers were insured privately against unemployment and sickness; it is thus a historical fiction to claim that they lacked such benefits until the state ensured compulsory enrolment [2002, 62-63,67]. As for other public works such as bridges and railways, for which a reasonable business case might be made, based on the tolls or fares to be collected, Mill noted again that compulsion is never removed entirely, because governments typically resort to taxation to finance such projects, along with the panoply of "expensive precautions and onerous restrictions" required to prevent tax evasion [1970,307].

Thus where government is concerned, supposed carrots look upon closer inspection to have a distinctly wooden character about them, a fact which Morris appears to recognize towards the end of his argument, where he notes that it is reasonable to assume that laws will be backed by sanctions to ensure compliance [2003,27]. Moreover he seems to assume that a government monopoly is required to restrain the recalcitrant and that the preferences of such a monopoly can be equated with the "social order" On the other hand, like MacCormick before him, Morris wants to maintain that it is simply a contingent fact about laws that they tend to be backed up by sanctions rather than that they are necessarily so. MacCormick doesn't say whether he considers it logically necessary that a legal order determine rights and

[27] Holcombe argues that while charitable exemptions might look relatively benign, decisions about awarding tax-free status are typically arbitrary and bureaucratic [2000, 247].

define offences for the members of a society, perhaps because that is what it means to have a legal order, or whether that is just what as a matter of legal history it happens to do. Nor is it clear whether he thinks some necessity attaches to the particular rights and offences which loom large in our system, or whether they are simply those we happen to think important. If sanctions are not exactly necessary, Morris thinks that they are a virtually universal accompaniment of legal orders, given that humans are the way they are, or as Raz put it, laws without sanctions are logically possible, but humanly impossible [1990, 158-159].[28]

2.2.3 The coerciveness of law and the presumption of liberty

Undeterred by the fact that writers such as MacCormick and Morris offer a good deal less than resounding support, if indeed they offer any at all, for his attack on the coerciveness of law, Edmundson insists that the rhetorical purpose of the received or, as he calls it, pre-reflective view, is to shift the justification of coercion onto the state and its legal apparatus. He argues that it therefore serves a similar function to its near relative, the presumption of liberty, which has likewise suffered from a dearth of critical scrutiny. In the hope of remedying this deficiency as well, Edmundson asks in what sense we are entitled to make any presumption in favour of liberty in the first place. Indeed, he considers Rawls, for example, to have definitively rejected any such presumption. However, while supposedly not assigning any special value to liberty, Rawls claims that there is "a general presumption against imposing legal and other restrictions on conduct without sufficient reason" [1993,292].

Even Edmundson admits that Rawls's formulation sounds an awful lot like a presumption of liberty,if there were indeed any such thing [1998, 92]. As Feinberg put it, "If a strong general presumption for freedom has been established, the burden of proof rests on the shoulders of the advocate of coercion" [1973, 22]. Edmundson of course thinks that Rawls has simply affirmed the consequent without having established the antecedent [ibid.]. Moreover, Edmundson takes Rawls's supposed failure to establish a strong presumption of freedom as indicative of the fact that this presumption has disappeared from serious political philosophy. One of the arguments that might be offered in support of such a presumption is that liberty is a good, to which Edmundson responds that this would not accord priority to liberty since it is only one good among many [1998,93]. One might contend that liberty is at the top of the heap of goods; Rawls seems to have thought that the golden age of liberty would eventually be ushered in, where "the desire for liberty is the chief regulative interest that the parties must suppose they will all have in common in due course" [1971,543]. However, since for Edmundson such arguments have failed to clearly establish any abstract presumption of liberty, he claims that

[28]Raz also goes on to point out that he considers the claim that resort to sanctions is not part of our concept of law to be controversial [ibid.].

liberalism has turned to something more concrete, namely the coerciveness of law, which will in turn prove as otiose as the presumption of liberty.

Of course, there is just no reason to think that liberty qua good is simply one good among many. Liberty is more appropriately seen somewhat negatively, as the absence, rather than the presence of some quality or other. Thus Lester writes that liberty, at least of the interpersonal variety, is "the absence of imposed cost" [2000,59]. Force and fraud typically impose such costs, as in Jasay's robbery example, where one is coerced into handing over the wallet one would rather keep, which is to say the handing over of one's wallet is imposed [1991,19]Rather than a value in and of itself, Narveson reminds us that as "the absence of disabling obstacles to action," it is a precondition to doing other things we value [2002b,38].

While Edmundson claims to have shown that the truism of the coerciveness of law should now be discounted as beneficial to political philosophy,like the presumption of liberty before it, upon closer inspection he has offered no convincing grounds for revising the thesis that the law is coercive. For that matter, nor does it seem that the presumption of liberty, from which such a thesis flows, has vanished from serious political philosophy. With respect to Rawls, for example,it may be that his ideas about the priority of liberty have shifted, perhaps due to Hart's criticisms.[29] In any case Rawls revised the first of his two principles of justice to read: "Each person has a right to a fully adequate scheme of equal basic liberties which is compatible with a similar scheme of liberties for all" [1993, 291].

Even in Rawls's revised standard version it hardly seems to be the case that the presumption of liberty has vanished, any more than it has from other writers who are much clearer about the role of liberty than he is: Hospers thought that equal freedom for all could only be secured by recognizing limits, so as not to violate the freedom of others [1971,12], while Narveson speaks of a sphere of "rightful liberty," whose limits are determined by what would infringe upon the rights of others [1988,7]. Dworkin also points out that he understands liberty in the negative sense of freedom from legal constraint, particularly in matters of great importance [2002,120]. If Dworkin's aim is to subsume liberty under equality of resources, this is in order to better reflect the status we accord it [ibid. 183]. As for Edmundson's claim that the coerciveness of law and the presumption of liberty from which it is derived no longer have anything to offer to political philosophy, this is just false. Rumours as to the demise of both the presumption of liberty and the coerciveness of law appear to have been greatly exaggerated.

2.2.4 *Malum prohibitum v. malum in se.*

For most of his discussion of coercion Edmundson claims to have proceeded on the assumption that the law's proposals are not wrongful. He also argues that if also we assume a moralized view of coercion, as Nozick does, we will find it harder

[29]See Lomasky [2005,181]. Rather than despairing of establishing the priority of liberty, as Edmundson argued, [1998,92], Hart thought that Rawls had failed to do so [1985,247]

to reject the conclusion that the law is not coercive.Edmundson contends that a robbery statute, for example, will make it more difficult to adhere to the thesis that the law is coercive, because those who think that the law should punish robbers will not believe that such a law is coercive. We have denied all along that there is any such difficulty, something Edmundson himself appears to recognize when he agrees that finding the law coercive is not necessarily to condemn it [1998,106]. Moreover, he thinks that at the very least a finding of coercion places a burden of justification upon the law, which in our view is as it should be. However, in his final chapter on coercion, Edmundson elects to test the assumption that the law's proposals are not wrongful by moving away from criminal law which provides the most plausible examples of the non-wrongfulness of law by outlawing behaviour generally considered morally wrong, or *malum in se*.

Edmundson instead tests the assumption on *malum prohibitum* cases or those where the act is not wrong in and of itself, or not *malum in se*, but wrongful, if at all, only because illegal. Indeed, such laws constitute the bulk of modern statutes, but are a likely source of the coerciveness of law, since their proscriptions appear to lack any independent moral warrant and should therefore be more difficult to justify [1998,110]. Edmundson responds to the view that there is a class of laws which exceed their moral warrant by appealing to the "Principle of Fairness," to which he already had occasion to refer in his opening chapter, and which can be traced to writers such as Hart and Rawls. According to this principle, if others have contributed to some aspect of the common good, it is unfair of us not to do likewise,since,as Hart points out,we benefit from restrictions others have imposed on themselves for the general welfare [1984,85]Indeed, Edmundson claims that failing to do one's bit, although a *malum prohibitum*, is morally wrong [1998,111], which if true, of course, appears to collapse the distinction between the two classes of wrongs.

In fact, Edmundson assimilates the *malum prohibitum* cases to the rules of the road,which are paradigmatic of those regulations necessary for coordinating the actions of a diverse populace [1998,110]. With the benefit of hindsight,he professes to have become persuaded of the fundamental truth of the Principle of Fairness, when he was upbraided by a fellow pedestrian for having disobeyed a crossing light. Although he apparently thinks this a good example of what Hart had in mind, it remains unclear how he is supposed to have benefited at the expense of the other's compliance, particularly in view of his own earlier remark that jaywalking is unlikely to herald the decline of civilization [1998,28]. Moreover, the Principle of Fairness has been attacked, most notably perhaps by Nozick , who finds it "objectionable and unacceptable" He asks us to consider whether we are obliged to take our turn in providing neighbourhood public entertainment simply because others have agreed and already done so. Nozick thinks that even if we add a rider to the effect that the benefits accruing from the performance by others were greater than the costs of your doing your share, it would still have to be the case that there was nothing you would rather do than stand at the microphone on the day in question.

Edmundson responds that Nozick's attack might be less compelling if it were to

involve something less frivolous, such as monitoring the city's water supply [1998, 112, n.22]. No doubt there are many ways of managing water and sanitation, ranging from the fully private to the socialized systems of recent years, but given the predominance of the latter, we could respond that it was too risky to be left in the hands of volunteers, and it wouldn't be efficient to provide adequate training for one day's work. In cases where volunteer labour is something of a tradition, such as jury duty or blood donation, possible undersupply could be met by increasing compensation, where it is poor or non-existent, bearing in mind that others such as lawyers and bureaucrats live quite handsomely off the avails of such industries.[30] Nozick again reminds us that the fact that we live in societies and benefit from the contributions of countless others who have gone before us does not mean that we have amassed a debt to "society" which can be called in whenever its self-appointed spokesmen decide [1974,90]. Thus, we would submit that Edmundson's strategy of showing that laws of the *malum prohibitum* variety turn out to be indistinguishable from those that more clearly track morality, or *malum in se*, fails; the former do indeed constitute paradigm cases of the coerciveness of law,and if wrongful,it is only because they are illegal.They can therefore be expected to present acute difficulties for the state's carrying its burden of justifying them.

2.2.5 The coerciveness of the state's monopoly on enforcement

At the end of his discussion on coercion, Edmundson takes up the question as to whether the state's assumption of a monopoly on punishment itself constitutes a classic case of wrongful coercion, as some have argued. Such writers contend that the state is acting immorally when it abridges our right to self help, to punish those who have wronged us. Appealing to Hohfeld's distinction between liberty and claim rights, Edmundson contends that there is is no such right, which theorists from Locke to Barnett have defended.[31] While individuals may have a claim to punish their wrongdoers, in respect of others they only possess a liberty, which the state may override without prejudice to any strong rights individuals have.

In response to Edmundson, the distinction between claim rights and liberties is not altogether clear, any more than it is clear which of the two best accounts for a supposed natural executive right to punish. It may even be some mixture of the two, as seems to be the case with property, where an owner's liberty to use a piece of property derives from a claim right to the property in the first place involving proper transfer of title. Indeed Edmundson appeals to a property example to clarify the right to punish, suggesting that if all you have is the liberty to use my car on occasion, you have no right to complain if my need to use it conflicts with yours [1998,121]. If, as Jasay points out, the basic example of a claim right is "the

[30] cf. Rothbard [1978,90]

[31] see Locke [1960,208]; Rothbard [2002,89-90]; Barnett [1998, 214].

contract of sale, lease or debt" [1991,48], those are the ways I acquire a stronger claim right to your property, including the liberties of use or disposal.

If liberties tend to ride on the back of claim rights, at least when it comes to property relations, Edmundson's example doesn't do much to explain how it is that punishment functions differently. It seems essential to Edmundson's account that we be able to detach liberties from their underlying rights in order to allow for the fact that the right to punish did not entail that others, especially the state, not interfere in the exercise of your right. Edmundson does not seem to have noticed that in thus removing a major obstacle to the state's assumption of a monopoly on punishment, it is unclear how the state itself could ever acquire more than an unprotected liberty to punish. A central claim in Edmundson's argument for the authority of the state, which we shall take up in the next chapter, consists in reducing the burden of the duty incumbent upon its subjects to one of non-interference in the administration of the law. It is not clear what the source of this duty of non-interference is, unless the state, unlike individuals, has a claim right to administer the law including punishing offenders.

Nevertheless, Edmundson appeals to Nozick to shore up his view that our liberty to punish is not protected from interference by others, notably the state. Although Nozick is inspired by Locke, who held that individuals possessed a natural executive right to punishment [1960, 271], Nozick does in fact think that confusion and disorder, which Locke himself anticipated as an objection, would indeed follow a regime of "open" punishment to which all hold a strong or claim right. Nozick therefore suggested modifying Locke's view, so that unlike compensation, punishment is not owed to the victim, and not subject to his authority [1974, 138] Of course, as Rothbard has written, there is no reason to distinguish punishment from compensation; punishment or compensation is owed to the victim rather than "society," though the victim may waive his right to punish for suitable compensation. Indeed, for Rothbard, compensation might well amount to "two teeth for a tooth"; the thief would be liable to restitution not only for the property wrongfully taken but for an amount equal to the value of the property for personal distress caused to the victim [2002, 86,89].

In fact, it may even be that double compensation falls short of the mark, a suggestion Rothbard thanks non other than Nozick for [2002, 89,n.7]. However, the Nozick of *Anarchy State and Utopia* thought that in order to avoid some of the hazards of leaving punishment up to victims or their agents, punishment should be a collective enterprise, which the agent chosen by the majority would eventually come to dominate. Accumulating as it does the entitlements of its subscribers apparently entitles the dominant protective agency to deny independents the right to take action against its members, thus paving the way for the agency to gain a monopoly on protection. Moreover, the prohibition of behaviour which might set its subscribers at risk will itself call forth compensation, to the extent that such prohibition sets the independents at a disadvantage.[32]

[32]One suspects that this compensation may not be as generous as that supposedly suggested

Again, it is not clear why the protective association can only aggregate the entitlements of its subscribers[33] and not the hazards which supposedly attend individual enforcement. Moreover, the sum of what both Edmundson and Nozick claim are unprotected liberties is still an unprotected liberty, which is to say, as Schmidtz observed, the dominant protective agency fails to gain a claim or strong right to punish which is not subject to interference [1991,36]. Thus, if there is a way of demonstrating that the state's monopoly on punishment is not wrongful,which is what Edmundson hoped to show, neither he nor Nozick have produced it. On the contrary, the independents do not act wrongfully if they decide to pursue their own wrongdoers, though as Rothbard pointed out, victims will likely, even under a libertarian dispensation, resort to other party private enforcement and adjudication services [2002,90; also n.10].

However, Edmundson thinks that that few are likely to agree that an independent who had not surrendered his Lockean executive right could rightfully punish an O.J. Simpson if he were found guilty of murder as charged. Indeed, not only is there much theoretical interest in legal traditions which predate the state's monopoly, one suspects that the proverbial man in the Clapham omnibus might well find it preferable to exercise his natural executive right, at least on occasion, to sitting on a jury for months on end, only to have the likes of O.J. walk away scot-free. If recent terrorist events in London and elsewhere are any guide, the man in the bus may have to be a good deal more proactive, since the authorities typically only arrive in time to pick up the pieces. Self-help, subject to differing degrees of control, goes back at least to the Twelve Tables of Roman Law dating from 450 BC, which according to Cicero, boys learnt by heart at school. According to Nicholas, one might punish a thief on the spot, provided one called out, or one might haul him and his stolen property before the magistrate who would order him scourged before handing him over to the victim [1984, 209]. In fact, Edmundson's conclusion that the coerciveness of law "cannot be easily sustained" [1998, 123] is somewhat less grandiose than his earlier claim that it is a fallacy typical of those who think, for example, that government is not entitled to a monopoly on punishment. If it were really a fallacy to hold that the law is coercive then one wouldn't have thought that it could be sustained at all, but rather ought to be consigned to the trash bin of history, along with its cousin, the presumption of liberty, as he himself also recommended at one point. However, as I trust I have shown, it is Edmundson's case which is much harder to sustain than that of his opponents.

Indeed, in so doing I have responded to Edmundson's challenge to produce argument to support the view that the coerciveness of law requires justification, rather than adopting it as a "ritual shibboleth." I have argued that the law is coercive, and that this fact does place a burden of justification upon the state and its law. Moreover, as Benson points out, many areas of contemporary law appear to have little justification, having begun as attempts to consolidate royal power, a

to Rothbard: cf. Nozick [1974,81-84,110-113]

[33]Nozick appears to think that the sum of all the entitlements is somehow greater than the sum of its parts [1974,140].

project which has continued unabated under representative democracy [1990, 87]. Although Hart was of the opinion that the simple doctrine of sovereignty could have benefited from radical surgery, Rex still appears to be live and well: "where there is law, there is ultimately to be found latent beneath the variety of political forms, in a democracy as much as in an absolute monarchy, this simple relationship between subjects rendering habitual obedience and a sovereign who renders habitual obedience to no one" [1961, 73,49].

On the other hand, under the decentralized legal system envisaged by Benson, there is no question of protection firms arrogating to themselves rights not held by individuals [1990, 294], or to paraphrase Nozick, having more entitlements does not mean being more entitled [1974, 190]. As David Friedman emphasizes: "Government is an agency of legitimized coercion" [1989, 112], a view echoed by Rothbard, who reminds us that only the law and order provided by government legitimizes coercion; in the absence of a state apparatus supported by coercive taxes, there would be no levers of power for private protection agencies to seize hold of and transform themselves into something more nearly resembling a state [1977b, 7].

2.3 Summary

We reviewed several prominent accounts of coercion, beginning with Nozick's well known essay, where he proceeds from the necessary and sufficient conditions for standard cases of coercion, to the more difficult ones of distinguishing threats from offers or warnings. In the second part we took up the question of whether the state and its law were coercive, by way of response to Edmundson's claim that they weren't. Edmundson admits to being in the minority on this view, since most political philosophers would deny Edmundson's contention that the coerciveness of law is a fallacy. We introduced Edmundson's distinction between laws that are *malum in se* and the great majority of statutes and regulations that are *malum prohibitum*. Having little or nothing to do with obvious moral questions, the latter are more difficult to justify, and we reject the attempt to do so by appeal to fairness. Finally, we reject the state's monopoly on coercion as simply an example of the sovereign prerogative which did not die out with absolutism, a question we return to in the final chapter.

Chapter 3

Authority

I trust I have clarified somewhat the notion of coercion, if only to re-affirm that *pace* Edmundson, one can coherently speak of the state as a coercive order. Some writers who do not necessarily share my skepticism of the state and all its works, nevertheless record the fact that modern democratic states compel uncritical obedience from their citizens [Dunn,2005,19]. Having established that the state is "a powerful bully," to use Edmundson's turn of phrase, let us now turn to the question of its authority to be the bully it is. In Edmundson's view, we should find it worrisome that the law is nothing but a powerful bully, even if its demands largely overlap with those of morality [1998, 34].

However, those of us who are interested in advancing liberty while constraining coercion are probably much less concerned with the convergence between morality and law than where there is little or no such convergence. To use Edmundson's terminology again, we find the class of *malum prohibitum*, or conduct wrong by virtue of being prohibited, which apparently constitutes the bulk of the state's legal and regulatory endeavours,[1] more troublesome than that of *malum in se*, or what most agree to be wrongful and typically oppose at least in principle.[2]

Even where the state touts its intervention as some sort of moral crusade, it is unlikely that it represents much of a departure from *malum prohibitum*. In the last couple of years, for example, the US Dept of Justice has been pursuing a criminal investigation of the Mercedes division of Daimler-Chrysler for having paid bribes as part of its overseas operations in Africa and Latin America. What isn't at all clear, however, is that bribes are morally wrong. While we might all prefer a situation where governments were not powerful enough to grant favours, various writers have argued that bribes of one sort or another may be simply a cost of doing business

[1] Newspapers regularly report such interventions, such as that of *La fromagerie Boivin*, a fourth generation cheese-maker in Quebec, who fell afoul of federal regulations when they decided to depart from time-honoured methods for ripening cheese by deep-sixing ten barrels to the bottom of the Saguenay River. Since this technique is largely untried it lacks the requisite bureaucratic approval [*Globe and Mail*, July 29, 2005].

[2] cf.Epstein [2003, 57].

in many foreign countries.[3]

About *malum prohibitum* cases in general, Edmundson observed that: "citizens don't appear to be under any extralegal moral duty to conform to the dictates of the law, and therefore it seems natural to say that the law's proposals are coercive; they are coercive, and until the state carries its burden of justifying them, they are presumptively illegitimate" [1998,110]. In our view, legal orders in general are coercive; what is peculiar to the class of *malum prohibitum* is that the burden of justification will be much more difficult to discharge than those where they incorporate an extralegal moral duty. With respect to the latter, the *malum in se* class, which are directly derived from moral duties, such as refraining from force, theft or fraud, compelling "righteous conduct," as Edmundson puts it [1998,34], is in fact legitimate, either on the part of the individual resorting to self-help, or as Simmons reminds us, on the part of states to which a similar right of punishing wrongful acts may be extended [1993, 265].

Given that the state appears to lack moral authority for much of its legal coercion, we shall return to the earlier chapters of Edmundson's work to see what sort of argument he is able to offer in favour of the state's legal reach extending far beyond the narrow band of *malum in se* cases. Edmundson's opening salvo is in fact directed against those of us who have succumbed to the siren song of philosophical anarchism led by writers such as R.P.Wolff, in the hopes of rescuing political philosophy from slipping once again into obscurity, as it had supposedly done at the hands of the positivists.

In fact, Edmundson has set himself the task of explaining how we can have a legitimate political authority, if as Wolff and other philosophical anarchists have argued, we have no general obligation to obey the law. Edmundson finds it particularly troublesome that it has now become quite fashionable in influential centres of learning to hold that that there is no such obligation [1998, 31-32]. Godwin, for example, had argued that neither morality, justice nor common sense could justify doing the bidding of something calling itself the government [1976, 228-229]. More recently, Wolff has written that the authority of the state, entailing a duty of obedience, is in direct conflict with the autonomy of the individual [1970,18].

As a prelude to showing how we might ground legitimate political authority in the face of attacks by philosophical anarchists such as Wolff, Simmons and Green, Edmundson begins by reviewing some of the arguments which have been deployed to defend political authority, most of which have proved unsatisfactory for one reason or another. Perhaps the best known of these is that found in Plato's Crito, where Socrates's interlocutor, after whom the dialogue is named, encourages Socrates to escape rather than submit to the death sentence. Socrates believes that he is obliged to abide by the laws, rather than follow Crito's suggestion, which Socrates considers the sort of behaviour one might expect from a slave, rather than a citizen.Socrates

[3]Rothbard [2002,129-130] holds that it is not wrong to offer bribes, though depending on one's employment contract, it may be wrong to take them;cf. Rockwell [1997]; Lemieux [2005]; Machan [2002c,152]

believes he is beholden to the well governed city which has nourished him from birth, and would rather suffer at its hands than bring the law into disrepute by going into exile.[4]

With respect to the question of emigration from an unjust regime, Nozick asked why that should be necessary, rather than staying and simply being able to opt out of collective orderings [1974,173]. Socrates, of course, doesn't think that either option is open to him at this stage because of the contracts and agreements implied by his long residence in Athens. However, it is not at all clear what is reasonably required by such contracts, implied or otherwise. Socrates apparently believes that they place us under an obligation to obey the laws, whatever they happen to be, although he also held that injustice was an evil, he thought that fleeing would amount to returning evil for evil. But as Narveson has rightly pointed out, while martyrdom might be a useful way of drawing attention to injustice, it hardly seems reasonable to think we are duty bound to follow Socrates's example [2000c, 4].

Recent history has not lacked for unjust regimes, and among the most widely discussed is that of Nazi Germany. Concerning the duty to obey the law, Edmundson wants to argue that indeed we have one, but unlike what Socrates was proposing, it is at most "a *prima facie* rather than an absolute duty, or duty *sans phrase*" As to the sort of duty residents of Nazi Germany could have been under, for example, to report their Jewish fellow residents to the authorities, Edmundson understands the notion of a prima facie duty to be one of obeying just laws, rather than of obeying the law, period [1998,10-11]. The implication is that Nazi laws, to the effect that citizens of the Reich had a duty to inform on their neighbours, or that it was wrong of them to flee the Fatherland, are not sufficiently just as to impose even prima facie duties, but, if anything, are plainly unjust on the face of it. Indeed, as Dworkin remarks, those who claim that Nazi laws were just a mockery mean that they lacked the properties of legal systems which would justify coercion [1986, 103-4].

3.1 Consent

But even in the case of less wicked states, it is not clear in what sense we have consented to obey the laws, as Socrates seems to have thought he did. Edmundson notes that giving express consent can, under certain circumstances, give rise to a duty, though he is less sure that,for example,traditional pledges of allegiance to God, King and Country can reliably bind those they are supposed to [1998,16]As well as forms of express consent, there are hypothetical varieties where it is supposed that X is the sort of thing that the reasonable and informed individual would consent to. Thus a doctor may proceed to treat an unconscious patient, believing that the reasonable patient would consent to such treatment if he were able [1998,17].[5]

[4]see "Crito," *Dialogues of Plato*,1953, Vol. 1, 382-4

[5]cf. Waldron [1993,49];Schmidtz[2006,98,n.39];of course,the doctor's belief about hypothetical consent could turn out to be mistaken, as in Malette v. Shulman (1987), 63 O.R. (2d) 243

Moreover, hypothetical consent arguments have been appealed to in justifying the state, claiming that it would be rational to consent to the state if that is the only alternative to the Hobbesian war of all against all. Though, as Schmidtz points out, the proposition that the state is the only alternative is the only one doing any real work in this argument and it is irrelevant to the justification of the state whether rational bargainers would consent to it or not [1996, 87].[6]

Leslie Green considers the problem of political authority to be one of deciding whether there are any valid reasons for wanting to bind oneself to the state [1988, 158]. Of the three sorts of reasons he thinks the most interesting, namely convention, social contract, and consent, he thinks the last is the most promising as a source of political authority, though even here he concludes with the caveat that in the absence of any compelling account of its validity, it will fail to provide any general justification [ibid., 185]. Before addressing the question of the validity of consent, Green however attempts to clarify what is or is not involved in consenting, especially the sort of consent that might be appealed to in justifying political authority. In that context it seems that consenting is typically seen as a way of undertaking an obligation [ibid., 162].

Plamenatz once remarked that "consent" had been used with many meanings [1968, 1], a fact also noted by Green. We referred above to the question of consent to medical treatment, and we might well wonder in what ways this sort of consent is or is not like consent to the state's authority. Raz, for example, claimed that the fact that we readily granted authority to professionals such as doctors meant that we were not precluded at least in principle from doing likewise with governments [1990,12]. If the case of medical consent is unlike consent to government it is that the former would appear to place much less onerous obligations on the consenter. Another important feature of medical consent is that it can be withdrawn, even in the middle of a procedure,and as Hebert points out, with the onus being on the doctor to show that halting the procedure would cause serious harm to the patient [1996,99-100].

However, in the case of government, Plamenatz concluded rightly that, despite their insistence that they acted with the consent of the governed, present-day governments were more oppressive than any in history [ibid., 181]. Green also acknowledges ultimate authority which the state claims over people's lives [ibid., 169], while Dunn reminds us that, as we concluded in the previous chapter, coercion being the defining characteristic of states, they have little interest in allowing their subjects to follow their own inclinations [2000, 117-118]. Whereas doctors may well have authority over people's lives, it is stops short of being all-encompassing and ultimate, with obligations incumbent upon the laity mostly amounting to advice, which they may ignore to the possible detriment of their health. We can fire our doctors, seek a second opinion, or opt for alternative therapies, or even if we consent to treatment,

(H.C.J.), cited in Hebert [1996,28-29].

[6]We might argue similarly with respect to emergency blood transfusions that the only proposition doing any work is that transfusions are the only alternative to death, in which case we could sidestep questions about what the rational patient would or would not do.

we may be less than compliant. Only in cases of mental illness involving clear risk to the patient and others can doctors order us to undergo involuntary psychiatric assessment, which they do*qua*agents of the state.[7]

Or as Green puts it, while most of us know what counts as consent to the use of one's organs for transplantation, it is far from clear what counts as consent to the authority of the state [ibid.,169]. He further argues that whereas medical consent guarantees the patient's say in his own well-being because of general presumptions of liberty and autonomy, political consent is largely about obedience to higher authority [ibid.,181]. Indeed, it is typical of governments that they enforce compliance by threats, with the result that, as Plamenatz claims, the government of the free may not be less coercive than one of slaves [ibid., 175]. With political consent largely in mind, Plamenatz defines consenting in terms of conferring a right on someone, which he would not normally possess [ibid., 167]. Such a definition could even account for the case of medical consent, where in the absence of consent, treatment may constitute battery.[8] However, Green objects to identifying consent with its normative consequences, such as the rights or immunities it confers; in his view, by incorporating normative consequences into the definition as Plamenatz has proposed, we are as it were begging the question as to whether there is a satisfactory theory of consent which would underwrite the state's authority [ibid.,163].

While Green's point is well taken, it perhaps should also be said that Plamenatz has little to add to Green's comparative study of consent. Plamenatz's interest is a somewhat different one, namely distinguishing what he considers the synonymous notions of government by consent or responsible government from other types of government [1968, 167-168]. As to the relative merits of such a form of government, Plamenatz is of the opinion that representative, or government by consent, is better than its alternatives, "given the conditions of industrial society and the aspirations that men acquire inside it" [ibid.,166]. For the purposes of his particular inquiry, Green recommends looking at consent as a way of acquiring obligations, rather than the resulting obligations themselves. Plamenatz does not deny that one could look at consent in the way Green suggests; it is just not relevant to the particular task he has set himself [ibid.,172]. Simmons, on the other hand, with respect to what he calls "consent in the strict sense," speaks not only of the consentor's handing over of certain rights to act but also of agreeing not to interfere in the exercise of such alienated rights [1979,77].[9] Indeed, as we shall see later, Edmundson will argue that the burden of political obligation need amount to nothing more than some such special obligation not to interfere in the administration of government. Of course, there are those who think that the duties owed to legitimate authorities are not just negative ones of non-interference. Just how onerous those positive duties are is partly a function of how closely consenting is seen to resemble promising. While

[7]cf. Hebert [1996, 162-164]

[8]cf. Foot's discussion of the anthropologist who wishes to photograph for scientific purposes an unwilling native servant [2001,48].

[9]One is reminded of Stanley Baldwin's supposed promise on giving up the premiership in 1937 not to spit on the deck or talk to the man at the wheel.

Edmundson notes, for example, that promising is a good example of how express consent can give rise to duties [1998, 15], Simmons argues that the sort of consent he is interested in differs from promising in a number of ways. For him the primary function of consent is authorizing, with obligation upon the consentor playing only a secondary role [ibid.,77]. Raz, on the other hand, thinks that political consent to the state entails, among other possible duties, a promise to obey [1988,83]. How much of an obligation is however quite unclear, though it is likely at most to be one of non-interference.But while Green thinks that we require actual consent of an individual to the state's authority [ibid. 162]. in order to become subject to any duties flowing from the principle of *pacta sunt servanda*, in Raz's view, unlike promises, consent need not be identified with specific acts of individual consent to obligations. Indeed, on this account there are other ways to incur duties or confer rights, short of specifically consenting to do just that, [ibid.83],such as, after deciding to fly, one finds oneself obliged to submit to a search and obey the cabin crew during flight. Green still thinks that the justification for these sorts of obligation which come by way of doing something else is different from those where we have voluntarily assumed an obligation [ibid.,164].[10]

3.1.1 The appeal to estoppel

Adopting forms of non-intentional consent can give rise to an appeal to the legal doctrine of estoppel to ground obligations to political authority, a move which Green understandably wishes to block. According to Lord Denning in reference to Charles Rickards v.Oppenhaim [(1950)1 KB 616], the term is "promissory estoppel," by which an agreed waiver to a contract may be considered binding. In the case cited by Denning, Oppenhaim encouraged Rickards to continue working on a project, even though it was likely to take much longer than provided for in the original contract [1979,206,208]. Thus his conduct, if not his words, implied that he would not enforce his rights under the contract, including refusal of delivery.

Of course, we then need to ask whether this principle has any relevance to obligations we may or may not have to political authorities. In fact,I suspect,it does not. As an example of estoppel, Green offers the case where by sitting down at a restaurant, I agree to pay for any food ordered, even if I intend to leave without paying [ibid., 163]. It would seem closer to the case cited by Denning if the restaurant informed me, for example, that there would be some delay in my being served, to which I responded that I was not in a hurry, thanks to my attractive date, and had even accepted consideration in the form of free drinks while waiting. The principle of estoppel, at least as understood by Denning, would then suggest that that I had agreed to the revised terms of my contract with the restaurant and would not be entitled to deny that I had done so and leave without paying.

[10]Then again it seems that in contracting with an airline for their services, we contract into a bundle of obligations with them and their regulators, as they do with us, some of which is no doubt spelled out in the fine print. The question is whether anything like that happens with states.

The case as envisaged by Green is perhaps closer to those who drive off from a gas station without paying for which a proprietor may seek an appropriate remedy such as a charge for theft.

In his discussion of democracy, to which we shall have occasion to refer in greater detail in the next chapter, Singer in fact appeals to the doctrine of estoppel, at least as it is more loosely understood, to elucidate his account of quasi consent. Singer draws a moral lesson from that celebrated Australian cultural institution, the pub "shout," where those in a group take turns buying drinks for the group,and thus oblige each to do so in turn [1974, 49]. No doubt much is to be learned from such traditions of mateship and a "fair-go," and perhaps less from ancient legal principles. Someone nevertheless inclined to try his hand at free-riding, or not giving his mates a fair-go, should doubtless place himself at the end of a large shout, when with any luck his mates will no longer be in any position to notice whether it was his shout or not. For that matter, nor will he, probably.

However, as to the value of any such appeal to a rather recondite legal doctrine, we seem to have moved too far from the details of the case presented by the Master of the Rolls for it to be at all clear how instructive it may prove in the question of political consent. The point of the legal case was that we were not entitled to return to the terms of the original contract when there was evidence of our having waived them, or given our quasi-consent, as Singer would have it. In the case of the state, assuming the initial agreement involved obeying the laws, it is not clear what variation to that agreement the state is under estoppel now entitled to hold me to. No doubt it will be said that this is a looser version of estoppel, which is perhaps what Raz means when he talks of "various forms of quasi-estoppel." In fact Raz considers the appeal to such quasi-legal arguments misleading and pernicious, by implying that individuals are obliged to obey even unjust laws[1979, 239, 240].

Moreover, as Green reminds us, since the state has no interests of its own, but instead serves the interests of its citizens, an argument claiming harm to the state or its authorities consequent upon rejection of obligations is entirely without merit. Moreover,if any non-compliance could be shown to harm other individuals, in that they rely on my compliance, this does not mean that I should be estopped from not doing my bit and failing to acknowledge the state's authority [ibid., 165]. Or as Raz points out, the problem of basing a general obligation to obey on the supposed harm to any individual caused by one's non-compliance is that often one's failure to obey does not affect anybody, or if it does, it is not something we are necessarily aware of.

3.1.2 Possible salvation in associative obligations

In the face of such difficulties, others, such as Dworkin, have suggested casting the net a little wider to derive a form of obligation which might guarantee the compliance on which it is believed others depend. Dworkin recommends taking a second look at associative or communal obligations which in his view display

considerable moral complexity. These particular communal or family associations are typically not overtly consensual, which is one of the reasons Dworkin thinks philosophers have tended to shy away from them. Even those associations,where there is an element of choice, such as our friends, do not in Dworkin's view involve the formal commitment typical of membership in a club [1986, 197].

One of the important features of such associative obligations is that they are typically reciprocal, which should lead to a much higher degree of compliance. Their reciprocity seems to result from their being special to a particular group, as well as personal, with duties being owed to particular individuals, who have a sense of what may reasonably be expected from one another [ibid.,199]. Not only do the members of such groups evince fraternal concern for their fellow members, but Dworkin also thinks it important that such concern be equal for all members, which he takes to mean that no one's life is more important than someone else's, a fact which will be reflected in the group's structure [ibid., 200-201]. This equality requirement apparently rules out, for example, caste systems, as genuine fraternal communities.

By way of comment on Dworkin's proposal, let us work back from the last point about equal concern. Given the less formal nature of associations and the relationships they give rise to, as compared with, say, contractual relationships, I would have thought it difficult to be sure that concerns were always equal in the requisite sense. No doubt caste systems more or less by definition consist of groups with rather rigidly defined boundaries, but presumably within the caste itself concern could reflect the equality Dworkin thinks is important. In that sense, castes don't seem very different from any other association, where personal reciprocal relationships are confined to members rather than non-members, a fact which is probably true of fraternal associations with which we are more familiar, such as unions or professions.

Here Dworkin's response seems to be that our obligations are not simply confined to the associations we happen to consider primary, but that obligations, such as those of reciprocity and equal treatment are owed in the end to all and sundry, since there are manifold ways in which we are associated with the rest of the human race, to say nothing perhaps of animals and the environment.Dworkin of course does not wish to be so enthusiastic about associations as to ignore their downside,namely discrimination in favour of their members, which he thinks will likely conflict with their duties to treat non-members fairly [ibid., 202]. Dworkin has thereby produced a *deus ex machina*for ramping up obligations, beginning with those at the level of a small association, until by a process of intertwining and ever more complex and larger associations,we reach the *polis* or governing association, where anything resembling a genuine association may well have disappeared.

Nevertheless, Dworkin insists on the hypothesis that political obligation is best construed as associative, and that rather than trying to find a contractual basis for collective decision making we would do better to look to the obligations generated by our fraternal and communal associations [ibid., 206]. With regard to our obligations

to macro-entities such as the political community, Dworkin distinguishes what he calls the "bare" community from the fully fraternal one which exemplifies more ideal qualities such as reciprocity. The bare community of Canada would in the first instance consist of the piece of real estate which standard atlases identify as the country, along with certain minimal beliefs about the structure and functioning of the state. Dworkin thinks that our associations may function at a higher level than mere history and geography might suggest and that we respect the rules which govern political outcomes. At a higher level still we understand the principles, such as those of integrity, which underwrite those rules,with the result that our associative community achieves moral legitimacy [ibid., 213].

Let us now look a little more closely at Dworkin's proposal to see whether associative obligations could offer any sort of satisfactory solution to the problem of political authority and legitimacy, or whether he has simply side-stepped the issue, a criticism he denies. Dworkin claims his opponents have two choices: reject associative obligations or show why political obligation cannot be associative [ibid., 207]. Of course, there is no reason to assume that these are the only alternatives open to us. We first have to ask whether Dworkin has given us a satisfactory account of associative obligations, before attempting to see whether they prove a more fruitful source of obligations supposedly arising from collective decisions. One important feature of associative obligations, at least as Dworkin understands them, is that contrary to the tradition of voluntarism quite widespread in political philosophy, they are quite often not a matter of choice. In fact, Dworkin claims that we cannot account for associative obligations if we accept the view that the only way we can incur obligations is by choosing to do so [ibid., 197].

So, what about the popular wisdom that, although we don't get to choose our family, we do at least choose our friends? Even in the case of family, there is considerable choice, such as when to leave the family into which one was born, perhaps to follow one's career or set up one's own family elsewhere. Perhaps Dworkin would not deny these choices, but as we develop a "shared history," we assume the obligations that arise in the course of it, mostly without being aware that we have done so. Dworkin's organic account perhaps picks out some features of our associations with family and friends, but says nothing about the fact that like all such associations they presumably evolve, or are shed, along with any obligations may have been incurred in their wake. Further, one might wonder how closely many of these familiar relationships exemplify the equal concern and reciprocity which Dworkin seemed anxious to see in them. One suspects that some contractual relationships, which Dworkin contrasts less favourably with associative ones, may well at times exhibit more of the properties he considers typical of the latter.

Moreover, one would have thought that one of the more obvious features of such familiar associations is that they presupposed emotional bonds of one sort or another. Immigrants, including myself, have found themselves subject to what Blainey has called the "tyranny of distance" [1966], which is to say that they are at too great a distance to maintain much by way of reciprocal relationships with

families and friends at different ends of the earth.[11] This still leaves the question as to what sorts of ties remain between the black sheep of the family and his far flung relatives, since lacking the requisite propinquity, there is little question of authentic associative obligations. Many have thought that some sort of connection remains, as suggested by the 1902 picture included by Blainey, bearing the caption: "Emotional ties with Britain: Melbourne's stock exchange had just sung the hymn Old Hundredth on hearing that the Boer War was won" [1966, facing 293].[12]

While Dworkin acknowledges that emotional ties are widely thought to be important, he does not consider them to be an integral part of associative obligations, since this would suggest, even at the level of large communities, that we had such ties with every member, which of course we don't [ibid, 196]. For similar reasons Dworkin insists that in close relationships such as those with a sibling, the primary feature is reciprocity rather than anything of an emotional sort, which just seems wrong on the face of it, whether we are speaking of close or distant relatives. As we saw, Dworkin had hoped to show that fraternity was a more promising source of political obligation than the domain of contracts favoured by philosophers. However, in order to do that, he has found it necessary to give a less than plausible account of the more familiar associative obligations, ignoring some of the fairly obvious features of their dynamic structure, such as voluntariness and emotions, in order for them to fit the mould of any recognizable political obligation. With respect to the dilemma presented by Dworkin, rather than denying all associative obligations, we have suggested that his characterization of them is less than convincing.

If we are correct, we have shown that political obligation cannot be associative, at least as understood by Dworkin. Even if he could show that political obligations could be fashioned out of more mundane associative obligations of one sort or another, others have rightly questioned whether polities are in any important sense associations. Rawls, for example points out that unlike the political, the associational is indeed characterized by voluntariness and affections [1993, 137]. Narveson has also observed that in forming associations people do come together to pursue some common goal. In the case of societies people just happen to be together, often as an accident of birth, rather than having joined it for a purpose. This of course has never prevented politicians from expatiating upon the purpose which society patently doesn't have and from ensuring that we shall never lack for guardians who will diligently attend to its pursuit [2002a, 165]. However, Dworkin seems to think that the virtues of the ideal association can somehow be replicated at the political level. He asks us in fact to consider three models of society in ascending order of virtue. At the lowest level is the one corresponding to the bare association mentioned earlier where citizens see their association as the sort of geographical and historical accident which Narveson thought was typical of a society, as opposed to

[11] Dworkin remarks that, if nothing else, distance may stand in the way of my becoming a citizen of Fiji, since I don't meet the bare requirements of geography which would form the basis for richer associations [ibid., 202

[12] Ties were apparently still strong enough a dozen or so years later for 60,000 of their compatriots to die for King and Country

an association. The next step up from this most rudimentary and inauspicious social arrangement is what Dworkin calls the "rule-book" society, which sounds much like the political society we are familiar with, where we generally agree to abide by the patchwork quilt of rules produced by legislative compromises [ibid.,210]What we should be aiming at is the society of principle, rather than compromise, bearing the hallmarks of an association whose aim is reciprocal and equal concern for its members.

While Dworkin insists that by equal concern he stops short of asking that we love our neighbours, this might be of little comfort, for example, to the attorney whose reaction to a possible forced evacuation from his home in a well-to-do part of New Orleans relatively untouched by Hurricane Katrina was that he would strongly resist any such attempt on the part of the authorities. Instead of equal concern, he claimed that the state owed him nothing but benign neglect, a duty which he for his part would no doubt be only too happy to reciprocate. The fact that most states have not reached the level of principled rather than pragmatic politics, and as I have argued, are unlikely to ever do so, implies in Dworkin's terms that they lack legitimacy and represent, as he puts it, " bare power in the name of fraternity" [ibid., 214]. The recalcitrant lawyer from the Big Easy would probably be rightly suspicious of the descendants of Citizen Robespierre invoking the name of fraternity, thus rejecting any attempt to remove him from his property as nothing more than the exercise of bare power.[13]

Dworkin, of course, thinks that if we could usher in the reign of a community based on principle rather than compromise we would achieve that unanimity of purpose which characterizes associations, though apparently we would still disagree about justice and fairness [ibid., 214]. However, if it is true that we disagree about justice and fairness, and I think he is probably right about that, then I am not sure why we would agree about what it was to have an association based on principle, even if that were possible at the level of a polity. On the other hand we find his description of the run-of-the-mill political society all too familiar, with its welter of "checker-board" or compromised statutes on everything from divorce to bankruptcy drafted in response to the demands of particular interest groups. While Dworkin thinks that by becoming an association of principle we could promote legal integrity, Leoni thinks that we would do better to abandon politically created statutes and return to a tradition where "law is, or was, essentially a private affair concerning millions of people throughout dozens of generations and stretching across several centuries" [1991, 88].[14]

[13]Some 60 years after The Revolution, Bastiat wrote that no end of troubles resulted from founding the law upon fraternity, genuine or otherwise, most notably the destruction of liberty [2001, 81,39-40].

[14]cf. Barnett [1998, 124]; Tamanaha [2006, 42]

3.2 Fairness as a possible foundation of political obligation.

Before looking more closely at Edmundson's account of legitimacy,let us briefly examine another quite influential argument for political obligation, namely the argument from fairness. There is to be sure some connection between obligations arising from some sense of fairness and Dworkin's associational variety, characterized by equal concern and reciprocity, but which Dworkin in fact sees as improving on obligations derived from fairness. One of the best known proponents of fairness as a ground of political obligation was Dworkin's predecessor at Oxford, H.L.A. Hart, who was concerned that some might free-ride on others' respect for the law [1961, 213]. In the context of arguing how political obligation differs from other right creating transactions such as consenting and promising, Hart held that those who have obeyed the rules governing some cooperative venture have a right to expect that others similarly restrict their liberty, a right which may be enforced by authority [1984, 85].

Hart's formulation raises obvious questions about the sort of "joint enterprise" he had in mind, and what the force is of its being conducted according to rules, since considerations of fair play need not be confined to organizations with rather formal sets of rules. Perhaps the rules determine how one becomes a member, and what is expected of members vis--vis other members. The rules may vest authority in officials, though one's obligation to do one's share may remain a moral one over and above anything the rules may call for. Acknowledging his debt to Hart, Rawls similarly emphasizes the moral nature of obligations of fairness which are incumbent on all participants in a joint venture, none of whom wish their compliance to be taken advantage of [1962, 144]. Although, as we saw, the later Rawls claimed to distinguish the associational from the political, the fact that this obligation applied to anyone who stood to gain from a regulated group effort would appear to cover just about any such venture along that continuum. Rawls goes on to explain that a paradigm case of the special prima facie duty which arises from voluntarily accepting benefits, and which he claims to have borrowed from Hart, is in fact political obligation. In opposition to some social contractarians, Rawls points out that political obligation does not presuppose an actual promise or contract. Although it may be overridden by mitigating circumstances, you cannot simply refuse to do your duty when the time comes, but need to declare conscientious objector status early on [ibid., 145-146].

Indeed, what Narveson calls particular rights, of which a typical example is the right that other parties fulfil their end of a bargain [1988, 56], appear at least initially to have something in common with Hart's special rights. However, as we noted, Hart seemed to think it important to show how the rights and obligations peculiar to politics differed from those arising from promising or consenting. In this context, I may be bound whether or not I have specifically agreed, though Rawls apparently allows for some process of opting out, depending on the benefits

which have supposedly accrued under any such tacit contract. In this sense, political obligations, although Hart contends that they are special, appear to impose general duties on all and sundry, as suggested by his phrase "mutuality of restrictions."[15]

However, to return to the question of special versus general duties, it seems that Hart's example of political obligation, since it is apparently incumbent on large numbers of people, comes much closer to a general than to a special obligation. However, Hart insists that while special rights, of the sort that supposedly give rise to political obligation, justify an individual's interfering with another's freedom, we appeal to general rights to ward off such interference [ibid.,87]. To the extent that such general rights imply duties of non-interference on the part of all, they amount to what are more often called negative rights, which on a libertarian view, such as mine, constitute our fundamental moral rights. Special rights would then be a variety of positive rights which give rise to positive duties, which you may be coerced if necessary into performing. When we ask how it is that I acquire such duties, it is because I have promised or contracted to perform some service to the individual to whom it is owed, or as Hart puts it, I have "freely chosen to create this claim" [ibid., 88].

Preferring not to be confined to promises or contracts, Hart and Rawls claimed there was another way of acquiring such positive duties, namely "mutuality of restrictions,"according to which those who first submitted to the necessary restrictions can insist that others do likewise. Leaving aside the question of who gets to decide that something is a required limitation on freedom, presumably those who first agreed chose to do so, therefore it is not clear why their choosing prevents others from choosing not to if their priorities are different. To hold otherwise is to say that citizens of the Third Reich had a duty to report dissidents to the Gestapo, and that they did not have the option of choosing otherwise because that would be unfair to those who had performed their duty. On the other hand, Narveson reminds us that promising in fact illustrates quite well how positive duties may be derived from more fundamental negative ones. One is not obliged to promise or contract, but once having done so, one has a positive duty to fulfil it. Not to do so is to interfere in the ability of others to do as they wish, since you have failed to do what you said you would do, whereas in the case of Hart's mutuality of restrictions you have not agreed to anything, which is to say the restrictions are unilateral rather than mutual [ibid., 60].

What is also clear is that Dworkin's construing of political obligation as associative owes much to his illustrious predecessor. As observed earlier, Dworkin similarly held that political association has it in common with other associations like family and friendship that the more you associate the more likely you are to find yourself collecting obligations [1986, 206-207]. Indeed, the first criterion of such associative obligations was just as Hart saw them, they must be special to the group rather

[15]Similarly, far from implying a right to do whatever you please, which as Narveson reminds us, is tantamount to no rights at all, [1988, 45],libertarianism involves mutual restrictions on the exercise of liberty, so much so that Freeman [2001]considers libertarianism in fact a rather illiberal doctrine, at least in his sense of liberal.

than general duties owed to outsiders [ibid., 199]However, as Green pointed out, one of the more obvious difficulties in attempting to piggy-back political obligation onto family associations is that it suggests that the authority of the state is something akin to *in loco parentis* rather than a doctrine which applies to mature adults [2004, 272]. The standard reply has been something to the effect that even mature adults occasionally need information which only the state can provide to ensure that decisions are taken in the public interest, a view which it is the aim of this chapter to reject. As to the state's ability to be uniquely placed to more efficiently coordinate the actions of large numbers, Barnett has argued that this sort of centralized ordering of widely dispersed knowledge is largely a myth, and gives rise to intractable difficulties [1998, 46]Even if the state could perform such wonders on occasion, as Green observes, this would not constitute grounds for binding anyone. Indeed a duty of obedience seems superfluous when the state's armamentarium already includes various weapons ranging from persuasion to coercion [ibid.].

Moreover, Green rightly reiterates his view that consent is necessary for the obligation to obey, which is to say we cannot back into such an obligation without really trying, as Hart and Dworkin would have us believe. If we reject the possibility of unconsented obligations, whether they result from association or not, it may well turn out, as Green claims, that people are under no obligation to obey, even if we were not dealing with Stalinist Russia, but one of Dworkin's true communities of principle [ibid., 280]. Green further suggests that one thing we might expect a theory of law to do is to explain how it is that law obligates. Dworkin seems to agree that it is worthwhile to ask how law justifies state coercion, except in cases where there are over-riding arguments,[ibid., 190]to which Green responds that it is a bit odd to simply assume that political obligation is justified except when there is some stronger argument against it.

In order to decide whether the law is or is not justified in using force, Dworkin explains that we appeal to both individual rights and past political decisions [ibid. 93]. Moreover, he claimed in an earlier work that "what an individual is entitled to have, in civil society, depends on both the practice and justice of its political institutions" [1977, 87]. While past and present political decisions may in practice dictate the justification of coercion and entitlement decisions, we are interested in the normative question of how such measures ought to be justified. If they are justified, it is because they are morally justified, a fact which may in turn be reflected in political or legal decisions. Governments forever have decided that they are justified in collecting taxes, and have produced mountains of law to back up their claim. The right to tax is typically justified, according to Murphy and Nagel, in the name of government services and distributive justice [2002, 3]. However, following Nozick who observed famously that taxation amounted to forced labor [1974,169], and Rothbard, that it is a coerced levy [1977b, 83], we are much less likely to hold that taxes are a justifiable method of paying for government services, if for no other reason than that, as Seldon points out, forced payment for such services prevents their ever being put to the test of seeing whether those for whom they are supposedly provided would pay for them [2002, 77]. As to how much we

might actually be inclined to contribute to ensure the continuance of some service will doubtless be a function of our estimation of its importance in the light of our financial means.[16] With respect to the alleged authority to redistribute wealth, as Nozick and Rothbard suggested, those from whom wealth is seized to give to those whose need is greater, at least in the eyes of the Central Committee, are condemned to slavery. Yet as Rand pointed out, "No man can have a right to impose an unchosen obligation, an unrewarded duty or an involuntary servitude on another man" [1967, 325]. More recently, Lester has written that "liberty is the absence of imposed costs"[2000, 59],and, with medieval tenure now a thing of the past, when it comes to you or your property, as Narveson puts it,"The owner is the person you need to clear it with before you use it" [2008, 90].

We noted earlier that Dworkin's doctrine of associative obligation owed much to Hart's account of political obligation, as did that of Rawls. However, it should also be said perhaps that Dworkin claims not to be sympathetic to the popular defence of legitimacy, such as that of Hart and Rawls, which is based on some notion of fair play. According to Dworkin, such an argument makes the unreasonable assumption that people can have favours and their resulting obligations thrust upon them. Moreover, the argument from fairness is ambiguous, since it is not clear in what sense people can be said to benefit from political organization. One typical answer, Dworkin suggests, is that someone can be said to benefit if they are better off under a particular regime than they would otherwise be, though he admits measuring any supposed improvement may prove difficult [1986, 194]. Dworkin's criticisms are reminiscent of those of Nozick who held that we should be very careful of any attempt to premise a right to prohibit free-riding on the supposedly joint enterprise to which Hart referred. Nozick offers a couple of reasons for such scrutiny, first that unanimous consent to coercive government in the state of nature appeared to be unnecessary. Second, such a joint enterprise was contrary to Nozick's rejection of group rights, to the effect that the sum total of individual rights did not create new ones. Nozick then proceeds to examine the two options open to Hart for grounding any right of enforcement, namely that it flows from the nature of obligations in general, or from the obligation of fairness in particular, both of which he will eventually reject [ibid., 90-91].

Hart for his part seems to have thought that in the paradigm case of promising the right and obligation have to do with the voluntary transaction between the parties, rather than that that there is some moral quality peculiar to promising itself [1984, 84]. However, more important for this discussion are the special rights which do not result from voluntary action, such as those involving mutuality of restrictions thought essential to a joint enterprise. In this case, since the defence of voluntariness would appear unavailable, Hart simply asserts that the initial cooperators are due obedience by late-comers [ibid., 85]. a view which Nozick observes is notable only for its lack of argument [ibid., 91]. Since Hart fails to show how a right of enforcement derives from supposed non-voluntary mutual restrictions on liberty, Nozick explores the option that such a right is a formal characteristic of all genuine obligations,

[16] cf., Narveson [1988, 239]

finding that obligations do not invariably go hand in hand with any such right and do not need to be understood against the background of a natural right not to be forced to do something, as Hart argues. Indeed, as Nozick points out, I may waive my right not to be forced to do A, which is to say that I release P or the state from their obligation not to force me to do A, yet this does not create in me an obligation to do A [ibid.].

Hart had claimed that the self-professed social co-operators had a right to enforce co-operation from those who might think it in their interests not to do so, but as Nozick observes, since the converse does not hold, we may consider the obligation to do something as separate from the right to force you to do it. To illustrate the fact that obligations are one thing and rights of enforcement another, Nozick offers the example where A's promising B that he will not murder anyone, while not conveying to B the right to force A not to, since that is a right B already has, does place A under an obligation to B [ibid., 92].

Having successfully driven a wedge between obligations and their enforceability, Nozick also rejects as objectionable the celebrated principle of fairness.To support this verdict Nozick, offers his equally celebrated counter-example of a joint enterprise consisting of a neighbourhood entertainment system where each listener is supposed to take a term as DJ and do his bit to entertain his neighbours as per the roster. However, Nozick does not think you are obliged to take your turn at the microphone;you may prefer to do other things than get on board the neighborhood scheme, which raises the question as to how others can put you under an obligation by setting up a venture themselves. Perhaps any such demand should have to meet a cost benefit test in order to show whether the costs of contributing to the community venture are outweighed by the benefits from the contributions of others. Even if we conducted such a test, despite the fact that costs are subjective and unmeasurable, Nozick concludes that the so-called principle of fairness would remain objectionable as it would if you were to dump unsolicited books on people's doorsteps and later demand that they pay for them [ibid., 95].

3.2.1 From fairness to prima facie obedience.

Like Nozick and Dworkin, Edmundson also claims to have some reservations about the principle of fairness touted by Hart and Rawls, since there does seem to be a bit of a gap between a supposed natural duty to support just constitutions and a duty to comply with the laws that happen to be on the books. As an example of such a gap, Edmundson recalls an incident from his student days at Berkeley where he crossed a deserted street on the outskirts of town against a "Don't walk" signal. Although he was not putting himself or any one else at risk by doing so, another pedestrian waiting patiently to cross scolded him for his illegal behaviour. Although Edmundson now finds himself occasionally thinking it unfair that he observes the speed limit while others rocket past him on the freeway, he is still uncertain whether he or the scolding pedestrian have any real reasons for complaint, at least any that

are grounded in fairness. Edmundson remarked earlier in the chapter that there may be other grounds for complaint, if one believes as he apparently does, that exceeding the speed limit can endanger lives. Indeed, he seems to be of the opinion that the highway code offers much useful instruction on the question of obeying the law, having begun his first chapter with the question of whether one had a duty to stop at a traffic sign in the middle of the desert where there is good visibility in all directions. In this case he considered that he had both a reason and a duty to stop just because the law says so [1998,12]. Such a duty is to be sure prima facie rather than absolute, which is to say that the duty to obey the law may be set aside in the face of more weighty moral considerations, such as those that would rank refraining from murder as more important than not jaywalking. In any case, if there is some such prima facie duty to obey the law, various theorists have asked whether we are to say about Germans in respect of Nazi law that they had a prima facie duty to report the whereabouts of Jews to Nazi authorities, but that, given Nazi policy toward the Jews, there was in fact no moral reason to comply. Edmundson modifies his original claim of a prima facie duty to obey the law to read a prima facie duty to obey sufficiently just laws. Since the Nazi state could not reasonably be described as sufficiently just, it would therefore seem to follow that its citizens did not have any such duty [1998, 111].

On the other hand Dworkin thinks that we need not deny that Nazi Germany possessed a legal system, since it obviously did, though we can well understand someone claiming that Nazi law was not really law, or a degenerate form of it [1986, 103-104]. Dworkin still wants to allow that even in this context a German judge could make a true finding, especially in a case with few political overtones. Even in a case where statutes discriminated against a Jewish defendant, it might be possible to justifiably, if only weakly find in favour of the Aryan plaintiff [ibid., 106]. Edmundson, of course, does not favour Dworkin's more nuanced approach, believing that the case of Nazi law not only serves to clarify what it is to have a prima facie duty to obey the law, but also that the Germans quite clearly did not have any such duty because of the absence of justice in the Nazi state.[17]

With respect to the question as to whether coercion, which is supposedly justified by appeals to fairness, is prima facie wrongful or not, Edmundson suggests asking a further question he thought relevant to determining what prima facie duties Germans had *vis-a-vis* Nazi laws, namely to ask whether it would be appropriate to feel badly about any coercion used in enforcing such laws, perhaps to the point of awarding compensation to those on the receiving end. However,if it turns out that Nazi or any other coercion was not justified, it isn't clear what such a test of remorse is supposed to accomplish- some may or may not feel remorse, regardless of whether coercion was justified or not. Edmundson nevertheless concludes that prima facie duties are only owed to a sufficiently just state, and not to a state

[17]Perhaps Edmundson would have shared Churchill's recently revealed opinion that Hitler merited the fate of a gangster rather than a sovereign, which is to say being put to death in the electric chair, something Churchill apparently thought could have been arranged through Lend Lease.

ruled by gangsters, where scruples about disobedience are entirely inappropriate. Of course,he thinks it a relatively easy matter to decide what will count as a just state, such that it may be reasonably thought to attract prima facie obligations. No doubt Canada, or the U.S., qualifies, given a greater reluctance, for example, to consign fellow citizens to concentration camps.[18]

On the other hand, Dworkin thinks we need to allow for contexts where we find significant parts of our own law morally reprehensible, where there are only relative differences between ourselves and the Nazi state [1986,107]. Edmundson considers it obvious that we live in sufficiently just states, such that it is not prima facie wrongful to coerce those who have benefited from a cooperative scheme from doing their fair share. The question, of course, is who gets to decide that this is the cooperative scheme we are involved in and that it is indeed fair, though it is doubtful that that Churchill, Roosevelt and Mackenzie King worried much about it in 1943, if only because they too probably considered the answer self evident. Among the long list of potential candidates for calling the shots are the state, the government, the House of Commons, whose servant, as Gilbert reports, Churchill claimed to be [ibid., 104], the people, or some segment thereof, such as the neighbours who have already contributed. If we are less hasty to rush to judgment, in the manner Dworkin recommends, we might try stepping into Judge Siegfried's shoes, which might in turn encourage us to be more skeptical about the supposedly obvious justice of our own states.

3.3 Edmundson's response to philosophical anarchism

Having canvassed various skeptical views about political obligation in his opening chapter, which Edmundson admits, raise genuine doubts about any duty of obedience[1998, 31]. he goes on to argue why any such doubts stop short of the philosophical anarchism which is now widely thought to follow from a rejection of political obligation. The first element in Edmundson's account of legitimacy is what he calls the simple correlativity thesis, namely that a state's legitimacy only is contingent upon its imposing on its subjects at least a prima facie duty to obey its laws [1998, 36]. However, he agrees that the sort of skeptical views about political obligation which have become widely accepted in political philosophy in recent years, together with his correlativity thesis, tend to undermine the claim that there is such a thing as a legitimate state.

Since Edmundson is greatly troubled by the prospect of philosophical anarchism, dropping the correlation between legitimacy and a duty to obey might look like a

[18]Churchill, for example, declared at the 1943 Quebec conference: "Here at the gateway to Canada, in mighty lands which have never known the totalitarian tyrannies of Hitler and Mussolini, the spirit of freedom has found a safe and abiding home" If Stalin was not added to the list of *personae non gratae*, Gilbert reminds us that it was because considerations of prudence prevented the leader of one of the Allied Powers from being added to the list of dictators [2006,105].

promising strategy. On the other hand, he notes that Raz, for example, holds that having authority, de facto or otherwise, is not just a matter of influencing people, but also one of issuing authoritative commands, since as he put it "the justified use of coercive power is one thing and authority is another" "1990, 118]. Political authorities do indeed resort to coercion and threats, but for Raz, legitimate authorities do more than that, since they claim to impose duties on their subjects, and to the extent that this claim is justified, they are owed obedience. For Raz it just seems to be a matter of our social history that "societies are governed by institutions claiming and being acknowledged to have the right to bind their subjects" [ibid., 118].

As to the question of justifying a claim to legitimate authority, Raz argues that we are more likely than not to act according to right reason if we accept authoritative directives as binding rather than trying to reason things out for ourselves [ibid., 129]. Anarchists such as Wolff were wrong in thinking that the only way to preserve autonomy was to consent to every act of government; for Raz this is going too far, since it rules out the possibility of legitimate authority [ibid., 11-12]. To do so is to undercut our reliance on authority in the everyday world where we depend on the advice of people such as doctors and financial planners. The fact that we do delegate authority to others shows that it is beneficial to do so, since we can then concentrate on doing what we do well. For Raz, the paradigm case of authority is taking advice from friends or fiduciaries, and if we deny acceding to government authority, then we shall have similar qualms about doing so in the case of other more limited authority [ibid., 12].

By way of response to Raz, we reject the view that the authority exercised by governments is just the authority we regularly delegate to others writ large. The whole point about governmental authority is that we have not delegated it, we have not consented. To the extent that others, such as a doctor, can order our detention, they do so as agents of the state, which has almost unlimited power to coerce and confine. This power was assumed by the medieval monarch in order to protect his subjects, and as Hogue notes: "The doctrine of the king's peace gave the king a large field for the exercise of authority" [1966, 149]. Even if we accept that rights pertaining to such a doctrine be reserved to the sovereign, the reach of government has long since ceased to confine itself to breaches of the king's peace, such as murder, rape and robbery. As Higgs writes, not only is protection much more likely to be provided privately rather than publicly, suggesting that the sovereign has neglected his long standing duty,[19] government functionaries go to great expense to prosecute people for offences that are in no sense breaches of the peace, such as using unapproved recreational or therapeutic drugs [2004, 104].

Another part of Raz's response to anarchism is the claim that legitimacy enables people to conform to right reason [ibid., 13]. Indeed, he thinks that anarchism derives much of its popular appeal from a rejection of rule by others, whereas we

[19]Benson estimates that US private sector expenditures in criminal justice are several times greater than those of the public sector [1998,80].

are more likely to do what is really in our interests if we follow the directives of legitimate authority. Hand in hand with this view is the sovereign's claim to serve the people, a notion perhaps captured in the royal motto *ich dien* and in the doctrine of *noblesse oblige*. The denial of the view that the business of authorities is to serve the governed has been typical of philosophical anarchism since Thrasymachus, who famously held that the ruling class typically legislated in their own interest.[20]

Having noted, then, that Raz, for one, might not be inclined to support Edmundson's decision to uncouple a duty of obedience from legitimacy, let us press on with Edmundson's case to see why he favours such a move. In so doing, of course, he wants to be able, like Raz, to reject philosophical anarchism, which he thought might prove irresistible, if it were true that a state's legitimacy depended upon its imposing a prima facie duty to obey the laws, and it were also true that there was no such duty. According to Edmundson, a satisfactory theory of the state will include an authority thesis and a legitimacy thesis, and that the true view will avoid the errors of philosophical anarchism by combining the appropriate version of each thesis. To be an authority entails that one's directives create enforceable duties of obedience, while legitimacy is seen to impose somewhat more modest requirements, namely that duties of obedience are reduced to duties of non-interference in the administration of justice [1998,43]The idea seems to be that while the anarchist might quarrel with a fully fledged doctrine of political obligation he cannot really object to a duty of non-interference. Indeed, at first sight this sounds like something that might even appeal to a common garden variety libertarian anarchist since the only duties owed to authorities are negative ones of non-interference. However, we need to ask exactly what it amounts to not to interfere with the reach of the long arm of the law, particularly when that arm reaches in our direction. Or as Edmundson points out, it is one thing not to stop for the proverbial stop sign in the desert, but quite another not to stop for the traffic cop who happens to be watching that particular sign.

Edmundson considers it "an embarrassment to political philosophy that the possibility of a legitimate state is vulnerable to every worry about political obligation" [1998, 50]. Then of course there are those of us who are more likely to find the possibility of a legitimate state an embarrassment to political philosophy. In any case, in order to insulate the legitimate state from Edmundson's worries, he argues that we should instead attend to administrative prerogatives which are supposedly less worrisome.Edmundson seems convinced there is a difference that matters between a duty to obey the law and a duty not to interfere in its administration, but it is far from clear why he thinks so, for even on his own account, there is considerable overlap, since a duty of non-interference also generates obligations [ibid., 52]Edmundson claims that other considerations, such as those of utility, can be appealed to in support of the latter, by which I take it that he is referring to the fact that while we can ignore the stop sign in the desert with impunity, we cannot so easily

[20]cf. Narveson [2000a,7];the ability of legislators to set their own remuneration and benefits, often leading to increases well beyond the normal workplace norm is an up-to-date example of rulers looking out for their own interests.

ignore the traffic cop who happens to be there to enforce it, because of the direct consequences that are likely to follow. So in this sense it is better for all if I don't complicate matters by running from the police. It is less clear why I might find myself duty bound to do so, unless he has in mind that the aim of such a directive is to limit my options as to whether or not I choose to obey, that is, to provide me with what Raz called exclusionary reasons to obey, where authority overrides our right to act as we see fit [1979, 27]With reference to necessity, which Edmundson also thought backstopped a duty of non-interference, one very clear way in which it becomes necessary for us not only not to interfere, but even to assist with the administration of justice is that such a duty is itself clearly expressed in law.[21]

Edmundson focuses his attention on resisting arrest, since that particular response to the reach of the law offers the most flagrant example of not complying with its administrative directives,one that "is likely to betoken a much wider estrangement from civil society than simply breaking law L" [ibid.]. He further argues that not resisting the administration of the law,as opposed to merely breaking a law, is more "content independent." While we have a weightier duty to avoid murder than not to jaywalk, which is to say the strength of the legal prohibition is relative to the moral quality of the action proscribed, Edmundson holds that both murderer and jaywalker are subject to the same duty not to resist arrest, a duty which is in fact part of "received legal doctrine, whose practical wisdom we should not lightly disparage" [ibid., 53].

However, Edmundson further claims that submitting without resistance isn't simply a counsel of practical wisdom, but is in fact a moral duty. This is evident, he argues, from the fact that while I might run a light because I am in a hurry to get my wife to the hospital, I have a clear duty not to ignore the police cruiser which attempts to pull me over, as well as to explain to the officer why I was in such a hurry. There might be other situations, such as my slipping away after being detained by mistake, where Edmundson thinks that people's moral intuitions might differ as to whether I had a duty to explain myself first. As to his remark that moral philosophy might not be of much help in sorting out such conflicting intuitions, he himself claims to be arguing for a view which is true, [ibid., 47]. and which suggests there is something by way of a moral argument to be given and a correct answer to the question as to whether I have a duty to explain myself to those charged with the administration of justice even when they make mistakes. As for what we may or may not feel any compunction about is, as he points out, a somewhat unreliable guide.

Edmundson also thinks that immunity from interference may extend to someone, who, for example, decides to direct traffic at an intersection after the traffic lights have failed, though that person in turn will need to hand off the task to more competent authorities.According to Edmundson, the latter, including those exercising de facto authority, have a *de jure* monopoly on administrative prerogatives,

[21]e.g.,The Canadian Criminal Code prohibits not only obstruction of, but also failing to assist a peace officer in the performance his duties. cf. Martin [1971, Sect. 118; Sect. 246]

underwritten by the presumptive legitimacy of the state.[22] To further illustrate the way in which he believes that the presumption of legitimacy supports a general duty to respect administrative prerogatives, Edmundson returns to the question of the legitimacy of the Nazi state. We are asked to imagine ourselves toward the end of the war in Nazi Germany and to contrast the duties we would have to assist in the apprehension of a fugitive from the American military police versus a fugitive from the German police or from a German civilian. Edmundson trusts that if we could somehow influence the outcome of the pursuit, we would agree that while we have a prima facie duty not to mislead the MP, we have no similar duty not to obstruct the German policeman or civilian. The reason is that the MP is acting on the authority of a legitimate state, whereas the German policeman and civilian are not [ibid., 55].

Edmundson contends that the nature of this supposed prima facie duty not to interfere in the administrative prerogatives of a just state is especially evident in cases of civil disobedience, e.g. the landmark case of Walker v. The City of Birmingham, which involved an injunction prohibiting Martin Luther King and associates from holding a demonstration against segregation. After proceeding with the rally in defiance of the injunction, King was found in contempt, a verdict later upheld by the US Supreme Court, despite the fact that the ordinance under which the injunction was granted was unconstitutional. Edmundson claims that his doctrine of administrative prerogative helps clarify the fact that although Dr King had no moral duty to obey the ordinance, he did have at least a prima facie duty not to resist the court's administrative prerogative [1998,56]. On this matter Edmundson finds Bentham's remark singularly instructive, that under a government of Laws the good citizen ought: "To obey punctually, to censure freely" [1994,10].

Edmundson contrasts his view that we have a general prima facie duty not to resist the administrative prerogatives of a just state with that of Hobbes who appears largely to hold the opposite view, namely that I cannot be required not to resist the imposition of force upon myself, or to incriminate myself [1909, 107, 167]. On the other hand, we are not free to interfere in the sovereign's attempt to bring another to justice because the prevents the sovereign from exercising his right of protection "and is therefore very destructive of the very essence of Government" In support of his view that we have no duty not to resist the king's men, Hobbes observes that condemned men are led to the gallows by armed guards, even though they have consented to the law, by which they are sentenced [ibid.,108]. However, Edmundson believes that rather than showing that there is no duty not to resist, Hobbes's condemned man example shows at most that it is understandable that we would try to avoid long sentences or execution [1998, 61]. However, Edmundson considers the condemned man example to be a case where not resisting is tantamount to obeying, which is to say that the only way not to resist the order to put your head on the block is in fact to obey it. Thus there will be cases where not interfering in

[22] One is reminded here of the criminal law requirement that a citizen who arrests someone "on reasonable and probable grounds" of having committed a criminal offence "shall forthwith deliver the person to a peace officer": cf. Martin [1971, Sect. 449, 359-360]; Edmundson [1998, 53, n.6]

administrative prerogatives amounts to obeying them, though Edmundson claims that in the end fewer duties will be imposed than under a traditional account of political obligation.

Thus it seems that at least sometimes the distinction between not resisting and obeying, which Edmundson thinks so important for his case against anarchism, is virtually non-existent. Indeed, he has thus far failed to convince us that this distinction ever amounts to very much, and as a result it will be unable to perform its expected function. For the proverbial man in the Clapham omnibus, obeying the law simply amounts to obeying the endless dictates of this or that official. Rather than worrying about some abstract duty to obey, the average citizen is more likely to be concerned about what someone on the endless list of government officialdom can do to him if he doesn't comply with this or that order.

Of course, Edmundson thought that the disposition of Martin Luther King's civil disobedience case provided a good illustration of his distinction. While King had no duty to obey an unconstitutional city ordinance, Edmundson thought King had a duty to comply with the relevant administrative procedures, even if the ordinance on which they rest is null and void [ibid., 56]But,if we are talking about a moral duty first and foremost, it seems odd to claim that we are morally required to do something which is a moral nullity.[23] But Edmundson insists that while there may be no legal or moral reason to comply with the unconstitutional ordinance, there may be good reason not to resist its administration. If he thinks we have a moral, as opposed to a legal or prudential one, it seems he has yet to tell us clearly why he thinks so.

Indeed, one of the central problems with state enforcement is that much of the time the state acts morally *ultra vires*, that is, it quite typically requires us to perform duties which are either moral nullities or morally wrong. Simmons, for example, cites laws which prohibit harmless behaviour, require military service, or demand payment to finance all manner of government operations [1993, 264]. More specific examples are not hard to come by: for example, Prairie wheat farmers have been jailed for ignoring the Canadian Wheat Board Monopoly, and privately selling their wheat south of the border where it could fetch a better price than in Canada. As Epstein points out, such farmers could be forgiven for thinking that a supposed right to farm, such as that touted by Roosevelt in 1944, implied at least two correlative duties: (1) nobody can block one's entry or exit from farming and (2) one can sell produce to anyone willing to buy at whatever price can be agreed upon [2005, 29]. However, some farmers have found a ready ear in government for a more positive doctrine, namely a right to be insulated from the vagaries of the market. In the case of the Wheat Board, what began in 1935 as a voluntary marketing organization, has become a state backed monopoly with considerable control over prices as well as insulation from commercial risks. Such state sponsored cartels are also, as Epstein observes, immune from the scrutiny to which private

[23]Aquinas held that unjust laws were more like acts of violence, and do not bind in conscience, quoting Augustine's view that: "A law that is not just seems to be no law at all" [1953, 72]

cartels are regularly subject [ibid., 32]. Nor are government prohibitions having little or nothing to do with morality confined to big government, for as Spooner argued, one need appeal to nothing more than the majority principle in order to justify takings, with the majority typically being influenced by envy and ambition [1992, 321]. Local government also offers fertile ground for the arbitrary will of a majority, and is thus the source of many similar unwarranted curbs on individual freedom. Bolick notes that cities frequently use powers of eminent domain not only for public projects like roads, but also for seizing property which they consider under-utilized, such as low income housing, but which could produce more tax revenue if redeveloped.[24]

However, according to Edmundson, the fact that a particular law is void of moral worth does not mean that we can ignore directives issued under its warrant. In fact, as we noted, Edmundson held that just such a distinction helps explain what otherwise might appear to be the incongruent findings in the case of Martin Luther King, that while on the one hand he had no duty to obey the ordinance requiring permission to hold a demonstration, he did have a duty not to disobey an injunction upholding that ordinance. [1998, 56]. On the contrary, while we are quite happy to leave the determination of legal sense to those who happen to make a career out of such questions, we deny that King had any moral duty to obey either the ordinance or the court order deriving from it. Edmundson claims that King had a prima facie duty to obey the court order simply because it constituted an administrative directive of a just state. One would have thought that an obvious earmark of such a state was that it did not require obedience to laws, whose moral, and for that matter, legal pedigrees were, in Edmundson's words, nullities. It seems that a state which requires such obedience has begun the descent into tyranny, which is to say, its justness is far from a foregone conclusion. Perhaps we shouldn't be inclined to follow Bentham's advice to obey punctually, not that Edmundson ever makes it clear whether any such exhortation derives more from prudential, rather than moral considerations. More germane, perhaps, is the celebrated dictum of Junius, that the subject who is truly loyal to the chief magistrate will neither advise nor consent to arbitrary measures, or, as Zakaria has written more recently, liberty has primarily meant freedom from arbitrary authority, especially that of the state [2003, 31-32].

Edmundson reaffirms his contention that one can somehow sidestep the anarchist's concerns about political obligation by focusing instead on the supposedly less demanding obligation of not interfering in the law's administration, which, as he puts it, "is drastically narrower and less objectionable than that of political obligation as traditionally conceived" [1998, 61]. On the contrary, I have attempted to show that even if one could distinguish not interfering with administrative prerog-

[24]What Bolick calls "Robin Hood in reverse"[2004,84-85]. One is reminded of the plan of the City of Toronto to prosecute those attempting to supplement their incomes by collecting bottles and cans from blue boxes in order to recoup cash deposits. The City considers the contents of blue boxes to have escheated upon being placed at the curbside.With respect to eminent domain seizures, Greenhut considers them legalized theft[2004, 190].

atives, as Edmundson is wont to call them, from obedience to the law in a wider sense, it is not clear how this is going to allay the fears of those, whose enthusiasm for government is under fairly tight control. Indeed as Edmundson himself acknowledged, those who speak of a broad consensus that there is no such duty are not cranks but hold positions in prestigious centres of learning [ibid., 33]. However, crank or academic, someone from the government, claiming no doubt that he is here to help you, will tell you under C circumstances that you are required to do A, failing which you will be subject to penalty P. Thus obeying the executioner by putting one's head on the block is the rule, rather than the exception, as Edmundson claimed. Obeying the sharp end of the law may constitute a narrower duty, but it is no less objectionable than political obligation as traditionally conceived.

Nor for that matter did Edmundson's distinction appear to be of any great use in clarifying Martin Luther King's treatment by the courts. Of all the administrative hurdles placed in King's way by the supposedly just state, it isn't clear why disobeying the court injunction should rank as the paramount instance of such disobedience. The fact that a court thought so probably has more to do with the fact that the bench and its jurists such as Edmundson are likely to be more sensitive to cases of contempt than that it was morally the most egregious of King's failures to obey the magistrates.

3.3.1 Authority indistinguishable from arbitrary rule

Edmundson sums up his view of political authority by the formulation "Do it because I say it is good and it is better that you take my word for it" He further comments that although the political machine does not possess superior knowledge, the populace is nevertheless better off heeding its *ex cathedra* pronouncements [ibid., 63-65]. While for Edmundson political authority is not epistemic, we may recall that Raz, for example, held that important forms of authority were in fact epistemic and that the anarchist was guilty of overstatement to the extent that he denied this; if we can grant authority to a professional there is nothing in principle wrong with doing so to a government [1990,12]. However, as noted earlier, forming a contract with some sort of professional to handle aspects of one's affairs because of their superior expertise or knowledge bears little resemblance to the coercive relations most people have with government. The latter is more reminiscent of Faust's pact with Mephistopheles than anything else. What Raz should have said is that we can have legitimate limited governmental authority, suggesting that we might fire our government with the same ease that we do an accountant. The fact that we cannot do so has forced voters to resort to other exit strategies such as escaping by affluence, or to the underground economy.[25]

Of course, there are those who believe that we consent to be governed, and that we receive a goodly measure of peace, order and good government in return. Others, such as myself, tend to hold that mostly what we get in exchange for

[25] cf."The escapes from over-government" in Seldon [2002,Ch.3]

our birthright is a mess of potage, and that central government can in no way approximate the precise knowledge held by individuals or small groups. Barnett notes that centralized decision making could work provided that it had access to that widely decentralized personal and local knowledge; in fact, knowledge is widely dispersed, implying similar decision-making [1998,61]Leoni makes a similar point about legislation, namely that its centralized production makes it impossible to reflect local conditions and the wishes of a dispersed citizenry,[1991, 22]which would seem to support Edmundson's view that legislative compromises do not constitute a superior form of cognition. While for him political authority is mostly not epistemic in nature, it can provide good reasons for obedience, though he admits they are often less than clear, such as the fact that many interests have been weighed in reaching a particular legislative compromise, suggesting that we would do better to accede to that result than not [ibid., 1966].

Apparently we have to take their word for it that whoever did the weighing and balancing got it right, and it is best if we just obey. This sounds more like an instance of no reasons at all than one of their being not perspicuous,thus lending weight to Leoni's claim that the dominant mythology of our age is political rather than religious, whose "chief myths seem to be "representation" of the people, on the one hand, and the charismatic pretension of political leaders to be in possession of the truth and to act accordingly, on the other" [ibid.,23]. Of course, in other respects such mythology is not entirely confined to the present era, since Plato also hoped to have political leaders in possession of the truth, which would be ensured by having only those fit by birth and philosophic training assume command of the republic [1941, XXII, 208].[26]

Moreover, he argued that those who failed to acknowledge that expertise was required to take charge of the ship of state were like sailors fighting over who should be at the helm, while failing to understand that navigation requires special expertise [ibid.,XXI,195-196]. Similarly, as Raz pointed out, a legislator may issue directives though many may not approve. He may for example have reason to impose a certain tax, and he may or may not leave some discretion as to how it is paid [1990,127].

Hobbes thought that while bees and ants could live peacefully together without any governmental structure, mankind could not do likewise but required the great Leviathan who would protect them from one another, as well as from foreign invasion [1909, Ch.17]. The latter justification is particularly ironical, since, as Porter reminds us, "the state is a creature of war and the source of all the truly large scale violence in the past half-millennium" [1994, 299]. Thus Horace's famous line *Dulce et decorum est pro patria mori* is characterized by the Great War poet, Wilfred Owen, as "the old lie" no longer fit for the edification of children. No doubt acknowledging that dying for one's country can be a tough sell, particularly during an election, Roosevelt promised in 1940 that the sons of America would not be sent

[26]With respect to such a doctrine Carter comments that: "The authority of the philosopher arises from an esoteric knowledge that must be accepted on trust by the common man. The authority of the true philosopher is then transferred to the political realm, where philosophers become kings, or the advisers of kings" [1979, 35]

to fight in foreign conflicts, but as Higgs pointed out, for close to half a million who never returned, this proved as much of a lie as the old one [2005,135].[27]

Other writers since Hobbes have elaborated on the doctrine of sovereignty, particularly with respect to those it supposedly protected. For example, Heinrich von Treitschke remarks that there is a gulf fixed between rulers and ruled with the State alone being sovereign, which in turn implies a right of arms and to resources sufficient to pursue its self-determined interests [1963, 77,18-19]. A generation or so later, Harold Laski observed that the authority of the state depended on its power to coerce its opponents and force them into submission, using the armed forces if necessary [1935, 14]. More recently, anthropologist Harold Barclay, has written that a democracy does nothing to alter the time-honoured hierarchy between rulers, consisting of a small elite, and ruled [2003, 23-24]. Boetie reminds us, however, that it is not the legions at the command of the sovereign who keep him in command, but rather a small number at the top of the hierarchy who maintain control through iterated pyramids, the main outlines of which seem common to various command structures [nd., 22].[28] Molinari on the other hand sees the notion of governors as a modern manifestation of the doctrine of divine right, a fiction which one would do well to dispel, whereupon their aura of authority will disappear and the governors will be seen to govern no better than the governed [1977, 10-11].

3.3.2 Moral discovery as a possible source of authority

Unlike Molinari, Edmundson, as we saw, has not lost faith in the authority of government, holding that government can provide us with better solutions to coordination problems than if we were left to our own inclinations. One of the ways in which it might do that is that the law is supposedly capable of what Hurd calls moral discovery, where from coordinating action on relatively straightforward moral questions it might provide solutions to questions with several right answers, and do so in a way that is morally authoritative [1999, 174-175]. As a possible example, Edmundson mentions a statutory rape law, which widens the definition of rape to include cases of "innocently mistaken conduct" [1998, 65]. Of course, to the extent that such a statute proposed to enlarge upon moral prohibitions against force and fraud, it may well risk harming the innocent, and thus represent a significant departure from customary moral norms. Although this does not seem to be what Hurd, for example, had in mind, she believes that law makers are uniquely placed to develop solutions which are thought to possess considerable epistemic authority [ibid., 176].

[27] Faust has recently reminded us that foreign conflicts may pale by comparison with domestic ones when we recall that in the case of the US: " The number of soldiers who died between 1861 and 1865, an estimated 620,000, is approximately equal to the total American fatalities in the Revolution, the War of 1812, the Mexican War, the Spanish-American War, World War I, World War II, and the Korean War combined [2008, xi]"

[28] cf. Grazia [1952, 116].

Of course there is still a question as to whether the ability of legislators to develop yet more laws, or find ways to tweak old ones in order to please certain constituencies really amounts to some sort of moral discovery. The minorities who simply go along with a statute are as unlikely to feel that it represents a genuine moral discovery as they are to believe that the solution reached by legislators possesses any authority akin to that possessed by other professionals with whom they might have a fiduciary relationship.[29] Moreover, the fact that law is able to make some solutions both salient and widely accepted as authoritative, tells us little about what law really ought to be doing and why it should have the authority it is often thought to have.

While Edmundson does not think that the law on the whole offers fresh evidence of antecedent moral obligations, he allows that it does provide for moral improvisation by making salient a solution to a coordination problem such as which side of the highway to drive on, thus generating a rule which supposedly has moral force because "it offers important benefits not securable otherwise" [ibid.]. While he appears to think that traffic laws are an obvious example of the law's facilitating a wide range of exchanges, we saw earlier that he had some trouble convincing himself that he really should stop at the traffic sign in the desert, where there was no opposing traffic, or that it was wrong of him to disobey a "don't walk" crossing light, and that another pedestrian was entitled to reproach him for doing so. He rightly concludes that not a lot hangs on relatively trivial cases of disobedience and that they don't offer great prospects as a foundation of some general duty to obey [1998, 28,31]On the other hand Edmundson contends that the law which solves such an important problem as which side of the street to drive on clearly has moral import. Hardin also thinks it a compelling example of real world coordinations, but reminds us that law only later reinforced coordinations which road users had already worked out among themselves. Indeed what is noticeable about such a solution is that it worked for a long time without authoritative enforcement.

This sounds like a different and more plausible tale than that told by Edmundson. According to Hardin, early road users did not need officials to tell them that everyone could benefit by keeping to one side while going in a particular direction [2003, 13-14]. While law did as it had always done, it did not invent the coordination, but gave expression to established custom. Nor did the law bring moral obligation in its wake, but rather those who wished to minimize harm to themselves and others doubtless saw the wisdom of this sort of coordination. There will no doubt always be risk takers, just like those who run remote stop signs or disobey pedestrian signals. Methods of enforcement range from the informal scowl of Edmundson's critical onlooker to hefty penalties which may accompany formal law and adjudication following the original coordinations.[30]

[29]cf. Leoni reminds us that minorities are unlikely to mistake democracy or "the hegemonic power of numbers" for freedom from coercion [1991, 101].

[30] Not that formal law invariably follows such coordinations, even when as De Soto argues, it might assist the development of eg., real estate capital markets in third world countries [2000, 156-157].

So Edmundson's claim that it is the job of law to solve a coordination problem, if not wrong, is an unfortunate oversimplification. He further argues that this solution just has to be one that people accept, not necessarily the best one, morally or otherwise [1998, 65]. One might wonder why people should adopt a solution which is not necessarily in line with their preferences, nor is it morally the best. Perhaps that isn't something they should even worry about, since we saw that in Edmundson's view solutions were best worked out by the state, and it is best that loyal subjects take the state's word for it. Those of us not inclined to blind obedience can offer a more plausible criterion of optimality, namely that suggested by Pareto, which will allow us to make up our own minds about a proposed government intervention. According to Pareto a social state of affairs is optimal if no further improvements can be made to A's lot without worsening B's. Further, a social state of affairs, Y, is an improvement over,or Pareto superior, to Z, if at least one person is better off in Y than in Z.[31]

Edmundson, on the other hand, thinks that the most we can ask of legislative compromise is that various goals and interests are weighed in the balance and that whatever decision is arrived at politically is better than no decision all [ibid., 66]Governments have little interest in applying the Pareto yardstick, which sets clear limits to what they can do.Indeed, responding as they do to all manner of pressure groups and lobbies just about guarantees that modern governments will not be shining examples of Pareto in action. They are only too happy to improve A's lot at the expense of B and countless others besides. As Tullock points out, concentrating benefits and diffusing the costs ensures that while it will be in A's interest to pursue the benefits, it will not be worthwhile for B and his fellow taxpayers who bear the small individual cost to oppose the levy. Tullock cites the interesting case of a small firm of manufacturers of violin chin rests for whom it was worthwhile to lobby for a protective tariff, whereas for the small amount it added to the cost of a violin, it would not have been worthwhile for a purchaser to travel to Capitol Hill to oppose it "2002, 38].

However, as Seldon notes, one way to end the granting of favours is to remove that power from the armamentarium of government, something "democratic government has chronically avoided or rejected" [2002, 46]. He argues that what we need is a public philosophy which would hold that it is immoral to seek favours at the expense of others and of our own real interests,[1990, 121]. since all producers are ultimately consumers. Indeed, I would submit that the Pareto criterion is a move in the right direction, since, as Narveson contends, it suggests some rough and ready way of deciding whether a change is better for some, and no worse for anyone [1988, 184].

[31]cf. Narveson,[2002a, 79]; improvement by incremental adjustments, as suggested by Popper [1961,65-66], perhaps sounds a little dull by comparison with many of the grand schemes touted by politicians.

3.3.3 Law and ethics do not necessarily overlap

A common assumption among those interested in the interface between law and ethics, such as Edmundson, is that both of these inquiries generally head in the same direction.[32] Indeed, as far as Edmundson is concerned, the degree of overlap between the two is such that law can reinforce any moral requirement and thus overcome the hazards allegedly inherent in private enforcement. Not only can it do so, but it rightly possesses a monopoly of doing so [1998, 157]. However, as we have pointed out in various places, there seems to be an abundance of cases where the government has no business presuming to monopolize compulsion, which is to say it all too often exceeds its moral warrant. In fact, as Epstein has noted, frequently the law not only fails to improve upon customary orderings, but may have the opposite effect, such as when the state intrudes in the workplace and undermines such orderings [1998,60].

An example of such unwarranted government intrusion is the at-will labour contract where one party is free to quit just as the other party is free to fire, with no questions being asked on either side. If arbitrary behaviour is permitted on both sides, there seems little reason to intervene in order to head off the capricious behaviour supposedly confined to management with its attendant regulation of wages and hiring. According to Epstein the attack on at-will contract fails since it is not plausible to think that the average employee contracts to become worse off than he was before [2005, 44-45]. Further, Hasnas has recently shown how in the ramping up of white-collar offences post-Enron, legal requirements can only be met at the expense of what business ethicists had traditionally held to be the important moral principles governing business practice. Recent US legislation has significantly broadened the definition of white collar crime, while weakening many of the traditional safeguards at criminal law such as the *mens rea* requirement, the ban on vicarious criminal liability, the presumption of innocence, and proof beyond reasonable doubt. In addition, new sentencing guidelines place a heavy premium on corporations going out of their way to comply, both before and after any investigation, in order to reduce draconian fines. Although ethicists have traditionally taught that corporations are bound by the same moral rules as the rest of us[33], Hasnas points out that corporations simply cannot afford, for example, to respect promises of confidentiality, despite loss of employee trust, because of the huge liability that might result. He concludes that failure to recognize the significance of such perverse legal incentives has rendered much contemporary business ethics beside the point [2006a, 10,15-16,19-20].

On the one hand then, Edmundson seems to think that the law generally tracks morality, though in providing solutions to certain coordination problems it may

[32]Edmundson also assumes that coordinations backed by law typically bring moral innovation in their wake, though as Hardin reminds us some coordinations are less than felicitous, such as those with respect to US slavery and later Jim Crow laws [2003,14]; similarly with respect to the Balkans, where coordination for group advantage broke down informal relations between ethnicities [1995b, 29].

[33] cf. Narveson [1998, 73].

give rise to further obligations having a moral as well as a legal force. On the other hand, he also contends that such a solution may be much less than the morally best and that we should console ourselves with the thought that the use of political authority leads us to believe that some decision is better than no decision. However, why the exercise of political authority gives us any such reason is far from clear, and if Edmundson's argument so far was intended to establish that, he has failed to do so.[34]

3.3.4 The morality of taxes in particular

While, as we have seen, Edmundson believes that the law incorporates morality into it and may often secure further benefits conveyed by rules, he also holds that a given coordination may fail to be optimal, either with respect to individual preferences or morality, or both. For example he claims that: "It is very hard to believe, with Hurd, that the governmental scheme of levies and expenditures – whether as a whole or in any part - is any clue to what we would independently and antecedently have a duty to do with our money" "1998, 65]. Well if it is so very hard to believe, one might well ask why we should believe it, unless we happen to subscribe to Tertullian's dictum *Credo quia absurdum est.* If that seems to be leading the witness, Edmundson does actually say that "a legitimate political authority gives citizens good reasons to believe that they ought to obey its laws, just as legitimate scientific authorities give the laity good reasons to believe what they say about the workings of the world" [ibid.,66]. Much of the point of our discussion is whether there are any legitimate political authorities, at least ,morally speaking, and, contrary to Edmundson, the answer appears to be that there are not. As for any supposed similarity between those and scientific authorities, besides the question as to whether "legitimate" is being used the same way for both, I am not really sure what a legitimate scientific authority amounts to, but it seems that government authorities would have much to learn from the humility of the physicist who said about quantum theory that it was the best theory they had at the moment and they hoped that it was approximately true. Of course, while not a lot by way of public policy generally hangs directly on the truth of quantum theory, in the case of climate theory, the hypothesis that there is measurable global warming has been pressed into the service of yet another political crusade. Politicians and their scientific lobbyists, who are convinced that such increase in global mean temperature over the past century or so as it has proved possible to record is moreover anthropogenic, [35] can be expected to ignore Jasay's warning and employ the full coercive apparatus of the state to correct heresy.

With respect to our duty to render unto Caesar, however, Edmundson was of

[34] Indeed, Jasay has argued just the opposite,namely that when it comes to political authority using coercion to impose value choices on society it should be guided by the principle "when in doubt, abstain [1997, 151].

[35]Essex and McKittrick refer to this hypothesis as the Doctrine of Certainty, which in their view is "manifestly false" [2002, 17-18]

the opinion that this may well be at variance with what we would probably think was our duty to do with our money. There also appears to be little doubt in Edmundson's mind that the government is quite correct in asking us to hand over tribute, which left to our own devices we may not have been inclined to do, at least partly because we thought we had no moral duty to do so. Edmundson on the contrary clearly thinks we have a duty to do so, paying taxes being one of the duties the state may impose on us [1998, 157]. Taxes are doubtless one of the least welcome of such impositions and as Bovard remarks, they serve as a continual reminder of state paternalism [1999,21-22]. which Edmundson thought definitive of political authority. Rothbard further noted that the government was peculiar among human institutions in acquiring its revenues through "coercive violence," a fact which the "mystical trappings of sovereignty" have for the most part managed to conceal [1978, 25-26].[36]

Apparently the libertarian indictment of taxes [37] is now thought to be so influential that those who favour what they style as an egalitarian redistribution of wealth have been moved to challenge the view that all taxation is legalized theft: thus Murphy and Nagel claim deny that anyone seriously believes that all taxation is illegitimate because it takes property without consent. According to these writers, many people make noises that sound like this because of the wide appeal of "everyday libertarianism," which misleads people into thinking that they have a moral property right in pretax income, when what they actually have is a legal right to their net or after tax income. Murphy and Nagel claim that the belief that we are morally entitled to our pretax incomes results from some sort of conflation of what we are legally entitled to, namely our post tax incomes, with what we may think we have a deeper moral claim to, namely our pretax incomes [2002, 33-34].

In response to Murphy and Nagel's claim that no one really believes that taxation is illegitimate, I very much doubt that most people have trouble distinguishing legal from moral claims, especially anyone who has had a friendly encounter with the tax authorities. Presumably Murphy and Nagel are also aware that a claim about the morality of taxation may well be true, regardless of the number of those who do or do not believe it. As for the rhetoric about everyday libertarianism, if the notion of strong property rights has proved harder to banish from everyday thinking than Murphy or Nagel would like, this may be evidence that such a view is also more widely held than they would have preferred. Nor is it obvious why everyday libertarianism need be any more confused than the everyday equivalent of one of Murphy and Nagel's claims, e.g., "that an ideally fair system would give everyone the same chance in life," [ibid., 55]. which already bears most of the hallmarks of your average confused platitude. In fact when Murphy and Nagel do

[36] As for Canadian taxation, in 2006, according to Veldhuis and Palacios [2006], it took Canadians till June 18 to pay off their tax bill, close to 2 months later than when calculations were first made in 1961. The OECD [2006]. found that Canada consumed a higher proportion of GDP, and had higher corporate rates than the US or Australia, with the CTF [2007]finding that only China had higher corporate rates.

[37] Rothbard called them "legalized and organized theft on a grand scale" [ibid]

consider libertarian views proper, rather than their popular coinage, what we have are fundamentally opposing views, rather than one clear and right view versus one confused and wrong view. Although it is not a view they share, Murphy and Nagel concede that libertarianism is one to be reckoned with, citing its defence of property and contract, opposition to redistribution, and individual sovereignty as severely constraining the right of government to interfere in our lives [ibid., 65-66].[38]

However, Murphy and Nagel argue that libertarianism, at least in its popular manifestations, confronts a conceptual problem when it claims that taxes constitute a taking which requires justification. On their view our income is by definition only post-tax income, which is to say, there is no income prior to taxation. On the other hand, if there were no pre-tax income, there is nothing on which to base taxes, and no post tax-income either, suggesting that even popular libertarianism has little to worry about. Indeed, as Brennan puts it: "Nothing in basic logic rules out the gross-of-tax formulation. If this is what Murphy and Nagel think, then they are guilty of an error– that of mistaking an arithmetic convenience for a conceptual claim [2005, 212]"

To Nozick's celebrated dictum that "Taxation of earnings is on a par with forced labor" [1974,169], latter day liberals, such as Ignatieff, have responded that "Taxation may be unpopular but hardly counts as an evil" [2004, 17]. To be sure, Murphy and Nagel also hold that there can be no principled objection to enforcing payment of taxes [ibid., 123]. As they argue, laws of any sort, such as criminal, traffic or zoning laws and the myriad other forms of regulation, all constrain what we can do. But on the libertarian view, a much narrower band of activities are subject to enforcement, namely those that cause wrongful harms to others. Indeed Rothbard proposes replacing the vague concept of harm with the more precise one of invasive violence against the person or property of another [1997,127,128]. If any taxes at all are legitimate this would only be, as Jasay reminds us, if it is necessary to prevent the state's subjects from harming one another, though even here there will be some unpleasant facts of life, such as the fact that you cannot have what I already own, which do not constitute compensable harms [1991,24, 27]. In support of his claim that taxation amounts to forced labour, Nozick argues that the redistribution which is the rationale for much taxation results in arbitrarily subsidizing certain individual preferences at the expense of others. Some choose to work longer hours for more pay, while others prefer less pay and more leisure. If it would be wrong to take leisure from the man with more of it because that would amount to forced labour, it is not clear why we can take money from the man who happens to have more of that good [ibid, 170].

Despite having claimed that no one really believes that taxation amounts to state sanctioned larceny, Murphy and Nagel admit to having a hard time convincing people that if they own anything it is only through the good graces of the state and should not resent having a goodly portion of their pre-tax income escheat to

[38] In view of Murphy and Nagel's claim that libertarianism "has considerable appeal and exercises a real influence in political debate" one should not be surprised at its influence on everyday thinking, something Macey [1998, 373]. found sadly lacking a decade so ago.

the state [ibid., 176-177].[39] Graetz and Shapiro admit to similar difficulties in understanding how the estate tax first introduced in 1916 could have been repealed in 2001 with broad bipartisan support. They surmise that robber baron envy could no longer be counted on to carry the day as it was in the early days of last century. Perhaps voters had come to realize that the real robber barons are, as DiLorenzo points out, the "political entrepreneurs and their government patrons" [2004,133]. In any case, as Citizen Gates claimed, if you work hard to set up a lucrative business,paying taxes along the way, it is not obvious why your death generates further tax obligations. Indeed, if Bill Gates is not seen as another Rockefeller, despite attempts of various governments to have Microsoft suffer the same fate as Standard Oil, maybe, as Graetz and Shapiro suggest, it is because Americans, contrary to Marx's predictions, rather than overthrow capitalism, have become paid-up members as property holders and investors [2005, 8].

Thus the belief in private property may not be as much of a myth as Murphy and Nagel would like to think. While they seek to remind us that property is a mere convention, for Hume, convention is absolutely central to stability in possession which can only be achieved "by a convention enter'd into by all the members of the society to bestow stability on the possession of those external goods, and leave everyone in the peaceable enjoyment of what he may acquire by his fortune and industry [1960, 489]" Such "mere" conventions, or spontaneous ways of coordinating divergent interests, are "fundamental laws concerning the stability of possession, its translation by consent, and the performance of promises," and, most notably, "are therefore antecedent to government[ibid., 541]" Robb writes, for example, that long after the advent of central government in France, many communities remained beyond its reach, with the result that: " Self-government was not an idle dream. It was the unavoidable reality of everyday life. People who rarely saw a policemen or a judge had good reasons to devise their own systems of justice. Hard-pressed provincial governors had equally good reasons to turn a blind eye [2007, 34]" The hamlet of Goust in the Pyrenees was just such a community, remaining an autonomous republic till the twentieth century, where " there were no beggars, no servants, and to the envious delight of the travellers who discovered this spartan Shangri-la, no tax-payers [ibid.,19]" The residents of this rocky platform high above the spa of Eaux-Chaudes appear to have led lives of reasonable quality and order without the ministrations of the Republic, no doubt as the result of conventions, such as a council of elders, about which Murphy and Nagel would have little to say, other than perhaps noting their mere conventionality.

Moreover, with respect to the egalitarian theories of justice to which these authors seem partial, Stone remarked some years ago that the presumption of equality is beset by many hazards, not the least of which seems to be the conflation of equality with justice, which only diverts us from the task of deciding which facts

[39] As an expatriate Australian, Murphy in particular might be distressed to learn that in recent years the Australian government has levied no tax on retirement income. There are doubtless pensioners in that country who believe, contrary to Murphy and Nagel, that in leaving their gross incomes intact, the government has finally acted justly.

of entitlement are relevant to justice [1978, 1019]. As Narveson has more recently pointed out, once we have settled on the appropriate characteristic according to which people are to be treated, "then a given person will get whatever degree of treatment possession of that characteristic is supposed to call for [2002a,61]", which might not be the same as someone else. But, as Lucas reminded us, while we may secure some measure of equality in some respects between some individuals, we shall never achieve "Equality in all respects between all men for all purposes and under all conditions" [1971, 150]. Again it is most encouraging to think that supporters of redistribution such as Murphy and Nagel face an uphill battle in getting a hearing in the market place for their theory of justice. Benjamin Franklin is recorded as having famously pronounced in a letter to Jean Baptiste Le Roy in 1789 that in this world nothing can be said to be certain except death and taxes. While death has remained an abiding feature of the human condition, to speak of the certainty of taxes and leave it at that is to beg the sorts of questions that we have been raising about them and the governments which institute them. First, given that governments in the 18th century mainly confined themselves to duties and excise taxes on imports and exports [40], Franklin probably did not have to spend most of the first six months in any given year rendering unto Caesar. Second, it suggests that like the poor taxes have been with us always, which of course is not the case. Richard Pipes notes that "as a rule, in the Western world since classical antiquity and until the twentieth century, regular (as distinct from emergency) direct taxation was regarded as unlawful except for subject peoples; when imposed domestically it carried the stigma of social inferiority" [1999, 238].

Further, according to Pipes, the US continued to meet its financial needs for the first half of the 19th century by customs duties and sales of land. However, as Van Creveld has written, the Civil War occasioned the imposition of the first income tax in US history [1999,232]. The move to progressive taxation, which takes an increasing proportion of income as income rises, appears to have been staved off for much of the 19th century by those who protested that the only just principle was to extract the same proportion of income from everyone.[41] The first to overcome such reservations about progressive income taxes was apparently Prussia under Bismarck's successor Caprivi, which in 1891 ordered the Kaiser's subjects to render taxes from less than one to about 4%. [42]

Canada's story on taxes is in fact worth noting, particularly because of the determination of its leaders of the late 19th century to keep taxes low in order to encourage immigration and investment. The first post-Confederation Liberal Finance Minister, Sir Richard Cartright, expressed views on taxation in his 1878 budget speech unlikely to be heard from any finance minister in more recent years: "All taxation is a loss per se. It is the sacred duty of the government to take only from the people what is necessary to the proper discharge of the public service; and

[40] cf. Milke [2002,4]

[41] cf. Hayek [1978, 308]

[42] Hayek notes that the modesty of such proposals would have rendered any attempt to oppose them unlikely to succeed [ibid., 310].

that taxation in any other mode, is simply in one shape or another, legalized robbery" [43] Rothbard has in more recent years explained how taxes are a loss, namely that they diminish the production base and act as a disincentive, causing people to spend more time on leisure or take tax-supported employment [2001, 797].[44] As for the myth that taxes are voluntary, and not robbery, Lysander Spooner, a contemporary of Richard Cartright, reminds us that if, unlike a highwayman, government does not literally hold a gun to our heads, at least the highwayman, unlike government, does not pretend that his robbery is anything else [1992, 84-85]:

Some present day politicians might still claim that deep down they agree with such views, but believe that what has changed since the days of Cartright and Spooner is the scope of the public service. Spooner would still reply that determining that scope is a rather one-sided business, and when the government comes to collect its bill to meet the expenses of protecting life and property, it will not do to say that you never asked them to do that in the first place [ibid., 85-86]. Moreover, lest we think that the promotion of life, liberty and the pursuit of happiness was more appropriate to the US than Canada, Sir Wilfred Laurier's words on the campaign trail in 1894 suggest that there was at least a period when there was something distinctly liberal about the Liberal Party: "The good Saxon word, freedom; freedom in every sense of the term, freedom of speech, freedom of action, freedom in religious life and civil life and last but not least, freedom in commercial life" [45] However, the rejection of direct federal taxation which characterized the first 50 years following Confederation was finally overcome in 1917, and as in various other taxes Canada seems to have been inspired by American precedent. Further,to Franklin's dictum that there is nothing as certain as death and taxes, Hospers replied that "this is no reason why we should be taxed to death" [1971, 322]. When income taxes have risen in the course of the last century from around 5% to anywhere from 20% to 70%,[46] Hospers argues that the government seizure of our means, although gradual, appears to have no limits, and simply constitutes a transfer of wealth and power to the bureaucracy who are convinced they know better than we, the people, how to put our money to the best use [ibid., 322-323].

3.4 The Public Goods' defence

Again, with respect to the goods which government has come to believe it must supply from its only source of income, namely taxes, Seldon has argued that we need to separate those goods that are truly public from those that are not. Public goods "proper" are "non-excludable," meaning that those who don't want them

[43]Quoted by Milke [2002,9]

[44]Arthur [2007, 79]. has estimated that about two thirds of the tax deduction is directly lost to the economy before the tax contributes to any spending, from which a further 20% is lost to government overheads and waste.

[45]Quoted in Milke [2002, 10]

[46] Veldhuis & Palacios "2006, 8]. report that Canadian tax rates for 2006 are around 45%

can't be excluded from receiving them, and "non-rival," meaning that those who use them without paying do not reduce the supply available to those who do pay. By this criterion, Seldon concluded that most so called public services are not public goods proper, and thus, contrary to widespread belief and practice, do not in fact have to be supplied by government [1990, 169, 174]. Jasay offers further comment on the nature of public goods and why it has been traditionally thought that the government must provide them and that they must be compulsory. On his account such goods are characterized by similar properties to those of Seldon: "non-rivalry" or "jointness" [greater use of the good by one user does not reduce the benefits available to others]. and non-excludability [a member of the public cannot be denied access to the good]. Goods having both properties are "pure" public goods. However, according to Jasay the traditional theory also recognized that the class of such pure public goods was small or non-existent. He cites the interesting example of a private good such as club membership which permits a member to make greater use of the facilities than other members at no additional cost, with any increase in costs being spread over the whole membership [2002, 19,20].

Even though the traditional theory allowed on the one hand that there were few if any genuine public goods, some goods having the above-mentioned properties will fail to be produced. In order to ensure that they are, coercion is necessary, though as Jasay rightly observes, if a good failed to be produced because it was irrational for anyone to contribute,"it is no less irrational to contribute a little than a lot" [ibid., 20]. On the other hand, Hayek seems to have accepted the traditional wisdom that the government ought to supply such goods as health, sanitation and roads because it would be difficult to charge for them "1978, 225]. Here Hayek apparently takes himself to be following Adam Smith who wrote that it would be necessary for the commonwealth to supply those public works which are "of such a nature that the profit could never repay the expense to any individual or small number of individuals, and which it therefore cannot be expected that any individual or small number of individuals should erect or maintain" [1976,Vol.2, 723].

However, while Smith thought there might be some case for public works, he was less convinced that any deficiencies in the private management of turnpikes, for example, would necessarily be remedied by state management. Because toll revenues tended to outstrip expenses there would be a strong temptation to use them as a cash cow, as Smith found in the case of the post office [ibid., 727]. Smith thought that one solution for "those publick works which are of such a nature that they cannot afford any revenue for maintaining themselves," if they were situated in a specific locale, is for them to be placed under local or provincial, rather than state administration. He cites the example of street lighting in London which would not be nearly so efficiently run if it were up to Whitehall; since the inhabitants of London are the prime beneficiaries, it makes sense to pay for them out of local taxes. Not that Tammany Hall is immune to corruption, but Smith thinks differences of scale are likely to minimize such problems [ibid., 731].

But, it seems, more recent writers are not as likely to share Smith's view that local government constitutes less of a threat. Bolick thinks that if the country

declares war we will know whom to blame, whereas finding out who is responsible at the local level may be more difficult, whence the old adage: "You can't fight city hall" [2004, xiii]. A much criticized instrument of local government power is eminent domain seizure, which many see as a glaring affront to property rights and nothing more than government sanctioned theft. Greenhut reminds us that many corporations have only been too happy to benefit from such seizures, offering increased revenues to the city fathers in return [2004, 191].[47] Perhaps it should be noted that occasionally eminent domain has also worked against corporations, such as when it was invoked to prevent Walmart setting up in Hercules, California, on the grounds that the corporation was not a good fit for city "smart growth" policies. Of course this raises the question as to whether planning should be subject to enforcement since writers such as Jacobs were skeptical that most city governments lacked the resources for understanding the enormous complexities of urban life [1992, 417].

Not that governments necessarily confine themselves to planning public works but are all too often directly involved in putting them into effect, and thus may be directly responsible when such projects go awry. For example, a recent report of the US Army Corps of Engineers has admitted that much of the havoc caused by Hurricane Katrina could be attributed to poor engineering.[48] On the other hand, if past government behaviour is any guide, what we will probably never hear is that someone has been personally held to account for policy and implementation failures stretching back over 40 years, as in the case of the New Orleans levees, not that government would display a similar reluctance to investigate if it involved a non-government agency. Thus Seldon has noted: "government is itself the source of the most far-reaching externalities and the most incorrigible, because the politician or bureaucrat at fault is more difficult to discover and less likely to be penalized (or rewarded) than its citizens" [1990, 176].

Even when government does reluctantly investigate, as in the case of 9/11, the National Commission report simply records the fact that there were widespread policy and management failures: "The US Government did not find a way of pooling intelligence and using it to guide the planning and assignment of responsibilities for joint operations involving entities as disparate as the CIA, the FBI, the State Department, the military and the agencies involved in homeland security" [2004, xci, xciv]. The 9/11 Report acknowledges that many of these agencies were formed in response to another famous surprise attack on the US, Pearl Harbor, with the presidential biographer claiming that both events were evidence of similar problems: "The problems that led up to Pearl Harbor, and this, are in a certain sense intractable human problems: bureaucracies, people being unwilling to share" [ibid., xlix].

The authors of the 9/11 Report thought it important to enter the caveat that

[47]For further ramifications of eminent domain see Fitzgerald [2003, 29], Jacobs [1992, 311], Sandefur [2006,96].

[48]Cf."Army Corps admits design flaws in New Orleans levees," Ralph Vartabedian, LA Times, June 2, 06.

they were writing "with the benefit and handicap of hindsight," just as one commentator on Pearl Harbor found it "much easier after the event to sort the relevant from the irrelevant signals" [ibid.,485]. In the case of the latter event, there is now evidence to suggest that Roosevelt was aware of an impending attack on Pearl Harbor. He ordered a build up of Red Cross resources to handle the expected casualties, explaining that American isolationism could only be brought to an end by the direct attack his intelligence had warned of. John Denson, a US judge and historian, thinks that the quote from Roosevelt on his monument in Washington: "I hate war" serves only to remind us of that president's hypocrisy and deceit [2006, 196]. But as Machiavelli pointed out, in order to preserve the state, the prince " often has to do things against his word, against charity, against humanity, against religion" The prince must focus on the end result, and if that is favourable, the masses will overlook the methods taken to achieve it [1992, 49]. Proving perhaps that he is not one of the masses, Denson does not consider Roosevelt's methods particularly worthy. As a memorial to the men trapped in the partly submerged USS Oklahoma who banged against the hull in the hope of being rescued, he suggests that: "A recording should be made to duplicate their desperate sounds and have it played every hour at the Roosevelt Memorial to remind Americans of the treachery of their commander-in-chief" [ibid.].

Despite its manifold failures, our habit of relying upon the omnipotent state dies hard. As Skoble notes, we just get used to having the state do certain things and find it hard to imagine how they might get done without the state's help [2002, 86]. Skoble argues that if we have trouble imagining a post office not run by government, it may be because we are concerned that this might be the end of mail service. But although in some Commonwealth countries the monopoly government post office was also responsible for telecommunications, most of us have gotten used to the idea that we can now choose from various providers of such services, and that mail itself did not become a thing of the past, once Fedex and UPS got in on the act.According to Creveld, war provided much of the impetus for the centralization of power in the monarch and for the expansion of services to encourage subjects to put on the king's uniform [1999, 336]Other writers such as Porter have also remarked on the connection between war and the welfare state, whose foundations were laid during the age of imperialism which preceded World War I.Those foundations continued to be built on between the Wars with the structure of the welfare state being completed in the aftermath of World War II [1994, 179-180].

With respect to the war economy as it were spilling over into peace time, Gilbert has noted Churchill's interest in harnessing the energy used to fight the Great War to build a better Britain, including such policies as nationalizing the railways, progressive taxation and state supported housing [2006, 55, 67]One might well wonder why Churchill, who at one time had supported free trade against protectionism, would advocate state monopolies to remedy the supposed faults of private ones. Mavor claims to have witnessed similar enthusiams in Ontario politicians who in the same era advocated public ownership of Ontario Hydro, a fact which he attributed to "an attempt on the part of a small number of politicians to establish an

industrial monopoly and to manage this monopoly in such a way as to keep themselves in power" [1925, 240-241]. Nor would this be the last time that government in Canada would try its hand at business. Foster reminds us, for example, of the celebrated case of Petrocan, the main result of which has been a $10 billion increase in the country's debt, requiring about $1 billion a year to service, or the equivalent of the income tax from 100,000 average families: "When government levies taxes for social policy, it may fairly claim that there will be fewer Cadillacs so there will be more welfare cheques. But when it creates something like Petrocan, it ensures that there will be both fewer Cadillacs and less money for welfare" [1992, 300-301].

Thus it is not surprising that Churchill believed that the methods of the wartime economy could be applied to peacetime, that lessons learnt in recycling spent shell casings to overcome a shortage of brass could help create public housing. Total war thus brought about the total ascendancy of the state, with the result that by the end of the World War II, Creveld is able to characterize its role thus: "Making use of tools such as statistics, taxes, the police, prison, compulsory education, and welfare, the state had been extending its power over civil society for centuries, imposing its own law, eradicating or at least weakening lesser institutions in which people used to spend their lives, and building itself up until it towered over civil society" [ibid., 354].

While the relief of civil disasters is a natural enough extension of the all encompassing role the state can be seen to have arrogated to itself, Hurricane Katrina and other calamities have led many to question just how effective the state really is as a relief agency. One of the problems with state intervention is that it tends to crowd out private initiative, with the result that as Taylor argues, "positive altruism and voluntary cooperative behaviour atrophy in the presence of the state and grow in its absence" [1987,168]. Moreover, it is often claimed, for example, that Canada's social safety net is more extensive than that of the United States. However, instead of comparing how much our respective governments are willing to redistribute to the less fortunate, when we look at how much individuals give privately to charity, Leroy has shown that every US state with the exception of West Virginia is considerably more charitable than Canadian provinces [2004-2005, 9-13].

Of course others have thought that the state and its tax apparatus were necessary to guarantee rights to life, liberty and the pursuit of happiness, characteristic of a liberal society. Thus Holmes and Sunstein cite the example of the 1995 fire in Westhampton, NY, which took three days to extinguish. The fact that there was no loss of life and minimal property damage is attributed to the spending of upwards of $2,000,000 in public funds to achieve that outcome. Actually, I would have thought that fire-fighting was not the most obvious example of state intervention to prevent losses to life and property, since throughout much of its history it has been largely voluntary. Indeed, Holmes and Sunstein themselves concede that 1500 local volunteer firefighters participated in Westhampton. Bush fires typically occur in less densely populated areas, and are largely fought by volunteers. Volunteer rural fire brigades are responsible for about 90% of the land mass of the state of New South Wales, Australia, for example. The fact that paid services may add to

the cost of anything contributed by volunteers, as in the case of Westhampton, is no guarantee that those services were necessary or that the money was well spent.

Indeed, Skoble cites the rebuilding of the city of Chicago largely though private charity as evidence that government is not necessary for disaster relief [2002,88]. McChesney notes further that only about $50 million of the $200 million losses incurred in the Chicago fire of 1871 were recouped through insurance, with many of the insurance companies being bankrupted as a result [1986, 71]. McChesney goes on to show how we got from fire-fighting being universally a volunteer activity in 19th century America to the government monopolies now common in larger urban areas. Traditional wisdom has it that direct municipal control of fire services was occasioned by market failure, notably where competition between rival volunteer brigades impeded efficiency. However, McChesney concludes that: "the emergence of paid fire departments may be better explained not as a response to market failure but as a source of political patronage" [ibid., 92]. The fact that much of North America and Australia, for example, is still served by volunteer fire brigades shows that government is no more necessary now than it was a century or so ago to ensure the service, thus supporting McChesney's argument that the reason for municipal takeover is probably not one of public interest. It seems that in rural areas there is less chance of Tammany Hall being confused with public interest, with fire fighting being seen on a par with barn raising. As McChesney notes, the fact that the most famous boss of Tammany Hall, William Tweed, whose notoriety as one of the more aggressive volunteer fire captains seems only to have helped his later political career,[49] lends further support to the view that municipalization had little to do with public interest and everything to do with the interests of fire-fighters, insurance companies and politicians [ibid., 83-84, 88]In the case of the latter, public employees offered more scope for patronage and voting influence, and it is probably not a coincidence that the change from private to public fire departments occurred during the era of 'machine' or 'boss' city government. Nor was this change confined to protection agencies. Publically financed education arose at about the same time, and according to West, once again was largely dictated by self interest [1967, 128].

As to why we should not be surprised that those claiming to act in the public interest are in fact acting in their own, Jasay explains that in contractarian theories of the state, the state is not a contracting party, but rather is the agent of the principals to the contract, with the intent being that it act impartially on behalf of the principals [2002,51]. Jasay suggests that such an intent would acquire copious amounts of virtue in order to be vaguely credible, if only because of a lack of any self-enforcing structure. Of course, he doesn't think any more than I do that there will be sufficient virtue to go around, which would ensure that the state not only delivered on formal equality, but that it could somehow avoid the temptation of acting like one of the principals, and the *primus inter pares.* The likelihood of its not succumbing is considerably reduced by the fact that although the government of the day may change, the state and its bureaucracy is permanent [ibid., 50]Thus McChesney recommends that we treat the bureaucracy simply as other

[49]see Ackermann [2006, 18]

actors or stake-holders with their own interests which would explain why "government officials might find it advantageous to define rights in themselves to establish government, rather than private, use of resources. Even if nonoptimal socially, public ownership would emerge when it offered greater net benefits to government definers of rights" [ibid.,81].

On the other hand,Holmes and Sunstein claim that libertarians talk rather glibly about the "minimal state" when the cost of policing and corrections in the US amounted to some $13 billion in 1992. Given that much of this amount was supposedly directed to protecting private property, then even the so-called minimal state could run up significant coasts as it did in the Westhampton fire. In response, it is very difficult to conclude much at all from government expenditures, as the Auditor-General for Canada is fond of pointing out. In the case of policing and corrections costs, we need to know whether law enforcement was directed towards removing serious threats to life and property, which we might think should remain the concern of even a minimal state. Browne, for example, has suggested ending the so called war on drugs and the prosecution of other victimless crimes, allowing us to concentrate on genuine crimes against the person and property of others [2000, 188].[50]To avoid the inefficiency and corruption common to public authorities he encourages greater use of private companies in crime detection [1995, 137]. That is to say, the costs of law enforcement which Holmes and Sunstein thought libertarians were so cavalier about could be reduced by about 45% by giving up the war on drugs alone. Bergland suggests eliminating at least 17 US federal departments, including FEMA, most recently notorious for its failures in responding to Hurricane Katrina, in order to produce a government only a fraction of its present size and more appropriate to its constitutional mandate [2005, 163]. In fact, Otteson argues that the all pervasive welfare state Leviathan has exceeded its moral mandate as well, in that its interference is incompatible with treating its citizens as persons, who should be free to make bad choices and suffer the consequences [2006, 78-79].

Thus it seems somewhat beside the point to pronounce with Holmes and Sunstein that: "An effective liberal government, designed to repress force and fraud, must avoid arbitrary and authoritarian tactics. Those who wield the tools of coercion must be institutionally disciplined into using it for public, not private, purposes" [1999, 64]. No doubt a government that confined its responsibilities to the prevention of force and fraud, might be welcomed, even by some libertarians, and it would doubtless be a good deal smaller than it is today, but as we have been pointing out, government typically does not confine itself to those tasks. In fact if such a prospect is not embraced by all libertarians, it is because they see little likelihood of ever reducing the writ of government to that understood by classical liberalism. Because the governors of the republic do not confine themselves to their moral mandate, namely the protection of individual liberty, it becomes much harder to avoid arbitrary and authoritarian measures. As McChesney pointed out, there is little chance of getting officials to wield their authority in the public interest, even

[50] See also Bergland [2005,88,98]; Block also foresees retailing recreational drugs in the same way we came to sell liquor post Prohibition]

though most claim by definition to be doing just that, namely to be engaged in "disinterested calculation of social welfare increases" when in actual fact they are calculating their own expected personal gains. One of the rights which the governors reserve unto themselves, if not exactly in themselves, is that of deciding, for example which uses of resources, such as land, are in the public interest and which are not. Thus they reserve such rights as those of planning, zoning, or eminent domain. Whereas the latter, for example, was traditionally mostly invoked for public works such as roads or bridges, it is now often used to assist private developers in projects politicians favour.[51] Following McChesney's analysis, the governor is first and foremost helping himself, by consolidating or even expanding the reach of the state at whose trough he feeds. Other options were clearly theoretically open, requiring little or no government action, such as leaving the developer to assemble the required real estate by making deals with the individual owners. Respecting the rights of individual property holders could well prove more costly, than if the developer were subsidized by state coercion in the form of eminent domain, which is why he will likely choose the latter method.

In his essay on the history of property Richard Pipes discusses a related assault by government on private property undertaken in the name of affirmative action, supposedly in order to reduce discrimination of one sort or another, especially in the workplace. In terms of public goods, the claim is that, left to their own devices, the unregulated interactions of ordinary people will fail to produce the good of non-discrimination. Not only is there the question whether it is anybody's job to produce such a good, [52] as Pipes points out, attempting to do so discriminates against those not singled out for preferential treatment [1999, 270]. Richard Epstein similarly notes how little anti-discrimination legislation has to do with upholding freedom of contract and prohibitions against force and fraud. Under a liberal dispensation individuals decide with whom to do business and on what terms, while the state's role at most is one of securing "a zone of freedom against aggression and fraud" for conducting such transactions [1995, 3-4]. Like the many government interventions already mentioned, such policies rest on all manner of assumptions which have rarely been put to any sort of empirical test. Sowell concludes after close examination of such initiatives in a variety of countries that despite claims made in their favour there is little or no evidence of their effectiveness [2004,198]. Moreover, it is interesting that Sunstein himself thinks that the futility of many government programs could be avoided by engaging in detailed cost benefit analysis, including qualitative and quantitative estimates of expected outcomes [2002,20]. Perhaps a cost benefit analysis might address some of the defects Sowell found with respect to affirmative action programs in particular, though something like his retrospective investigation is also needed to see whether a program lived up to its expectations. Of course the politician is likely to respond that he has his own cost benefit analysis to conduct, and it is quite unlikely his reading of the political tea leaves will bear any resemblance to the sort of findings Sowell or Sunstein would have in mind.

[51] Cf. Stossel [2004,149-150]

[52] Cf. Narveson [2002a, 203-224].

Sunstein does indicate some awareness of the pitfalls of government regulatory policy, foremost being "exceptionally poor priority setting, with substantial resources going to small problems and with little attention to some serious problems" [ibid., 4]. Further he comments that: "the national legislature is in a poor position to ensure that regulation makes overall sense and engages in sensible priority setting. Often an initiative owes its origin to the fact that a single committee, led by one or more powerful officials, is able to insist on it, and the technical issues are simply too complex for others to resist" [ibid., 28].

Despite such reservations, Sunstein reports that the Office of Management and Budget's accounting of the costs and benefits of regulation generally show benefits to be in excess of costs. While he admits that such figures are probably self-serving,he believes we need to start somewhere, and that on the whole in the case of most government interventions, benefits exceed costs. In order to arrive at the latter conclusion, he apparently takes the government's word for it, though he does admit that regulatory policy involves compliance costs of at least $400 billion a year [ibid.,4]. But even here Sunstein may be underestimating compliance costs by about 75%, since Blundell and Robinson report another study where they are estimated at $700 billion, of which only 2% falls on the regulators. Indeed the fact that the great bulk of estimated compliance costs are externalized explains the great growth of regulations, whose supposed rationale was of course to overcome externalities: "though market failure is the common reason for urging government regulation, the institution of regulation itself leads to a different form of failure" [2000,5-6]. Holmes and Sunstein were indeed right to qualify as "ideally conceived" the notion that "a liberal government extracts resources from society fairly and efficiently" to produce socially useful services. The reality of course is mostly otherwise. While the existence of taxes is one of the more obvious examples of the government's extracting resources, and the clearest sense in which it is liberal is that it is liberal with other people's money, I continue to maintain, *pace* Edmundson and others, that there is no warrant for its doing so. On the contrary, to the extent that the myth of authority persists,as Mencken pointed out so aptly, it has to do with the view that government is not a mere human institution but rather "a transcendental organism composed of aloof and impersonal powers devoid wholly of self-interest, and not to be measured by merely human standards." In reality "we almost invariably find that it is composed of individuals who are not only not superior to the general, but plainly and depressingly inferior, both in common sense and common decency" [1958, 179-180]. If government is not entitled to extract the resources in the first place, then its doing so "fairly and efficiently" is of little interest, though, as Narveson points out, governments which insist on providing services have a duty to distribute them impartially [1999, 303]. Moreover, the fact that one's resources are supposedly redeployed "skillfully and responsibly to produce socially useful public goods" is also beside the point, since the taxpayer is no doubt capable of finding his own pet projects to spend money on, rather than have them dreamed up by the bureaucracy, whose schedule of socially useful public goods will likely be different from that of the taxpayer. Of course, there is a good chance that Joe

Public's schedule of goods will include the deterrence of theft, which is doubtless why Holmes and Sunstein present it as a paradigm case.

On the other hand Mencken would have found it somewhat ironic that deterrence of theft should be placed in the hands of those who in his view, have about as much public spirit as so many burglars or streetwalkers and are about as useful to the commonwealth as an abundance of "tightrope walkers or teachers of mah jong [ibid.,180,181]" As David Friedman reminds us, since government consists largely of legalized theft we find the same principles operating as with private theft, notably that "the wealth taken is mostly a net loss, not a transfer" Further,those competing for government handouts will invest close to the expected payoff in order to secure it "just as a private thief will put in twenty dollars worth of labor to steal twenty-five dollars worth of loot" Indeed, sa with the latter, resources are required to minimize depredation, such as tax avoidance strategies, with the result that "in the long run, society is probably poorer by more than the total amount stolen" [1989, 153-154].

Not only do governments claim the authority to take possession by force, which is to say they have the right to do what is forbidden morally and legally by others, they similarly claim the high moral ground when dealing with fraud. The same hypocrisy is evident here as in other government enthusiasms. As Bennett and DiLorenzo write, governments have responded to demands for accountability by moving more and more of their expenses off-line or off-budget. They concluded for example that local government, the sector supposedly most responsive to its citizens: "is largely out of control and beyond the direct scrutiny of taxpayers" [1983, 122]. In the case of national governments, Bennett and DiLorenzo cite well publicized loan guarantees made directly by the US Congress, such as those to New York City and to the Chrysler Corporation. However, governments of all stripes seem to have a knack for bailing out failing enterprises, and in the view of Bennett and DiLorenzo substitute "inefficient and inequitable political resource allocation for the more efficient market allocation of capital" [ibid., 142]. Canada, of course, does not lack for similar examples which are short on economic rationale but long on political. As Foster records there is a long list of disastrous government interventions from the Bricklin car to Mirabel airport, to say nothing of Petrocan, which left the country with little other than an enormous debt [1992, 297,301]. Bennett and DiLorenzo further observe that it is not even necessary to vote appropriations to generate funds for pet projects. Lawmakers can simply create various forms of regulation to achieve the same effect, such as import quotas on automobiles which subsidize local producers at the public's expense. Another form of tariff which also restrains trade on behalf of producers is a licensing requirement on all manner of jobs from taxi drivers to funeral directors [ibid., 165]. Further, on the matter of regulation, McChesney reminds us that politicians often stand to gain by merely threatening to regulate, which he characterizes as a form of political extortion. The threat might also involve the deregulation of hitherto cartelized industries, which can generate large political contributions from cartels, such as the dairy or medical industries, anxious to head off such a threat.Interestingly McChesney does not necessarily

oppose such "milker bills," because politicians would find a way round any attempt to get rid of them, and possibly inflict greater harms than the present forms of rent extraction. In his view the obvious way to reduce the latter is to reduce "the size of the state itself and its power to threaten, expropriate, and transfer" That is of course exactly the solution we are proposing here, since we have the luxury of setting aside the real world of politics, which as McChesney observes is very much "second best" [1997, 169,170].

3.4.1 Public goods via decentralized coordination.

With respect to the normative theory of the state, as opposed to the sordid realities of everyday politics, it has become something of a commonplace for the authority of the state to be seen in the final analysis as one of solving both coordination problems and prisoners' dilemmas, of seeing that public goods are produced which individuals left to their own devices will fail to provide. Thus Edmundson writes that: "The acts of the state themselves are capable of changing the moral situation of citizens, for example, by solving coordination problems and prisoners' dilemmas" [1998, 69], while Raz holds that: "The case for the legitimacy of any political authority rests to a large extent on its ability to solve coordination problems and extricate the population from prisoner's dilemma type situations" [1990, 132]. While Edmundson does not elaborate upon prisoners' dilemmas, he does discuss the matter of coordination, principally that of the necessity to coordinate on the side of the road we drive on, a matter Hume himself had seen as relevant in the 18th century: "They cannot even pass each other on the road without rules. Waggoners, coachmen, and postilions have principles, by which they give the way; and these are chiefly founded on mutual ease and convenience" Some rules are even needed for pedestrians to prevent "jostling, which peaceable people find very disagreeable and inconvenient" [1975, 210]. Raz for his part stressed the right of the competent authority to back up such conventions by coercion, since "coordination may fail altogether if it does not enjoy a sufficient level of cooperation, and those who cooperate may face greater burdens than would be otherwise required because some people prefer to free-ride" [1990, 15].

More recently Russell Hardin has taken up what he considers "the central mode of social order in a complex modern society," namely coordination. On his view much coordination occurs spontaneously, founded no doubt like the principles of Hume's coachmen and postilions on "mutual ease and convenience" Such rules, as Hume observed, may well be somewhat arbitrary like the rules of a game, rather than something necessary for survival. Or as Hardin puts it: "Any way that would work to coordinate the citizenry is good for our purposes. There is typically no a priori reason for choosing one way of doing things over some other way or even many other ways" [2003,14]. Hume in fact thought the doctrine of first possession, "where nobody has any preceding claim and pretension," to be also one where we are unable to "determine any particular rule, among several, which are all equally

beneficial," but where successful coordination would "prevent that indifference and ambiguity, which would be the source of perpetual dissension" [ibid.,195-196].

As a variation on the rules of the road as the paradigm case of coordination arrived at over centuries, we could also point to more recent transportation history, in particular to railway gauges.While so called Standard Gauge [4'8 1/2" — 1435mm]. is used in about 60% of the world's countries, including most of North America, narrower gauges are still to be found on this continent, as well as the occasional wider one such as the Toronto Transit Commission [4'10 7/8" —1495mm]. which is similar to a gauge found in the American mid-West until after the Civil War. Another urban system, the BART in San Francisco, uses an even broader gauge [5'6" — 1676mm], widely used in Canada till 1873. The main impetus toward eliminating the variations typical in the 19th century, which is to say coordinating on the gauge which became standard in Britain by the end of that century, was economic. Interoperability allowed for much easier transfer of freight over the large distances in North America, for example, whereas the persistence of those variations has proved economically costly in a country such as Australia. Where territorial boundaries have proved an obstacle to change, technological developments such as variable gauge axles have proved useful, e.g. between France and Spain, or China and Central Asia.

Not only do coordinations arise for the most part spontaneously, they are also largely self-enforcing, which as Hardin points out, is different from the answer traditionally given, namely that it is authority. We keep ourselves in order because it is in our interest to do so, and such coordinations may just evolve, as they did with rules of the road [ibid.]As long as we settle on a particular railway gauge for a given system, variability between systems, as between the TTC and surrounding CN or CP railways, need not be a problem unless we require interoperability. Ellickson also emphasizes the fact that order often arises quite independently of the state, contrary to the belief of statists who fail to appreciate informal ordering systems [1991, 4]. As a result of his study of how ranchers in Shasta County, Calif., actually got along with one another, solving various problems such as straying cattle and boundary fences, Ellickson observes that Hobbes was a little too ready to assume that order required government. Rules and entitlements can often arise spontaneously, supplementing or preempting those of the state, including enforcement by gossip and occasional resort to violence [ibid., 143].

In their study, Anderson and Hill report that cattlemen's associations found more productive ways of enforcing grazing limits than the range wars often depicted in film, such as excluding non-cooperators from the economic benefits of the round up.Even the great and famous were not immune from such sanctions. When Theodore Roosevelt expanded his herd well beyond the range rights associated with a new ranch, another leading rancher informed him that if he did not resolve his cattle's trespass by acquiring additional grazing rights at a substantial premium, he should clear out, a warning which Roosevelt apparently heeded [2004, 164-165]. Anderson and Hill conclude that while the American West provides ample illustration of the use of property rights to encourage responsible development, there are

other cases, such as water shortages in Oregon, to which the government responded with fiat property assignments, which in the view of these writers dissipated rents and failed to promote cooperation [ibid., 211-212].

As further examples of non-hierarchical processes of coordination, Ellickson mentions language and cities. In the case of the former, he cites the English language which developed into the pre-eminent world language, shaped by millions of speakers, without the need for any analogue to the *Acadmie franaise*[ibid., 5]. As an example of a city whose development was largely managed in the absence of a master overseer, Ellickson cites Chicago, which resulted from the coordinated efforts of a few million people in the Midwest. Chicago's rapid growth paralleled that of famous medieval European cities such as Venice, Genoa and Antwerp, which historically played an important role in creating a class of citizens independent of feudal lords. They became important centres of commerce and wealth, and as Richard Pipes records, they were instrumental in creating a class of property owners who possessed political, personal, economic and legal freedoms.[53] Among those freedoms were the right to self-government, the right to own and alienate property, exemption from external taxes, and the right to due process including freedom from arbitrary arrest and searches [1999,108-111]Finally, another institution of non-hierarchical coordination is the free market which for example enables food to get from the farm to the kitchen, employing thousands of people along the way, most of whom only contribute to solving a small piece of the market puzzle;not that it would be any benefit, to have a market czar in charge of the whole operation, since,as Ellickson points out, "undirected market processes can supply food more economically than would an intentional hierarchy" [ibid., 5].

So the answer to the question as to who will keep us in line, is as Hardin pointed out, that we will do so ourselves, because it will be in our interest to follow the coordination that we have settled upon. We are all the authority that is needed, and are quite capable of taking on the Teddy Roosevelts of the world when required. One of the benefits of coordinating on one's own solutions is that one can tailor them to local conditions which may require coordinating upon different rules. Anderson and Hill note for example that the west required a different approach to water use from the common law tradition of landowner riparian right which held in the east where there was no shortage of water. In the west they opted for a prior appropriation doctrine which permitted diversions of less abundant water for farming and mining, as well as tailoring rules to fit the conditions faced by people such as trappers, ranchers and wagon train travellers [2004, 10]. However while Hume clearly thought that there was a place for non-hierarchical orderings, such as those of the waggoners, coachmen and postilions, for the appropriate use of the road, he seems at the same time to have thought that only government and the magistrates could ensure that justice and equity prevailed over "the allurements of present pleasure and advantage" in order to preserve "peace and order among mankind" [1975,205]. However, as we saw earlier, the waggoners and coachmen

[53]Thus the famous slogan *Stadtluft macht frei* which the Nazis famously modified to suit their own purposes.

apparently have "sufficient sagacity" to realize that they need rules of the road at least for their own safety and convenience, so it is not clear why Hume thinks we now need Whitehall's help to do what it is plainly in our interest to do. For he argues that the exercise of liberty in accordance with natural law was not "a sufficient restraint," otherwise there would have been no need for positive law. However, customary rules of a trade are a form of positive law, so it isn't just a matter of choosing between positive rules handed down by government and natural justice, as Hume implies. Non-hierarchical rules can apply the broad doctrines of natural justice and liberty to everyday issues, such as right of way on the road, or as Hume reminded us, avoiding "disagreeable and inconvenient" jostling on the sidewalk.

It seems reasonable to assume that if the principles of natural liberty and justice were just part of the human stock in trade and existed prior to government, at least as Hume understood it, detailed rules to coordinate other human activities could be developed by those whose mutual ease and convenience depend on them. It isn't clear why we need Hume's vast apparatus of government to develop positive rules, though one could imagine that decentralized law making might be thought to do little to address concerns such as Dworkin's about "checkerboard statutes," or those where "a community enacts and enforces different laws each of which is coherent in itself, but which cannot be defended together as expressing a coherent ranking of different principles of justice or fairness or procedural due process" [1986,184].

One might respond to such a claim by observing that the lack of principle and integrity which Dworkin finds in the multitude of statutes is apparently the best, that two or three centuries of parliamentary rule have managed to produce. Perhaps it is time to leave "government and political society," which Hume thought essential, and McChesney second best, and draw upon earlier common law traditions which seemed more faithful to principles of natural justice and liberty. Although this is probably not what Dworkin had in mind, it is not necessarily incompatible with his call for greater legislative integrity, since: "Integrity expands and deepens the role individual citizens can play in developing the public standards of their community because it requires them to treat relations among themselves as characteristically, not just spasmodically, governed by these standards" [ibid.,189]. However, to the extent that for Dworkin integrity implies some sort of top down uniformity of principle, for example that government uniquely creates and enforces a property regime [ibid., 296], as we saw in the case of riparian rights, local conditions may dictate considerable variation in customary rules and have often developed quite independently of government intervention.

However, it would seem that the role of citizens in developing rules for everyone, as touted by Dworkin, has diminished with ever expanding government. Indeed as Hazlitt wrote a generation ago, we are accustomed to "a ceaseless downpour of laws," with the US Congress at that time having enacted some 40,000 laws, which Hazlitt thought could be reduced to a fraction of that number if government confined itself to "laws simply intended to prevent mutual aggression and to maintain peace and order" [1997,41]. As Hasnas points out, those who took their disputes to

the early moots were simply seeking a better alternative to blood feuds, which the moots provided by at times levying heavy fines against wrongdoers, rather than imprisonment [2005, 128]. Further, Rothbard recommends returning to a system where restitution is paid to the victim of crime, rather than have the victim pay taxes to keep his attacker in prison, as at present [1978, 45-46]. Successful resolutions by the moots eventually built up a body of customary law or morality, which as Hasnas writes, served as the basis for the English common law. Such decisions established payments due in damages as well as rights and behaviours necessary in a peaceful society [ibid., 129-130].

Hasnas also records an important development in customary law, namely the Law Merchant in medieval Europe, which provided the assurance necessary for trade both within and beyond state borders. Merchants at first devised their own informal tribunals to settle disputes because national courts lacked expertise and efficiency in this area. These merchant courts eventually developed into a system of commercial courts which applied the principles of the Law Merchant throughout Europe [ibid., 130-131]. Benson writes that one of the significant contributions of the Law Merchant was the development of negotiable credit instruments, such as promissory notes and bills of exchange. Merchants thus replaced what had been lost with the fall of Rome, namely a reliable currency.[54] Benson notes various features of customary law, of which the Law Merchant was a paradigm case, such as emphasizing individual rights through voluntary cooperation, which was encouraged in order to eliminate recourse to violence; informal sanctions provide incentives for offenders to participate in hearings which could award restitution to victims, with rules evolving in response to changing circumstances [1990,35-36].[55]

Benson goes on to address the question, if customary law, particularly as developed in the Law Merchant, proved so effective, why it was not continued to the present day. To the extent that such traditions have been abandoned in favour of the king's law, it has to do with the rise of monarchies and the transition from customary to authoritarian law. Even with the eventual transition from absolute monarchies to popular governments of one sort or another, governments have continued to act *in loco regis* as the source of law and social ordering. But, as Benson reminds us, while government institutions and laws have tended to eclipse those of customary law, contrary to Hume, this does not mean that that they are necessary for maintaining social order, to say nothing of the fact that authoritarian law runs counter to the tradition of individual rights and property recognized by customary rules [ibid.,45-46]On the other hand, royal law in fact had to coerce victims to seek redress at criminal law from the king's courts, since resorting to customary law offered no profit for the monarch; thus, for example,royal law penalized out of court

[54] Nor would this be the last time that merchants produced their own currency: cf. Selgin's account of privately produced commercial money in late 18th century England [2008]and Hayek who argued that a government monopoly in money was one way to ensure that we got bad money [2008, 25-26].

[55]Hayek found such characteristics typical of rules which originated in customary practices, which he thought served as a reminder that,if anything, authority derived from law and not the reverse [1975, 85,95].

settlements or restitution [ibid., 62]. Further, the role of public prosecution and police was greatly enhanced by the inability to absorb into postwar economies large numbers of demobilized veterans who had been overseas fighting the king's wars and found the adjustment to civvy street somewhat onerous [ibid., 64]. Again, Benson emphasizes that: "The fact that government law has taken over as much as it has is not a reflection of the superior efficiency of representative government in making or enforcing law that facilitates interaction" Rather in order to transfer wealth to the politically powerful, you need a coercive apparatus, unlike customary law which relies on cooperation and enforcement by reciprocal incentives. Although defenders of authoritarian law argue that it is essential for maintaining order, Benson argues that the adversarial process of pitting givers against takers undermines order and provides disincentives against cooperation [ibid., 77]Writing more recently, Cutler supports the view that it was in the interests of states to juridify what had for centuries been regulated by custom, thus eclipsing private merchant regulation and enforcement [2003, 177].

However, it now appears that independent commercial arbitration never entirely disappeared, and that the Law Merchant has taken on a new lease of life in what some have called the age of globalization, which in fact is not new but has accompanied the Law Merchant since its inception. Cutler cites an observation concerning the Law Merchant to the effect that she is a venerable old lady who has twice disappeared from the face of the earth and twice been resuscitated [ibid., 108]. Its first renaissance was in 11th century Europe with the rebirth of commerce. Its second reappearance from its moribund condition was in the 20th century, where functions which the state had assumed have been returned to private organizations[ibid., 190], and according to Cutler, one area where the return to privatization is especially noticeable is in the area of dispute resolution, a task which was central to the Law Merchant from its very earliest days [ibid., 225]. Indeed Cutler's claim that we have seen the revival of the medieval *lex mercatoria* or Law Merchant, where private arbitration of international commercial disputes is once again the norm, is all the more interesting since this is not something she particularly relishes. For Cutler contends that an elite global "mercatocracy" is responsible for this revival and expansion of private dispute resolution [ibid., 12]. The fact that it is an elite association hardly seems troubling, though perhaps the problem is that it is a private one and not a political one which Cutler might have some chance of influencing. However, if international business is something Cutler would rather have done, then I'm not sure what is standing in her way: the mercatocracy apparently includes lawyers. On the other hand, as Mises wrote, "if you prefer to the riches you may perhaps acquire in engaging in the garment trade or in professional boxing the satisfaction you may derive from writing poetry or philosophy, you are free to do so" [1972, 10].

But perhaps there is a more serious objection, namely that, as Cutler puts it, in liberal mythology "Private international economic relations are depicted as the apolitical realm of freedom, while the public sphere is depicted as the political realm of necessary unfreedom [ibid., 69]" Indeed, liberalism, at least of the classical, or as

Cutler would have it, the mythological variety, does claim that to live under a liberal dispensation is to have the right to exchange one's property with anyone willing to do so. As Rothbard writes, if we own something we have the right to alienate it, and the free market rests on the right to property; and,in addition to tangible goods, we may also exchange our labour [1978, 39-40]. Cutler also understood liberal mythology as holding private exchange to be "natural,neutral, consensual and efficient" [ibid.]. As for whether or not having property in the first place, and then exchanging it for some other property which I value more and someone else values less is natural may be hard to say, since Cutler doesn't at least at this point clarify what she means. But it is natural in the sense that mankind seems to have engaged in that activity for so long that it seems a natural thing to do. Rothbard would go a step further and say that we have a natural right to own something we have produced or acquired by exchange, beginning with the right to own ourselves.

Or as Narveson writes: "On any reasonable accounting of the matter, the right to property simply is part of the more general right to own one's own life" [2006, 3]. Cutler implies that market relations are not consensual though again it is not clear what she means. As Narveson puts it: "A has x, B has y, A believes himself to be better off with y than x, given the choice, and B with x rather than y, given the choice. The market enables them to exercise precisely that choice, and thus improve their respective situations" [ibid., 4]. If it were true that such exchanges were not consensual, they would not take place since as the old saying goes, it takes two to tango, or as Rothbard observes, "The developed market economy, as complex as the system appears to be on the surface, is nothing more than a vast network of voluntary and mutually agreed-upon two-person exchanges such as we have shown to occur between wheat and cabbage farmers, or between the farmer and the teacher" [ibid., 40]. Rothbard's remarks apply just as well to international trade, though Cutler seems troubled by the prospect that a global mercatocracy, as she calls it, is able to exercise "near hegemonic influence," and is in the process of "harmonizing, unifying, and globalizing merchant law" [ibid., 12].

If indeed merchants are running their own show, that is what you get to do when you own property. It is also something they have been doing since the Middle Ages, since as Hasnas explains, in the absence of government, merchants were forced to step up to the plate to secure trade and handle disputes" The trial and error process by which they did so produced the Law Merchant and the system of merchant courts that eventually established a set of commercial rights that facilitated peaceful exchange and the flow of commerce" [2005, 131]. However, now that there is a European government, Cutler thinks that we are into a different ball-game and the merchant hegemonists can't quite carry on as they did before. But, as we pointed out above, the Law Merchant not only was, but appears to be a continuing example of regulation outside of the state, and thus, as Cutler herself puts it, "reasserts the efficacy of merchant custom as a source of legal norms, favors the adoption of soft over hard law and private arbitration over adjudication in national courts of law" [ibid., 191]. Not that Cutler welcomes private regulation and adjudication, which she considers yet another liberal myth, namely that "private regulation is

regarded as producing greater efficiencies by reducing transaction costs and achieving greater economies.' '[ibid., 237]. However, Cutler herself reports that the more flexible nature of the Law Merchant allows it to tap into the Chinese *quanxi*, an interconnected system of family and friendship networks facilitating social as well as domestic and foreign economic relations. One would have thought it much to be welcomed in the name of efficiency that, as she observes, "in China *lex mercatoria* and the old Confucian dimensions of Chinese legal culture interpenetrate" [ibid., 235]. On the contrary, Cutler complains that the "increasing reliance on soft, discretionary standards and privatized international commercial arbitration is strengthening private institutions and processes, whilst weakening mechanisms that work toward participation and democratic accountability" [ibid.].

We shall have more to say about the supposed virtues of "participation and democratic accountability," but suffice it to comment that the market offers, not the sort of democracy which, as Narveson puts it, "gives everyone a hand in everyone else's pocket," [2006, 4]. but one where, for example: "Those who satisfy the wants of a smaller number of people only collect fewer votes- dollars- than those who satisfy the wants of more people. In money-making the movie star outstrips the philosopher; the manufacturers of Pinkapinka outstrip the composer of symphonies" Or as Mises further reminds us, for those such as Cutler who claim to be concerned that the mercatocratic elite will ride roughshod over the masses: "Capitalism is essentially a system of mass production for the satisfaction of the needs of the masses. It pours a horn of plenty on the common man. It has raised the average standard of living to a height never dreamed of in earlier ages. It has made accessible to millions of people enjoyments which a few generations ago were only within the reach of a small elite" [1972, 10; 49]. Of course, the capitalist cornucopia can never pour quite enough on everybody, it would seem, or at least not in such a way as to satisfy those such as Cutler who complains of "economic liberalism obscuring the distributional and even coercive foundations of private exchange" [ibid., 69]. No doubt to remedy such obscurities in Cutler's ideal society, as Nozick famously remarked, we "would have to forbid capitalist acts between consenting adults" [1974, 163]Cutler's view is similar to that characterized by Nozick where: "Each person has a claim to the activities and products of other persons, independently of whether the other persons enter into particular relationships that give rise to these claims." Nozick responds that allowing others to lay claim to what you have produced is tantamount to making them a part-owner of you, and it doesn't matter whether this is achieved by taxes on wages or profits. Regardless of the mechanism, the objection remains that "patterned principles of distributive justice involve appropriating the actions of other people," and thus "involve a shift from the classical liberal's notion of self-ownership to a notion of (partial) property rights in other people" [ibid., 172]. Jasay has, in fact, recently questioned how much we really need the notion of self-ownership to effectively respond to those, such as Cutler, who think that freedom to engage in capitalist acts should be severely circumscribed. Jasay thinks that we should dispense with the rather inelegant notion of self-ownership and simply emphasize that we are at liberty to do whatever

we want with whatever we own or produce, with the onus being on someone else to prove that for some reason, we are not at liberty to do so. Thus exchanges of property are to be justified in similar terms to freedom of contract, where a contract is accepted as just until evidence is produced to the effect that it was not. In the case of property, "It is for challengers to prove that they–or the less-well-off on whose behalf they plead– are entitled to take part or all of it away from him" [2006, 11,13].

Cutler, to be sure, has not made any attempt to discharge such a burden of proof other than vague references to supposed elites who make contracts under private rules not subject to democratic oversight. However, with respect to the metaphor of self- ownership which Jasay would be happy to do without, Narveson agrees that many, philosophers and non-philosophers alike, are troubled by the notion that our bodies could be considered our property. Narveson is not sure why this should come as such a surprise, since people have been known to sell themselves to others, as in slavery. Indeed, the libertarian objection to slavery has typically been in terms of self-ownership, namely that we are rightful owners of ourselves and not of other people [1988,67-68]. Jasay, for his part, might simply prefer to say that slavery did not result from the exercise of freedom of contract, though as Hare, who served as a POW/slave on the Burma railway, noted, "in some societies (Athens before Solon for example), one could choose to become a slave by selling one's person to escape debt" [1998, 153]. While Jasay's reluctance to speak of one's relation to oneself also extended to talk of disposing of parts of oneself, such as one's labour, there are no doubt enough examples of that to go around as well, from those in poorer countries who sell a kidney to strangers, as well as those who donate one, perhaps to a family member, to the man seeking amputation of a transplanted forearm because it doesn't feel like it belongs. Interestingly, G.A.Cohen reports that leftists, who also have qualms about the thesis of self-ownership, at the same time are not overly enthusiastic about the prospects of being compelled to donate an eye to a blind person, were that technically feasible, despite the fact their having two good eyes is a matter of luck [1995,70].

But to paraphrase Nozick, the fact that some lack the normal number of eyes, limbs, parents, or other resources, is unfortunate rather than unfair, Cohen's "standard leftist objections" notwithstanding. Thus Jasay asks rightly why fairness requires immunity from luck, or for that matter why justice requires fairness? [2006, 27]. The typical response is that most advantages are due to luck and therefore undeserved. But Jasay further points out that it is wrong to assume that if something is not deserved it is therefore undeserved. There are many things neither deserved nor undeserved and most of the advantages and disadvantages of everyday life usually ascribed to luck are in fact neutral with respect to desert [ibid.]. Or, as Nozick observes, things do not have to be deserved "all the way down"; Rawls may well deserve praise for *A Theory of Justice* regardless of whether he earned all the assets, natural and otherwise used in its production [1974, 225].[56]

[56]Or as Schmidtz writes, desert is "for honoring people who do what they can to be deserving of their advantages [2006, 67]"

Even if we did allow that, to be fair, or to level the playing fields of Eton where the Battle of Waterloo was supposedly won, we should attempt to correct for chance, Jasay thinks it is still unclear why justice requires fairness, since the latter is "a difficult and elusive notion," as we have also had occasion to remark. Not only does fairness dictate that we should control for chance, but it also "seems to involve an array of conditions and norms to which games, contests, trades, exercises of authority, and interpersonal relations must conform." Poorly matched prizefighters may lead to an unfair but not unjust outcome, as may stealing a good friend's partner. However such cases lend little or no support to the view that: "if being lucky is unfair, it is also unjust, and the lucky therefore must share their good fortune with the unlucky and must be made to do so by force in the name of justice" [ibid., 28]. We appealed to the Law Merchant as an important example of rules and conventions which grew up quite independently of the merchants' cities or states of residence in order to facilitate trade beyond those particular borders. Contrary to Hume, we believe that we can have the benefit of "the twelve judges" without "all the vast apparatus of our government" such as " kings and parliaments, fleets and armies, officers of the court and revenue, ambassadors, ministers and privy-counsellors" [2003, 20]. Elsewhere, of course, Hume appears to have agreed that while we could live without government, we could not manage without justice, which is to say that conventions about property and contract precede government, "and are suppos'd to impose an obligation before the duty of allegiance to civil magistrates has once been thought of" [1960, 541].

Thus Jasay is prompted to ask, if indeed government is exogenous to society, an effect rather than a cause of justice, that is "if agreements bind prior to the state, how can the imperative need for it arise?" [1997, 14]. Hume's short, and somewhat unsatisfactory answer appears to be that "if government were totally useless it never could have place" [1975, 205]. The evidence of history, as shown for example in Hume's own *History of England from the Invasion of Julius Caesar to the Revolution in 1688*, suggests that governments of one sort or another have been a relatively permanent accompaniment of human society. One possible exception is "the American tribes, where men live in concord and amity among themselves without any establish'd government" However, in time of war they confer "a shadow of authority" on a leader, "which he loses after their return from the field, and the establishment of peace with the neighbouring tribes" Hume claims that such limited exercise of authority serves as a reminder of the occasional need for government, when eventualities such as war or trade might lead them to overlook "the interest they have in the preservation of peace and justice" [1960, 540]. Indeed, there might be something to be said for resorting to government on an *ad hoc* basis, which Hume thinks characteristic of the American tribes. Holcombe points out that in the case of the Iroquois Confederacy, such a premium was put on reaching consensus that the scope of government was limited so as to permit "a high degree of political freedom and equality" European governments by contrast were top down, rather than bottom up style of the Iroquois [2002, 50-51]. Hume also had an explanation for top down governance, namely that it was best suited to

war, and provided a convenient model for post-war civil government to manage its day to day crises or "fortuitous inventions" by reposing decision making in a single individual [ibid.,541]. Thus not only do we lack the Iroquois consensus mechanism for minimizing the costs government can impose upon its citizens, Higgs argues that crises prove an endless source of government expansion which preclude a return to normalcy " because the events of the crisis created new understandings of and new attitudes toward governmental action; that is, each crisis altered the ideological climate" [1987,59]. History was thus for Hume an important source of experimental data about "the constant and universal principles of human nature." Polybius and Tacitus are as much scientists as Aristotle and Hippocrates, though instead of studying "the nature of plants, minerals and other external objects," the former instead study human behaviour as revealed in "records of wars, intrigues, factions and revolutions"[1975, 83-84]. While on the one hand Hume seems anxious to distance himself from those philosophers who hold "that men are utterly incapable of society without government,"[1960, 539]. as well finding it remarkable how readily the many submit to their few rulers [2003, 16], on the other hand, history apparently teaches us that, despite a need for law and order, man has an incurable tendency to forget his "distant interests" and succumb to the allurement of present and possibly frivolous ones. In order to secure justice, we require obedience, and thus appoint magistrates who "oblige men however reluctant, to consult their own real and permanent interests" [2003,20-21].

I doubt if many classical liberals or libertarians are utopian enough to believe that even if the state were to wither away as Marx predicted, we would not have to deal with those who commit force and fraud against others.[57] What we do assume is that the trend to privatization of law and security, as evident in the centuries old Law Merchant, will continue, as Benson says it has been doing in recent years, where, it seems, the private security enforcement industry has overtaken public law enforcement [1990,201]As for the justice which requires enforcement, Hume thought that largely amounted to the rules of common law and morality, which more recent writers, such as Narveson, have found encapsulated in the "general principle that we are to refrain from inflicting harm or damage on others" [2006, 6]. Indeed Sumner has recently argued that the Supreme Court of Canada regularly applies the test of Mill's harm principle, for example, to allegedly hateful or obscene publications, where "the harms done by a particular form of expression must be balanced against the harms that would be done by the restriction itself" [2004, 164].

While we are likely to agree with Hume's interdiction against "fraud and violence" as being a precursor of the harm principle, we do not agree that government or the state are necessary for maintaining moral order, because in Hume's view, we are more inclined to obey the magistrate than our fellow citizens [ibid., 21]. We are of course interested in maintaining order, though we have much less interest than Hume in having it supplied by politics. Just as the Law Merchant was able to bring order to international trade, so it is our contention that much of society could be privately coordinated as well, with policing, for example, being ever more

[57]cf. Rothbard [1978, 234].

privately provided. As Rothbard commented, the extent to which this has already happened,should dissuade us from thinking "that police protection is somehow, by some mystic right or power, necessarily and forevermore an attribute of State sovereignty" Not only are private agents often more effective than their overworked public counterparts, the latter are less interested in acting as agents of the victim than in punishing the criminal on behalf of society [ibid., 217-218].

One of the first to advocate market provision of police protection was, in fact, the 19th century French economist, Gustave de Molinari. He held that police interest in society stemmed from a belief that they, as the most visible agents of the coercive monopoly of governments, had the authority to remake it, which is simply Divine Right in the garb of majority rule.As to whether security could be left to the private market, Molinari thought the answer of most writers on government was that a sovereign authority was required whose monopoly to remake society stemmed directly from God [1977, 10]. Hume, on the other hand, writing several years before the American Revolution in 1776, held as a matter of experience that order in society is much better maintained by government. It should not be surprising therefore that after another couple of centuries of experience, we are much less confident than Hume was that, as Molinari put it, monopolistic governments really possess the higher authority they say they do. On the contrary, as Rothbard argued, it is our job to desanctify and demystify rulers as the American revolutionaries did with the English monarch [2007, 6]. Moreover, according to Albert Jay Nock, the early colonists shared the same realistic view of the State as their forebears, who were beneficiaries of the merchant-State in England, or of the ancient feudal State, namely, as Voltaire is supposed to have remarked,that the state is a device for taking money out of one set of pockets and putting it into another [1994, 51].

While Hume seems prepared to consider the possibility that just as we can have good and bad citizens, we could also have a magistrate who was "negligent, or partial, or unjust in his administration,"he lacks the skepticism of his colonial contemporaries. Hume seems to think that merely by dint of taking office, the magistrate will avoid any temptation to partiality, and the citizenry will be more inclined to obey an official than any of their non-official fellows. Moreover, there is no shortage of those ready and willing to obey the dictates of government, just as there is a ready supply of those willing to meet the apparent demand for "domination." More often than not, would be administrators supposedly find they can overcome their "private passions" to meet the demands of "the impartial administration of justice," helped no doubt by the customary handsome emoluments and perquisites of office [ibid., 21].

But, as Molinari pointed out, holding that some are fit to rule, while others must of necessity be ruled, is just an example of the divine right fiction, namely that rulers are appointed by the Almighty. Molinari thought that the prestige of leadership was a function of the belief that the magistrates took orders from on high, which led theoreticians to take great pains "to establish the superhumanity of the races in possession of human government" [ibid., 10]. Hume certainly thought that the governors were by definition superior to ordinary mortals,[ibid.]. something

another couple of centuries of democracy might have disabused him of [ibid.]. And for those who are less persuaded of the official's merit than he is, the former can always resort to the use of supposedly legitimate force, on which he has a monopoly.

Towards the end of his essay "Of the Origin of Government," Hume concedes that government is characterized by a perpetual struggle between authority and liberty, and although the former stops short of being absolute, it certainly requires "a great sacrifice of liberty" [ibid.,22]Of course, we have been arguing throughout this discussion that there appears to be no basis for political authority as such, or, as Narveson has written,despite the fact that mankind has subscribed for millennia to the omnicompetence of the state, "it is a fraud, and a travesty that no thinking person could put up with for a moment" [1988,214]. Hume is right that government requires considerable loss of liberty, and we have discussed various examples which illustrate just that. As to the supposed struggle between authority and liberty, while this might be true as a matter of *Realpolitik*, from the point of view of this discussion authority is a non-starter. In the case of liberty, on the other hand, it is something we all have a right to.

However, as noted above, Hume thought it unreasonable to believe that man "following his natural liberty" could live "in entire peace and harmony with others" Hume appeals to the longstanding notion of omnipotent government to justify his claim that it is entitled to "abridge our native freedom," since we cannot guarantee that "in every instance, the utmost exertion of it is found innocent and beneficial" [1975,205]. Of course, if Hume means by "utmost exertion" simply doing as we please, without regard to others, then it is unlikely that acting that way will be "innocent and beneficial." But those such as myself, who contend that there is a general right to liberty, and that it is in fact the only basic right there is, add the important proviso that, as Narveson writes: "the principle of liberty says that those whose actions do not adversely affect others are entitled, have a right, to noninterference as far as that is so, whereas those actions that do interfere with innocent others are, again prima facie, in the wrong, and not to be permitted" [2002b, 40].

To be sure, something much closer to a libertarian society than we now have would not put an end to the use of force and coercion. As Narveson further points out, libertarianism, perhaps contrary to first impressions, is "in essence a theory about the use of force" [1988, 50]. Or as Freeman observes: "libertarians do not condemn all coercion or aggression, or hold that no one can be forced to act in ways she has not chosen to. Libertarians clearly endorse the coercive enforcement of personal and property rights and contractual agreements" [2001, 124]. Well, indeed they do, but in doing so they are merely enforcing rights that have been long held to exist at common law. We should also not lose sight of the fact that most people have been brought up to respect those rights and generally manage to avoid harming others. Thus, as Rothbard remarks, even in a large city like New York, one does not depend on police protection but "solely on the normal peacefulness and good will of his fellow citizens" [1978, 201].

In reply to Hume's question as to why we should abridge our native freedom, we might reply with Narveson that we do so in order to protect the liberty of everybody else; moreover, "a universal right to unlimited liberty is nonsense"[ibid.]. However, ensuring observance of something like Mill's no harm principle is not the same as issuing a blank cheque for government, as Hume seems to think. We have suggested that most of the work can readily be accomplished by ourselves, developing spontaneous conventions over time, without the troops who are rarely there when needed anyway. One such example is queuing, where the overwhelming majority of people observe the first come first served rule. While the uncommon ignoramus who tries to butt in may fly below the radar of official peacekeepers, who are doubtless busy attending to more important matters, he may well have various forms of opprobrium heaped upon his head for his failure to conform.

So Hume is wrong to think that the only thing keeping us from "disorder or iniquity" is government. Moreover, the same private arrangements by which "two neighbours may agree to drain a meadow, which they possess in common," may also permit of projects on a vast scale where "bridges are built; harbours open'd; ramparts rais'd; canals form'd; fleets equip'd etc." However, Hume persists in believing that such endeavours involving casts of thousands are somehow "by the care of government" exempted "in some measure" from the usual human frailties. Perhaps if he could have witnessed the endless record of government failure noted earlier, the failure of flood control and subsequent response in New Orleans being one of the more recent examples, he might have realized that government was in no measure'"exempted from all these infirmities" [1960, 539]. On the contrary, Hume seems convinced that "political society" provides remedies for the difficulty of coordinating large numbers of people on a solution and for the tendency of some individuals to avoid "the trouble and expence" and "lay the whole burden on others" The magistrates can push the project which they believe favoured by "any considerable part of their subjects," and, unlike most of us, "need consult nobody but themselves to form any scheme for the promoting of that interest" [ibid.,539-539]. But as Jasay has argued, as long as we can contract into Pareto-superior solutions to a cooperative game, and as long there are benefits which outweigh the costs, it is not clear "why coercive arrangements requiring the maintenance of a state are expected to be, all in all, less costly and more efficient than voluntary ones. Whichever way we turn the various supports that have been provided for the body of theories that explain why it is rational to have the state, only the problem of keeping promises is crucial and indispensable" [1997,13].

Hume's claim that bridges might not be built nor harbours opened etc has continued to be a popular argument for the political provision of so-called public or collective goods. However, as Rothbard has observed, even if there are collective goods, they do not have to be supplied by one agent, typically government, nor should all be coerced into paying for them. Indeed he considers the notion of collective goods "highly dubious" since only individuals exist and have preferences. In the case of so-called public defence, for example, not all inhabitants of a particular area require either protection, or the same level of it [2001,883-884]In fact there

is a complex variety of levels of protection, determined by factors such as available manpower [1978,215-216]. According to Rothbard, the main question raised by putative collective goods is whether everybody can be forced to pay for a good which he may not even want; the pacifist, for example, may have as little use for police protection as a Jehovah's Witness for the Canadian Blood Service. As Seldon remarks, governments fail to understand that collective charging for individual benefits is resented by non-beneficiaries [2002, 30].

For Rothbard, the collective goods argument turns out, on analysis, to reduce to the external benefit argument [2001, 884]. While individuals may be left to their own devices to benefit one another, positive or negative externalities which spill over onto others are often held to constitute grounds for government intervention. Rothbard claims that criticisms leveled against externalities are typically of two varieties: first that A is not doing enough for B, and second that B is free-riding on A: "Either way, the call is for remedial state action; on the one hand, to use violence in order to force or induce A to act more in ways which will aid B; on the other to force B to pay A for his gift" [ibid., 886-887]. However, Rothbard rightly rejects the view that the state is in any position to remedy such transactions, which are optimal in the sense that any free market transactions are, namely that they are freely expressed consumer preferences, which means that: "Government interference, therefore, will necessarily and always move away from such an optimum" [ibid., 887]When government does interfere and compel public provision of goods to remedy such supposed market failures, as Rothbard noted, for example, with respect to the mix of services offered by publicly supported police, government spending is "subject to the full play of politics, boondoggling, and bureaucratic inefficiency, with no indication at all as to whether the police department is serving the consumers in a way responsive to their desires or whether it is doing so efficiently" [1978, 216].

Similarly, Jasay has argued that it is often simply assumed that non-excludability or the inability to prevent free-riders is sufficient justification for a good to be supplied by government. Hayek thought that the only question to be asked about the government's undertaking to supply such goods was whether the benefits exceeded the cost [1978, 222]. If indeed this is the only question, as Jasay comments, it is a large one. Moreover, it is far from clear how to answer it;it is certainly problematical whether we should take the outcomes of politics as revealing society's true preferences [2002, 23]. Part of the answer to Hayek's question as to whether or not a good is a benefit will depend on which side of the winning political coalition an individual is on. The winning side will skew the "product-mix" in its own favour and against the losing side, with the result that the redistributive bag of goods is likely to be seen as beneficial by the winners and not worth the candle by the losers. Jasay further notes the tendency to over-provide public goods, with users having no incentive to economize, as one typically finds in what are thought to be public goods *par excellence*, namely health-care and education [ibid.,24].

With respect to overconsumption of health care, Gratzer reports that under state provided systems patients see doctors more often and demand more tests and

specialized services [1999, 131]. Not that overconsumption is entirely the fault of the consumer. High demand ensures that doctors do not have to compete and face the prospect of lower earnings [ibid., 133]. Although greater accessibility is often advanced as one of the justifications for supposed public goods, with respect to publicly provided health care, such as the National Health Service, Seldon comments that they are often under-provided as well, with the result that "for many people with the lowest incomes it has not been available when, where, or how it was wanted. The evidence of history is that it would have been available in all three respects if the government of democracy had allowed it to continue as private medicine from the very beginning" [2002, 71].

In Canada the failure of central health care planning results in rationing in the form of resource shortages and lengthy queuing for treatment, with politicians grand-standing about their refusal to seek readily available private solutions. The Canadian Institute for Health Information reports the average waiting time for knee replacements in Ontario to be around 9 months from decision to treat to surgery. CIHI reports further that this post decision waiting time only accounts for about 60% of the total; the other 40% will be taken up with the wait from initial referral to decision to treat [2006, 19]. As for other wait times, of 5 countries surveyed, Canada had the highest percentage of adults who had to wait longer than 2 hours for treatment in an emergency department, and in both Canada and the UK respondents were more likely to have experienced longer waits for specialists than in other countries surveyed. In general CIHI concludes that the main problem seems to be the wait for an appointment in the first place [ibid., 16-17].[58]

With respect to public education, at least in Britain, Seldon holds that the only solution to poor quality public schools would be to allow parents to send their children to schools of their own choice [ibid., 73]. In a recent research Note, the Montreal Economic Institute has observed similar problems in various advanced countries involving waste, bureaucracy, slow reaction to changing labour demands and hostility to efficiency assessment. They believe that competition and decentralization are essential to improving service [2007, 4]. For Rothbard the basic fault of public education is that, like much else under the aegis of the state, it is compulsory. As West also comments: "it is remarkable how readily most democratic governments, especially most republican governments, have, within the last century, resorted to the general use of police power in education" [1994, 334]. Rothbard thought that forcing children into classrooms was unjust, both to the dull as well as to the bright, to say nothing of the parents who should have the responsibility for educating their own children, especially in the early years. The Prussian

[58]The Canadian system is typically contrasted with that in the US,which is often mistakenly thought to be a free market system:cf.Gratzer[2002,193]. But despite their differences, US shortcomings seem little different from those of Canada, namely "too much government, too much bureaucracy, and too many regulations and mandates": cf. Sally Pipes [2004,137]. With respect to the US system Salerno also notes that "the irrational and labyrinthine structure of regulations and prohibitions imposed by government on the industry has massively distorted resource allocation, restricted supply, and further driven up the costs of medical care" [Postscript to Mises [1990,69].

model of compulsory education was quite influential in the US, and Rothbard considers it much to the discredit of compulsory state education that the Nazi regime seized upon the institutional structures laid down by Imperial Germany to further its own totalitarian objectives [1999, 34-35]. Rothbard also considers the fact that teachers are civil servants to be a source of "tyranny and absolutism" in the schools [ibid., 48-49].

In addition to being part of the long arm of government by being civil servants, teachers also typically belong to powerful unions, as Lieberman points out, which "try to eliminate wage competition, restrict entry to the occupation, increase the demand for services provided by union members, and weaken rival service providers" [2000,30]. Not surprisingly, Lieberman finds that such powerful producer unions with large funds at their disposal will continue to stand in the way of parents seeking something better for their children [ibid., 282]Indeed,Rothbard argued that compulsory public education was on a par with compelling everyone to read newspapers put out by a national chain supported by the state[ibid.,17-18]. Moreover, he is a vigorous critic of the Rousseau-Pestalozzi-Dewey doctrine which has held sway during the past century in American education, the net effect of which he believes is to destroy any independent thinking in children. In the name of equality, grading is often made relative to the child's supposed abilities, which Rothbard argues does justice neither to the bright nor to the dull [ibid., 54]. Such "dumbing-down" of schooling might have been avoided, if the so-called progressives had drawn the appropriate conclusion and abandoned compulsory education for all. However, the belief that children should be prepared for democracy is the source of yet another hazard, namely the suppression of individuality in the interests of group solidarity [ibid.].

More than a generation ago Milton Friedman, who favoured some minimum of education for all, but thought there were no grounds for the nationalization of the education industry, famously proposed his voucher system as a step towards providing greater freedom of choice in schooling, with government being restricted to monitoring minimum standards [1962, 89]Lieberman notes that for various reasons vouchers never caught on, among them no doubt the fact that the bureaucracy and teacher unions saw them as a threat [ibid., 267]. With respect to the matter of producer monopolies it is also worth noting that Friedman proposed an interesting remedy which appears to have received even less attention than that of vouchers. He argued that the medieval guild system was still with us in the form of occupational licensure and that it was time we rediscovered the spirit of 19th century liberalism according to which "men could pursue whatever trade or occupation they wished without the by-your-leave of any governmental or quasi-governmental authority" [ibid., 137]. Professions and trades have claimed that licensure is in the public interest, a notion to which the state has typically appealed to expand its writ by approving licensing authorities. While this may sound innocuous enough, Friedman observes that the awarding of licences may often be based on considerations having little to do with professional competence, but rather with the fashionable political correctness of the day [ibid., 141].

One might be inclined to think that there is something of concern to the public interest, when say in the case of barbers, most jurisdictions have passed licensing regulations of one sort or another. In fact, according to Friedman, it has little to do with supposed public interest but rather, as has been already noted, with the fact that producers have a greater interest in matters affecting their trade and will devote more time and energy lobbying on behalf of it than their consumers will [ibid.,143]. The social cost produced by such producer interest is that it becomes a mechanism for that group to develop a monopoly, one which is in fact aided and abetted by the state. What is especially interesting in Friedman's case is that his analysis not only applies to barbers but to the barber-surgeons, or latterly the medical profession, where: "It is clear that licensure has been at the core of restriction of entry and that this involves a heavy social cost, both to the individuals who want to practice medicine but are prevented from doing so and to the public deprived of the medical care it wants to buy and is prevented from buying" [ibid.,155]. As to whether licensure, even in the case of medicine has been of any benefit, other than adding to the monopoly powers of the profession and the licensing state, Friedman concludes that it has simply been an obstacle to the beneficial practice of medicine and should henceforth be abandoned [ibid.,158].[59]

However, despite serious medical manpower shortages, which according to CIHI, result in Canada's reporting the highest use of emergency departments, as well as the longest wait times for such treatment [2006, 16]. Friedman's solution is likely to remain politically unpalatable,[60] as is Rothbard's concerning compulsory public education. Although Friedman thought that governments might be responsible for setting minimum standards in schools and schooling, we have argued that their authority to do so is very much in question, and even if that matter could be settled, schools themselves could monitor their own standards. Nor, as Rothbard remarked, is it any help to have the state inspect private schools since this removes their independence and also makes them creatures of the state [ibid.,16]. It is therefore not surprising, that in the two areas where public provision has tended to predominate, and, according to some, necessarily so, Seldon predicts that improving incomes will enable increasing numbers of dissatisfied parents and patients escape to private schooling and medicine [2002, 85].

With respect to the standard criteria which are thought to determine whether or not a good is publicly, which is to say politically, supplied, Jasay argues that they are not as straightforward as often assumed. In the case of exclusion costs, for example, or the costs of protecting full property rights, these may range from the fairly objective to the quite subjective: in the case of the former we a talking about a good which could not be delivered profitably, and in the latter where political costs

[59]Lest Friedman's findings, confirmed around the same time by Arrow, be thought somewhat dated, a more recent study by Svorny reaches similar conclusions, namely that states should eliminate licensing because it adds nothing to safeguards provided by courts and markets, but if anything reduces access to care and gives consumers a false sense of security [2008, 12]

[60]Svorny is also aware that her recommendations might run into political difficulties, so she suggests more gradual improvements in workforce flexibility by wider recognition of licenses and attention to qualifications and scope of practice of non-MDs [ibid.]

might militate against its production [2002, 25]. In the case of the two principle public goods we have been discussing, the main barriers to having them supplied privately to a much greater extent would appear to be subjective costs, such as electoral defeat, especially in the case of Canadian health care. Jasay also notes that politicians cannot be counted on to properly assess exclusion costs, thus tilting the balance in favour of public provision [ibid., 26]. One of the most famous examples of underestimating the case for private provision was that of the lighthouse, which had long been seen as the paradigmatic non-excludable good. However, Mill and Sidgwick notwithstanding, Coase famously reported that lighthouses in England and Wales were successfully privately owned and operated, financed by tolls collected by port agents [1988, 212-213].

Jasay notes further that it has often been assumed that the provision of public goods is best seen as a prisoners' dilemma, where the best strategy is non-contribution. But if the benefits of a particular good are high enough the benefits to be gained by contributing, regardless of what others do, may well exceed the cost. If this is the case we are no longer dealing with a prisoners' dilemma where default or non-contribution is the dominant strategy. While contributing may risk providing a free-ride to non-contributors, not contributing also involves the risk that others will do likewise and a valuable good will not be provided. People will no doubt differ as to their assessment of the greater risk of the two, with the result that we cannot rule out the private production of public goods, as in the case of Trinity House,the private lighthouse agency, nor can we necessarily appeal to the prisoners' dilemma as our reason for doing so. As Jasay concludes, public goods may well be produced by voluntary cooperation, with the decision to adopt sucker or free-rider roles being spontaneously assigned by individual risk assessment, rather than by the government [ibid., 29].

3.4.2 The authoritative solution of prisoners' dilemmas

Having questioned whether or not the provision of public goods is best interpreted as some sort of prisoners' dilemma from which we need to be rescued by authoritative fiat, Jasay goes on to examine the extent to which the authority of the state can be thought to rest upon the existence of prisoners' dilemmas of one sort or another. In general he notes that strong consent to the state rests on the belief that: "alternatives to the state are held to be unthinkable, contradicting as they are understood to do, the iron logic of the non-cooperative "game" that in manifold social interactions, corrupts human conduct, the prisoners' dilemma" [ibid., 31]. We might resort to virtue to produce the necessary commitments but, as the tale goes, virtue cannot be relied upon since it may be in short supply in large anonymous social groups. Thus Heath writes: "Every exchange is facilitated by either an implicit or an explicit promise to pay. And it is always in one's interest to make such a promise. At the same time it is almost never in one's interest to actually keep such a promise" [2001, 52]. Since according to the traditional story

virtue cannot be uniformly counted upon to deliver the goods, prudence dictates a state to deliver us from our prisoners' dilemmas.

Jasay thinks that two sorts of challenges are possible. With respect to the logic of the dilemma we can ask whether it does mean what it really seems and is widely thought to mean. Secondly we can ask what the dilemma is relevant to, that is, whether "any important social interactions really resemble it" The first sort of challenge involves denying that the PD, hooked up to a maximization assumption, does in fact imply a dominant default strategy. Gauthier, for example, proposes that the interest of both players requires that we adopt constrained rather than straightforward maximization, which will improve the game sum as well as individual payoffs. This supposedly has the result, *pace* Heath, that performance by one player will result in performance by the other, since "those not disposed to fair co-operation do not enjoy the benefits of any co-operation, thus making their unfairness costly to themselves, and so irrational" [1987, 179].

In Jasay's view such an attempt to avoid the inexorable logic of the PD is subject to the objection that constrained maximization appears to require us to ignore the dictates of rationality, since as he puts it, "No disposition to deviate from rationality can be rational" [ibid., 35]. Constrained maximization, he argues, would only make sense if we could assume "mutual clairvoyance" on the part of the players; only thus could we transform PP into an equilibrium and break the dominance of DD. However, to assume that both players could read one another's minds well enough to make PP dominant is simply change it from a prisoners' dilemma to a cooperative game by making commitments credible [ibid., 36]. Even if we are stuck with the "grim logic" of the one shot PD where mutual default is the Nash equilibrium, one may legitimately ask whether that really matters and how often we are likely to get one shot PDs in a social setting. Indeed, Jasay responds that they are the exception rather than the rule [ibid.].

Such an exceptional case might arise if at least two conditions are met, namely independence and irrelevance. If independence obtains, then whatever the player plays in the present game will have no effect on how a future partner might play. On the other hand, Jasay argues that one may run the risk of a sanction in the form of banishment from future games, which will make the defaulter aware of his foregone gains-something even below the security payoff of DD- thus switching on "the well-known Folk Theorem, by which the mutual performance strategy is an equilibrium, as is every other mutual strategy (if such exists) that lifts the present value of both players' payoffs above the security level" [ibid., 37-38].

If we transfer this theorem to the social situation where there are many potential players, "budget constraints" of one sort or another will send us in search of the best games, namely those which offer payoffs above the security level. This in turn amounts to finding the best partners to play with, such as employers, customers, spouses, and to accomplish that goal we need to build a reputation as a reliable player. According to the independence condition, in the transition from *Gemeinschaft* to *Gesellschaft* the Folk Theorem does not get switched on, with the

result that: "one can default with relative impunity, collecting the free-rider payoff without thereby having any influence on the strategies others will choose in future games where he participates-if indeed he is given a chance to participate at all" [ibid., 40].

Whereas the independence condition claims that the present casts no shadow over the future, under the irrelevance condition "the future is irrelevant if it casts no shadow over the present" One such case would be where a player knows this is the last game and will therefore play it as a one shot game. Similarly situated are the fly by night operators, transient tourists and "the somewhat sad case of the Man Without Qualities and of no substance." The latter has so little to offer that the most he can get from other players is a poorly paid casual employment. Although there are such irrelevance-of-the-future cases, Jasay does not think that they would provide good grounds for an individual to consent to "the state as ultimate enforcer of formal or informal commitments" [ibid.,41].

As to whether independence-of-the-future offers greater promise as grounds for strong consent to the enforcer state depends on the strength of what Jasay calls the anonymity argument: "If anonymous players are not identified with the strategies they employ, their future payoffs may well be independent of their present conduct: they can default with impunity, and being rational, they will" [ibid.]. However, the anonymity argument is, as it turns out, false, and this has to do with the fact that in a PD "performance" can only be met by "default" if either the players' strategies are hidden from each other, or the game is sequential. Simultaneous performance, coupled with at least partial transparency will produce either of two symmetrical solutions, that is, PP or DD, since "as much as I should love to default while you performed, you will not perform if you do not see me perform too" [ibid.]. Simultaneous performance in fact turns it from a PD into an assurance game, whose real life analogue is the spot exchange or cash transaction. While it does admit of anonymity, there is no free-ride option, nor will it help get a "contract enforcing authority" off the ground, since the game is cooperative and the contract self-enforcing [ibid., 42].

On the other hand sequential, non-simultaneous play does not support anonymous social interaction. As in a credit transaction the performance of the first player precedes that of the second. But the first is unlikely to advance goods on credit to an anonymous individual. Thus, as Jasay puts it, "Anonymity is tolerated by simultaneous, but is inconsistent with sequential, play, which, unsurprisingly, spoils much of the charm of the default strategy" [ibid.]. Hobbes's Foole discovers that even if there is no such thing as justice to enforce the keeping of covenants, there are still considerations of prudence or expediency. If he breaches his covenant, the only person likely to play with him is another fool, but as Jasay reminds us: "Foolishness is surely an inadequate source from which to draw the imperative need for an enforcer of covenants" [ibid., 43].

However, Heath is convinced that without the enforcer we will end up with outcome 3 in his schema, or DD, where he fails to deliver and you fail to pay.That

is, our natural propensity to truck and barter, of which Adam Smith so fondly spoke, will be undermined by our tendency to free-ride. In reply of course we can simply remind Heath that truck and barter long preceded the state, as noted earlier in this chapter, and continues under private dispensation even today, much to the chagrin of people like Cutler. Indeed it was noted in the aftermath of 9/11 that following the money trail was made very difficult by similar private customary arrangements in Islamic countries. Heath's predictions notwithstanding, we are not confined to simultaneous exchange and much touted globalization would not have occurred if we were.

Heath claims further that therefore "economic exchange, when it does occur, must involve more than just self-interest; it must also involve some form of moral or legal constraint" No doubt it must, in the sense that "some form of moral or legal constraint" is in our interest. After all Gauthier thought that it was in our interest to constrain our maximizing tendencies, and Jasay thought the Foole might at least be prudent, if not moral. Besides, as Foot reminds us, prudence has its place under the tent of practical rationality [2001, 13]. If "legal constraint" is also necessary, we suggested that we do not need Hume's "vast apparatus of our government" to produce it, but that firmer rules may evolve as did the common law or the Law Merchant. As Hasnas notes, for most people law is co-extensive with the state, whereas in fact there are many examples of law which the state has not produced such as bargaining and mediation, or institutional management. The common phrase "law and order" implies that the two necessarily go together. However, as Hasnas further explains, law is one method of producing the order we need for a harmonious existence, though in its present incarnation it tends to be rules generated by the state [2007, 184; 186].

However, Heath does think that the only way of getting ourselves out of the prisoner's dilemmas into which our self interest has led us is by handing over some of our freedom to the state and living under its rules: "Freedom is good when some of its consequences are good. When the consequences of freedom are not good, then people are better off without some of that freedom" Heath assumes that the state will somehow know what has escaped the rest of us, that is, which of the consequences of freedom are good, and which bits of freedom we are better off without. Again, there is little need to stand in line at some state bureaucracy in the hope of getting an answer which is readily at hand, namely Pareto's idea that something constitutes an improvement if it makes at least one person better off than she was, and no one worse off than he was.

Heath claims that following Hobbes the "rules and institutions of society" are designed to ward off the effects of our exercising our natural liberty, including the free-riding which "undermines all forms of economic and social cooperation" [ibid., 53]. But as we have argued, the rules and institutions of society are many and varied, and extend well beyond those produced by the magistrates. To the extent that free-riding is a problem, it tends to be a self-limiting ailment, and one largely managed without the ministrations of the state. The Pareto principle or Mill's no harm principle would certainly qualify as examples of the rules of society, and as

moral principles most people are quite capable of putting them into practice to produce the order without which life would be even more nasty, brutish and short than it is. Though as Jasay noted, there is something peculiar about saying that one prefers the state to the state of nature in much the same way as one might prefer familiar objects such as tea or coffee, since most of us have only lived under states which by definition preclude any direct experience of the state of nature [1998,19]Binmore makes the further point that the social contract theorist not only needs to show how the social game differs from the state of nature game, but why the players would feel committed to the rules of the new game [1995,118].

As we saw, considerations of prudence would dictate that even the Foole should keep his agreements, lest he be confined to playing with fools such as himself in future games. While this lesson may have been lost on the Volk, according to Jasay, "the bowdlerized War of All Against All" does seem to have remained in the public consciousness, with the result that: "The theory of the state, with a strong consent to authority, continues to be reproduced on the basis of a prisoners' dilemma whose social significance appears to shrink remarkably under an analytical stare" [ibid., 43]. Though Heath is one of those who leverages his theory of the state on the dubious significance of the prisoner's dilemma, he admits that in his view a prisoner's dilemma is a one-shot game. However, as Jasay notes, it is on the contrary "a single instance of a chain, or network, of repeated games, whose relevant payoffs turn out to be the present values of the future payoff-streams that the player expects to earn, thanks to, or despite, his choice of present strategy" [ibid.].

Heath however is not consoled by the thought that there might be a series of games, since this might just mean that people get stuck in one prisoners' dilemma after another [ibid., 55]. However, Binmore, like Jasay, believes that the prisoners' dilemma does not correctly map the way societies produce cooperative solutions and is thus not troubled by the fact that cooperation is impossible in a one shot game.Moreover he holds that repeated games are strategically quite different because time permits players to take into consideration opponents' past behaviour [ibid., 114,115]. Heath insists that once people get stuck in repeated prisoners' dilemmas, they typically go from bad to worse or what he calls a "race to the bottom" [ibid.]. However, although it sounds rather dramatic, it simply isn't clear in what sense the outcome supposedly gets worse and worse. The Nash equilibrium of a prisoners' dilemma is DD, or as Binmore prefers to call it (hawk,hawk), which is not to say that there is no solution which would be a Pareto improvement, such as PP, (dove, dove) which has a higher payoff than DD. If a series of Pareto inefficient outcomes strikes Heath as somewhat worrisome, Binmore does not find it problematic that rational individuals can make choices which produce such outcomes, since "The rules of the Prisoners' Dilemma create an environment that is inimical for rational cooperation and, just as one cannot reasonably expect someone to juggle successfully with his hands tied behind his back, so one cannot expect rational agents to succeed in cooperating when constrained by the rules of the Prisoners' Dilemma" [ibid., 103].

It seems as though Heath has committed what Binmore regards as the mistake of arguing that because rational individuals sometimes fail to keep their promises, they can never be counted on to do so. Moreover he thinks that the fact that we find the prisoners' dilemma somewhat bleak is indicative of the importance we attach to developing a reputation for keeping promises as illustrated in a quote from a New York merchant: "Sure I trust him. You know the ones to trust in this business. The ones who betray you, bye-bye" [ibid., 112]. Jasay also emphasizes the importance of reputation in becoming a desirable partner and enlarging the pool of future partners. Reputation is not just one of mechanical reliablity but that "B believes that what keeps A honest is his justified calculation that honesty is the best policy" [ibid., 38-39]. In fact, Heath should heed Binmore's admonition that "the Prisoners' Dilemma is not the right game to be studying" and that there is no point in continuing to defend one's position by analysing the wrong game [ibid., 114]. Indeed, as Binmore reminds us much later in his work, "for indefinitely repeated games, the folk theorem tells us that we do not need to rely on anything but the enlightened self-interest of sufficiently forward-looking players to maintain the full panoply of cooperative possibilities" [2002, 293].

3.4.3 The principal-agent problem

Having shown that the supposed existence of prisoners' dilemmas does not provide support for the authority of the state that Heath and others are inclined to think, let us advert to a related issue, which Jasay argues contractarian statists have to contend with, namely the principal-agent problem. Under such a view the principals or parties to the social contract set up an agent state to manage the collective choice mechanism provided for in the contract, as well as in some versions of the theory, a sub-contract with the agent spelling out his fiduciary duties. However, as Jasay notes, the fact that there is an agent to enforce collective decisions provides incentives to free-ride on public enforcement. All manner of special interest groups manage to get deals enforced from the public purse if for no other reason than that the mere existence of the agent-state "sets up a "game" in which some principals will, in an unstable solution, always form an alliance with the agent at the expense of other principals" [ibid., 50- 51].

Not only is the agent-state the cause, rather than the cure of the most incorrigible free-rider problems, the prisoners' dilemma, for which it was the much heralded silver bullet, as Jasay puts it, now "comes back with a vengeance" wreaked upon those who have not managed to form an alliance with the agent and lose out in the great redistribution game. Although the typical contract is largely self-enforcing, the social contract is not. Enforcement might in turn be contracted for, but that contract will itself need enforcing, and so on into the afternoon, no doubt leading Juvenal to famously ask: *Quis custodiet ipsos custodes?* Thus the only way out of the infinite regress of enforcement dependence is to set up a cooperative game where the contract is self enforcing. What we are not entitled to claim, according to Jasay, is that although contracts or promises are incurably infected by the pris-

oners' dilemma, the social contract itself manages to avoid contamination [ibid., 52].

3.5 Summary.

Throughout this chapter we question the supposed need for authoritative solutions to problems such as coordination, enforcement, and prisoners' dilemmas of one sort or another. As Edmundson agrees, the class of *malum prohibitum* laws, which comprise the bulk of modern legislation, are a good test of the authority of the state, which we contend is non-existent. While consent is now widely thought to offer little hope for justifying the state's authority, we also discuss other proposals such as estoppel, fairness and associative obligations, which we find similarly wanting. Although Raz thinks we should have no more difficulty accepting the authority of the state than that of a doctor, we see no relevant similarities. Over the past century the state has vastly increased the scope of problems thought to require an authoritative solution, for which it imposes ever increasing taxes, supported by coercive measures dressed up in the trappings of sovereignty. As for the public goods which, it has been widely believed, can only be provided by the state, the two classic cases of medical care and education exhibit all the disadvantages inherent in central provision, such as both under and over-supply of a poor quality product. Similarly, prisoners' dilemmas, which have been thought to depend for their solution on the heavy hand of the state, turn out on closer inspection to be iterated games, where, to paraphrase Jasay, the future casts some solution over the present.

Chapter 4

Democracy

We have thus weighed in the balance several of the more influential recent apologies for the authority of the state and so far found them wanting. In this chapter we shall address the question as to how democracy might or might not be a source of the state's authority, or as Dworkin aptly phrased it: "What can give anyone the sort of authorized power over another that politics supposes governors have over the governed? Why does the fact that a majority elects a particular regime, for example, give that regime legitimate power over those who voted against it?" [1986, 191]. I have already answered the first of Dworkin's questions, namely nothing, and the short answer to the second is that it doesn't, an answer I shall attempt to argue for in the course of this chapter.

4.1 Singer on Democracy

In *Democracy and Disobedience* [1974], Peter Singer explores the question as to whether the fact that a government is more democratic would lend greater moral weight to claims that its decisions ought to be obeyed. While we shall refer to several points that Singer makes in developing his view, we shall be less interested in the sorts of obligations we might or might not have towards a putatively democratic order, even though Dworkin thought that his questions raised the problem of the legitimacy of coercive power which in turn piggybacks on another, namely political obligation [ibid.]Our concern will be rather, given what Singer has to say about democracy, why anyone would think it had enough going for it as a way of deciding anything to even be bothered putting a new spin on the old question about political obligation. On the latter issue I would agree with Pateman that "Liberal justifications for political obligation are now in tatters" [1979,194]. or with Simmons, who supports Baier's view that the main question about political obligation is whether there is any such thing [1979, 3].

The Byzantine workings of governing bodies at Oxford seem to have inspired a number of interesting reflections on democratic decision making. For example,

Black devotes the last chapter of his *Theory of Committees and Elections* to the earlier work on elections of the famous 19th century Student of Christ Church, the Rev. Charles Dodgson [aka. Lewis Carroll]. In a similar vein, Singer asks us to contrast different ways of governing an institution within a college, in this case a common room association. Of course he is not concerned with any particular such association, many of which have doubtless existed, as it were, *ab universitate condita*, and been governed more by tradition than written codes. As well as having, like most governing bodies, considerably predated the advent of the present generation of college members, they do have the virtue of being a much simpler model of government to examine.

Singer thus asks us to consider three models of such associations. The first apparently exemplifies the *Führerprinzip*, ruled as it is by a self-appointed leader who according to oral history was installed in his present post by some sort of coup. The leader avoided serious challenges to his authority by not only having powerful allies within the association, but also by supposedly making good on his promise to rule in the interests of all. Under the second model, decisions are made in the interests of the members by that member, who according to tradition and rule is most senior, and who apparently rules without any of the intimidation which accompanied the accession to power of the first. Finally, in the third governance model, decisions are taken along democratic lines, that is, by majority vote.

Singer then asks that we consider the case of a dissenting member who disagrees with the decision of the common room to subscribe to a newspaper which he considers racist. When the dissenter sees that neither the leaders under the first two models, nor the majority who carry the vote under the third are inclined to change their views, he decides to take the law into his own hands and remove the newspaper from the common room. The purpose of Singer's thought experiment is to explore the question as to whether there is something about the democratic way in which decisions are taken under the third model which makes it harder to justify the dissenter's disobedience than in the first two models, where decisions are taken by one man on behalf of the members. As Singer puts it, although the dissenter flouts the customary decision procedure in each case, "If there is a special reason (or reasons) for obeying laws in a democracy, we should be able to detect reasons for obeying this rule of the association in the third case which do not hold in the other two" [1974, 17].

One of the common responses from *The Crito* onwards to such acts of disobedience is to say that it is wrong to disobey, because even the dissenter has benefited in some way from the organization he disobeys. As Socrates points out, the state has nurtured us from before the time we arrived on this earth by regulating the marriage of our parents and our subsequent education and upbringing [Plato,1953, 380]. However, Singer responds that just about any sort of state could make a similar claim on our allegiance. In the case of the governing body of the common room, all three versions could claim to govern in the best interests of their members, a claim which Singer thinks reasonable to take at face value. The question is whether a democratic government of the sort envisaged by Singer's third model, as opposed

to the Athenian democracy which prevailed in Socrates's time, is somehow more deserving of our allegiance.

Singer outlines the views of other commentators since Plato who have sought to ground our allegiance to the state on some supposedly relevant property of democracy such as popular sovereignty or equality. Common to many of these views is the claim that the legitimacy of popular government and of any obligations allegedly incumbent upon its citizens is derived from some form of consent on the part of the governed. The doctrine of consent as such goes back at least to *The Crito*, where Socrates argues that if you do not agree with the way "the laws" order your society, you may take your business elsewhere. But if you stay, you can be considered to have accepted the deal offered by the state, and are not entitled to ignore your obligations owed to it, even if doing so should result in your death, as was the case with Socrates: "he who has experience of the manner in which we order justice and administer the state, and still remains, has by so doing entered into an implied contract that he will do as we command him" [ibid., 381].

As to the merits of Socrates's take it or leave it principle, Nozick asks: "What rationale yields the result that the person be permitted to emigrate, yet forbidden to stay and opt out of the compulsory scheme of social provision?" [1974, 173]. With respect to his third model, where members of the common room form a governing committee with each member having an equal vote, Singer holds that its most salient feature is that of fairness. By that he seems to mean that power is equally divided with each person having only one vote. Such a franchise is supposed to be fairer than, say, that proposed by Mill, who argued against extending the vote to the illiterate or those on welfare rolls. On the other hand, those demonstrating a superior education or station in life might have more than one vote in order to avoid "too low a standard of political intelligence," thus preserving "the educated from the class legislation of the uneducated" [1958, 135,139]. Of course, Mill was speaking of the national electorate, rather than an Oxford common room, which by definition constitutes some sort of meritocracy.

We might still ask, however, in what respect the third model association is fairer than the other two where one individual makes decisions on behalf of the other members. While there may be grounds for questioning the method by which the leader of the first association acceded to his position, it is not immediately clear what is unfair about a rule which says that government of the association is in the hands of the senior member, provided, one may imagine, that there is general agreement about such a rule including the determination of seniority. Singer in fact seems to admit that we may well be hard put to demonstrate by argument, and may simply have to assume that the more democratic model of governance is fairer, and that it therefore has a greater claim on our allegiance.

The question of fairness seems connected to that of legitimacy, though with respect to the view that only popular governments can possess legitimate authority, Singer observed that legitimacy can be notoriously difficult to agree upon. This may have to do with Hare's view that acknowledging a government as lawful is

not to state any facts about it, [1967, 172] though Singer responds that even if we agreed we should obey governments which are legitimate, "we would still have to produce reasons for holding that certain forms of government are legitimate while others are not," [ibid., 23]. implying that this might be a rather tall order. Hare himself suggests that to ascribe lawfulness to a government is simply to express one's allegiance to that government, which one does for moral, prudential or political reasons, rather than legal ones. In declaring such allegiance, I agree to treat its laws as binding, and like Socrates, will not complain if I end up in prison [ibid., 168-169].

Actually Singer does attempt to clarify the sense in which the third model association is fairer. It no doubt stops short of being fair in any absolute sense, if indeed there is any such sense of fairness. Rather it is fair in the sense that a compromise is fair, given the circumstances, as when we are forced to draw lots to decide some outcome. A particular compromise might be less than fair, because it results in someone doing more than her fair share, as in Singer's case of the woman tending her baby every week night, while the husband only does so on the weekends. Of course, it may be that even this case is not as unfair as first appears. There may be all sorts of reasons why in any given situation domestic chores are divided the way they are, having possibly to do with other work, domestic and otherwise, performed by each spouse according to their respective aptitudes. Indeed it may well turn out to be an instance of that famous principle of fairness: "From each according to his abilities, to each according to his needs"

Again, Singer emphasizes that the particular feature of the third association, which supposedly makes it harder to justify disobedience is that it is founded on a fair compromise. Moreover, he argues, the democratic alternative, where each member has an equal say in decisions, is preferable, for example, to Malatesta's anarchism, whose solution to the impossibility of ever getting any agreement as to who is going to run the show is not to bother having a show to run in the first place. Further, with respect to Mill's meritocracy, Singer believes that it is not so much a question of its being unfair, but rather imprudent, because it could prove to be a hard sell, especially to the uneducated. Indeed there is a sense in which, attempting to fine-tune voting along Mill's lines, amounts to pursuing an unattainable level of fairness, the net result of which will be much political unhappiness. In that case the compromise represented by "one man,one vote" would be preferable [ibid., 35].

Another reason why the third association is held to represent something of a fair compromise is because "it gives no advantage to any of the parties to a dispute and is therefore preferable to the fight to the finish that would otherwise ensue" [ibid.]. Again, it is not clear why this is necessarily superior to the second association, where the decisions are made by the senior member, and where the basis for his right to decide, which may pass on to others who in their turn qualify for election by seniority, is understood and accepted as appropriate. Political differences will arise, and the decision procedure may have little to do with heading off an all out brawl. During a difficult period before World War I Gilbert reports that Churchill apparently did not think that "one man one vote" would be sufficient to bridge

the great political differences of the day and set up a regular dinner club where members of the government and opposition could meet and settle their differences more amicably [2006, 48].

In fact, as many have pointed out, there is often little satisfaction to be had from being able to cast a vote, which led Churchill, for example, to seek other ways of exploring political differences. For example, voting is known to generate paradoxes, such as explained by Narveson, where three different voters assign different ranks to three alternatives with the result that no clear majority results [2008, 123]. One solution to this sort of problem is to hold some sort of backroom gathering, no doubt reminiscent of Churchill's Other Club where perhaps, as Narveson further suggests those having more influence than the "one man one vote" principle might suggest will cajole or bully a solution out of those with less influence [ibid.].

Another mechanism for managing democracy, as Mr Putin would no doubt call it, is vote trading or logrolling which is often thought to be morally wrong because it distorts the legislator's true preferences, but as Tullock observes most people know it is what goes on in the back-rooms that counts, since "the art of legislation involves bargaining, haggling, and efforts made to sweeten deals" [2002, 30]. Nor, as Tullock reminds us, is logrolling confined to the US; some of Churchill's political heirs under Mrs Thatcher had to support policies they didn't like in order to receive party support for those they did. Indeed, according to Tullock, logrolling is as widely used as it is morally condemned by the public [ibid., 79].

Thus when one considers the wide array of human institutions with which one has dealings, not only does it seem that one rarely negotiates on equal terms in the way that Singer's fair compromise recommends, but it is also unclear why that would necessarily be a desirable state of affairs. An airline captain could be bound to follow the democratic wishes of his passengers, or for that matter draw lots, which Singer thinks is the fairest decision method, but it is far from obvious that to do so would be either practicable or sensible. If members of the second association become dissatisfied with some aspect of rule by the senior member, perhaps because it had led to a declining quality of decisions by people who had stayed on past their prime, then they might be motivated to explore alternative models of governance, one of which might be Singer's "one man one vote." But it still isn't clear why any such alternative is fairer than its predecessor, or why it is easier to justify disobeying the rulings of the senior member, as opposed to the majority of members in a democratic body.

Nor is it apparently sufficient for Singer that a voting structure such as that of the third association represent what he considers a fair compromise. Not only must we have fair or equal opportunity for participation but we must guarantee fair outcomes as well. Minority groups within the association must not feel that they get the short end of the stick. For example, Singer asks us to consider the case of a common room consisting mostly of white members and a handful of non-whites. Because a majority carries the day we have at least in theory the possibility of a vote splitting along racial lines, with little that the non-whites could do about it

since they are in a minority. Thus in addition to the decision procedure being a fair compromise, there must be "no tendency or general pattern of decisions which are unfair to a particular group" [ibid., 43].

Perhaps it is worth recalling at this point that the dissenter, whose grounds for expressing his dissent in the way he did are supposedly diminished under a democratic dispensation, was a minority of one, who disagreed with the common room's decision to subscribe to a newspaper, which he claimed was prejudiced against the black minority [ibid., 15]. If neither the dissenter, nor those who voted against him on the newspaper issue, were to change their minds, then it is conceivable that he would continue to be a minority of one every time this or some related matter came to a vote, in which case he might well feel unfairly treated as a result of repeatedly losing.

Thus, even if we could make any sense of what a fair compromise amounts to in the first place, it is far from clear what is involved in adjudicating the fairness or otherwise of a pattern of decisions, as Singer thinks we need to do to ensure that what began as fair remains so. Voter paradoxes and logrolling seem to be part and parcel of various democratic arrangements, but does that mean they count as fair compromises, even though one of them has often been considered immoral? Who is to decide whether or not there is, as so often claimed, some systemic unfairness, such as voter paradoxes, or discrimination? What would it be like for a particular claim of unfairness on the part of the dissenter or some other minority to be thought to have merit, or not, as the case may be? If that too is decided by majority vote, then the dissenter could lose again, and for all we know, deservedly so.

Singer admits that in in any large society, there will groups who allege unfair treatment, a matter which will need to be adjudicated in each case. But this in turn raises the question as to whose judgment will count, that of the minority complainant or the majority. The reason we cannot leave it to the majority, supposedly, is that this would make the majority judge in its own cause [ibid., 44], so the cards have to be stacked in favour of the complainant, and we may just have to hope there aren't too many wrong decisions. Of course, it is far from obvious why this solution doesn't just as easily fall afoul of the same principle of natural justice: *nemo iudex in causa sua*, especially when we take account of Dahl's observation that minorities more often threaten majorities than the reverse [1985, 27]. Thus on the one hand Singer thinks there is no solution to claims about overall unfairness,yet any there are ought to be resolved in favour of the complainant, if for no other reason that we might face endless disobedience on the part of those who consider themselves wronged. This again reminds us of Mill's prudential worries about a restricted franchise, or Binmore, who is one of those who favours conservative reforms because they are less likely to destabilize society, though we need to be on our guard, since our present standard of living depends on "society's currently dominant but precarious system of conventions" [1995, 4-5]. However, Mises reminds us that from the social instability of the 18th century, for example, resulting from a surplus of people on the land, modern capitalism arose. Thus from the efforts of some of the social outcasts of the day to provide work for themselves, industries arose to

produce goods for the masses rather than luxuries for the few [2000, 3].

As for Singer's view that considerations of prudence might suggest we favour minorities, adjudicators specializing in complaints from those who claim to have been dealt poor hands in the great crap game of life have been known on occasion to find against a minority complainant. The Ontario Human Rights Commission in recent years dismissed the complaints of a physics professor at the University of Toronto that he had been unfairly passed over for a permanent post, though it took some 6 years to reach that finding. Fairness seems never to have quite recovered from the popular wisdom that it largely exists in the eye of the beholder. Perhaps it is not a robust enough notion to carry the increased load which Singer places upon it. Although we might be able to get a rough idea of the sense in which 'one man one vote' might be said to be fair, for example in the sense, as Narveson puts it, of "equality of fundamental political power" [2008, 53], it is not clear why the dissenter can claim that the outcomes of supposedly fair voting must meet evermore stringent tests of fairness.

4.1.1 Voting as quasi-consent.

Assuming for the present that Singer's enthusiasm for fairness has not got the better of him, and that we can coherently talk of some sort of fair decision procedure as being characteristic of his third model, let us then see how Singer thinks participation might be relevant to the justification of disobedience. If we participate in the decision making of something like the third model association, we cannot when it suits us pretend we haven't done so, ignoring votes that may go against us, as the dissenter claims to do. Following Socrates, obedience is seen to be required in exchange for the benefits conferred by "the laws." Moreover, Singer proposes fine-tuning the doctrine of consent, the traditional source of duties of obedience, along the lines of what he calls "quasi consent" to distinguish it from Locke's "tacit consent," which he thought we could be presumed to have given to the government of that dominion where we enjoyed life or property [1960, 347-348].

As far as the theory of tacit or unexpressed consent goes, there seems little reason to think that it may be any more promising as a ground of obligation than express consent, about which Simmons noted that: "The paucity of express consentors is painfully apparent" As for tacit consent, Simmons concludes that it "must meet the same fate as express consent concerning its suitability as a ground of political obligation. For it seems that very few of us have tacitly consented to the government's authority" [1979, 79, 93]. The question is whether Singer's notion of quasi consent is different enough from its predecessors to escape a similar fate. As an example of this quasi, or "as if there were" consent, Singer asks us to consider the case where we participate in a drinking party, with each round being bought by one of the participants in turn. When it is your turn, you would be rightly thought to have acted badly, if you simply got up and walked away. You are not bound by any consent, acknowledged to the group or yourself, yet by participating in the

ritual you may incur an obligation, which you cannot reject on the grounds that you never consented [ibid., 49].

Similarly, the dissenter by participating in the decision process incurs a quasi obligation to abide by the majority decision, and one cannot after the fact walk away from the process and pretend that one had never participated. Indeed, the only way one can act as if one had no obligation is to declare at the outset that one has no intention of reciprocating [ibid.]. Similarly in the political context, one can be presumed to have consented if one participates in the voting ritual, and doesn't declare that this does not signal consent [ibid., 51]. Further, Singer believes that the legal doctrine of estoppel can help clarify the way in which quasi consent can give rise to obligations. Estoppel is akin to a promise, and thus one is estopped from denying that one consented: "The effect of this doctrine is to prevent someone denying something which, by his voluntary behaviour, he led another reasonably to believe" [ibid.].

With respect to the notion of estoppel, Green agrees that it could explain the way in which, for example, by my sitting in a restaurant and ordering a meal, I can reasonably be held to have consented to pay the price shown on the menu, although I have not explicitly promised to do so, and may have no intention of doing so. Or as Jasay puts it: "This is tantamount to a credit transaction, in legal parlance a (partly) executory contract" [2002,42]. While Green agrees that estoppel might help explain obligations under this sort of forward contract, thus providing an account of one type of consent, he is less sure that it could be appealed to to justify a duty to obey the state [1988, 164]. Singer cites Lord Birkenhead's opinion, to the effect that estoppel addresses the harm that B may suffer as the result of his believing that a certain state of affairs existed as the result of A's words and conduct. However, according to Green, democratic theory assumes that the state is not there to serve its own interests but rather those of its citizens [ibid.]. Or, as Jasay put it, the state is not a party to the contract but rather an agent of the principals who contracted with it to serve their interests; though as we saw above, the state seems to have enormous discretion for an agent under contract, acting more often like one of the parties, and the dominant party at that [ibid.,50-51]. Green thus rightly denies Singer's appeal to estoppel, since, unlike the restaurant situation, people vote without relying on the compliance of others, so there is no reason to think that voting should be taken as a sign of consent to or acceptance of the state's authority [ibid., 172].

On the other hand, Plamenatz has also upheld the view that voting is tantamount to consenting where one hands over authority to those elected [1968, 170]. Simmons, however, does not think it reasonable to see voting as an act of consent to the authority of the successful candidate. Rather he thinks that most people are unaware of what voting supposedly commits them to. Indeed, Simmons goes on to argue that to the extent that voting is seen as a duty, so much so that some states make it compulsory, the duties of citizenship must be on a different footing from any consent involved voting [1993, 224]. This divorce of political obligation from voting is further underscored by the fact that the state does not consider our

political obligations to be contingent upon whether we have voted or not. Thus Simmons concludes that"the conventions governing democratic elections, and the rhetoric surrounding them, do not establish that voting is a way of undertaking obligations and granting authority" [ibid.]. Thus,*pace* Singer, voting is not an "as if" or quasi consent, and if others act on the assumption that we have so consented, that is their problem, or as Simmons puts it, if we later deny having consented, nothing hangs on it as far as others are concerned.

But as Simmons points out, it is a rather odd feature of Singer's view that our obligations from voting are a function of the beliefs which others form on the basis of our participation, suggesting that our obligations may be restricted to those who happen to have those beliefs [ibid., n. 13]. Nelson adds the further point that we do not need the notion of consent to explain the point of voting, if it has one, as Singer seems to suggest. Given the highly structured and coercive context of the state, people may vote because they might as well try and influence whatever result they will be stuck with [1980,44]. Of course, as Narveson has reminded us: "the expected value of your voting is not simply the value of G getting in, but of that, weighted by the probability that she will if you vote- and that probability is vanishingly small" [2008, 124-125].

As we saw earlier, Singer thought that we could avoid our obligations by clearly announcing our non-participation at the outset. Others of course could do likewise, in which case the prospects for voting also look rather bleak with a majority vote leading to nothing [ibid., 55]. Unfortunately, Singer does not go on to explain why we should shrink from a democratic meltdown if that in fact was a likely outcome. After all, on his own account we have two other reasonably efficient governance models to fall back on. Rather than telling us why we have reason to fear the breakdown of democracy, Singer repeats his charge that the dissenter is free-riding on the majority, regardless of whether he has declared his non-participation, since if everyone did that, there would be no democracy.

4.1.2 Fair play as a solution to consent

Again, it doesn't seem entirely clear what is or is not unfair about the dissenter's actions. Much of Singer's argument is restatement of Hart's principle of fair play discussed earlier, namely that those who have submitted to rules governing a joint enterprise have a right to a similar submission from other beneficiaries. We already saw that the attempt to clothe this principle in the mantle of estoppel added nothing of significance; as Green points out: "Even if voters are bound to obey because failure to do so will frustrate the legitimate expectations of others, it is not a consequence of having consented. To believe otherwise is to make the mistake of identifying consent with its normative consequences" [ibid., 171-172].

However, as Simmons reminds us, Hart's principle of fair play, also endorsed by Singer, is designed to get around the difficulties posed by the consent doctrine, which was embarrassed by a lack of subjects who had in fact consented. Fair play

promises to provide such a general account, "Since mere acceptance of benefits within the right context generates the obligation, one who accepts benefits within the right context can become bound unknowingly" [1979, 117]. Thus Singer at this point in his argument emphasizes participation rather than consent. The fact that we participate in the decision-making process, and receive benefits thereby, makes it harder to justify non-compliance, much harder than under the first two common room associations where decisions are left up to a leader. To refuse to be obliged by the deliverances of a fair democratic compromise is to take advantage of those who accepted them.

We earlier discussed Nozick's response to the fair play principle, where he argued that we were not bound to cooperate with such schemes, such as a neighbourhood entertainment system. Nozick's PA system was put in place by "some of the people" which might suggest from Singer's point of view that it was less entitled to call upon contributions from all in the neighbourhood. But if the consent doctrine faces a paucity of consenters, then the fair play principle is going to have to explain what sorts of things constitute cooperative schemes, and what it is to accept a benefit and be beholden in return. In the case of public goods, or "open benefits" as Simmons calls them, such as a PA system, Nozick is right that the principle is "objectionable and unacceptable" [1974, 93]. Or, in Simmons's more measured assessment, even at the level of the neighborhood association: "participants in cooperative schemes which produce "open" benefits will not always have a right to cooperation on the part of those who benefit from their labors. And this does not look like a result that either Hart or Rawls would be prepared to accept" [ibid., 136].

As we saw earlier, when we attempt to ramp up from what might or might not be true at the level of the neighbourhood association to the larger polity, Simmons rightly concludes that it is unreasonable to hold that actual political communities function on anything like this basis, which is to say that any lessons which could possibly be drawn from the association have little bearing on the political state, which for most of us is not a cooperative enterprise in the relevant sense. Indeed, as Simmons puts it: "it must be a rare individual who regards himself as engaged in an ongoing cooperative venture, obeying the law because fair play demands it, and with all of the citizens of his state as fellow participants" [ibid., 140].

So far then, neither consent nor fair play seems to have offered much promise as a way of explaining what Singer has in mind by participation. Yet he would doubtless reply that participating in voting in and of itself meant that we could not pretend we had not done so, and therefore ignore the outcome. But as Green pointed out with respect to the failure of Singer's estoppel argument, "there is generally no independent evidence of the meaning of voting," Plamenatz's conviction to the contrary notwithstanding [1968, 171]. According to Simmons, voting is better seen as a matter of expressing preferences rather than consenting. Voters are presented with options, rather like condemned prisoners who may be offered a choice as to how they are to die. Just as the prisoners could not be said to consent to either option, since they despise both, the voter chooses the least unappealing of those on offer. But this is only a matter of preference, not one of agreeing to hand

over authority to the candidate [1993, 223]. Moreover, if participation amounts to consent, Nelson is not so sure that participation is a good thing, because it looks like: "From a moral point of view, participants lose (or at least limit) their freedom to reject immoral policies. The government, being founded on consent, legitimately exercises authority whether or not it governs well [1980, 45]"

4.2 Democratic rules

As well as any question of unfairness to individuals who may have gone along with the majority vote, Singer claimed that some of the unfairness resulted from violating some rule essential to democracy. Singer's next task then is to explain which rules are supposedly essential to democracy, and which not, so as to determine the proper role for disobedience within a democratic organization. We noted above that that Singer had already observed that majority rule in and of itself was no guarantee that a democratic compromise was as fair as it should be. Now he proposes to clarify what sort of rights an individual has against a majority decision, such that if those rights are infringed, there may well be grounds for disobeying the will of the majority. In his view there are some rights which are essential to the democratic decision procedure, such as freedom of speech, voting and assembly, which if prejudiced by the association, could undermine its authority and make acts of disobedience justifiable.

But even if we assume with Singer that the decision procedure is as sure a foundation for fair government as we can hope to find, and superior to the other models because of the degree to which it permits participation, it is not clear how we are going to separate the rights essential to democracy from those that are not. We are told that it will take "judgment" to discern the difference [ibid.,69], but not the judgment of the decision procedure, it seems, since as Singer ruled in the case of aggrieved minorities, "the fairness of the decision procedure cannot be left to the decision procedure itself"[ibid., 68]. Since he doesn't think that a higher tribunal such as a supreme court is a workable solution, it will simply be up to the judgment of the individual to decide whether a right is fundamental to democracy and whether it has been infringed.

If indeed it is up to the individual, there seems to be nothing to prevent someone deciding that some of the rights Singer is inclined to treat as non-essential, such as freedom of religion or gay rights, are in their judgment essential. Indeed, it looks as though Singer is prepared to countenance a situation where "the violation of non-essential rights may be so serious as to justify disobedience despite the democratic reasons for obedience [ibid., 69]," a state of affairs which it will presumably also be a matter for the individual to determine. The individual can decide, according to Singer, whether or not she has got a fair hearing, and short of coercion, may attempt to persuade the majority of that fact. It is a matter for individual judgement again as to whether or not one has gotten a fair hearing, since "there seems to be no general principle which would enable us to decide when views are getting an

adequate hearing" [ibid.,80]. If we think we have not, we are apparently entitled to such disobedience as will allow us to fairly present our case.

Of course, how much disobedience is enough to do the job will presumably also be an individual judgment call, though Singer thinks that as famous a dissenter as Bertrand Russell can confuse acceptance of his views with getting a proper hearing [ibid., 76]. As an example of disobedience which goes further than necessary to protest lack of a fair hearing, Singer mentions sending in false registration papers for military service. Even though such disobedience is non-violent, it is "an attempt to coerce and not to persuade," or to "fuck the system," as the language of protest so eloquently puts it [ibid., 83].

The reason we are not entitled to fuck the system is that if other groups in the community did likewise there would be a breakdown in democratic decision making, which, as we saw before, is to be avoided at all costs. I take it that, for Singer, filing false papers counts as some sort of left wing extremism; left, because the left is traditionally thought to oppose the draft, and extreme, because, according to Singer, it resorts to coercion rather than persuasion.

However, it seems odd to describe not doing the bidding of the state, which we consider the paradigm case of a coercive institution, to be itself coercive. It is the state which threatens various and sundry unpleasantries to those who fail to carry out its orders, even if they are not persuaded that it has any authority to make those orders in the first place. Edmundson, for example, thought we had a duty not to interfere with the state's administrative directives, or in Singer's more colourful terms, not to fuck the system, but at no point did Edmundson suggest that our not doing so would amount to coercion. Perhaps the source of some of Singer's difficulty here is that he has slipped from talking about a small association to talking about the state, although he has yet to show that anything instructive about the latter can be derived from the former.

Indeed, if we are talking about the state, we have already argued that Edmundson has not shown that we owe the state even as much as cooperating in its administration, which is to say we are under no obligation to correctly register for the draft or supply information required by the census, or whatever else the state believes it needs to fulfil its supposed mandate. Singer is right that this sort of interference with the functioning of the state goes beyond the persuasion he thinks we should be engaged in. Of course he readily forgets that the state is not remotely like the debating society model of the common room association, and while we could attempt to persuade our local MP that we ought not to have to comply with some directive, most of us have better things to do. No doubt Singer thinks we should make the effort because if other groups in the community did likewise, "the democratic decision procedure would break down, almost as surely as if they had tried to settle issues by violence" [ibid.].

Again, Singer seems a good deal more troubled about the possibility of a democratic meltdown than I am. There is no reason to consider not complying with the state's directives as either coercive or verging on the violent, which is to say it is

not on the same footing as burning down the *Reichstag*. Nor do I think that there is much hope of separating democracy from the interventionist or *dirigiste* state, as Mises did, which is to say that the only way to get rid of the latter may well be to get rid of the former.[1] If the left could bring democracy into disrepute by burning their draft cards, Singer thinks that widespread disobedience might also involve "the possibility of similar campaigns by right-wing extremists designed to make welfare legislation unworkable" [ibid.]. Well, I suppose it might, though if he has in mind inundating the bureaucracy with illegitimate welfare claims, I'm not sure why such a strategy would be peculiar to the right. Libertarians, on the other hand, can be hard to categorize as either right or left, but are likely to engage in the sort of persuasion Singer approves of, in this case, to persuade their audiences that welfare legislation is but another example of state interventionism, which is to say, as Mises put it, "government interference with the market" where "all the measures of interventionism by the government are directed toward restricting the supremacy of consumers" [ibid., 40]. Inspired by Voltaire, Bastiat also proclaimed that: "The state is the great fictitious entity by which everyone seeks to live at the expense of everyone else" [1995, 144]. More recently Hazlitt has written in the same vein that, since the government has nothing to give which it hasn't taken from somebody else, "all its relief and subsidy schemes are merely ways of robbing Peter to support Paul" [1969, 209].

Thus it is not clear what one would have to do to make welfare legislation unworkable, since in the libertarian view it already is. As to what the government can do to help the poor, according to Rothbard, it simply needs to get out of the way in order to release the productive energies of rich and poor alike, with a resulting enormous benefit for all [1978, 162]. Rothbard lists various ways government could increase the welfare of the poorest, namely by removing its own regulatory roadblocks from their finding their own solutions, such as minimum wage laws, trade union and licensing regulations. He mentions the case of Dr Thomas Matthew who set up a multiracial hospital in the black section of Jamaica, Queens, arranging his own bus transportation because the city system was inadequate for patients and staff. The City of New York put his buses out of business because they did not have a license, as they did another low cost hospital Matthew set up in Harlem, citing fire violations.[2] One can only assume that Singer sees merit in such obstacles because they are the result of a democratic decision procedure, and any attempt to by-pass them, as people like Dr Matthew did, will no doubt strike Singer as misguided and no doubt coercive.

If Singer is concerned about coercion, supposedly bordering on the violent, he need look no further than one of the above roadblocks, especially favoured by the left, namely trade unions, whose privileges vouchsafed by government, according

[1] cp. Mises,[2000,99]

[2] University of Waterloo students, who recently tried to set up a low cost bus service, found out that government stumbling blocks remain much as they were in 1960's New York; such enterprises are a privilege reserved by the state, as Dr Matthew no doubt could have told them, to inefficient but protected monopolies.

to Rothbard,"enable them to keep the poorer and minority-group workers from productive and high wage employment" [ibid.]. As Mises also remarked, a union is granted the right to resort to violence and disruption against entrepreneurs and those of their own members who do not go along with a strike[2000, 67,87], which leads Henderson to recommend removing their legal privileges, and "protect the rights of those who wish to work for employers no matter who tries to prevent them from working" [2002, 111]. While, according to Hazlitt, such violence is tolerated in the name of supposed justice for workers,[1973, 142],in Mises's view, the only thing that will raise the standard of living is not union activity, but increased investment [ibid., 87-88]. As we saw, Singer thinks that we need to uphold the principle of democratic decision-making and not simply ignore it when it results in unwarranted restrictions on individual freedom. This is not to say that it does not have some shortcomings as a principle. According to Singer, one of the characteristic weaknesses of democracy is that because it simply counts votes, it is unable to take account of the intensity with which some views are held. It might be considered a much fairer compromise if the degree of dissent could be more accurately registered. We noted earlier that Mill thought it a good idea that democratic voting reflect levels of education or political intelligence, a view not favoured by Singer because he thought it might have trouble garnering popular support. Perhaps the proposal to take into account voter intensity would run into similar problems, to say nothing of the fact that it seems to have even less to recommend it than Mill's meritocracy, since political intensity, as well as perhaps being hard to measure, may not be worth measuring in the first place.

Singer also defends his view of democracy against Russell, who claims it is essential to civil disobedience to flout the law which one believes unjust, and to suffer the consequences, than to take the legal way out, for example, in the case of the draft dodger, to apply for exemption as a conscientious objector. For Singer, Russell's position betrays a misunderstanding of democracy, in particular the democratic decision procedure. Accepting the majority decision does not mean simply acquiescing in the law passed by the majority, as Russell thinks, but rather that one respects the process. One may make one's opposition to war as widely known as possible, using all legitimate means available to change the law in question, but actually breaking the law undermines the democratic process.

4.2.1 Wollheim and the paradox of democracy

Curiously enough, in a footnote to his claim that Russell has misunderstood the democratic decision procedure, Singer levels a similar charge against Wollheim with respect to the democratic paradox referred to in the latter's well known paper.Although Wollheim does think there is something paradoxical about the fact that when we vote for option A, the democratic machine may deliver option B as the one favoured by the majority of voters, he spends the rest of his paper explaining the supposed paradox away. If anything, Singer may in turn have misunderstood Wollheim, who seems to agree with Singer on the need for maintaining the demo-

cratic decision procedure, or democratic machine, as Wollheim calls it. Wollheim arrives at his formulation of the paradox of democracy, after having rejected the solution that in voting for option A, the individual voter was merely expressing his want, as opposed to recommending the best course of action: "if a man expresses a choice for A and the machine expresses a choice for B, then the man, if he is bound to be a sound democratic, seems to be committed to the belief that A ought to be the case and to the belief that B ought to be the case" [1962, 78-79]. If Wollheim had simply left us with this paradox, as one might perhaps have expected, given the somewhat skeptical tone of his opening remarks about democracy, Singer's hasty dismissal might have been in order, but Wollheim does attempt to resolve the paradox in a manner not incompatible with Singer's position.

Again, Wollheim canvasses a couple of possibilities, first that one's support for A is hypothetical and contingent upon the majority read-out provided by the machine. Wollheim rejects this explanation on the grounds that a majority vote would only mean something if it aggregated unconditional choices, as opposed to hypothetical ones, which could be more easily set aside in the face of an opposing majority choice. The second possible solution is to consider the individual who supports A as making an unequivocal moral recommendation, whereas the machine in supporting B is simply offering a counsel of prudence, which A can then agree to without appearing to give up on the moral convictions which led him to vote for A in the first place.

Despite its initial plausibility, Wollheim similarly rejects the second solution to the paradox, since for him belief in democracy amounts to more than a readiness dictated by prudence to fall into line behind the democratic machine, should the majority vote differently;he is in fact a "genuine believer in Democracy" [ibid., 84]. Given that neither of the proposed solutions, which involve discounting the force of voting for either A or B, prove satisfactory, Wollheim trots out his *deus ex machina*: we can avoid a head-on clash between A and B, if we distinguish what he calls "direct" from "oblique" moral principles. To say that murder is wrong is a direct moral principle, whereas "what is commanded by the sovereign or people is right" is an example of an oblique moral principle. The citizen who votes that A ought to be enacted, and is later outvoted by the majority who support B, derives his support of B from an oblique principle, namely the Principle of Democracy.

However, it seems that Wollheim is right that his distinction is rather unsatisfactory [ibid., 85]. Even if the voter can comfortably support both A and B because of what Wollheim claims is an important difference in their respective derivations, whatever B is seems always guaranteed to carry the day, since it is underwritten not only by an oblique principle, but also one that has some prior claim on obedience, such as the principle of democracy. To those who are not persuaded, and who are inclined to the view that there is no way around the incompatibility of holding that both A and B ought to be the case, Wollheim asks us, for example, to consider the claim that Jews ought to be given privileged treatment. Such a claim can be uttered directly, perhaps as an expression of Jewish chauvinism, or obliquely, where it follows from some facts about Nazi Germany together with a principle that the

persecuted merit special attention.

Wollheim is right of course that one proposition can lend itself to rather varied interpretations, depending on context and supporting data. But even in the case of the direct principle we have to supply a context within which it is to be understood. The chauvinistic interpretation of the claim for special treatment of the Jews, for example, could just as easily be the result of a majority vote, and thus result from an institutional action, perhaps that of a Zionist group. Coupled with the relevant facts of Jewish history, and the principle of democracy, the less favoured or chauvinist interpretation could also be said to have an oblique derivation, if that is what Wollheim thinks is important. In response to a second objection that one could not coherently opt for the implementation of both A and B, knowing that simultaneous implementation of both is impossible, Wollheim replies that voting for A does not commit one personally to implementing A. If I am committed to A, then I am committed to strongly advocating on A's behalf, but once votes are cast, I am also committed to swinging my support behind the majority vote for B, so that for Wollheim " it seems perfectly possible to be simultaneously committed in these two different directions" [ibid., 87].

If there really isn't a paradox in the theory of democracy after all, as Wollheim claims to have shown, it isn't clear why Singer thought that Wollheim's discussion was another example of Russell's mistake of failing to understand the nature of democracy. While Singer may have had cause to disagree with the first part of Wollheim's paper where he presents what he takes to be the findings of social choice theory about democratic voting procedures, he has little reason to be concerned with Wollheim's proposed resolution of the paradox, which would only lend further support to Singer's own position. Of course Singer may well have thought that Wollheim was wrong to suggest that there was a paradox about democracy in the first place. In the absence of a fuller discussion by Singer, the question about whether Wollheim was more friend than foe need not detain us, nor would it in our view particularly redound to Wollheim's credit, should he turn out to be the former rather than the latter. With respect to his formulation of the paradox, as one way to characterize what is wrong with democracy it has something to recommend it, though his proposed solution is unconvincing.

Wollheim's view that one's enthusiasm for one's own vote is always under tight control seems to be at odds with his earlier position that there would be no point in aggregating votes that were based on less than unconditional support. Similarly, with respect to majority vote B, Wollheim had earlier claimed that there was a commitment on the part of the genuine democrat to the deliverances of the democratic machine, as suggested by the dictum that "what the democratic machine chooses ought to be enacted" But when he presents his resolution of the paradox, support for B is also qualified in order to narrow the gap between A's vote and that of the majority. A need not believe that any obligation to enact the wishes of the majority is incumbent upon him personally, but rather his obligation may amount to no more than simply not impeding the majority vote being translated into action. As we saw earlier, Edmundson argued in similar fashion that instead of

a general obligation to obey the law, we were subject only to a duty not to interfere in the administration of laws duly passed by the majority.

4.2.2 The relevance of Singer's models to large scale democracies

In the latter part of his essay, Singer turns from a discussion of the ideal form of democracy as represented by the third or democratic model, to explore in more detail whether anything that might be true of that model would also hold in something closer to real world democracies, though as we noted, some of his discussion thus far seems to have assumed that such a transition is possible. In any case Singer now proposes to ask whether any of the countries commonly thought to be democracies meet the criteria characteristic of the third model, such as an equal vote of all members, impartial procedural rules, as well as some concern that justice not only be done to minorities, but also be seen to be done by them. Only thus, according to Singer, could a governance association be considered to represent the sort of fair compromise of power and participation, such that one could reasonably expect the membership to support the outcomes of the association's deliberations.

However, such democracies as actually do exist present significant departures from the ideal sort of direct democracy envisaged by the third model, which according to Singer hearkens back to the Athenian democracy where "the citizens met in a General Assembly and there, under conditions of political equality and debate, discussed and voted on the major issues that faced the community" [1974, 106]. With respect to the origin of democracy in Greek antiquity, Wollheim further notes that the government of the demos contrasted with a modern democracy by being the government of a particular segment of the population, namely the populace or poor. The names of other parallel structures referred to the section of the population which wielded power within that sphere, such as Aristocracy, or government by the best, or Oligarchy, government by the few.

Moreover, Wollheim observes that it is a feature peculiar to modern democracies that the governing body is drawn from the citizens as a whole,[ibid.72]. a fact which has led to democracy being no longer direct, but representative. Although the view that democracy meant some sort of direct rule by the people seems to have persisted until at least the 18th century, by the middle of the 19th Mill remarked that because of practical considerations direct participation was likely to be restricted to relatively small organizations [1958, 55]. According to Dahl recent scholars have estimated the average Greek city state to have numbered between 2000 and 10,000 full citizens, which in their view was about the right size for the ideal *polis*. However, those of us who have sat on much smaller governing bodies, say of 20, have long since realized that if every member is to talk on average for no more than 10 minutes, we need to set aside at least 4 hours, which is already beyond what most of us want to spend in a meeting. If we crank up the numbers to a small town of 5000, a town hall meeting where each tried to speak for 10 minutes

would take over 100 working days for all to be heard, leading Dahl to remark that "in an ideal *polis* of 10,000 full citizens, the time required is far beyond all tolerable limits" [1998, 107].

Curiously enough, Singer dismisses a view such as Dahl's to the effect that direct democracy is only workable in very small units as a common, but false platitude of political theory. Singer thinks that although representative systems came into existence at a time when it was not practical for citizens to come together, given our modern methods of communication, we are now within easy reach of government, and it is only fashion which dictates otherwise. While Dahl would agree that electronic meetings are possible, it is another matter for large numbers to engage in productive electronic discussion [ibid., 105-106].

Goodin is nevertheless proof that the ingenuity of democratic enthusiasts is not to be underestimated, with deliberative democracy being touted as one of the more interesting developments to have appeared in recent years.[3] However, as innovative and valuable as deliberative democracy supposedly is, Goodin suggests that because of some of the practical difficulties already alluded to we shift the focus from group to individual reflection. Deliberating with oneself does put things on a more manageable scale, but Goodin suspects that this modality cannot quite replace group discussions. By setting more store by internal reflection than others have done, Goodin hopes to improve the quality of the face to face encounters which remain indispensable in most accounts of deliberative democracy [2003, 170-171,179].

No matter how fruitful the deliberation, we will eventually have to call the question, and Goodin considers the final vote to be the ultimate source of "democratic legitimacy" [ibid.,192]. On the other hand there may be some question as to what the show of hands really signifies, other than the end of deliberation at least for the time being. As we saw, Singer thought that the final decision was not enough to confer democratic legitimacy, because a clear majority vote could still raise questions about the fair treatment of the losers or the minority. Narveson also acknowledges that some think it unfair that a sector of the Canadian voting public, such as Quebec, is persistently relegated to minority status, something which no doubt the *Bloc Québecois* hopes to remedy [2008, 127].

Singer proposed various corrective measures to cure the perceived unfairness of being in a more or less permanent minority, as does Goodin, where they take the form of an internal accounting of the various ways in which other parties may be treated unfairly in the democratic process. It is also intended that internal deliberation make up for some of the practical difficulties which Dahl thought inevitably attended large scale deliberation, as well as confer the equally important "democratically deliberative" seal of approval; in Goodin's words, "the more democratically deliberative our internal reflections manage to be, the less it will matter that external-collective decision procedures can never be as directly deliberatively democratic as we might like in large-scale mass societies" [ibid.,193].

[3] cf Gibson [2003, 229]

So instead of recognizing with Narveson that "democracy is inherently and necessarily majoritarian" rather than just "some kind of accidental sideshow" [ibid.], Singer and Goodin in their own different ways offer us more of the same. But, as Harper wrote some years ago, "Decision by the test of dominant preference (majority vote, etc.) is the same operating principle as the one that might makes right" [1949, 60], which is to say that it should come as no surprise, widespread beliefs to the contrary, that it is inimical to individual liberty. More recently, Narveson has also argued that it is often just assumed that democracy is morally right, rather than just perhaps the least reprehensible;if so, we need to ask how it is we find in favour of the former, rather than the latter [2002a, 176].

As both Harper and Narveson point out, democracy possesses moral authority to the extent that it promotes liberty and not otherwise. Indeed, as Harper reminds us the conflation of democracy with liberty is wholly mistaken.While the right to vote is a liberty some think worth preserving, so much so that it is seen as a right which cannot itself be abridged by voting, there is no guarantee that the outcome of any vote will in turn preserve liberty [ibid., 56-57]. Moreover, to the extent that democracies have been successful,as Narveson observes, this is because their support of liberty has not simply been confined to that of voting, but has been written into their constitutions, perhaps in the form of some of the standard liberal freedoms, such as those mentioned above by Singer, and as a result influenced community practice.

4.2.3 Representation and authority

Given that various attempts to improve democracy appear to involve our getting more of what we don't need, assuming of course that those who currently avoid the ballot box like the plague will show any interest in doing the mental homework Goodin has in mind for them, we seem to be left with some version of the sort of representative democracy with which we are now reluctantly familiar. Singer thus canvases some of the standard theories of representation to see in what sense the criteria he is interested in, such as fair compromise and participation, are preserved under different versions of representative democracy. If representation is taken rather literally, it means the representative sees himself in some straightforward sense as representing those who for various reasons couldn't be there, as well as taking some pains to represent the views of his electors. Although Singer thinks that there might be circumstances where the voters would feel betrayed by a representative who was greatly imbued with Burke's doctrine of independence, in general he concludes that "there are forms of representative democracy in which reasons for obedience that hold in direct democracy would still have their full force" [ibid., 111].

Of course, as we have been suggesting, if there are any reasons for obedience, they are of an independent moral sort, and have nothing to do with whether a position was arrived at democratically, either directly or indirectly via representatives.

Further, while thus at least *prima facie* there is no reason to think that representative democracy would in and of itself give rise to grounds for disobedience which would not exist under the hypothetical model association, it also remains to be seen how closely actual representative democracies conform to any theoretical account of them. In fact, Singer concedes that most theories of representative democracy do not describe real political systems:"Representatives do not vote as their constituents would have voted; nor do electors choose those whose wise judgment they can trust; nor are representative bodies microcosms of the nation" [ibid., 112]. According to Singer, if we have been able to revise the traditional myth of representative democracy, it is because of the work of commentators such as Schumpeter, or Dahl, who echoed Schumpeter's criticisms.

Indeed, Schumpeter disposes of the classical doctrine of democracy according to which there is "an institutional arrangement for arriving at political decisions which realizes the common good by making the people itself decide issues through the election of individuals who are to assemble in order to carry out its will" [1950, 250]. Schumpeter holds that there is no such thing as a common good which might be arrived at by rational discussion, if for no other reason than that in political matters rationality is in short supply. Even if people were capable on more than the odd occasion of forming consistent rational desires "it would not necessarily follow that the political decisions produced by that process from the raw material of those individual volitions would represent anything that could in any convincing sense be called the will of the people" [ibid., 254].

Moreover, given the opposing preferences surrounding most political decisions it is unlikely that the end result will conform in any way to what people really want,nor *pace* Singer, is it a foregone conclusion that what they come away with is some sort of fair compromise. Schumpeter thinks that something resembling a compromise might be possible when dealing with quantitative issues, e.g., when there is general support for a particular expenditure, but where the actual amount may need to be decided via compromise. However, when the question turns on qualitative or value issues, such as in Singer's example, whether or not the common room should subscribe to a particular newspaper, there is much less chance of reaching what the dissenter and maybe others would consider a fair compromise. In fact, Schumpeter contends that decisions produced under governance models more closely resembling Singer's non-democratic ones, at least when dealing with the more problematic qualitative decisions, might well be received more favourably, a point which he illustrates by an example drawn from Napoleon's First Consulship, a governance structure similar in some respects to Singer's first model association.

According to Schumpeter, the ordinary citizen has trouble generating the mental energy to understand more complex domestic and foreign policy issues, or as Narveson writes, given the vast scope of government, acquiring the relevant information is beyond most of us, and given how little our vote counts, it is not worth our while [2008, 125]. However, ignorance has never been known to stand in the way of citizens responding with enthusiasm to politicians' assurances that the day of the free lunch is not yet over, which is not quite what the classical theory had

in mind when it spoke of the voter seeking to promote his rational interests. As Schumpeter observes,"it is only the short-run promise that tells politically and only short-run rationality that asserts itself effectively" [ibid., 261]Schumpeter further notes that when it comes to politics the typical citizen, rather than using his analytical capacities, "becomes a primitive again. His thinking becomes associative and affective" [ibid., 262]. This means that the non-existent will of the people has to be manufactured by the politician, who appeals to those subconscious thinking patterns by borrowing from the techniques of advertising.

It is not surprising then, as Narveson has reminded us, that governments communicate via sound-byte how they plan to set the world aright, or for a different audience, to have it rain beer, with the help of funds which the taxpayer has apparently been only too happy to donate to the cause. Of course the sound-byte is wholly inadequate to properly treating just about any issue of importance, such as global warming, a subject of considerable political enthusiasm of late, which only serves to illustrate Schumpeter's comment that "effective information is almost always adulterated or selective and that effective reasoning in politics consists mainly in trying to exalt certain propositions into axioms and put others out of court" [ibid.]. Or, as Narveson puts it: "Democracy, it seems, dooms us to mediocre government, as dictated by easily propagated misinformation." [4]

Having shown the classical theory of democracy to be largely a myth, Schumpeter states that the role of voting in a democracy is simply to produce a government. Those who would rule must compete for the favour of the electorate, ably assisted by an assortment of image makers and political operatives. In case we thought that we had some control over those we elect to office, Schumpeter reminds us that the best we can hope to do is to turf them out, if they prove incompetent, as they generally do.[5] So on Schumpeter's view it sounds as though Wollheim, for example, has got the modern version of democracy wrong as well, since for him democracy implies that the people should rule "in the sense not of devising or initiating legislation, but of choosing or controlling it" [ibid. ,73].

According to Schumpeter, while we choose the legislators in some sense or other, we don't control either them or their legislation, despite the fact that the number of those, who think we do, including Wollheim, is legion. Dworkin, for example, claims as one of his background assumptions that each citizen has a " a roughly equal share of control" over decisions made by legislators [1986, 178]. Shapiro speaks of democratic justice, which is not simply procedural but: "It is concerned with reshaping civil arrangements to ensure that those affected by collective decisions have a say in them, and wherever possible to diminish the domination they facilitate" [1999, 89-90]. This is achieved by improving participation, perhaps by reflection prior to voting, as suggested by Goodin, even though he himself admitted at the outset that one individual's vote is unlikely to make much difference [2003, 5]. Shapiro's fine-tuning of democracy, like Goodin's, is inspired by the view, which

[4]"Government by sound-byte," 5

[5]Narveson also speaks of democracy as a mechanism for throwing the rascals out ["Liberalism and Democracy," 5b]

we have already called into question, namely that democracy is correct in principle, or in his words, "doing things more rather than less democratically is a good thing" [ibid., 90].

As we also saw above, Singer placed Dahl in the same camp as Schumpeter who was intent upon revising traditional democratic theory so as to make it less of a normative account and more descriptive of actual practice. Thus Dahl states that if we expect elections to reveal the will of the majority on various questions, we are mistaken since that rarely happens [1956,131]. However, Dahl thinks that elections not only install leaders along with their governments, but also provide some sort of control over the leaders, if not over policies. While, unlike Schumpeter, Dahl stops short of saying that political activity both at elections and in between is of no importance for determining policy, he does hold that there is no guarantee that policy will match majority preferences. In fact he thinks that democracy is wrongly described as majority rule. Nor is it rule by one minority, which is more or less what constitutes a dictatorship. It is in fact government by competing minorities against a background of majority "acquiescence or indifference" [ibid., 133].

Thus if Singer was hoping to find some reassurance from influential commentators such as Schumpeter or Dahl that there is anything corresponding to his third model association in the real world, he can only have been somewhat disappointed. Dahl thinks that polyarchal democracy, or government by minorities, is preferable to dictatorship, because he believes more people at least get in on the act under the former regime than under the latter, and have some chance to influence leaders and policy. While, in his view no real world governments are true democracies, polyarchies are "highly inclusive and extensively open to public contestation" [1971, 8]. Perhaps one obvious sense in which we get government by minorities is where governments are elected by around 40% of voters, in exchange for 100% of government power, as typically happens in Canada. [6] As for the benefit of public contestation conferred by polyarchy, for most of the voters, who even bother to vote, it means nothing more than going to the polls every four years or so. On the question of whether polyarchy offers us any greater influence over government than a dictatorship or monarchy might have done Gibson *et.al.*write that rather than being democracies,Canadian governments are in fact "a four year elected dictatorship" [2003, 248].

Canadian democratic enthusiasts need not immediately rend their garments, however, since *The Economist's* index of democracy lists the country in 10th place among the 28 which qualify as "full democracies," a category which apparently tolerates the odd bit of dictatorship between consenting adults. Canada's overall score at 9.07 out of 10 perhaps reflects the fact that we still have some way to go in achieving that rather elusive control of governments by the governed. Small European countries such as Sweden, Netherlands and Norway are apparently closer to the holy grail of democracy, if Kekic of *The Economist* has managed to measure anything of significance, while the US is in 17th place, and the UK, home of the

[6] cf.Gibson [2003, 255]

mother of all parliaments, is in 23rd place. It is also worth noting that the 28 full democracies only account for 16.8% of the world's countries and 13% of its population, suggesting that the golden age of democracy may be a long time in coming [2007, 4-6].

Kekic's study carries on the Schumpeter/Dahl tradition of looking democratic practice squarely in the face, something which strikes Singer as making "virtues out of necessity," as Churchill perhaps also did when he famously remarked to the Commons in 1947 that: "No one pretends that democracy is perfect or all-wise. Indeed it has been said that democracy is the worst form of government except all those other forms that have been tried from time to time" [7] Even if we think that democracy, such as it is, is about as good as it gets, Singer would still want to ask of this revised view, whether it could meet the criteria which he thought sufficient to dissuade the dissenter from disobeying the wishes of the majority. That is to say, whether the state of affairs proposed by the latter day revisionists constitutes the supposed "fair compromise between all individuals and groups giving no particular advantage to any of them." For Singer, fairness seemed to be bound up with the traditional model where "each member of the society has one vote, which he allots to the candidate who he believes will best represent his views, interests or social group, or who will make the best decisions on the major issues of the day" [1974,116].

Singer was no doubt inspired by Plamenatz, who also thought that we might be able to clarify the notion of a fair compromise, provided we keep to small groups of half a dozen members, thus perhaps even smaller than Singer's common room association. Even within such small groups there may be on any given issue as many opinions as there are members. One way such a group could attempt to reach a compromise is by appointing an outside arbiter whose judgment they all trust. They may on the other hand attempt to reach a compromise among themselves after due consideration. Plamenatz suggests we also consider the worst case scenarios for each modality, namely where the arbiter is less professional, or in the do-it-yourself version, where a couple of members feel their views have received a less than sympathetic hearing. While Plamenatz notes that Schumpeter is in good company in believing that "democracy is not a matter of putting a sort of collective will, the people's will, into effect," [1973, 104]. Plamenatz wants to show that there are at least some cases, such as the two less problematic small group instances, where we might say the decision reflected the will of the group. In both of these cases the six members may all agree that the final proposal constitutes a fair compromise, whereas in the two worst versions, there is less than unanimous agreement that either the arbiter acted fairly, or that all views received a fair hearing.

Within the fair compromise subgroup, one arrived at via an arbiter and the other via group discussion, a decision may be reached as a result of some members siding with the majority after due deliberation. Others may stick to their original proposals, while agreeing that the overall decision represented a fair compromise.

[7] cited by Gilbert, [2006, 124]

Plamenatz argues that two different senses of the notion "the will of the group" are needed to distinguish the first case where all agree with the decision arrived at, from the second where they agree that the decision was fair, despite the fact that their views did not coincide with the majority. While Plamenatz thinks the first will primarily be of interest to theoreticians, the second will be more likely to occur in practice, or if it doesn't, is something democrats think they should aim at [ibid., 106]. Plamenatz also thinks that the collective will may manifest itself even in cases which some believe rest on an unfair compromise, such as where the arbiter was less than impartial, or where they feel that their views were not given a proper hearing.Plamenatz responds that if you have agreed to submit to an arbiter, or to majority rule, that agreement is binding and to be considered a fair compromise, regardless of how biased the arbitration was, or how unsatisfactory the deliberation, since all were aware of the ground rules for a decision. However, in the case of the former, it does sound a little like insisting that those who complained about the notorious partiality of Nazi judges really had nothing to complain about. In the latter, you might have good reason for complaint, if for some reason or other you were unable to state your case, perhaps because of time constraints.

Thus despite Plamenatz's intention of clarifying the notion of a fair compromise, we don't seem to be any further ahead than we were with Singer, who doesn't even pretend to explain it. What is really driving Plamenatz's account is the notion of a "collective will" which he thinks has more going for it than Schumpeter does, and which he thinks is revealed in the sort of small group cases already mentioned, including those supposedly involving unfair compromises, "for in these two cases, the men affected by the decision have actually made proposals, have expressed preferences" [ibid.]. Of course, it may be that those who complained of not getting a fair hearing, did not in fact get a chance to express their preferences.

However, in the case of macro level decisions such as that of Napoleon's religious settlement, Plamenatz argues that the Concordat could not be seen as giving effect to the will of the people, "unless the people or the group have been consulted and have expressed their wishes, and the maker of the decision has reached what seems to them a fair compromise" [ibid.,107]. Plamenatz incorrectly assumes that Schumpeter was simply putting the Concordat forward as an illustration of the will of the people, whereas he is more interested in pointing out that democracy could almost never be counted on to deliver "anything that could in any convincing sense be called the will of the people" [ibid., 254].

Indeed, it may well be that in complex qualitative issues, a dictatorship, such as that of Napoleon, to say nothing of the Holy See, could take decisions which proved acceptable to the people in the long run. This was the case with the Concordat, a decision which Schumpeter feels could not have been reached democratically, and yet: "If ever there was any justification at all for holding that the people actually want something definite, this arrangement affords one of the best instances in history" [ibid.,255]. The fact that such a non-democratic decision came as close to being a paradigm case as anything could of such an improbable notion as the will of the people leads Schumpeter to conclude that: "If results that prove in the

long run satisfactory to the people at large are made the test of government for the people, then government by the people, as conceived by the classical doctrine of democracy, would often fail to meet it" [ibid., 256].

If Schumpeter is right, democracy does not have a monopoly on fair compromise, since the Concordat seems to fit that bill too, if anything does. In any case Singer thinks that the notion of a fair compromise, though it could in principle survive the transition from direct to representative democracy, is unlikely to survive in practice, at least as that has been characterized by the revisionists. In fact, any hope that Singer might have had that any actual large scale democracy could replicate the equal division of power envisaged by his model association should be finally laid to rest by Dahl's observation that "inequalities in power" have existed in all ages, and democracies, at least in their latter day polyarchic manifestation, are no exception [1989, 271]In fact he thinks that full political equality is probably "beyond the limits of our human capacities" [2006, 119].

Of course if we agree with Narveson that "democracy is the equal division of fundamental political power among all the governed" [2008, 115]. then what you see is what you get. Expecting democracy to deliver something more than "one person one vote," as presumably implied by Dahl's ultimate goal of "complete political equality," may be even more futile than the hope that one vote will really make a difference. On the other hand the politically astute have decided that it is equally futile to await the golden age of democracy, and have decided to make the best of the existing version, or what Dahl calls polyarchy. While it hardly pays the individual *qua* individual to vote, being part of a minority or pressure group,if the political timing is right, can make it worth one's while when it comes to feeding at the political trough, where notably some animals are more equal than others. Indeed there are endless opportunities for political enthusiasts to generate rents as full-time politicians or government bureaucrats, both of whom can wield disproportionate influence in their own favour. As Seldon reminds us, government rewards go to the organized at the expense of those who lack the skills of political organization, and thus "To speak of majoritarian democratic "rule by the people" is a careless distortion of the English language" [2002,44].

4.2.4 Political parties

Another important feature of contemporary parliamentary democracy is the political party, which has no real counterpart in a direct democracy such as the third model association and which probably developed after the traditional theory of democracy had already taken hold. Perhaps because of this it seems difficult to account for something like party discipline along the lines of the traditional model, or for other features of parties which have struck some commentators as rather undemocratic. Michels famously remarked that: "Organization implies the tendency to oligarchy. In every organization, whether it be a political party, a professional union, or any other association of the kind, the aristocratic tendency manifests itself

very clearly" [1959, 32]. As for any control over the leader, which the revisionists thought was still to some extent a feature of democratic practice, Michels concludes that this is largely fictitious, since the leader soon acquires the habit of making his own decisions without consulting the rank and file [ibid., 34].

While Michels's belief that hierarchy was essential to the functioning of a political party might strike some as dated, having been first enunciated almost a century ago, Simpson reminds us, with reference to the Canadian parliamentary machine, that little has changed. Although the title of prime minister suggests a first among equals, the cabinet and party, to say nothing of the parliament itself, exercise very little control [2001, 62]. With respect to public support for what one commentator has called "the imperial prime-ministership," Ibbitson points out that of the 15 majority governments Canada has enjoyed since World War I, in only 4 of those cases did the government receive 50% of the vote. Voter turnout has also been on the decline in recent years, with the lowest ever in the 2004 Federal election of 62%, and since there is no guarantee that the list of voters contains all those eligible, less than 50% may end up voting. Indeed, Ibbitson concludes that younger people are staying away from the polls in droves,"raising questions of whether modern liberal democracy is democratic at all" [2005, 214,215]. If this is right, perhaps it just confirms the prognostications of Plato and Tocqueville that democracy would degenerate into despotism.

On the other hand, there is much to suggest that democracy is just despotism dressed up as the mythical will of the people, that Hart's Rex never really departed, but just exchanged the orb and scepter for a business suit. In that case we can only hope that so-called disengagement from politics is indeed on the increase, but rather than something to be deplored, as journalists with an appetite for politics are fond of claiming, it is to be welcomed as an important step in the decline of the state. As Chodorov asked himself, why bother attempting to clean up "an institution grounded in thievery," when every vote for good government gives more of the same? He recommends we all do as he did many years ago and ignore election day [1980, 205].

Michels's view that political parties are undemocratic and ruled by oligarchies appears to be shared by Dahl, who observes, for example, that both major US political parties are better described as "coalitions of oligarchies" [1967, 245]. However, in later writing, Dahl held that Michels was somewhat hasty in extending his "iron law of oligarchy" from political parties to the government as a whole. Dahl thinks that while it is not impossible that dominant elites or minorities should rule, if not directly then by indirect manipulation, competition between parties, as well as Dahl's theory of polyarchy, where a variety of minority groups have some influence, reduce the chances of government by oligarchy. As much as anything else, Dahl believes that theories of minority domination will fail for want of empirical evidence in support of any such tendency. In fact, he argues that because of the vast range of government interests a ruling elite or inner circle will be forced by circumstance to focus on what it considers to be key issues, which means that other minorities can have considerable influence in areas important to them and perhaps less important

to the central committee, for example farmers on agricultural policy, or seniors on pensions and health care. In general Dahl believes that theories like the iron law of oligarchy "divert us from a realistic assessment of the true limits and potentialities of democracy" [1989, 279].

As to "the true limits and potentialities of democracy," our assessment thus far has not proved very encouraging for those who see it as the obvious source of the authority of the state. We certainly look forward with Marx to the eventual withering away of the state, as a prelude to establishing a liberal rather than a state-sponsored order, coming somewhat closer to Dahl's "promised land of perfect freedom," though we are realistic enough in his sense to believe that this will more likely be accomplished by increments than "an apocalyptic revolutionary transformation" [ibid.]. What isn't clear is what democracy supposedly has to do with that, since, as Narveson has observed, liberal freedoms, such as those of contract,or speech, to the extent they have anything at all to do with democracy, are likely to be threatened by it [2002a,172].

With respect to Dahl's worry that we might be distracted from the grand vision where we govern ourselves democratically as free and equal citizens, one would have thought that, as a card-carrying revisionist, he would have long since consigned that collection of confusions to the rubbish tip. Mueller contends, for example, "that democracy in practice is not about equality, but rather about the freedom to become politically unequal," [1999,137]. while Mill famously reminded us that "the "self-government" spoken of is not the government of each by himself, but of each by all the rest" [1974,62]. And if it is the latter that we are really talking about, then, as Narveson has remarked, this becomes a rather difficult exercise, if rule is for the ruled and not the rulers, which is to say that "it is up to B to decide whether A's rule is for B's good" [ibid., 172].

Moreover, with respect to Dahl's criticism of Michels, it doesn't strike me as too much of an oversimplification to suggest that as the party goes, so does the government, if only because under the Westminster system, the leader of the party that wins the election is called upon to form the government. The leader continues to lead the party as well as heading the government as prime minister. As for evidence of a tendency to oligarchy at all levels, there is no shortage of at least anecdotal evidence of one sort or another attesting to dictatorial behaviour of prime ministers, ministers, caucus members, party whips, to say nothing of the vast bureaucracies who claim to deliver the government's policies. Simpson writes, for example, that "the prime minister is the Sun King around whom all revolves and to whom all must pay varying forms of tribute" [ibid.,4]. The fact that most of us are not privy to discussions held in the corridors of power is noteworthy in and of itself, as well as making such events hard to document.

Further, Dahl argues that even if we agree with Michels that political parties have a tendency to oligarchy, one of the guarantees against oligarchic government is competition between political parties. To support this contention, Dahl offers us an analogy with business, where although an individual firm may internally

be an oligarchy, competing firms set limits to its ability to control the external environment and become a monopoly. However, in the case of Canada, the Liberal Party governed for almost 70 years of the past century, suggesting that genuine political competition was largely absent.

More recently Shapiro has further noted that with the small number of major parties in countries such as Canada and the US "what we actually get is oligopolistic competition, and it becomes clear that the sense in which parties are as attentive to voters as firms in competitive markets are to consumers is quite attenuated" While governments have not hesitated to prosecute firms such as Microsoft for supposedly breaching antitrust laws, in the face of a constrained political market, Shapiro thinks it "remarkable that public interest litigants, activists, and political commentators (not to mention political theorists) do not argue for attempts to use antitrust laws to attack the existing duopoly" While it is often thought to be a good thing that individuals and parties engage in deliberation to overcome their differences and reach consensus, Shapiro holds that "bipartisan consensus (and the ideal of deliberative agreement that lies behind it) is really anti-competitive collusion in restraint of democracy" [2003,204].

4.2.5 The supposed virtues of polyarchy

As for the claim that what we are really dealing with is not democracy as traditionally understood, but rather polyarchy, or competing minorities, while this may describe an important feature of contemporary democracy, more recent critics of democracy have correctly found this to be one of its more harmful characteristics, including, as Seldon points out, the producer lobbies which are spawned in staple industries such as manufacturing, transport and education [2002, 45]. The alleged strength of polyarchy is that everybody can get on the minority bandwagon at some point and that all minorities or lobbies have roughly equal clout and can in some sense or other keep one another in check. The view of Seldon and more recent critics is that democracy does not come anywhere near the fair compromise Singer talked about, but that its deliverances are distinctly unequal, favoring as it does the politically skilled and organized over the unskilled and unorganized [1990, 115].

No doubt the classical view of democracy would have us believe that a representative acting in the interests of all his electors might help overcome some of these inequities. Indeed, it might, but chances are it won't, because political considerations will likely dictate otherwise. Though, you might be in luck, according to Tullock, if your preference on some issue is around the middle, since parties wanting to be elected gravitate towards the position of the median voter [2006, 53]. But regardless of your preferences, shopping at the one-size-fits-all government store, in Seldon's view, is never a sure thing, since "In the long chain of instruction or command from voter to representative to minister to bureaucrat and back, there is considerable room for misunderstanding of preferences, misinterpretation of circumstances, misrepresentation of wishes, ambiguity of instructions and misdirection of effort" [1990,115]. Although escape to other suppliers is often blocked

by government regulation, Seldon lists a number of escapes which are becoming increasingly popular, such as affluence, which enables people to use the schools or medical services of their choosing, the parallel economy or black market, the internet, and finally the world, via emigration [2002, Ch. 3].

The various escapes from over-government are doubtless prompted by the lack of any choice between parties, which, as Tullock pointed out, are falling over themselves to govern from the centre, a centre which continually shifts, it seems, in a statist direction, despite the pretence of some of the rulers to be interested in doing otherwise. Indeed, this tendency for there to be little difference in the actual performance of the two governing parties is further evidence of Shapiro's anti-competitive collusion in restraint of democracy. Rothbard reminds us that, at least in the case of the US, bipartisanship is not only typical of foreign policy, promoting global intervention in the name of democracy, foreign aid and trade mercantilism, but is equally pervasive on the domestic front, where the collectivism which might have been advanced by Democrats has if anything been ratcheted up by Republicans [1994, 4].[8]

On the question of any real competition between parties and their leaders for the people's vote, Schumpeter thought it was only one of potential competition. Although elections generally preclude military coups, he also thought that they do so at the price of actions which in the economic arena might be called unfair or restrictive trade practices. However, being the political realist that he is, Schumpeter thought this preferable to some unattainable ideal since, "Between the ideal case which does not exist and the cases in which all competition with the established leader is prevented by force, there is a continuous range of variation within which the democratic method of government shades off into the autocratic one by imperceptible steps" [ibid., 271]. As for parties and party discipline,Schumpeter contends that if we want to understand how things work, rather than philosophize how they might,then in a similar spirit to Michels we will realize that the party boss and his machine are not just a sideshow but "the essence of politics," whose aim is to get one up on the competition just like a trade association [ibid.,283].

In any case it looks as though the realities of democratic politics as described by seasoned observers such as Schumpeter and Dahl require much more by way of compromise than Singer bargained for when he talked about his third model association representing some sort of fair compromise, with the result that he is forced to concede that there may not be much carry-over from his model democratic community to those with which we are familiar [ibid., 128]. The latter may well be polyarchic, but that is no guarantee that they are fair. Moreover, as he concludes: "some groups have less than an equal share of influence, while many people are not effectively represented by groups at all" [ibid., 134]. To be sure, those same theorists would think that Singer's fair and equal compromise is nowhere to be found, and the best we can hope for is a system open to more influence, such as

[8]And the situation appears no different in Canada. According to Kheiriddin and Daifallah, the Mulroney Conservatives proved no better than the Trudeau Liberals when it came to government expenditure, and if anything they were more profligate [2005,21]

Dahl's polyarchy, rather than a hegemonic, or autocratic one, though as Dahl notes: "Some readers will doubtless resist the term polyarchy as an alternative to the word democracy, but it is important to maintain the distinction between democracy as an ideal system and the institutional arrangements that have come to be regarded as a kind of imperfect approximation of an ideal" [1971, n.4,9].

Indeed, such institutional arrangements often appear to be far from any ideal, despite having been the source of largesse to many and sundry supplicants. Tammany Hall, which began life as a patriotic social club, eventually became synonymous with political influence, graft and vote-rigging, as well as providing a helping hand to Irish immigrants in return for political support. Perhaps Schumpeter had Tweed of Tammany Hall in mind when he noted the importance of the political boss and his machine, which Ackermann sees as a way of "fitting the lofty theories of democratic government to the rough realities of life" [2006,359]. Thus confronted with the "rough realities" of everyday democratic life, Singer, whose particular worry is that some will fail to be adequately represented in decision-making, so much so, that he is less than convinced at the end of his essay that a democratic society produces stronger reasons to obey than a non-democratic one. If this were ever true, and Singer never really showed that it was, it did not survive the transition from his model society to the one in which most of us live.

Moreover,in the years since Singer wrote his essay, not only have the electors continued to vote with their feet, but more theorists are now prepared to doubt that democracy can be the source of authority, as Singer initially hypothesized. Even if democracy is better described as polyarchy, as Dahl thinks, Singer remains unconvinced, and as Narveson has pointed out, to the extent that democracy has retained any appeal, it is because it is regularly identified with certain liberal rights which flow from the basic right of all to liberty compatible with a similar liberty for others, and not from democracy. On the contrary,as Narveson has recently written, democracy hardly merits the exalted position where many have placed it, but should rather be seen for what it is, everlasting interference in individual liberty on behalf of special interests [2008, 133]. As already noted,one of the main problems of democracy is that it is by definition majoritarian, which means, according to Hardin,that "almost everyone loses on almost every vote in the sense that almost all fail to get precisely or even approximately what they want" [2003,309]. Indeed as Toqueville famously argued, life under a reasonably benevolent monarch might be preferable to a democratic ochlocracy which confines its despotic acts to those in the minority on any issue [2003, 298-299].

In fact Dahl responds to Tocqueville on this very issue, namely the supposed threat to liberty posed by majoritarian democracy with its predilection for equality. Dahl attempts to clarify in what sense Tocqueville claimed that democracy was likely to lapse into tyranny, that is, whether the tyranny consisted in some sort of injustice perpetrated by the majority, or whether majority tyranny *per se* constituted the injustice in question. Since he doesn't think that Tocqueville has been sufficiently clear about what democratic tyranny amounted to, Dahl proposes that we look first at primary political rights, such as the right to vote or freedom

of speech as ways of bench-marking democratic performance. In the 150 years or so since Tocqueville penned these observations, Dahl claims there is empirical evidence to suggest that such primary rights have expanded rather than contracted, but agrees that what we make of such data will perhaps depend on theoretical questions about the nature of these rights and their relation to democracy. Some favour a doctrine of prior rights according to which such primary rights are both anterior and superior to democracy or rights against democracy [1985, 25].

However, rather than construe these primary rights as independent of democracy and therefore as yardsticks against which democracy might be measured, Dahl prefers to think of them in a manner "more consistent with democratic ideas" He recommends that we settle upon one basic right, namely the right to self government, from which other primary rights can be derived. One of the main advantages of this approach from Dahl's point of view is that it heads off a direct challenge between liberty and democracy which was at the centre of Tocqueville's analysis. Moreover, such rights are inalienable in the sense that any attempt to abridge them would be tantamount to destroying democracy, in much the same way that Singer thought that violation of essential democratic rights could undermine democracy and provoke disobedience. Thus in response to a concern that, if it suited them, a majority might be able to override the rights of a minority, Dahl claims that they could not rightfully do so and would not be acting democratically if they did. Nor can a majority decide to quit the whole programme since such a decision would be incoherent [ibid., 29]. To the extent that Tocqueville implied by "tyranny of the majority" riding roughshod over the rights of minorities, or selling the democratic farm, Dahl thinks that he failed to appreciate the significance of primary political rights within a democracy.

4.2.6 *Rex nunquam moritur*

However, Tocqueville thought that the transition from monarchy to democracy does not remove the centralizing tendency of the state but rather that it will in fact "widen and reinforce the powers of this same authority." In fact the "art of despotism" is even more easily practised under a democracy, and requires one single principle, namely equality [ibid.,789]. Thus it is not surprising that in the two centuries since the revolution handed off command from a monarch to his democratic successors, Hardin would claim that "democracy has at best been limited in the ways that it must be in practice in any real society and it has often been virtually irrelevant" [2003,290]. Indeed, as the Romans noted quite some revolutions ago, *rex nunquam moritur*, the king never dies. Or as Hobbes wrote, there is one sovereign, who at different times assumes the various guises of monarch, aristocracy or democracy, with little to choose between them "where any one of them is already established," since all three possess the absolute sovereignty that belongs to the monarch [1909, 428]. While we are more interested in general questions as to the possible basis for sovereign authority, there is a narrower legal sense in which the monarch is never entirely absent even in a parliamentary democracy, such as

Canada, where Parliament includes the Queen and both Houses, while the Executive Government is vested in the monarch, with many of her powers delegated to the Governor General. [9] With respect to the latter powers, Evatt thought that perhaps the most important question was whether the sovereign or his representative could override the advice of his elected ministers, and at least with respect to legislation, it appears that the sovereign may indeed withhold assent, a view shared by more recent writers.[10] While such constitutional oddities can serve as a reminder that the sovereign has only disappeared behind a democratic faade, exercises of the royal prerogative are in fact fairly rare. More recently attention has been given to the right of the Upper House or Senate, consisting as it does of appointed rather than elected members, to withhold assent to bills originating in the elected Commons.

Tocqueville of course does not believe that the tendency to arbitrary rule is confined to such lapses in democracy which are a throwback to earlier days of absolute monarchy. It is rather to be found in the regular use of sovereign authority by democratic governments to advance the cause of what Mises calls "etatism," which holds its citizens in "tutelage" and substitutes state initiative for that of the individual [1985,46]. Or, Tocqueville a century or so earlier, having premised that democracy was likely to bring in its wake forms of tyranny unknown in earlier centuries, spoke of an immense paternal authority whose aim was to the monopoly provider of its citizens needs and thus "to keep them in perpetual childhood" He sees democracy as some sort of "compromise between a despotic administration and the sovereignty of the people" whose mistake is to "think that they have sufficiently safeguarded individual freedom when they have surrendered it to a national authority" [2003,805,807].

Of course, with the benefit of another 150 years since Tocqueville wrote, it now seems quite clear that democracy, which traditionally has claimed to embody the sovereignty of the people, has indeed proved the source of enslavement that he predicted. However, Dahl responds, no doubt in a manner "more consistent with democratic ideas," that when we review the historical record to see whether any actual democracies had succumbed to the despotism predicted by Tocqueville, relatively few have done so, if we are talking about countries which began life as democracies, but later fell off the wagon and ended up as dictatorships. Dahl concludes that with the exception of Uruguay, in countries such as Argentina, Germany or Spain, the decline into despotism had mostly to do with the fact that democracy was not as firmly rooted as in other countries which did not suffer a similar fate.

As we saw earlier, Dahl claimed that Tocqueville had not made it clear whether in speaking of democracy resulting in majority tyranny he was referring to specific injustices brought about by majority rule or to the fact that democracy per se could be every bit as tyrannical as the hegemonies it replaced.Tocqueville, it seems, inclines to the latter, pointing out that whether rulers are anointed by divine right or by election, they believe that it is in the nature of things that some rule while

[9] cf Forcese & Freeman [2005, 10]

[10] cf. Evatt,[1967, 2,286]; McWhinney, 2005, 27]

others obey, and better they than others less fit. Tocqueville's concerns about the rule of the majority were not new when he raised them half a century or so after the American republic had thrown off the tyranny of George III. Plato had raised similar issues, when Thrasymachus argued in *The Republic* that might was right, and that the rulers make laws in their own interest, not in the interest of those they rule.[11]

Several years after Tocqueville, and within weeks of the 1848 Revolution in Paris, Proudhon expressed little faith in the democratic dogma about the right of people to govern themselves much celebrated by Dahl, since "there is not and can never be legitimate representation of the People.All electoral systems are mechanisms for defeat" [12] And as Mill famously remarked a decade later, self government is actually a misnomer, since what we really mean is not "the government of each by himself, but of each by all the rest"; as a result we would have to guard against the tendency of the rest to tyrannize the minority [1988, 62]. Indeed,when it comes to governments, democratic or otherwise, it is by their power to coerce that we shall know them. Thus Plamenatz shared Tocqueville's sentiment that there was no guarantee that government by consent would be any less coercive than the absolutism it had replaced, but rather that present day governments acting in the name of the people have proved to be "never more often or more widely oppressive" [1968, 175,181].

In the case of the suppression of minority opinion Mill thinks that government can all too readily convince itself that in doing so it speaks with the voice of the people, whereas Mill considers the right of the government to coerce to be illegitimate, whether the majority supports it or not [1974, 76]. Similarly Bovard rejects the view that coercion becomes acceptable because democracy permits us to elect our coercers [2005, 225]. Indeed, the error that democracy amounts to nothing more than the right to govern ourselves, a notion which Dahl thought we should we should receive with enthusiasm, implying that in obeying the edicts of government we are only obeying ourselves, can be traced back at least to Hobbes, who held that in accusing the sovereign of wrong was tantamount to accusing oneself [1909, 136].

It is interesting to note that Singer characterizes Dahl and Schumpeter as revisionists or realists in political theory, who are largely responsible for his concluding that any actual democratic government is but a poor reflection of his ideal common room association.However, both Singer and his mentors stop short of the more thoroughgoing skepticism of some of the writers we have mentioned. The former seem to have assumed that government, like the poor, is with us always, as well as the fact that democracy is quite high on the evolutionary chain of government, with the odd banana republic that relapses into an earlier stage being the exception that proves the rule.

As we saw, Dahl seemed anxious to avoid putting democracy on trial and to

[11] cf.Narveson [2000a, 17]
[12] in Hoffman,[1970, 60]

avoid any suggestion from people such as Tocqueville that there might be better ways to preserve liberty than to hitch it up to the democracy bandwagon. According to Dahl, democracy contains all things necessary to salvation, and instead of addressing the question as to whether democracy is compatible with a right to liberty, he offers us the right to govern ourselves, a right which Proudhon decided long ago was largely empty. Provided we stick with the program, and refrain from heading off into the jungle like Colonel Kurtz in "Apocalypse Now" to try our hand at a little despotism, then all our needs will be ministered unto by Tocqueville's "immense and protective power." Indeed, in one of his more recent essays, Dahl responds to skeptics that rumours as to the demise of democracy have been greatly exaggerated; although the institution is not in the best of health it has proved remarkably resilient [1998, 188]To such a resounding affirmation of the faith one can only ask with Schumpeter how such a doctrine whose falsity is known to all can have persisted to this day [ibid., 264-265].

Dahl is right that there has been no shortage of commentary to the effect that democracy is in some sort of crisis. Harold Laski wrote 75 years ago that legislatures were in need of much reform; as for minority governments of the sort found in Canada of late, he found that they tended to pursue policies which they hoped would keep them in office rather than those they actually believed in. Majorities on the other hand condemn the opposition to years in the wilderness[1933, 77,78], and lead to complaints about the country degenerating into a one party state. The fact that governments have often been elected by less than a majority of the voters leads Gibson to suggest that in fact it is the majority which is being oppressed by the minority, particularly when parliamentary rules create a virtual dictatorship between elections [2003, 8,13].

As for Dahl's claim that democratic institutions once established have tended to prove very resilient, it would appear to follow from what Hardin calls "the marginal workings of democracy" that so called democratic institutions are simply a sideshow, and that what is important is "a generalized background coordination on order" [2003, 280,281]. In fact Hardin finds that "majoritarian democracy is both conceptually and motivationally flawed" which suggests that Dahl's supposed resilience of democratic institutions may therefore simply be the result of what Hardin describes as "a compromise to live within the constraints of these perverse conclusions" [1990, 157]. We have already referred to the difficulties in deriving a collective preference from diverse individual preferences, first formulated by Arrow, for example, where among the three possible choices x, y, and z, we end up with the odd result that x will be preferred over y by a majority, y over z by a majority, and z over x by yet another majority [1967, 227]. Lest we think that such a paradox might be merely a theoretical curiosity or perhaps peculiar to some fault in majority voting, Arrow reminds us that its implications are so general as to render impossible any rule for deriving social choices from a set of individual preference orderings.

Thus Hardin concludes that the belief that social choice procedures occasionally work is not based on any very clear understanding of how they do, while plausible instances of such choices "turn on nondemocratic, coercive and deceptive moves

too much of the time for us to feel normatively at ease with it. Not only may minorities get trampled, but so may majorities. Within a democratic shell even the seemingly most democratic of modern governments may often be undemocratic" [ibid., 164]. However, as we saw in the previous chapter, Hume thought that the magistrates never let such quibbles stand in the way of getting things done: "Thus bridges are built; harbours open'd; ramparts rais'd; canals form'd; fleets equipp'd; and armies disciplin'd;" [1960, 539]. Though, Hardin rightly thinks that Hume's "lovely vision" of a government which miraculously escapes the manifold frailties of the individuals who comprise it, only to shower blessings upon its subjects, is not quite sufficient to justify overriding the wishes of those who did not necessarily seek the largesse in the first place, or who might have benefited, had it come their way instead. While government might overcome a collective action problem, there is always a question as to whether it overcame the right one, and whether it is justified in coercing those who thought that if any collective solution was needed, this certainly wasn't the one [ibid., 165].

Of course the reason we end up with q and s rather than p and t may be due to any one of a number of maladies, such as those suggested, for example, by Seldon, and to which we have already had occasion to refer, such as a voting system which tends to frustrate voter preferences, while promoting rent seeking, log-rolling, bureaucratic interests and the taxes necessary to pay for them [2002b, 134]. Thus Hardin comments that even assuming knowledgable voters, there is no reason to believe that their preferences are tracked by voting outcomes [ibid., 166]. Thus Hardin is not reassured by Churchill's oft quoted bromide. As an a priori claim it is of little use if, as he suspects, the doctrine of majority rule is conceptually incoherent. Considered as an empirical claim there is the problem of a lack of coherent principles by which to support the supposed superiority of certain forms of government over others [ibid., 170].

On the question of basic political rights which Dahl so graciously vouchsafed us, on the ground that to do so would not upset the democratic apple cart, Jasay rightly notes the emptiness of any such justification: "If a move gives more power to many and less to but a few, more will like than dislike the move. That is all there is to it. What is the point of baptizing the simple consequence of rationality a "liking for democratic values" [1998,134]. " Of course we could also add that such a move, rather than actually giving more, only has to appear to give more to many and less to a few.

As to democratic rules, which either refer to the sorts of rights Dahl claimed were implied by the basic right to self-government, or to ways of operationalizing such rights, in the context of whether democracy is to be seen as a process or end result, Jasay remarks that "the democratic rules are not such that, provided only they are applied, reasonable men would be bound to agree that what they produce is democracy" He notes further that the term "democratic" has become largely devoid of meaning, having been equated in recent political discourse with "the good life," about which he observes that: "It also follows from the conception of democracy as the good life, that it may be necessary and justified to violate the

democratic rules in the interest of the democratic result" [ibid., 139]. Someone who loses an election might claim, for example that the rules as presently constituted should be overridden because they were not conducive to a democratic result, having manifestly failed to preclude unfairness, caused perhaps by an unsympathetic press, or other ways in which the playing fields of Eton are thought to have become notoriously uneven of late. Politicians have now taken up the prophet's call for the crooked to be made straight and the rough places plain, for which, as Narveson reminds us, they do not hesitate to call on ever larger portions of private wealth to accomplish their divinely appointed task [2002a, 175].

With respect to the concern that a majority might decide to do away with democracy, Dahl, we may recall, offered the rather unconvincing response that though a majority might empirically do so, logically they could not, or at least not "rightfully." Jasay, on the other hand, thinks the worry a genuine one, which does not admit of any pat answer. Rather we would consider any such decision in the light of feasible alternatives rather than resorting to simplistic pronouncements of the "democratic because democratically arrived at" type [ibid., 138]. Indeed, Narveson thinks that there is nothing whatever preventing a majority from doing whatever it pleases, including throwing away the democratic scaffold by which it ascended to power, and in this respect a majoritarian democracy is no more trustworthy than any other form of government. Contrary to Dahl, Narveson argues that there is at least one right logically prior and morally superior to democracy or the right to self government, namely liberty. Like Tocqueville, there is for Narveson a question as to whether democracy preserves liberty, and generally it doesn't, since it has it in common with any form of government that it is in the business of coercion. It therefore hardly seems to place much of a constraint on democracy to insist that it act democratically, if for no other reason than, as Jasay pointed out, it is by no means clear what it is to make such a demand. Thus Narveson responds that Dahl is wrong in assuming that democracy is simply to be desired for its own sake;if we want democracy at all, it is because ends we seek are better attained democratically than by some other means.[13]

4.3 Liberalism v. Democracy; recent trends

While earlier classical liberals such as Hayek and Mises would probably not have disagreed with much of our criticism of democracy, they generally felt that democracy represented something of an improvement over absolute rule, though, as Hayek warned us, the supposed antidote to arbitrary power, if not itself constrained by liberal principles, might well become yet another arbitrary power [1978, 106]. Mises for his part rejected as nonsense the view that only monarchs are evil and capricious, while the people are pure and uncorrupted; nevertheless, he thought that democracy provided a mechanism for orderly and non-violent changes of government [1996,42]On the other hand, we have been suggesting that it is no longer clear

[13]cf. "Liberalism v. Democracy," 6

that democracy is as compatible with liberalism as Mises and Hayek may have thought. As Narveson puts it, liberalism is finally incompatible with democracy, since: "Given the choice between doing what you want, on condition that it harm no one else, and being forced to do what a lot of your fellows want, what argument can be adduced for generally preferring the latter" [2002a, 175].

Hoppe also holds that democracy has little to be said for it, and if we are going to have a state at all, a real monarchy without the democratic posturings is likely to offer both economic and moral advantages [2002, xx]. With monarchy come the benefits of privatizing government, since the monarch is less likely to squander the resources of the realm he owns. Similarly, Hoppe contends, he is likely to be more moderate in the expropriation of his subjects, since to do otherwise would kill the goose that laid the golden egg, that is, cause a decline in the productivity of his subjects and therefore in his "parasitic monopoly of expropriation"[ibid., 19]. A democratic ruler, on the other hand, while he can and typically does use the government to his personal advantage, does not own it, unlike the monarch. The democratic leader is under no pressure to preserve the capital of the realm, and even if he wished to do otherwise,"he could not, for as public property, government resources are unsaleable, and without market prices economic calculation is impossible" The democratic steward has no incentive to moderate his expropriation, because unlike an hereditary monarch, he is not in the business for the long haul. He has nothing to gain from moderating his confiscation of the country's resources, since "for a president, unlike for a king, moderation offers only disadvantages [ibid., 24].

To be sure, one might respond that the possibility of being turfed out at the next election should act as a brake on the profligacy of democratic rulers. On the other hand, as Hoppe suggests, elections may simply spur them on to seek rents while the sun shines; or they can always appeal to the need to provide what Juvenal considered particularly close to the heart of every Roman, *panem et circenses*. About the latter Narveson comments that democratic perks are typically at someone else's expense, a fact which political grandstanding mostly obscures [2002a, 175]. Then again, providing bread and circuses, or their even more costly contemporary analogues, requires the raising of vast amounts, which governments typically do via taxes or debt instruments of one sort or another. We saw in the previous chapter that direct taxes on income, for example, were a relatively recent phenomenon, for which there appeared to be no satisfactory justification.

But given that modern governments have also granted themselves a licence to print money, they regularly resort to this more recondite method of financing their pet projects. As Mises has noted, this inevitably causes inflation, since more money for the same basket of commodities increases demand and therefore prices. This is not to say that there aren't some beneficiaries whenever it rains dollar bills. Those directly involved in the project for which the new money was printed stand to gain, e.g., materiel manufacturers during wartime, whereas those much lower down the feeding chain, such as teachers and clergy during World War 2, were at a disadvantage because their salaries took much longer to catch up [2000, 58,61].

Mises emphasizes that although some do better than others under inflation, they can hardly be reproached for "profiteering," since it was the government which decided on a policy of inflation, not that it would ever call it by its real name [ibid., 63].[14] While Mises also thought that governments would be eventually forced to abandon inflationary policies or face catastrophic currency failure, as in Germany in 1923, or Zimbabwe in 2007, Rothbard is less sanguine, believing that the only alternative is to replace the fiat currency of the politicians with something they cannot so easily manipulate, such as the gold standard [1990, 111].

In the light of Hoppe's earlier remarks we should inquire as to whether a democracy is more likely to debase the coin of the realm than a monarchy. Hoppe in fact admits that monarchs did tend to enrich themselves by monopolizing the mint and "coin clipping," beginning with the foundation of the Bank of England in 1694. Indeed, it seems that relatively few empires, with the exception of the Byzantine from about 500-1000AD, have managed to resist the attempt, at least from time to time, to corrupt gold or silver with base metals. However, in general not even kings managed to establish monopoly fiat currencies,[ibid., 57]which we have had since the US finally abandoned the gold standard in 1971.During this period the US debt has risen from 370 billion to over 10 trillion by the fall of 2008, which Hoppe considers to be evidence of the "present orientation" of Republican democracies, as illustrated by Keynes's celebrated dictum that "in the long run we are all dead," and which for Hoppe epitomizes the democratic ethos [ibid., 59,n.25]. Kant, for his part, thought that the ability to rack up vast amounts of offshore debt in the service of war, as opposed to national infrastructure, was an important stumbling block to peace, and should be subject to international interdiction [2003,4-346].

4.3.1 The democratic peace

Having raised the subject of war, let us address another issue, which for many has been considered at least since Kant and Tocqueville as an important article of the democratic faith, namely that unlike war-mongering monarchs down through the ages, democracies are slow to wage war, and typically avoid wars with other democracies. Although Kant has been thought to favour such a view, his position is a little more complicated, since he sharply distinguishes republican from democratic constitutions, with the former being characterized by the separation of the executive power from the legislative [ibid.,10-352]. The republican constitution, Kant claims, is more conducive to perpetual peace because consent of the populace is needed to wage war, which will allow them to fully consider the costs, including postwar reparations. However, under a non-republican constitution it is much easier to resort to war, since the prince is the nation's owner rather than a citizen and is as likely to give as much thought to opening hostilities as he might to going on a hunt [ibid., 9-351]. Of course, with respect to the people acting as a check on their

[14]Despite the government's complicity in the present financial crisis they have kept a watchful eye out for what they consider "profiteering," such as executive compensation or short-selling.

leaders, as Radnitzky points out, this requires voters to be much better informed about the justification and costs than they typically are [2003,178].

Interestingly, since it supports what we have argued above, Kant considers democracy to be a form of despotism, being necessarily majoritarian and relying upon the incoherent notion of the general will: "it sets up an executive power in which all citizens make decisions about and, if need be, against one (who therefore does not agree); consequently, all, who are not quite all, decide, so that the general will contradicts both itself and freedom" [ibid., 10-352]. While Kant thought it reasonable to conduct citizen military training he thought that standing armies were likely to cause wars and should be demobilized [ibid., 3-345]. Writing some 40 years later, Tocqueville was of the opinion that all countries, including democracies, could find themselves at war,and therefore would require an army. However, while the officers' corps of old Europe had been reserved for the aristocracy, whose social status was more important than an army career, the armies of democracies exemplify Napoleon's dictum that: *Tout soldat français porte dans sa giberne le bâton de maréchal de France.* While the nobleman was motivated by *noblesse oblige*, the possibility of attaining the field marshal's baton, facilitated by Napoleon's principle of *la carrière ouverte aux talents* was what drove the soldiers of democracies. Peace of course is not conducive to promotion since there is nothing like a war to clear the market for officers. Thus Tocqueville reaches what he considers the rather paradoxical conclusion that "of all armies, the ones most keen upon war are those in democracies and that, of all the nations, the ones with the greatest attachment to peace are democracies. What finally makes this extraordinary is that equality produces both these conflicting results" [ibid., 753].

Hoppe agrees with Tocqueville that democratic armies may be even more bellicose than those commanded by a monarch, while drawing different conclusions from Kant about the royal owner of the nation. In Hoppe's view a king desirous of expanding his realm, unlike a president, does not have war as his only option. The former may unite kingdoms through marriage, an option not available to the non-state owner president, whose treaties or contracts with other governments may be revoked by his successors, if not by him when politically expedient. Moreover, the king's wars are much less likely to be ideologically motivated than to be over expanding his real estate holdings [ibid.,34]. But as Howard observes the more more popular war became, it also became more violent, whereas those, for example, of the *ancien rgime* tended to be limited at the very least by cost [2002,33]. Hoppe argues that the democratic-republican temper of the French Revolution found a champion during World War I in Woodrow Wilson, who sought to use war to make the world safe for democracy [ibid., 41]. The Wilson doctrine has been reiterated by later presidents, including for example, Bill Clinton who claimed in his State of the Union Address in 1994 that the US should support the advance of democracy throughout the world because "democracies don't attack each other,"a view which Radnitzky claims has become a shibboleth of American foreign policy [ibid.,185]. Eland finds that paradoxically this amounts to "fighting perpetual war in the quest for perpetual peace" [2004, 42], while Kant thought that we would do better to

foster trade among nations rather than war, since most people favoured the former rather than the latter [ibid., 25-368].

Rothbard writes, however, that we are still labouring under the Wilsonian delusion that,unlike dictatorships, democracies do not start wars, and in doing so, we falsely assume that domestic policy is a clear guide to foreign policy.t historical lesson, namely that a country's domestic policies need not be any guide to its foreign policies, since "many dictatorships have been passive and static in history, and, contrariwise, many democracies have led in promoting and waging war" [1966, 2]. Because the Wilsonian myth is seen to be politically correct [15], a president may have a more difficult task than a dictator and therefore need to resort to greater manipulation and subterfuge. This will typically involve the characterization of the enemy as non-democratic, a charge which will generally not be that hard to make out, if the *The Economist* Intelligence Unit's index of democracy is right that only 13% of states are fully paid up members of the democratic club.

Moreover, a president may have to devote considerable effort to selling a war, and in the case of the Iraq war, we never seem to have gotten beyond the sales propaganda. As Creveld comments, we are still left guessing as to the reasons for the Iraq War [2006, 246]. Pea claims that the war on terrorism has been subject to "mission creep" where the Bush administration was able to sidestep the original congressional mandate largely by ratcheting up rhetoric from WMD to the "the axis of evil," whereas the actual threat from either appeared to be minimal [2006, 10]. According to Radnitzky, one of the ways that a democratic president can circumvent constitutional oversight and assume personal control of foreign policy, much as monarchs of the *ancien rgime* were wont to do, is to claim that the enemy fired the first shot [ibid., 181]. In the case of Iraq one might hold the view that Sadam was involved with those that did, or that a preemptive strike was necessary to prevent his firing first. In fact such a preemptive rationale for the attack on Iraq was propounded by the US administration and has come to be known as the Bush Doctrine, despite that fact that Clinton had authorized at least three such actions.[16]

Indeed in some of the discussion prior to the Iraq war one commentator offered yet another version of the *pax democratica*, namely that democracies, in particular the US, do not fight preventive wars.[17] Dershowitz responds that preemption is somewhat of a paradox:"When it is employed successfully, we rarely can be sure what it prevented. When it is not employed, it is difficult to assess if it could actually have prevented the horrors that did occur" [ibid., 159]. However, at least in the case of Nazi Germany he is inclined to say that in hindsight the democracies should have taken preventive action against Germany. While rejecting analogies between Hitler's Germany and Sadam's Iraq as flawed, he does not wish to rule out cases where preventive action by a democracy could be justifiable [ibid., 160]. Again, Radnitzky emphasizes that while it may not be the case that democracies

[15]cf.Radnitzky, ibid.,184

[16]cf.Dershowitz [2006, 157]

[17]cf.Dershowitz [ibid.,159]

are more reluctant to go to war, preventive or otherwise, a democratic president has more legal and political hurdles to overcome than a dictator [ibid., 181]. No doubt launching a war against Sadam when he could not have posed much of a threat following his rout in 1991 [18] required considerable political shrewdness on the part of the Bush administration. Sometimes duplicity is used to provoke others, such as allies or enemies, into action. Thus, according to Raico, it now appears likely that Churchill engineered the sinking of the Lusitania in 1915 in order to bring the US into World War I. [19] Similarly, Denson accuses Roosevelt of provoking the Japanese attack on Pearl Harbor and withholding information which might have prevented it [2006, 102].

As for Clinton's version of the *pax democratica* that democracies do not go to war with one another, as Radnitzky points out, it is falsified by the American civil war itself, a war of secession between two democracies with the same currency [ibid., 191]. Nor is there any reason to think that Wilhelmine Germany was any less of a democracy than the UK, and indeed as welfare states go, Germany was far ahead of Britain. Indeed President Wilson provided a demonstration of democratic totalitarianism which the Kaiser could only wish to have emulated, instituting a system of neighbourhood watchers who would report suspicious individuals.[20] In fact much like Tocqueville, Radnitzky sees totalitarianism as being at the very core of democracy and particularly evident in its ability to concentrate power during a supposed crisis. German industries under Albert Speer were for example less tightly regulated than those in the US, with consequent reduction in US output [ibid.,182]. According to Radnitzky such totalitarianism is supported by the quasi religious democratic ethos which treats the results of an election "as if they contain revealed knowledge, revealed by the new deity, the People, king Demos, the *Vox Populi*" [ibid., 188].

Thus war is undertaken as a democratic jihad which often results in prolonging hostilities until the infidels have been wiped out or made to see the error of their ways. Taylor informs us that those who entered World War I to make the world safe for democracy were in no great hurry for an armistice, but were willing to fight on until Germany offered an unconditional surrender [1964, 45]Radnitzky again contends that since wars waged by democracies are more ideological they also tend to be harsher and more difficult to finish than those of autocrats. Roosevelt's enthusiasm for democracy apparently did not get in the way of friendship with Stalin, though like his predecessors, it probably prevented his being in a hurry to end the war [ibid.,181, 192].

As for cruelty, democracies could more than hold their own when it came to the bombing of civilians. American insistence on unconditional surrender prolonged the Pacific war and resulted in the nuclear bombing of Japan. Terror-bombing of German cities authorized by Churchill killed about 600,000 and injured another

[18] cf. Creveld [ibid.,246].

[19] "Rethinking Churchill," in Denson [2003,332]

[20] cf. Nisbet [1989, 44-46]

800,000, compared to about 70,000 killed in raids on Britain. Nevertheless, according to Gilbert, Churchill thought there were a couple of important differences between parliament and a dictatorship, namely that the former avoided "fisticuffs" and acted as the "controller and, if need be, the changer of the rulers of the day" [2006, 134]. Throughout his long career Churchill appears to have relished the many opportunities for wielding power, from First Lord of the Admiralty to Prime Minister, which according to Raico, allowed him "to live a life of drama and struggle and endless war" Indeed, Raico's final assessment of the great champion of parliamentary democracy is that he was "a man of blood and a politico without principle, whose apotheosis serves to corrupt every standard of honesty and morality in politics and history"[21]

Talmon once claimed that there were two types of democracy, the liberal and the totalitarian. The former is called liberal because of its emphasis on freedom, whose essence in Talmon's view is in "spontaneity and the absence of coercion" Totalitarian democracy, on the other hand, he considers to have Messianic mission in postulating as the ultimate goal of humanity "a preordained, harmonious and perfect scheme of things." While liberal democracy holds that we will gradually succeed to a more harmonious state without coercion, totalitarian democracy has a sharper vision of that ideal state, and has much less hesitation in using coercion to reach it, since it finds no conflict between coercion and the democratic principle [1970, 1-3]. Indeed, it would appear that it is the second, or totalitarian version which has gained the ascendancy, one whose lineage can be traced to the "Committee of Public Safety governing in a Revolutionary manner with the help of the Jacobin clubs, and the Babouvist Secret Directory supported by the Equals" [ibid., 251]. Gottfried considers the central feature of the Revolution to be the fact that people were killed in the name of democracy, a tradition which he now finds exemplified in "the aggressive behemoth spouting therapeutic bromides that all of us have come to recognize as the perfected version of American democracy" This latter day descendant, which owes more to the French Revolution than the Founding Fathers is moreover "a dangerous mixed regime, which upholds neither liberal freedom nor democratic self-rule. It is the hegemonic ideology of the American political class, invoked to justify the seizure of power by public administrators, privileged corporate interests, social therapists and mediacrats." [22]

4.3.2 Democracy and property

If latter day liberalism and democracy have not shrunk from war, nor have they been averse to commandeering the resources necessary for the various wars and crusades undertaken by the state against both internal and external threats. Thus we should perhaps not be surprised to see a diminishing respect for property rights, which Gottfried also recorded, and of which the Canadian Charter provides a good

[21] cf."Rethinking Churchill," in Denson [2003, 360]

[22]In Denson,[2003,426-427,429]

example, where protection of the life, liberty and security of the individual does not extend to the individual's rightfully acquired property. Even if it did, it would doubtless be subject to the notable proviso that it be limited by what "can be demonstrably justified in a free and democratic society," despite the fact that, as Jasay noted, "no majority vote can settle questions of justice" [1998,169]. In fact, Jasay writes that private property used to be seen as reinforcing the bulwarks of civil society against the state and therefore an important institution for both owners and non-owners [ibid.,144]. [23] Or as the historian, Pipes, puts it, property has been the single most effective device for ensuring both civil rights and liberties, marking out a sphere in which the individual is sovereign [1999, 281]. Thus, according to DeSoto, property was essential to the production of capital in the West: "the legal property system became the staircase that took these nations from the universe of assets in their natural state to the conceptual universe of capital where assets can be viewed in their full productive potential" [2000, 51].

Despite the clear benefits to all of a propertarian regime, sovereign democracy can override title in any way it sees as "demonstrably justified" [24] As observed earlier, Rex has not departed the political scene but has simply appeared in new finery, and as Jasay points out, about all the *legum leges* or constitutional charter guarantees, is that "the threat to people's liberty and property can just as well come from the sovereign people as from the sovereign king. The danger, then, lies in sovereign power and not in the character of the tenant who holds it" [ibid., 208-209]. One of the chief sovereign prerogatives is what has latterly become known as redistribution, and which appears to be derived from earlier granting of land and privilege based on meritorious service to the monarch. According to the medieval constitution, as mainly revealed in its land law, "All land is held of the king," though the king may grant tenure to his subjects, for example, for military service, or perhaps knight service, which meant limited war service as a fully armed horseman. There was considerable disagreement between king and barons as to the scope of the latter, the upshot of which was that, unlike modern conscription, it did not imply overseas service. Unlike modern democracy, medieval sovereignty was subject to increasing limitations beginning notably with Magna Carta. [25]

However, as Jasay reminded us, sovereign democracy knows no such bounds, supported as it is by the fiction that majority rule in its various manifestations is a direct pipeline to yet another fiction, namely the common good. Or as Salin has put it, democratic procedures are self justifying, assuming as they do that there is a way of ascertaining a demand for collective goods or that there is a common good which has priority over individual rights [2000,112]. The redistributive state possesses a vast array of goods to hand out as it sees fit to all and sundry, the most notable feature of such transfers being that they benefit some at the expense of others, or as Jasay writes, the state robs Peter to pay Paul, being apparently unable to

[23] Among the non-owners having interests are bankers, governments of one sort or another and other suppliers of goods and services: cf. DeSoto [2000, 51].

[24] cf.Jasay [ibid., 144]

[25] cf. Maitland [1965, 23-26]

contemplate a Pareto improvement where Paul's lot would be made better, but not at Peter's expense [1998, 255,149]. On the contrary,democratic competition necessarily makes some winners and others losers; benefits to one particular group are at the expense of some other group. Indeed, as Jasay further points out, "Democracy is a generalized and impure version of the elementary three-person pure distribution game. In that game, the distribution of the game sum among the three players is what any two of them agree on. This has the well-known result of producing, each time the game is played, a coalition of two players that redistributes the available sum in its favor, to the detriment of the third player" [2002, 110].

Of course we might ask why Pareto improvements where some gain and none loses are preferable to non-Pareto solutions where some gain while others lose. Jasay replies that, provided we can ignore envy, the former are "ipso facto good," since some have ended up better off and no none worse off, while the latter would require an argument as to what was good about them, since some have been harmed as a result. As for the prospects of ruling out envy, as we have already had occasion to remark, Lucas thought that, at least for the egalitarian, they were rather dim [1971, 150]. With respect to the frequent assimilation of inequality to injustice, Schumpeter, in a noteworthy obiter, believes we have democratic rhetoric to thank, which has been "instrumental in fostering the association of inequality of any kind with "injustice" which is so important an element in the psychic pattern of the unsuccessful and in the arsenal of the politician who uses him" [ibid., 254, n.3].

In addition to the general Pareto objection against redistribution, Jasay mentions a couple of others. First is the fact that the government's duties to protect rightly held property conflicts with its supposed democratic mandate to redistribute that property to others. Further, those such as Schumpeter's "unsuccessful" who press their eleemosynary petitions upon the emperor, may not always find sovereign power so beneficent since recipients of the sovereign's favour today may fall from grace tomorrow [2002, 84-85]Or as Milton Friedman pointed out, once you invite the state to legislate against discrimination, the same power accorded to the state can also be used to discriminate, as in the Nuremberg or Jim Crow laws [1962, 113].[26] Thus when it claims to offer protection, the only hazard the state does not protect against are those inflicted by itself, which, contrary to what Walzer thought, are not confined to banana republics or "people's democracies" [1983, 83].

4.3.3 Hayek and the state

If war is "the health of the state," democratic or otherwise, being the citizen of one could well prove dangerous to one's own health. In fact the past millennium from the Norman Conquest to the present day has proved singularly fatal to millions, with the 20th century being the bloodiest of all. Indeed, Denson has estimated that some 170 million were killed by governments, of whom 60 million died in the two

[26]Thus the Jeffersonian principle that a government big enough to give you everything you want is strong enough to take everything you have.

World Wars [2003,17]. With respect to the latest enthusiasm of the war and welfare state, the so-called war on terror, Robin has also observed that when the war on terrorism comes to an end we shall still be living in fear of our own governments who will have managed to dispose of any threat except that posed by themselves [2004,25]. Both war and welfare require the coercive redistribution which has come to be the hallmark of the contemporary state, despite the arguments that have been leveled against it.

Although as we mentioned at the outset, Hayek was on record as wishing to keep coercion to a minimum, he does not think that maximizing liberty will rule out all government activity, since there are supposedly non-coercive activities, which it would be reasonable to support by taxation [1978, 257]. Hayek seems to think that there is some way to determine which actions of government are coercive, and which are not, other than by asking whether or not a proposed action would infringe upon someone's liberty, which we are not entitled to do unless that person threatens to harm someone else. Government coercion could be justified on similar law and order grounds, namely to neutralize threats from those proposing to harm others, a justification which Sumner has, for example, reaffirmed as a reasonable approach to regulating freedom of speech [2004, 185]. Sidgwick calls such a criterion for government intervention by its then fashionable name of "Individualism," according to which others are owed only duties of non-interference, and compensation in the case of harm [2005, 43].

However, Hayek reminds us that modern governments have never just confined themselves itself to the "individualist minimum"[ibid., 257],influenced perhaps by Sidgwick's view that individualism or libertarianism will not deliver "the attainable maximum of social happiness" [ibid.,44]. Hayek argues that all modern governments charged themselves with the welfare of the unfortunate, as well as with health and education [ibid.]. To which we would respond that indeed they have, though generally with little to show for the enormous expenditure. The political takeover of private charity, as Seldon observes, is no exception: "Politicised collective charity through taxation has not only diminished the charitable instinct to succour the needy but also weakened the financial self-help of the family" [2002,86]. [27]

In our view, of course, nothing whatever follows from what recent governments have found themselves inclined to do. Similarly we reject Hayek's claim that it is possible to supply needs collectively without affecting liberty [ibid., 257]. Since collective action is mostly synonymous with government action, it by definition restricts individual liberty, even though Hayek holds that "government may, usefully and without doing any harm, assist or even lead in such endeavors" The criterion Hayek proposes for separating the non-harmful or non-coercive functions of government from the coercive and undesirable ones is that of "the rule of law" which means "freedom under the law" as opposed to "the absence of all government action." Thus we can distinguish the coercive measures of government from services

[27]cf. Whelan's suggestion that if we could rediscover the motivations driving the private production of welfare before state takeover, we might be able to solve "the enormous problems which are posed by an over-stuffed and under-performing welfare state [1996,98]"

such as health and sanitation, which do not involve coercion, or do so only to the extent that taxes are required to support them. In Hayek's view the provision of such services only becomes coercive if the government acted as monopoly provider [ibid., 220-223].

Working back from the last point, we argued in the previous chapter that once government decides there is a need for it to supply a service, before long it assumes it has an exclusive right to do so, just as it assumes it has an exclusive right to coerce compliance. The supposed importance of the need in no way mitigates the coerciveness of the taxation, for as Jasay writes, taking money and giving it to others is redistribution, regardless of the motive [2002, 90]. As for the benefits of the rule of law adduced by Hayek, where "all coercive action of government must be unambiguously determined by a permanent legal framework" [ibid., 222], as Jasay has pointed out recently, it is not clear the "legal framework" really acts the way many theorists claim. According to this received view, the state ensures that we do the right thing by providing monopoly enforcement, which we pay for, not only because we have to, but because this is supposedly the most efficient way to stave off social breakdown. However the monopoly is subject to the all sorts of political restrictions, with the result that it rarely delivers what it promises. Further because enforcement are financed by taxes they invite free-riding by individuals downloading responsibilities onto the state that "in a well-ordered society they could and would themselves carry on their own behalf or for neighbors, partners and peers" [2007, 1].

It should also be noted that Hayek is aware that the main concern of public finance " has been from the beginning to raise the largest sums with the least resistance" This has gone hand in hand with " an endeavour to outwit the taxpayer and to induce him to pay more than he is aware of, and to make him agree to expenditure in the belief that somebody else will be made to pay for it" As opposed to the Murphy/Nagel approach discussed above, the one way to counteract the law of growing public expenditure is not to have needs determine taxes, but the other way round. Hayek believed government should be reformed so that we could know what we were paying for, and get what we paid for, rather than paying for all government services regardless of whether we use them. Majoritarian democracy is not a recipe for rational public finance, but rather " leads in the end to a general attitude, which regards political pressure, and the compulsion of others, as the cheap way for paying for most of the services one desires" [1979, 51-52].

Hayek also makes it clear that while he favours a larger public sector than we have been advocating throughout this discussion, the concern for social justice which drives the Murphy/Nagel enterprise has no place in his, emphasizing as it does the spontaneous ordering of the market. Hayek argues that while it might be tempting to consider the misfortunes of life, including the unequal distribution of worldly goods, as unjust, no one has in fact acted unjustly towards another: " There is no individual and no cooperating group of people against which the sufferer would have a just complaint, and there are no conceivable rules of just individual conduct which would at the same time secure a functioning order and

prevent such disappointments [1976, 69]" The belief that in s socially just system wealth would be equally distributed is largely responsible for the contemporary " highly interventionist mixed economy, " where government acts as though it could and should level the playing field.

Again Hayek emphasizes, as we have done in discussing the Murphy/Nagel proposals, that " our whole system of morals is a system of rules of individual conduct. " In Hayek's Great or Open market society there would be no room for governments to chase the will-of-the-wisp of social justice, rather than performing their sole function of providing for law and order and any collective needs which might not be met by the market [1976, 82,83]. In his view social justice simply consists in giving " moral approval to demands that have no moral justification," whereas " justice in the sense of just conduct is indispensable for the intercourse of free men [ibid., 97]" In fact Hayek even thinks it possible, as we have been intimating in this essay, " that the spontaneous order which we call society may exist without government " though the rules of just conduct may require " an organized apparatus for their enforcement [1973, 47]" Indeed they might, though one suspects that a private court system could prove much more efficient than the hopelessly inefficient government counterparts we are familiar with.

It is also worth noting that in the Great Society, where we simply enforce the rules of just conduct or laws prohibiting *malum in se*, much of the enterprise of law as we presently know it would disappear, consisting as it does of *malum prohibitum* or statute law. The latter would include the host of regulations by which politicians have sought to control economic activity, for which in fact nothing more is needed than that people avoid force and fraud, and honour contracts. As an important step in the direction of providing capitalism withy the tools required to do its job, Hayek recommends removing government monopoly on money, which was never intended to be a source of good money but rather of providing government with a licence to print it. Private monetary systems, on the other hand, will prove more stable in purchasing power. He believes that democracy where " every little group can force the government to serve its particular needs, " will never be able to give us reliable money, but rather will resort to inflation, followed by totalitarian price controls.[28] Indeed, as Hayek wrote more than 30 years ago, it is this " whole crazy structure " of a government monopoly which is " very largely the cause of the great fluctuations in credit, of the great fluctuations in economic activity and ultimately of the recurring depressions" He ends with the following caution: " At the present moment we have of course been led by official monetary policy into a situation where it has produced so much misdirection of resources that you must not hope for a quick escape from our present difficulties, even if we adopted a new monetary system [2008, 23-25, 27-28]"

[28]The present recession is yet another excuse for the government to shower money on all and sundry. But as Woods points out, "Problems caused by excessive spending and indebtedness cannot be cured by more spending and more indebtedness" The government borrowing necessary to fund bailouts will require "further money creation and thus the continuing debasement of the dollar" [2009, 150-151]

While Hayek appears to be ready at least in principle to overlook the coerciveness of taxes in order to provide some basic goods, he also thinks it important to distinguish laudable "aims" from the actual "methods" used to put them into practice. Having desirable goals is one thing, but if many state welfare activities are seen as a threat to freedom,it is because they rely on coercion to maintain the state's monopoly [1978, 258]. The paternalistic state then doles out portions of the income it has taken from its subjects as it sees fit [ibid., 260-261]. Nor should we think that democracy will safeguard our liberty by somehow reigning in the bureaucrats, including the highly bureaucratized professions, who consider it their job to give us what they think we need [ibid.]. Indeed, as we have already pointed out in the course of this chapter, democratic control is as much a myth as the public good the *nomenklatura* are supposedly charged with safeguarding; as Hayek observes: "It is inevitable that this sort of administration of the welfare of the people should become a self-willed and uncontrollable apparatus before which the individual is helpless, and which becomes increasingly invested with all the mystique of sovereign authority" [ibid., 262].

4.3.4 Democracy and redistribution

The redistribution which is central to the doctrine of state sovereignty depends, as Jasay explains, on the further notion of "an unowned pool of wealth emitting bountiful positive externalities" [2002, 100]. Such bounties typically spill over from two party contracts, where both parties consider themselves to have given "sufficient value for value received" The fact that a third party who is external to the contract happens to profit in some way puts him under no obligation to the contracting parties who undertook their contract solely to benefit one another. Thus, "If "society," or past generations, have created that positive externality, its recipients owe nothing for it to "society" or to contemporary heirs of past generations. Whoever created it has already been paid in full" [ibid., 103].

Even if there was something to be recaptured from the products of past contractors, since, as Jasay observes, "Society" has no more claim on the supposed pool of these than the individuals who contributed them do [ibid., 104]. there is no reason to assume that the state has any authority to do so, and as we have argued, democracy is in no position to provide such authority. On the contrary, Chodorov points out that:"Obscurantism sets in and disguises the character of the State when the personnel of rulership is subject to periodic change, and particularly when the oligarchy convinces both itself and Society that it serves a noble purpose.It is in the phrase "social service" that the true character of the State is lost" [1959, 99].

Further, as Jasay explains, the supposed unowned pool of wealth which is available for redistribution to the hungry multitude appears upon closer inspection to be two rather different pools. The first consists of the sum of unintended consequences of various forms of social cooperation, while the second consists of those additional goods which we have at least metaphorically contracted with a government to supply such as defence, law, and contract enforcement. Indeed, some enthusiasts for

redistribution, such as Judge Posner, have gone so far as to claim that the government's enforcement of property meant that the individual was in effect a trustee of government property: "When I eat a potato chip I am actually eating the government's potato chip with its permission, since it is the government that created, recognizes and protects protects my property right in the chip" [29] What these commentators would need to explain is in what sense I could still coherently be said under such a regime to have a property right in the chip.

If I have, as it were, contracted with government suppliers for certain goods, there may well be positive externalities available to non-contractors, as there were in the case of private contracts. Moreover, if the principle of *ne bis in idem* continues to hold, according to which someone who happens to benefit from a positive externality, as we all do when people refrain from attacking us, or plant nice gardens, is under no obligation to pay for the benefit, contracting taxpayers are not entitled to seek redistributive compensation from the non-taxpayers. But then, as Jasay observes, it is not at all clear "why anyone should think that compensation might well be due the other way, from the taxpayers who provide the beneficial externality to the nontaxpayers who receive it (which is the usual direction of most redistributive proposals)" [ibid., 103]Indeed,he concludes that: "Externalities that cannot be, as it were, traced to somebody's particular act do not, for that reason, put us in debt to "society" any more than do the externalities we could impute to particular persons put us in debt to those persons" [ibid., 106].

We noted earlier that democracy was a distribution game where commonly Peter was robbed to pay Paul, but according to Jasay, redistribution often takes the form of churning, where: "Both Peter and Paul will be paid on several counts by robbing both of them in a variety of more or less transparent ways, with a possibly quite minor net redistribution in favour of Paul emerging as the residual byproduct" [1998, 261]. This is not to say that either Peter or Paul will be aware of what their net positions are, and as Tocqueville points out, this was as true in 18th century France as it is now. Although the nobility supposedly benefited from tax exemptions, which caused great resentment on the part of the populace, "the inequality, though great, was not so bad as it seemed, since the nobleman was often affected indirectly, through his tenants, by taxes from which ostensibly he was exempted" [1955,87].

Rather, in order to divide and conquer, the state seems intent upon keeping both Peter and Paul, and their heirs and successors, in the dark, or as Jasay puts it: "It is in the state's interest to foster systematic error. The more people who think they are gainers and the fewer who resent this, the cheaper it is crudely speaking to split society into two moderately unequal halves and secure the support of the preponderant half" [ibid., 261-262].[30] Despite possible political benefits, there is always the chance that Peter and Paul will tire of playing the distribution game, as their French ancestors apparently did at the Revolution, "both because more

[29]cited by Jasay [ibid., 102 n.13]

[30]Thus the Shavian wisdom that a government which robs Peter to pay Paul can always depend on the support of Paul.

churning takes more government, more overriding of mutually acceptable contracts and the rights of property (which may upset one half of society), and because of some perhaps dim, inarticulated frustration, anger and disappointment that so much redistributive ado is at the end of the day mainly about nothing (which may upset the other half)" [ibid., 264].

4.4 Dworkin on democracy

In the last chapter of his recent discussion of democracy, Dworkin asks whether indeed democracy is possible, concluding much as we did earlier that the prognosis for majoritarian democracy is in fact rather bleak. He cites the pitiful standards of public discourse and the abysmal ignorance of the average citizen about any matter of significance. Politicians have become so accustomed to dumbing down their message that "truth as a gold standard has become obsolete: politicians never seek accuracy in describing their own records or their opponent's positions" [2006, 128]. Worse still, politics is a matter of money, with politicians spending a great deal of their time bagging as much of it as possible by peddling their influence to large donors.

In response to the rather pathetically pedestrian realities of everyday politics, rather than taking the sanguine view that things were ever thus, Dworkin offers the more serious assessment that: "our politics are now so debased that they threaten our standing as a genuine democracy that they have begun to undermine, that is, the legitimacy of our political order" [ibid.,130]. Curiously enough, however, it doesn't occur to Dworkin that democracy itself might be the problem, as we have been suggesting. On the contrary, according to Dworkin, all of us accept the general superiority of democracy to other forms of government, believing that "no other form of government would have moral title to command allegiance over us" [ibid.].[31]

But of course that is exactly what we have been questioning here. The fact that a government is democratic, in some sense or other, and Dworkin admits that the US is far from being a pure example, in our view, adds nothing whatever to its legitimacy which it doesn't already possess *qua* government. The only legitimacy it could possess *qua* government is that we have contracted with it to perform certain functions on our behalf, which on the whole it appears we have not done, or if we thought we did, this supposed agent all too often acts like a super contractor/enforcer of some sort.

However, Dworkin claims that underneath a vaguely Churchillian cheer for democracy rests profound disagreement as to its nature. Views divide into two

[31] Kekes offers a more recent version of that view: "All forms of government are imperfect, but their imperfections can be greater or smaller. I think that the imperfections of democracies are the smallest of all" [2008, 213]

main camps–majoritarian versus partnership democracy. We have already had occasion to refer to the majoritarian view of democracy, but somewhat like Singer, Dworkin proposes his partnership view as a way of rescuing democracy from its majoritarian errors: "democracy means that people govern themselves each as a full partner in a collective political enterprise so that a majority's decisions are democratic only when certain further conditions are met that protect the status and interests of each citizen as a full partner in that enterprise" [ibid., 131]. This account of partnership democracy is certainly "sketchy," as Dworkin admits, but we have already raised objections to the notion that democracy amounts to people governing themselves, and no qualifications either of the Singer or Dworkin variety serve to render it any more intelligible. Once you get hooked up with a "collective political enterprise," it is hard to avoid the absurdity noted so aptly by Rose Wilder Lane: "To control himself, an individual must control the Government that controls him. Isn't that bright?" [1993, 208].

The essence of Dworkin's partnership view is "mutual attention and respect," which, however, appears to be little more than "a possible aspiration," since contemporary politics favours the simple majoritarian position. On the latter view the majority carries the day, even if that means, according to Dworkin, having the legitimacy of our democracy threatened by our unwillingness to dig ever more deeply into our pockets to rescue others "from hopelessly bleak and dangerous lives" Of course, Dworkin still thinks that "wonderful redistribution programs" run by the government are actually capable of delivering much besides rents to the politicians and the various functionaries who administer such programs. Indeed, redistribution seems to have it in common with any form of socialist calculation, that in the end it is impossible to make. Rather, as Salerno has pointed out, the state can only produce welfare for some "by siphoning off the resources and destroying the economic arrangements that support the welfare of others" [32]Nor is it any surprise that Dworkin should be mistaken about the virtues of redistribution, since as Jasay has observed,"the more highly developed and piecemeal is the redistributive system and the more difficult it is to trace its ramifications, the more scope there must be for false consciousness, for illusions and for downright mistakes by both the state and its subjects" [1998, 262].

Of course Dworkin argues that the virtues he does see in redistribution in turn rest upon his analysis of liberty, of what we are free to do or not do: "No one has a right to live precisely as he wishes; no one has a right to a life dedicated to violence, theft, cruelty, or murder" [ibid., 69]. Well, indeed one doesn't, for as Narveson has pointed out one's own freedom of action is constrained by the "rightful liberty" of others [1988, 7]. Thus one is not free to live a life of "violence, theft, murder or cruelty," since such actions violate the right of others to live their lives free of such predations. Dworkin agrees with a similar limitation on one's liberty: "I cannot claim a right to live like Attila the Hun on a bad day, because I cannot think that your life and property are at my disposal" However, Dworkin for some reason believes it also follows that "we must also accept that liberty is not damaged when

[32]Postscript to Mises [1990, 70]

government restricts freedom if it has a plausible distributive reason for doing so" [ibid., 69-70]. What Dworkin seems to have overlooked is that restrictions upon my liberty imply restrictions upon my ability to compel or coerce others. If I am not at liberty to seize your property because I believe I need it more than you do, as we have argued all along, there is no reason to believe that a government is at liberty to do so either. As Nozick wrote: "We are not in the position of children who have been given portions of pie by someone who now makes last minute adjustments to rectify careless cutting. There is no central distribution, no person or group entitled to control all the resources, jointly deciding how they are to be doled out. What each person gets, he gets from others who give to him in exchange for something, or as a gift" [1974, 149].

Dworkin, however, subscribes to a doctrine of *Staatsräson* or the view the state may possess plausible justifications for its actions not morally available to individuals, or as he puts it: "A distributive justification appeals to some theory about the fair allocation of resources that are available to the community as a whole" [ibid., 170]. We have already addressed the question as to how a theory of distributive justice depends upon a questionable notion of an unowned pool of wealth which is supposedly not fully captured by commutative justice, but, in Jasay's words, "must be adjudicated by the political process that administers distributive justice" [ibid., 101]. Further, with respect to Dworkin's view that the state may rightfully seize some proportion of our assets to accomplish its ends, Nagel writes that:"Taxation therefore provides a case in which public morality is derived not from private morality, but from impersonal consequentialist considerations applied directly to public institutions, and secondarily to action within those institutions. There is no way of analyzing a system of redistributive taxation into the sum of a large number of individual acts all of which satisfy the requirements of private morality" [1978, 88].

Again, if there really is such a disconnect between the morality of the state and its institutions, and that of the private individual, as Machiavelli famously thought, it is not clear why the individual should feel morally compelled to take any notice of the state's predilection for redistribution, and that although Dworkin thinks most of us don't in fact "count taxation as a constraint on liberty," there is no moral reason why we shouldn't [ibid., 69]. In fact, Dworkin appears to recognize as much when he suggests, in favour of his own view, that "the bare fact of majority support supplies no reason at all why a community should adopt the policy it supports," [ibid., 134]. and offers further criticisms of majoritarianism reminiscent of those made above. He claims, for example, that "it is a serious mistake to think that a majority vote is always the appropriate method of collective decision whenever a group disagrees about what its members should do" [ibid., 139]. Accordingly, it would probably be wrong to use a majority vote to decide who in an overcrowded lifeboat had to take his chances with the sharks, who was to be drafted for military service, or whether some questions of sexual behaviour might be subject to collective oversight.

In reply to the position that there might be times when a majority vote is the only fair way to decide a collective political matter, Dworkin rightly reminds us that: "In representative government, people's influence over political decisions is

for a thousand reasons never equal; on the contrary, it must be strikingly unequal. At any given moment many thousands of people enjoy elective and appointive office, and the political power of even the lowliest of these will be much greater than most of their fellow citizens who remain in private life" [ibid., 141]. The democratic race is to the politically swift and influential, where, as Dworkin admits, " the idea of equal political power is a myth," [ibid., 142]; for, as Seldon also noted, "the more some people can organize to attract general public attention or sympathy the more they derive advantages or concessions, benefits or subsidies from government at the expense of those who lack the requisite skills" [2002, 44]. Being neither capable of delivering the truth, nor of equal political power, Dworkin concludes, again happily, that: "The majoritarian conception of democracy is defective because it cannot explain, on its own, what is good about democracy. Mere weight of numbers, on its own, contributes nothing of value to a political decision" [ibid., 143].

Other than thanking Dworkin for supporting many of the criticisms we had already made about majoritarian democracy, that should be an end of the matter, except that Dworkin thinks he has a cure for what ails democracy, namely that we take seriously the rights of others to fair treatment, something he has been advocating for the past 30 years. One plank in such a platform is "equal concern," to which we might give effect by electing officials by wide suffrage, and not from within their unaccountable bureaucracies. Given that their number is reminiscent of the "ten thousand times ten thousand, and thousands of thousands" gathered about the throne in heaven, the cure for unsatisfactory elections sounds like an everlasting dose of them. Of course, about the notion of "equal concern" in general, Jasay has aptly remarked that it: "is devoid of any specific meaning that would make it compelling for reasonable men to agree, with respect to how people are treated in a given situation, either that it is violated or that it is not" [1991, 40,n.1].

Another way to give effect to "equal concern" we are told, is "by embedding certain individual rights in a constitution that is to be interpreted by judges rather than by elected representatives, and then providing that the constitution can be amended only by supermajorities" [ibid., 144]. However, recent writers have shown that the US had such a constitution, whose provisions for individual rights have apparently been whittled away by unelected judges. Thus,according to Barnett, instead of "islands of government power in a sea of liberty," judicial redaction has left us with " islands of liberty rights in a sea of government powers" [2004, 1]. Similarly Epstein writes that whereas the Old Court cannot be accused of playing fast and lose with the original text, the Progressives "saw in constitutional interpretation the opportunity to rewrite a Constitution that showed at every turn the influence of John Locke and James Madison into a different Constitution, which reflected the wisdom of the leading intellectual reformers of their own time" [2006, 135-136].

Both Barnett and Epstein mention the particularly egregious instance of rewriting in favour of more expansive government powers, which we raised in the previous chapter under the heading of eminent domain. With respect to the recent and much discussed Kelo case, Epstein comments that "the crushing defeat in Kelo is a dis-

aster for the ordinary people who now stand to be thrown unceremoniously out of their homes. But, more than any academic writing could, it may expose the dangerous side of the big-government position that is the hallmark of Progressive thought" [ibid., 134]. If constitutions have not proved the bulwark against the erosion of rights, which some had hoped they might, it was Dworkin who reminded us years ago that rights would be trumps unless some overriding collective purpose dictated otherwise: "Individual rights are political trumps held by individuals. Individuals have rights when, for some reason, a collective goal is not a sufficient justification for imposing some loss or injury upon them" [1977, xi].[33] Jasay rightly responds that about all this seems to mean is that rights are trumps except where they are not, which is a rather odd definition of a trump; or that "some rights may consequently prevail over some collective purpose some of the time. Nothing more predictable and absolute(i.e. rule-like)can plausibly be read into rights-liberalism" [ibid., 39-40].

Dworkin does attempt to clarify when a majority will have the right to impose its will on a minority, by appealing to the notion of self-government. While it would compromise my dignity for others to automatically assume coercive authority over me, "my dignity is not compromised when I do take part, as an equal partner, in those decisions" While this is apparently "a crucially important assumption" which underwrites democratic legitimacy, it is by no means clear, as we noted above, what would count as fulfilling it. Thus such a notion can be of no help in explaining why "democracy means self-government" It apparently means self-government, except when it doesn't, just as rights are trumps, except when they aren't, which is much of the time. Instead of self government in any literal sense, what you get is a right with a lower risk of abridgement than some, such as "the right to participate in political decision, as a voter and as eligible for political office" Similarly, it seems, while some "personally judgmental constraints are permissible," such as those relating to the use of seat-belts or pharmaceuticals [ibid., 73], one has a right to decide "what role religious or comparable ethical values should play in his life," [ibid., 146]. provided, I imagine, that one's religion is not, for example, a front for terrorism or female genital mutilation.

Dworkin's schedule, as it turns out, parallels that of the Canadian Charter of Rights and Freedoms, which after acknowledging the "supremacy of God" in the preamble, lists freedom of conscience and religion as the first right, including freedom of expression and assembly, to be protected from legislative encroachment, with the next being that of the right to vote. The Charter's catch-all, "reasonable limits prescribed by law as can be justified in a free and democratic society," has apparently permitted seat-belt and pharmaceutical legislation, no doubt as part and parcel of the nanny state. Should that prove insufficient, parliaments can enact

[33]Barnett considers allowing the defence of "public purpose" rather than "public use," as in the case of a road or park, to be an example of gutting a crucial limitation on the takings power [2004,354]In Kelo *et al. v.* City of New London, Conn. the Supreme Court upheld the city's taking private houses under eminent domain so that Pfizer Inc. could redevelop the land on which they stood and bring increased revenues to the cash-strapped city.

overrides to any of the earlier provisions including the schedule of legal rights, the first of which is "the right to life, liberty, and security of the person" About this ordering of rights, Narveson correctly notes that this latter right "could have and should have stood as a general preamble to the whole, for it implies all of the freedoms that actually precede it" [2002a, 236].

Thus, for example, the European Convention on Human Rights lists protection of the right to life as the first of its 66 articles, a protection which might be diminished by the circumstances of the particular case, such as one's having engaged in unlawful violence, rather than by contrary legislation. The Convention also provides a right to private property [Protocol, Article 1], recently used, for example, to roll back union dues in Sweden [34], a right which Dworkin does not mention, and which is notably absent from the Canadian Charter. [35]

If Dworkin was hoping to escape the curse of majority rule, schedules of rights are not handed down on tablets on the mount, but are established by committees who very much rely on majority rule. Dworkin thought that one way to guarantee equal concern was by listing individual rights in a constitution interpreted by judges rather than politicians, since courts represent an "independent forum of principle," where "rights will be enforced in spite of the fact that no Parliament had the time or the will to enforce them" [1985, 27,32]. However, there is no escape from majority rule either in the appointment of judges in the first place, or in the decisions rendered by a full bench of judges. Moreover, although Dworkin admits that while Americans have often considered lawyers to be " scoundrels, lacking the prestige of doctors and maybe even teachers," they abound in government where they wield considerable power and influence [ibid., 31-32].

We should thus not be surprised to find a widespread tendency to produce what Robert Martin calls a "government of lawyers, by lawyers, for lawyers," [2003, 180]. something which appears to happen in spite of their poor public image. No doubt there is the illusion that donning the mantle of legislator, or the robes of a judge, is able to overcome the frailties all too evident in more humble pursuits. While politicians do not typically fare any better in the public estimation than perhaps they did as lawyers, *pace* Dworkin, judges are not always held in great esteem either. For example, Martin claims that the tenure of a recent member of the Supreme Court of Canada, Justice L'Heureux-Dubé, was "a major national disgrace," since her responsibilities "transcended both her intellectual and moral capacities" [ibid., 195].

Of course, Dworkin admits that we are a long way from "partnership democracy," a fact which undermines any claim to democratic legitimacy. In fact we share Dworkin's criticism of the present state of democracy, where most notably

[34] cf. Sdergren [2007, 23-25]

[35] However, in the absence of such a provision, on the question of union membership, while the Supreme Court of Canada has, for example, read into freedom of association under Article 2. that one cannot be compelled to join an association, under Article 1. it has at the same time found such compulsion "justified in a free and democratic society";cf.Sdergren [ibid., 13]

our electoral procedures are not genuinely democratic and political disagreements are not conducted in a respectful manner: " Our degraded politics are not only insulting and depressing; they are not even democratic" [ibid., 147]. While most of Dworkin's criticisms have already been anticipated earlier in this discussion, we fail to share his belief that there is a genuine democracy which would be revealed if we were to strip away the practices that have been carried on in its name over the past couple of centuries. In our view what you see is what you get, and as with other proposals for democratic rehabilitation, the solution is not to be found in yet more democracy. Even if political debate could rise to the level of a mutually respectful disagreement, we may well continue to disagree, and do so profoundly, and may well have to resort to a vote, if there appears to be no alternative to collective action of some sort.

Part of the problem is getting to some agreement in the first place as to what matters, if any, will unavoidably be the subject of collective action and what won't. Perhaps this requires settling upon a constitution involving, as Hardin suggests, "coordination on big issues of general structure and protections" [2003, 84]. Assuming we can agree on the matters which call out for some sort of collective resolution, a relatively short list, on my view, we will presumably have to agree on how those resolutions are to be taken. With respect to the US Constitution, for example, Dworkin claims that "our government is not and was not intended to be fully majoritarian" [ibid., 146]. Elsewhere, however, he speaks glowingly of "the last liberal settlement," that is, The New Deal, which he takes to have established some sort of benchmark for the latter-day liberalism which he espouses. A principal feature of this sort of view is "that inequalities of wealth be reduced through welfare and other forms of redistribution financed by progressive taxes." While favoring economic intervention, Dworkinian liberals prefer "a pragmatic and selective intervention over a dramatic change from free enterprise," plus a general assortment of latter day liberal causes such as affirmative action and the protection of civil liberties [1980, 122].

Following the example of the New Deal, the aim is for such positions to issue in firm government policy by the usual majoritarian routes of electing a party and president who support such causes. Of course the end result may stray considerably from such objectives, as did Roosevelt's first New Deal which appeared to have more in common with Mussolini's fascist state than the customary liberal nostrums.[36] As for the claim that Roosevelt rescued the US from the Depression by government spending, DiLorenzo comments that such strategies simply divert resources from the private to the government sector, depressing genuine economic growth, with the result that unemployment was higher in 1938 than in 1931. Rather than the New Deal being of any benefit to the needy," there is much evidence that New Deal spending was designed with one overriding objective: to use the money to buy votes in order to assure FDR's re-election, regardless of regional disparities in the degree

[36]cf. "While at the same time proclaiming his devotion to democracy, [Roosevelt]. adopted a plan borrowed from the corporative state of Italy and sold it to all the liberals as a great liberal revolutionary triumph" Flynn [1940, 83]

of economic hardship" [2004, 199-200].

Thus it seems rather difficult to reconcile the New Deal with Dworkin's claim that it embodied a political morality whose constitutive element was supposedly treating its citizens with respect, a view reflected in his partnership conception of democracy, which is just a more recent elaboration of the liberal package inherited from FDR [1980, 120-121]Indeed, it is hard to see what is particularly liberal about the first liberal settlement, for as Holcombe observes, "that era saw the growing acceptance of democracy as a principle on which to base government policy and a corresponding decline in the principle of liberty" [2002, 231]. Although Dworkin claims to have avoided the errors of majoritarian democracy, his political morality, such as it is, is clearly descended from that tradition, and despite much posturing to the contrary, never really departs from it.

And as Spencer asked well over a century ago: "The true question is: Whence the sovereignty? What is the assignable warrant for this unqualified supremacy assumed by one, or by a small number, or by a large number, over the rest?" [1981, 128]. The answer, as we have been suggesting, is that there is no such warrant, and according to Spencer it is superstitious to think otherwise: "The great political superstition of the past was the divine right of kings. The great political superstition of the present is the divine right of parliaments. The oil of anointing seems unawares to have dripped from the head of the one on to the heads of the many, and given sacredness to them also and to their decrees" [ibid., 123].

Again, Chodorov reminds us that in a republic the transfer of power to representatives is "well nigh absolute," since the supposed constitutional restraints "can be circumvented by legal devices in the hands of the agents" Even if we vote the incumbents out at the next election, another crowd of hopefuls step up to the plate, with the result that "people still put the running of their community life into the hands of a separate group, upon whose wisdom and integrity the fate of the community rests" One way to end the eternal cycle of sovereignty is to take ever diminishing voter turnout to its ultimate conclusion and stay away from the polling booth: "All this would change if we quit voting. Such abstinence would be tantamount to this notice to politicians: since we as individuals have decided to look after our affairs, your services are no longer needed" [1980, 199-200].

Of course, we may expect a reaction from those who have most to lose by this reductio of the state. Statists par excellence, such as Hitler, Mussolini and Stalin still liked to see a ballot, even if there was only one party to vote for, but politicians of every stripe are unlikely to view with equanimity losing the stamp of legitimacy conferred by the people, and could be expected to respond by enforcing voting, as has happened for years in Australia. Even "the seemingly disinterested" might be expected to join in the chorus: "All the monopolists, all the coupon-clipping foundations, all the tax-exempt eleemosynary institutions — in short, all the "respectables" — would join in a howling defense of the status quo."[37]

[37]cf.Chodorov[ibid., 202]

Then there are the legions who live full-time off the avails of government, from welfare recipients to deputy ministers. With respect to those on welfare, Mill famously held: "that the receipt of parish relief should be a peremptory disqualification for the franchise. He who cannot by his labor suffice for his own support has no claim to the privilege of helping himself to the money of others" [1958, 134]. As for the *nomenklatura*, Tullock thought that "because bureaucrats can vote in a democracy, it has difficulty disciplining them," suggesting the further restriction, "that government employees or people who draw the bulk of their income from government by other means should be deprived of the vote" [2002, 55,58]. Thus we conclude with Spencer that "when it begins to be seen clearly that, in a popularly governed nation, the government is simply a committee of management; it will also be seen that this committee of management has no intrinsic authority. The inevitable conclusion will be that its authority is given by those appointing it; and has just such bounds as they choose to impose" [ibid., 161,165-166].

4.5 Summary

In order to determine how democracy might be called upon to underwrite the authority of the state, we began with Peter Singer's discussion [1974], where he considers three possible modes of government for his model common room association, ranging from the autocratic to the democratic. He expects that only the latter will generate the sort of obligations on the part of its members to support the decision favoured by the majority. No doubt influenced by Hart's argument from fairness, Singer thinks the dissenter will feel constrained to go along with the majority because he has as it were by his participation consented to the outcomes of the democratic machine. Even if this is true of a small scale association, there is still a question of its relevance to the republic, and as we have argued elsewhere, we suspect the answer is very little. Indeed, if there are any reasons to obey, it would be because they are independently morally right reasons, and not because they were arrived at democratically.

To the extent that democracy continues to have any appeal, it is because it is often seen to be connected in some way with liberal rights, which themselves derive from a basic right of all to liberty. In fact democracy is inimical to individual liberty, interfering with the latter on behalf of the special interests which constitute Dahl's polyarchy. Democracy is no guarantee of peace, nor of a quick end to war, any more than it has proved a defender of that central individual right, namely private property. Its main *raison d'être* is redistribution, and it serves as a reminder that the sovereign people represent no less of a threat to individual liberty than the *ancien régime*, for example. Dworkin claims to see much wrong with majoritarian democracy, as we have done, but approves of its central tenet of redistribution; while he touts self-government, we seem to end up with participation, which sounds like more of the same, rather than any cure for what ails democracy.

Chapter 5

The non-fallacy of anarchism

The conclusion to Edmundson's *Three Anarchical Fallacies* is appropriately entitled "The State for What." Here he reviews arguments he has made in favour of the legitimacy of the state and against the skeptical view I have been advancing. Thus he claimed that "legitimacy entails a prima facie duty not to interfere with the state's administrative prerogatives" [1998, 79].However, while legitimacy might conceivably entail such a duty, it simply begs the question as to whether there are any such states to begin with, something we cannot tell simply by inspection of its prerogatives.Indeed, it seems more likely that there are no such states, or as Jasay, has put it, states are "never legitimate, and never a necessity for binding agreements" [1997, 36].

The second skeptical fallacy which Edmundson claims to have exposed is that of the coerciveness of law, since "If the law is essentially coercive, it would be much harder to believe that there is a prima facie duty not to resist it" [ibid.].We have argued that the law is indeed coercive, but whether or not that makes compliance more difficult seems to depend less on the presence or absence of coercion, but rather on whether coercion, by individuals or their agents, is justified in any particular case. In his attack on the third anarchical fallacy, Edmundson thought it important to show that the "state may enforce whatever morality may" which will in turn demonstrate that "law is least coercive where its requirements track those of morality" [ibid.].

Moreover, "Exposing the third fallacy tells us only that the law may legitimately reach wherever morality reaches, but it does not even begin to tell us where that is" [ibid.]. Again, I suggested earlier that Edmundson has things the wrong way round, since the anarchist is generally more interested in legal requirements that appear to have little basis in morality. However, Edmundson thinks it an important question,"whether there may be valid moral requirements that may not validly be made requirements of law," or as he also phrases it, whether there is "any department of conduct that morality claims as exclusively its own, and which the law has no business penetrating" [1998, 127].There are of course occasions where this sort of rhetoric has been used, most famously, for example, in the recommendation of

the Wolfenden Committee that: "Unless a deliberate attempt is made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business."[1]

However, as Hart points out, the principles enunciated here "are strikingly similar to those expounded by Mill in his essay On Liberty,"and as such constitute a "general critical principle that the use of legal coercion by any society calls for justification as something prima facie objectionable to be tolerated only for the sake of some countervailing good" [1963, 15,20]. Lord Devlin, on the other hand, found the approach of the Committee "wrong in principle," since "society may use the law to preserve morality in the same way as it uses it to safeguard anything else that is essential to its existence" [ibid., 11]. Thus, in his view, the Committee was mistaken in claiming that there was "a private realm of morality and immorality" beyond the reach of the law, which could leave the vulnerable open to exploitation.Moreover, even "when all who are involved in the deed are consenting parties and the injury is done to morals, the public interest in the moral order can be balanced against the claims of privacy" [ibid., 19].

Hart denies that there is any such public interest which may rightfully be offended by private acts, for which offence it may demand relief at law: "Recognition of individual liberty as a value involves, as a minimum, acceptance of the principle that the individual may do what he wants, even if others are distressed when they learn what it is that he does — unless of course there are other good grounds for forbidding it" [ibid., 47]. While Hart thinks it important to avoid Devlin's error of legal moralism, where the law, rather than being an instrument to protect one man from another, is deployed in a crusade against moral wickedness, he finds no inconsistency between his enthusiasm for individual liberty and his claim that "paternalism — the protection of people against themselves — is a perfectly coherent policy" If indeed paternalism has become more fashionable since the heady days of Mill and laissez faire it is apparently merely a fact of social history, of which we should duly take note, just as we should find it equally unremarkable that as a result, for example, "the supply of drugs or narcotics, even to adults, except under medical prescription is punishable by the criminal law" [ibid., 31-32].

In support of his claim that "The criminal law of England has from the very first concerned itself with moral principles," Devlin noted that the law had "never permitted consent of the victim to be used as a defence," [ibid., 6] implying of course that it would be inconsistent to permit such a defence in the case of homosexual relations. The fact that we don't permit the defence of consent in a murder case, however, Hart thinks is still better explained by paternalism than by appeal to "moral principles which society requires to be observed," as Devlin would have it. However, Devlin is also right to wonder what the distinction between legal moralism and paternalism actually amounts to, something which Hart does not bother to explain [ibid.,133]. While conceding that paternalism is "a possible explanation of

[1]Cited in Devlin [1975, 2]

such laws," Hart appears to sidestep any question about its moral status by simply characterizing it as "one of the commonplaces of social history"

But of course paternalism is not only a fashionable policy, it is also a moral principle telling us that on at least some occasions we may be entitled to go further than Mill's non-maleficence and act as our brother's keeper. As Hart writes: "Certainly a modification in Mill's principles is required, if they are to accommodate the rule of criminal law under discussion or other instances of paternalism" If we are talking about the rule which does not permit consent as a defence to murder, it seems a little odd to describe this as a case of paternalism since it is already too late to speak of protecting the victim; Devlin is right to see it as a case of punishing the wrongdoer for his immoral act. Moreover, it isn't obvious that Mill's principle needs to give way — it clearly provides for coercion to be used against murderers, and, *pace* Hart, is right to question paternalist legislation against drugs. As for Hart's claim that "euthanasia or mercy killing terminating a man's life at his own request is still murder" [ibid., 30], those who find Mill's principle instructive might well suggest modifying the criminal law as it applies to euthanasia, much as the Wolfenden Committee did in the case of homosexuality and prostitution.

As for Edmundson's believing that he has uncovered another of the errors of anarchism, it seems that he has mostly been misled by rhetoric reminiscent of Wolfenden to the effect that there are acts, which some consider still to raise moral questions, but which ought no longer to fall under the purview of the criminal law, and are best left up to the individual. If others participate in such acts, provided they have done so freely, there is no harm which the law need protect them from, which is to say they raise no genuine moral questions. Curiously enough, Edmundson admits that legal change inspired by Mill's principle does not necessarily commit one to holding that delegalized moral requirements exist, but rather what he, following Feinberg, calls "a perfect coincidence view," namely that "something like Mill's harm principle determines both what morality requires and what law may permissibly require" [ibid., 128]. Indeed, the sort of liberalism to which I am inclined, does suggest that the harm principle determines both the content of morality and that of law, which is to say, it is in Hart's words a general moral principle "used in the criticism of actual social institutions including positive morality"[ibid., 20], though talk of law should not be taken to mean the whole edifice of the law and state as Edmundson seems to understand it. Moreover, as we have already had occasion to point out, the more interesting question is the one which Edmundson doesn't ask, namely whether there are any strongly demoralized legal requirements of the *malum prohibitum* variety, as opposed to those picked out by the harm principle as *malum in se*, to which we have offered a clearly affirmative answer.

As for the "perfect coincidence view," or the somewhat appealing view that the harm principle determines the content of both morality and law, according to Edmundson, many liberals "are reluctant to claim that their principles circumscribe morality as well as law because to do so would embroil liberalism in controversies about the ultimate ground of value.Value is closely tied to religious belief for many"

[ibid., 129]. Well, it seems that liberalism, at least in the form of it latterly called libertarianism, as, in Narveson's words, "a substantive moral and political theory," quite clearly circumscribes both morality and law. Indeed it is the view that individual liberty is paramount and that the only grounds for preventing someone from doing what she wants is that her doing so would infringe upon the rightful liberty of someone else: "No other reasons for compelling people are allowable:other actions touching on the life of that individual require his or her consent" [1988, 7].

With respect to Edmundson's concern that, for many people, value may be connected to religion, we would simply point out that while that may be true as a matter of historical fact, it is of no great philosophical importance. The libertarian view is not itself dependent upon any religious view, but rather, as Narveson again has remarked, adding a divine stamp of approval to a supposedly right action does "nothing at all to explain what makes it right, and therefore nothing at all to help us understand what is right. Theology is necessarily a fifth wheel in morals: it can do no useful work" [1999, 23]. While Edmundson agrees that liberals are "officially agnostic," following Nagel, he thinks that prudential considerations might militate against any overt hostility to religion. On Nagel's account of liberalism there is of necessity a discontinuity between political or public morality and private morality, at least to the extent that the latter may involve religious or other views of the good not shared by all. Thus "the legitimate exercise of political power must be justified on more restricted grounds — grounds which belong in some sense to a common or public domain" [1991, 158].

Such a view can probably be traced to Rawls who thought it important to distinguish between "a political conception of justice and a comprehensive religious, philosophical or moral doctrine" [1993, 174]. While Rawls admitted that "there is some resemblance between the values of political liberalism and the values of the comprehensive liberalisms of Kant and Mill," there are "great differences in both scope and generality between political and comprehensive liberalism" Whereas "The liberalisms of Kant and Mill may lead to requirements designed to foster the values of autonomy and individuality to govern much if not all of life" political liberalism is supposedly a more limited project concerning itself with "a political conception of justice for the main institutions of political and social life, not for the whole of life" [ibid., 200, 175].

According to the more modest goals of Rawls's non-comprehensive liberalism, rather than attempting to convince the young of the virtues of autonomy and individuality, their civic education should mainly consist in their being apprised of their rights at positive law. However, it seems that not even Rawlsian civics will entirely eschew the sorts of principles derived from Kant and Mill, since we are told that children's "education should also prepare them to be fully cooperating members of society and enable them to be self-supporting; it should also encourage the political virtues so that they want to honor the fair terms of social cooperation in their relations with the rest of society" [ibid., 199-200]. As for the political values, and the virtues conducive to them, they will "normally win out" in any contest with "basic rights" inherited from the liberal tradition, in order to "insure

that all citizens have sufficient material means to make effective use of those rights" [ibid., 157].

Indeed, although Rawls assures us that "the most reasonable political conception of justice for a democratic regime will be, broadly speaking liberal,"[ibid., 156] though one cannot help wondering at what point such a latitudinarian view ceases to be liberalism at all. The usual way to ensure that those who the *nomenklatura* believe lack resources commensurate with their rights is to give them a right via redistribution to the resources of others, who supposedly have more than they need, a right we have already suggested is both non-liberal and non-existent. Rawls also claims that his variety of liberalism, in the face of "reasonable pluralism," "removes from the political agenda the most divisive issues, serious contention about which must undermine the bases of social cooperation" [ibid., 157]. Again, it is not clear how much pluralism will count as "reasonable," or why, though no doubt those who claim to set the political agenda will think they have answers, just as they can determine which items are on the agenda and which, in the interests of something called reasonable social cooperation, must be left off. Of course, one suspects that those things which it is supposedly reasonable to do are just those things which Rawls's so-called liberalism holds dear, which is to say that he has been no more successful than either Kant or Mill before him in avoiding what he considers the besetting sin of comprehensiveness.

5.0.1 Abortion and liberalism

Abortion is apparently one of those questions, about which there is such fundamental disagreement that, as Nagel puts it, "it is best, if possible, to remove those subjects from the reach of political action" [ibid., 164,169]. From a survey showing that while there is no great enthusiasm for abortion, nor is there any for regulating it, Edmundson concludes that such results imply that there are "strongly delegalized moral requirements," and further, that liberals such as Nagel typically hold "that the "bracketing" of certain moral issues is what morality itself demands of politics" As we have seen, the view of such "sophisticated liberals," as Edmundson characterizes them, "involves an implicit or explicit denial of the perfect coincidence view," namely that the demands of morality coincide with those of the state [ibid., 130]. However, although Edmundson claims to understand the attraction of such a position to many latter-day liberals, since in the case of abortion it allows one to hold both that "abortion is a terrible wrong and that the state may not legitimately forbid it," [ibid.] he does not find the language of Wolfenden congenial, namely that there is an inner sphere of morality which is not the state's business. On the contrary, it is Edmundson's view that "any moral requirement that is enforceable by private compulsion is permissibly enforceable by some legal compulsory means" [ibid., 157]. We agree of course that moral requirements, which attempt to curtail the class of *malum in se* actions, can be enforced by coercion, wielded either by the individual affected or his allies. Customs of enforcement may well have long since distilled into rules backed up by tribunals of one sort or an-

other, or as Edmundson puts it,"some legal compulsory means" However, we are still a long way from Edmundson's state with a monopoly of enforcement.

As discussed earlier, Edmundson thinks that there are reasons for monopoly enforcement, since "the law exists, after all, to eliminate the hazards of a regime of private enforcement, and the law achieves this end by presuming to largely monopolize compulsory means"[ibid.]. We might well ask whether it is a case of eliminating one set of hazards, or simply replacing one set with another, perhaps even greater, for the king's justice through the ages has hardly proved to be an unqualified boon to its petitioners. Monopoly guarantees overwhelming threat, and there is little the individual can do to counter to such disproportionate and possibly unjustified use of the enforcement prerogative, as the case of a recent would-be immigrant in Vancouver demonstrated.[2] Nor does Edmundson think we should attempt to do so, since he held that at a minimum there is a *prima facie* duty incumbent upon all subjects not to interfere with the administration of enforcement.

Edmundson also claimed that the state may enforce requirements above and beyond those available to the individual, which is yet another implication of the doctrine of sovereign prerogative: "There are in fact many moral requirements that the state and only the state may permissibly enforce by compulsion, for example, paying taxes, ceasing public nuisances" [ibid.]. Of course, it is not surprising that the state should insist on presiding over its personal fiefdoms, since both taxes and public spaces are paradigmatic creatures of the state. The view that the state may create duties and enforcements not available to individuals leads one to question Edmundson's support for the perfect coincidence view, according to which the harm principle serves as both a moral and legal criterion. While noting that recent liberal opinion was divided on the question, Edmundson opted for the coincidence view, no doubt as a way of blocking the existence of a moral domain not amenable to the reach of the law. The fact that there are laws beyond the reach of the moral principles available to individuals apparently doesn't trouble him nearly so much.

That is, as noted earlier, according to Edmundson, the law does not confine its purview to the class of *malum in se* actions, as a coincidence view might suggest, but is capable of declaring other actions to be illegal which do not meet a test of harm to others, though the government may attempt to claim that it or "society" is harmed by non-compliance. These are the *malum prohibitum* actions, those whose wrongfulness simply derives from the fact that they fall under a state prohibition. If indeed the state presides over an arsenal of rules and enforcement not available to ordinary mortals, as Edmundson argues, and is able to prohibit by fiat, then it is not clear why we have any obligation not to interfere in the administration of its prohibitions, since in the words of Junius, the subject who is truly loyal to the chief magistrate will neither advise, nor consent to arbitrary measures. Reminiscent of *Euthyphro*, the other alternative, which I favour, is for morality to be independent of the state, in which case, if it is a liberal state, like any individual, it will be

[2]In 2009 an inquest was held into the death of Robert Dziekanski who had exhibited symptoms of psychological distress after arrival in Vancouver airport, which led to his being tasered 5 times by police.

constrained at the very least by a principle of non-maleficence. Should it have any inclination to beneficence, following Pareto, it may improve the lot of some, and worsen the lot of none.

Not only are there supposedly moral requirements that only the state may enforce, Edmundson claims in support of this asymmetrical enforcement that there are "many moral requirements whose performance may not be compelled by any private person" [ibid.]. By way of illustration, he offers the case of a passer-by who fails to render assistance to a blind man who has dropped his cane. While a third party might well upbraid the passer-by for his want of charity, the observer may not force the passer-by to retrieve the blind man's cane, for as Epstein reminds us: "The libertarian norms against force and fraud do not require any assistance to persons in peril. Such assistance may be freely offered but never required" So duties of charity by definition are not subject to enforcement by individuals or the state, with the result that, as Epstein continues, "it is not surprising that the law remains stubbornly close to its common law origins" [2003, 100-101].

According to Edmundson, "To grant that something is a moral requirement is to authorize some means of social enforcement" [ibid., 176]. Perhaps we need to clarify what we mean by "requirement" as well as what we mean by "enforcement." With respect to the first, Narveson recommends that we distinguish between strong moral requirements such as non-aggression, and moral virtues, such as charity, which go beyond what we have to do. While the pursuit of virtue is much to be commended, including the virtue of pursuing one's own health and well-being, "positive acts of doing good to others are not basically required of us in the way that forbearances from inflicting evils are required" [2000b, 316].

As for "enforcement," Narveson suggests we distinguish that from "reinforcement" which takes the form of various forms of suasion and exhortation which stop short of direct intervention used in enforcing rules [ibid.,318]. In any case, it is not at all clear how Edmundson's case of the blind man supports the view that the state can go one better than any of us when it comes to enforcing or reinforcing a moral principle. States have generally avoided the sort of Good Samaritan law which might compel direct assistance to those in distress, such as Edmundson perhaps has in mind, though, of course they have had no hesitation in compelling various forms of indirect assistance via taxation, something which on our view they are not justified in doing. Thus to the extent that states have arrogated powers to themselves unavailable to individuals, this is not something we should commend, as Edmundson does, but rather declare their actions to be morally *ultra vires*, or unjustified.

While a genuine moral requirement may well be backed up by social sanctions ranging from reinforcement to enforcement, Edmundson has a distinct preference for the latter, which is moreover "state-imposed and backed by the awesome machinery of the state." In an age when social networks are not as strong as they once were, "private correction can be irregular, unfair, scary, risky, and invasive" [ibid., 170,175-176]On the other hand, according to Morgan, state intervention is a

source of moral hazard which encourages people to take less responsibility for themselves and their offspring, leading some to argue that the state is at least partly to blame for "undermining self-supporting family structures" [2007, 13]In supporting Devlin's view that the state is is not to be excluded from the enforcement of morals, Edmundson holds that we may on balance benefit from its oversight, though that question cannot be settled *a priori*. However, he does seem to have forgotten that morals are the paradigm instance of a privately supplied public good and are mostly reinforced by upbringing.Where further enforcement is required, there is no reason to think that cannot be adequately supplied privately as well.

5.0.2 Private enforcement.

With respect to the alleged deficiencies of private correction, we have offered various arguments suggesting that state intervention would be every bit as "irregular,unfair, scary risky and invasive," if not more so. By way of some sort of non *a priori* backing for his claims about the greater reliability of government enforcement, Edmundson asks us to imagine a case where a citizen who is concerned about someone's driving pulls him over to complain about it. He suspects that, were we confronted by such a highway vigilante, we would find it much more annoying than being pulled over by police [1998,171]. However, our supposed negative responses hardly qualify as an empirical account of the deficiencies of private enforcement. I suspect that for many, reactions to police intervention are not much different, or one can imagine such a scenario as a prelude to police involvement, such as a citizen's arrest, the total effect of which is humiliating and intrusive, as the use of coercion tends to be. If private intervention is any more galling than that by public officials, it may just be that this is not what we are accustomed to, at least on the highway.

In addition to its perhaps unusual and erratic features, Edmundson thinks that public and private correction also differ with respect to "there being a necessary permission on someone's part to chastise wrongdoers and there being a claim right on the state's part to punish wrongdoing" Because the former is merely permissive, a private citizen is not backed up by a right of non-interference, whereas, according to Edmundson, those operating at the behest of the state do possess such immunity. While we are quite aware that the state claims a right to punish, and at the very least its subjects may have a duty of non-interference, it is just that, in our view, Edmundson never quite managed to produce any satisfactory grounds for such a claim. As for the protection against interference which piggy-backs on such a claim right, the private citizen who attempts an arrest may have to be prepared to defend himself if challenged. If so, his situation is probably no different from that of many police officers, though his weaponry may fall short of standard police issue.

Edmundson, again, sums up what he takes to be the defining characteristics of state, as opposed to other forms of social enforcement as, first, the right to award an official sticker of social disapproval and to possess a monopoly on doing so [ibid., 175]. To which we reply, that we know what it is they claim, but have

no idea what it is to justify such a claim. Presumably morality itself expresses the disapproval of society as a whole, and it is unclear what officialdom has to add to that process, other than the social cost of having yet another special producer group, as Friedman puts it, "obtain a monopoly position at the expense of the rest of the public" [1962, 148]. However, the anointing of authorities, if not of kings, appears to have continued unabated, and the ancient myth of the divine right of kings has simply been replaced with that of states. Or as Burke wrote,"the contract of each particular state is but a clause in the great primeval contract of eternal society," which derives from Cicero in *De Republica* who thought that nothing was more pleasing to the Supreme Ruler of the Universe than "these societies and associations of men, cemented by law,called states" [1955, 110-111].

Edmundson seems to be of a similar mind, declaring that "a regime of private punishment cannot be coherently imagined" Besides the fact that the gods smile kindly upon those entities called states, the right to punish, Edmundson claims, is "irreducibly social," which I take it is code for irreducibly statist. He also notes approvingly that Nozick was reluctantly forced to accept a similar conclusion,[ibid.,175]given that "there seems to be no neat way to understand how the right to punish would operate within a state of nature" [1974,139] Not that it is surprising that Nozick should be found under the same tent as Edmundson, since the aim of both endeavours was to subject anarchism to serious scrutiny in order to reassert the legitimacy of the state. If the latter has commonly been characterized by a monopoly on the use of force, including punishment, then Nozick famously set himself the task of showing how we might get there without abridging anyone's rights in the process.

Of course, there would be holdouts, who refused to get on the dominant protection agency bandwagon and preferred dealing with offenders on their own terms, enlisting the aid of allies when needed. Nozick thought that rights-preserving compensation could be offered to the non-joiners, in order to secure their participation in the great public protection racket, commonly known as the state. But to preserve the "ultimate enforcement" characteristic of the state [ibid.,14], Nozick needs to circumscribe the right to punish of which Locke spoke, where "every Man hath a Right to punish the Offender, and be Executioner of the Law of Nature" To punish, or "lawfully do harm" to an offender, according to Locke, was "to retribute to him, so far as calm reason and conscience dictates, what is proportionate to his Transgression, which is so much as may serve for Reparation and Restraint" [1960, II , 272].

5.0.3 Locke on punishment.

Locke admits that "this will seem a very strange Doctrine to some men," though he argues that the ability of the magistrates to punish aliens, or "Men without Authority," for example, is predicated on just such a right to punish [ibid., 273] Nozick for his part thinks the doctrine strange, unless we interpret the right to punish as

a liberty "rather than as a right which others may not happen to interfere with," a solution which he thinks "would give Locke much of what he needs" Moreover, Nozick also claims that a distinction between punishment and compensation serves to underscore the fact that punishment is a right of all in common: "unlike compensation, punishment is not owed to the victim (though he may be the person most greatly interested in its being carried out), and so it is not something he has special authority over" [ibid., 138].

Locke also speaks of two separate rights, that of "Punishing the crime for restraint, and preventing the like Offence," or protection/deterrence, as it might now be called, rather than "some retributive view," as Nozick suggests [ibid.], "which right of punishing is in every body," and that "of taking reparation, which belongs only to the injured party" [ibid., 273] While Locke agrees with Nozick that restitution is owed to the victim or third parties who sustain collateral damage, Locke holds that "every one has the Executive Power of the Law of Nature." This is to say that "every Man in the State of Nature has a Power to kill a Murderer, both to deter others from doing the like Injury, which no Reparation can compensate, by the Example of the punishment that attends it from every body, and also to secure men from the attempts of a Criminal." Thus it is not clear what "special authority" Nozick thinks is needed over and above the power which each individual has to respond with lethal force where necessary against someone, who has "declared War against all Mankind, and therefore may be destroyed as a Lyon or a Tyger, one of those wild Savage Beasts, with whom Men can have no Society nor Security" [ibid.].

As for lesser crimes than murder, Locke allows that "Each Transgression may be punished to that degree, and with so much Severity as will suffice to make it an ill bargain to the Offender, give him cause to repent, and terrifie others from doing the like" [ibid., 274] Nozick, however, thinks the devil is in the details, and that a system of open punishment is likely to become a shambles, and thus prove an entirely unreliable method of correction. If Nozick is concerned that leaving punishment up to anyone who feels disposed to dish it out is "defective," we could insist that the victim, if willing and able, should have first crack, assisted by anyone inclined to help. Nozick again would object that while a victim is owed compensation, he is not owed punishment, so he has no "special right to punish or be the punisher" [ibid.,138].

5.0.4 Nozick on punishment.

Because of the supposed difficulties in determining who has a right to punish, Nozick recommends "that all concerned (namely, everyone) jointly act to punish or empower someone to punish," which would in turn "require some institutional apparatus or mode of decision within the state of nature itself" [ibid.,139] Such a suggestion would reinforce Nozick's view that what Rothbard called the immaculate conception of the state is not prejudiced by preventing the last holdouts against

monopoly provision of protection services from resorting to self-help, provided that the non-joiners are compensated for being thus disadvantaged. Requiring that all have a right to punish, rather than just the victim or his surrogates, virtually guarantees that there will be "no neat way to understand how the right to punish would operate within a state of nature" Of course, it also leaves Nozick with the task of defending collective rights, something which may well prove less than straightforward.[3]

However, in his enthusiasm for the minimal state, Nozick has overlooked at least one famous chapter in legal history, namely outlawry as a mechanism for allowing the participation of all, or at least anyone, in punishment. Nozick thought it important that the offender not owe a duty of punishment to the victim. Maybe so, but under the outlaw doctrine the offender is placed beyond the protection of the law, which is to say he is subject to the same "open season" as he declared upon his victims, and *pace* Nozick, appears well suited to the state of nature. As Pollock and Maitland explain, outlawry is an ancient weapon for communities lacking professional enforcement, where "to pursue the outlaw and knock him on the head as though he were a wild beast is the right and duty of every law-abiding man. 'Let him bear the wolf's head': this phrase is in use even in the thirteenth century." [1978, 476].

With reference to Nozick's concern about "some institutional apparatus," Rothbard reminds us again that since law can develop quite independently of any state, the appropriate institutions for adjudication and dispute resolution would also be produced as needed [2002, 236] Nozick thinks that the dominant protection agency is right to prevent hold-outs from using such "unreliable procedures for enforcing justice," a prohibition which in turn transforms the agency into the *de facto* state. However, as Rothbard again points out, the ugly history of the state is unlikely to inspire much confidence in its reliability. As for the right to prevent hold-outs from engaging in the risky activity of not getting on the bandwagon, Rothbard considers such coercion as an "impermissible aggression against the rights of others" [ibid., 238-239].

However, Nozick insists that there is nothing untoward in coercing the holdouts, which is to say, contrary to what I have suggested, that the protective association is not a protection racket, because, as he puts it, "Protective services are productive and benefit their recipient, whereas the "protection racket" is not productive" [ibid., 86]. Such a distinction supposedly allows Nozick to rule out blackmail, since it is not productive, which is to say that "his victims would be as well off if the blackmailer did not exist at all, and so wasn't threatening them" [ibid., 85]. Productive exchanges, on the other hand "are those that make the purchasers better off than if the seller had nothing at all to do with them" [ibid., 83]. An example of the latter is neighbour A, who agrees for a fee not to go ahead with plans to put up a structure that B would find offensive. If A did not have bona fide plans to build anything, but attempted to cash in on the threat of doing so, this would not

[3]cf. Narveson, "Collective Rights" [2002a,225ff].

be productive.

5.0.5 Blackmail revisited.

Blackmail is a similarly unproductive activity for Nozick though it apparently has nothing to do with the blackmailer's threat not being genuine. It simply has to do with the entirely gratuitous presence of the blackmailer, such that his victims would be better off if he had never appeared. Of course, the same could be said of the real or imaginary neighbourhood developer, which is to say that the distinction between productive and unproductive exchanges sounds more and more like the proverbial distinction without a difference. If so, it will prove quite unable to do the work Nozick had planned for it, namely to justify compensation for the coercion of hold-outs against a protective monopoly/proto-state. Indeed, Rothbard and Gordon have suggested turning Nozick's notion of unproductive exchange back on his own derivation of the State: "If the dominant protective agency did not exist, then clients of the other, non-dominant agencies would be better off, since they prefer dealing with these independent agencies.But then on Nozick's own showing, on his own "drop dead" principle, these clients have become the victims of a nonproductive exchange with the dominant protective agency and are therefore entitled to prohibit the activities of the dominant agency."[4]

Since Nozick's valiant effort to distinguish the genuine protective services of the nascent state from those of a protection racket [ibid., 86] has amounted to nought, we should take stock as to where this leaves us. As Narveson has recently pointed out, there are those who want to be governed, that is, hand over their right to protect themselves to an agency they believe can do a better job of it, and those who don't. While it is true that a democracy can ride roughshod over the wishes of the minority, when it comes to contracting with a protective agency, as we have seen, unmade contracts are nullities and give rise to no rights of enforcement, or anything else, for that matter. Rather, as Narveson suggests, there is a question about "the eligibility of any centralized agency to claim the right to decide about *all matters*, domestic and foreign. Where would it get this right? Again, the answer seems clear enough on the libertarian view: it has it if and only if the individuals who participate in these "matters" give it to them" [2008b, 107].

5.0.6 Anscombe on authority

If, as we have suggested, individuals have not conferred any such right on a central agency, then there appears much to be said for the view, as Anscombe puts it, that "government is a refined and grandiose banditry" who "clothe themselves in the luxurious cloak of authority" [1981, 136]. While Anscombe is to be commended for such a characterization of the libertarian position, like Nozick, she herself holds on

[4] cf. Rothbard [2002, n.35,245]

the contrary that the civil authority does have a right to coerce and use violence in a way that the Mafia does not. Anscombe argues that such a right is derived from "a human need that there should be government and laws backed by force" [ibid.] The task of government could not be accomplished without "extensive civic obedience," and the right of the governors to use force. Therefore, she concludes, "those who by right exercise the powers of government have authority in the sense which I have argued we need" [ibid., 137].

While Anscombe's attempt to derive the right to govern from human need appears at least *prima facie* to avoid the question of consent, we should press her further on her first premise, where the need for government was thought to follow from the fact"that some men do not leave others in peace, though these are peaceable, but will attack them and violently impede their activities and enterprises" [ibid.,135-136] However, as we have pointed out, while the use of force against those who do not let others live and work in peace is justifiable, Anscombe has not shown why something called government should have a monopoly on such force, or, as she puts it, why we need "a top decision making machinery in a large complex society" [ibid.,153].

While not addressing the question of a monopoly, as such, Anscombe implies that top-down decision making is by definition in the hands of the few "who by right exercise the powers of government," in order to coordinate the activities of the large masses of humanity [ibid.,137] We would respond,of course, that if we can manage, for example, to feed, house and clothe most people without the aid of government, there is some question as to whether we really need it for any of the activities which have historically fallen under its mandate. Anscombe, however, believes that private coordination, or what Hayek calls "spontaneously ordering forces" [1975, 41], cannot supply the requisite machinery in large societies, since "only in very simple societies is custom sufficient" [ibid.].

Thus on Anscombe's account we cannot hope to explain the right of the civil authority to forcefully impose solutions as a customary one, derived from ways in which communities had historically developed their own procedures. Authoritative acts of the civil governors are not acts of self-help writ large: "The role of the civil power in using a standing force cannot be assimilated to that of a passer-by who sees someone set on by a thug" [ibid., 146] Contrary to the Lockean tradition which assumes "a private right of punishment in a state of nature," Anscombe holds that "civil society is the bearer of rights of coercion not possibly existent among men without a government" [ibid., 147].

In supposedly rejecting the view that civil authority arises "by a transfer of rights already possessed by men without a state," Anscombe is no closer to explaining how it is that the state can acquire rights sharply discontinuous with those of ordinary mortals. Indeed she acknowledges that "the idea of civic authority, so far as it threatens coercion against any defiance of its laws (no matter what they may be) seems to pull itself up by its own bootstraps" [ibid., 153] In this respect the source of the authority of the state turns out to be on a par with tran-

substantiation, about which Anscombe observed that: "When we call something a mystery, we mean that we cannot iron out the difficulties about understanding it and demonstrate once for all that it is perfectly possible" [ibid., 109].

Pace Anscombe, we hold with Jasay that authority must indeed be generated in anarchy, which is to say, as Green points out, it "can be provided without the need for a higher level enforcement mechanism" [1988, 147]. If it can't be generated in the absence of higher level enforcement, as Anscombe suggests, then we have a situation where "the agent itself cannot be bound by contract to any of the parties as its principals if it is true that binding contracts require an agent for enforcement, since the supposition of an enforcing meta-agent to make the agent fulfill its contract would have to rely on the notorious infinite regress" [1997, 21].

Moreover, in addition to Juvenal's ancient question: *Quis custodiet ipsos custodes?* coming back with a vengeance, there is also Green's point that if authority can be generated in the absence of higher level enforcement, why we would need to provide political authority in the first place. With respect to taxes, for example: "After all, if we could convince rational agents to obey laws requiring that they pay taxes, then could we not use a similar argument to show them the rationality of paying taxes, laws or no?" Indeed we could, given that "authority is much less likely to be produced than are many of the first order public goods that are supposed to justify it in the first place" [ibid.,147,149]. Thus Jasay concludes definitively that "there is then no contractual exit from the state of nature: if the state is to be created by contract, it cannot be created, since it is its own antecedent condition" [ibid., 22].

5.1 The appeal of anarchy

In the course of this discussion we have repulsed Edmundson's attack on anarchy, though as he himself reminds us "to establish a conclusion, it is never enough to expose the fallacious arguments for its denial" [ibid. ,180] In this respect, we have not simply exposed Edmundson's errors but have considered other attempts to stave off the anarchic day of reckoning, finding them similarly wanting. So where then does this leave the project of order without the state? At the very least, as Boettke has observed, it continues to be a lively research program "not only valuable at a fundamental theoretical level, but also of practical significance as well" [2005, 215-216].

Perhaps we should emphasize again that in questioning the authority of the state, we are not questioning the need for order. Or as Hasnas has recently put it, what we are contemplating is "a society without government, not a society without governance. A society with no mechanism for bringing order to human existence is oxymoronic; it is not "society" at all. Indeed, on the subject of coercion, with which we began this discussion, Hasnas says that in order to make a case for anarchy, he is not arguing for a society without coercion, but only one where "human beings

can live together successfully and prosper in the absence of a centralized coercive authority" [2008, 112].

To those who think that government is necessary to produce the laws which will enable us to live together in peace and harmony, Hasnas reminds us of the long tradition of common law which preceded anything like government as we now know it. Common law has the advantage of not being derived from political sources, but of having grown up in the context of settling actual disputes between individuals, creating "the rules necessary for a peaceful society with minimal infringement upon individual liberty" [ibid., 116]. Such rules are part of the communal heritage, and unlike much contemporary legislation, do not run counter to the ordinary moral understandings of the proverbial man in the Clapham omnibus.

As for the courts, which Hasnas sees recovering their powers of independent adjudication, he reminds us that "tax supported courts of general jurisdiction are an entirely modern phenomenon" [ibid., 121]. As noted earlier, the commercial courts continue to this day to mediate mercantile disputes, quite independent of any government oversight, to say nothing of the myriad tribunals and systems of private arbitration, which have burgeoned as their public counterparts have become mired in inefficiency. Thus we would have no trouble envisaging how other bodies might fill in the spaces left by the eventual departure of much of the machinery of the public administration of justice.

While many have little trouble in imagining a largely private and independent system of arbitration, which assesses fees directly on litigants, some may contend that policing must remain a government monopoly. Again Hasnas points out that government supported police are also a relatively recent development, beginning with the Runners of the Bow Street Magistrates' Court in London in the late 18th century [ibid., 122]. However, as Benson shows, the establishment of the metropolitan police did not happen overnight, since many Britons were not anxious to emulate the aggressive style of French policing developed under the *ancien régime* [1990, 74-75]. Similar suspicions were confirmed by the arrival of police departments in American cities around the middle of the 19th century, where as Benson notes, they were first and foremost creatures of their political bosses. In many ways not much has changed in the intervening century or so, since corruption is still quite widespread, and most crime goes unreported, suggesting we may have much to gain from a return to the "greater private sector involvement in criminal justice that disappeared centuries ago in the face of efforts by kings to expand their revenues and power" [1998, 224-226].

Of course, in another sense the private provision of security has never quite died out, no doubt because many have always realized that sovereign monopoly had little to do with individual security. Benson reminds us, for example, that the period when public police were in the ascendant also saw the establishment of many prominent private protection agencies which have continued to prosper, apparently because of their ability to provide better service than their tax-supported counterparts [ibid.] Indeed, Hasnas argues that a private system could hardly do

worse than a publically funded one, which requires "all members of society to pay them regardless of the quality of service they render, and invest them with the discretion to employ resources and determine law enforcement priorities however they see fit subject only to the whims of their political paymasters" [ibid., 125].

While Morris seems to agree that a private security system may perform the same functions at least as well as a public one, he reminds us that in doing so, the private system provides "benefits that are also indivisible and nonexcludable" suggesting that it may not be possible to efficiently provide law and order in the absence of a state. This is the standard public goods defence of the state, to the effect that free-riding would cause privately produced order to be underproduced, which Morris admits "has been under attack in recent years" [1998, 61], an attack which we have also continued to press.

However, as Hasnas points out, the fact that private policing would generate uncompensated positive externalities in the form of deterrence is no reason to think that such services would be underproduced. On the contrary: "The evidence that police services and courts are not public goods is that, like lighthouses, television and the internet, they have been supplied non-politically for most of human history" Indeed, as Hasnas further remarks,"it is difficult to think of any useful activity that does not produce some uncompensated positive externality" [ibid.,128,]In addition to paying attention to such matters as personal hygiene and dress, most of us perform duties of non-maleficence, as well as the occasional duty of beneficence.Indeed, as Hasnas reminds us time and again, if we want examples of the anarchic production of public goods they are all around us. Or as we noted earlier, schemes for providing such goods are not dependent on "political entrepreneurs," as Jasay calls them, but rather there are private suppliers happy to risk being played for a sucker because they themselves want some good badly enough. Under non-political provision people make their own choices about being sucker or free-rider, rather than have those roles assigned via the political process.[5]

Although many would have little trouble seeing how we might increase the share of the private market in protection services within a country, they may have more trouble doing so when it comes to the defence of the country as a whole. Hasnas admits that if we are talking about the sort of massive defence spending that now goes on, it is hard for that to be provided without a government. What isn't clear of course is how much of the massive defence arsenal of a country such as the US is really necessary to the defence of its citizens. Indeed, in view of the colossal security failure of 9/11, it seems about as effective as the Maginot Line. Of course, in order to decide if the US is actually in the business of protection, and not of latter-day Caesarism, then, as Hasnas suggests, we need some reliable assessment both of the external threat, and of the proportion of defence spending really proportional to that threat [ibid., 33].

If Hasnas is right that it is not reasonable to expect the state to wither away overnight, the provision of national defence may well be one of the last bastions

[5]cf. Jasay [2002, 29].

of government to fall. While of course the best solution for all would be for all states to disarm, leading by example is not necessarily the wisest course. Indeed, it seems for as long as there are states, at least the threat of war may be needed as a way of gaining concessions from a holdout state which otherwise would have little incentive to do so. Not that this is likely to be of much comfort, since as Jasay comments,"collective choice inspired by nationalism fails in its own purpose and gets entrapped in irrationality," to say nothing of the fact that it "would have a hard time withstanding the test of morality" [2002, 70]. The reason Jasay holds that collective choice gets entrapped in its own irrationality is that it breaks the nexus "between benefits enjoyed and costs borne by any individual," which is to say "it becomes individually rational for some people to make everyone pay for something that benefits them alone" [ibid., 70].

5.1.1 The private production of defence.

As Hoppe points out, the sovereign is no exception, in that he obtains his security at the expense of others. The way in which he is different is that he has arrogated to himself the office of "a compulsory territorial monopolist of protection," with "the power to impose taxes in order to provide security collectively" [2003,336] Of course, the fact that the sovereign turns out to be "an expropriating property protector" should make one wonder how it is that he is able to provide protection for his subjects that they could not provide for themselves. On the contrary, as Hoppe argues, "collective security, it would seem, is not better than private security. Rather, it is the private security of the state S, achieved through the expropriation,i.e., the economic disarmament of its subjects" [ibid., 337]. Indeed, pious pronouncements about the protection of life notwithstanding, Jasay notes that such expropriation may also involve life and limb, "often for the good of nobody except those few whose vanity is served" [ibid., 70], a fact no doubt obscured by what Owen called the old lie, *Dulce et decorum est pro patria mori*[1987, 188-189].

However, Hoppe offers us an interesting way out of the contradictions of collective choice in the service of the nation/state by reminding us that defence is a form of insurance [ibid., 346]. Companies which agreed to underwrite such risks would possess the resources necessary to deal with real or imagined threats, being part of "a network of contractual agreements of mutual assistance and arbitration as well as a system of international reinsurance agencies, representing a combined economic power which dwarfs that of most governments" [ibid., 347] Just as regular insurance excludes certain misadventures initiated by the client, so defence insurance would "systematically exclude (prohibit) all provocative and aggressive action among its own clients" [ibid., 348].

Under the present arrangement of states there is not the same disincentive to aggressive behaviour as under an international insurance market, since a state can externalize the costs of its aggression onto its taxpayers. Indeed, Hoppe argues that there is a tendency for hostilities to escalate into total war, for example, of all

Israelis against all Palestinians, since all subjects are implicated in the wars waged by their respective states which by definition monopolize protection and taxation. However, in a possible post-state world, aggressors would have an incentive to confine hostilities to their uninsured foreign counterparts, lest they provoke response from very powerful international insurers with strong incentives to protect their clients. Such insurers would no doubt contract out protective services in the way states have done in recent years to the private military industry, whose ability to wage war, like that of many other players in a great variety of endeavours on the international scene, has, as P.W. Singer notes, "become a globalized function" [2003, 242]. Indeed, speaking of one such firm, Scahill observes that "by 2007, Blackwater had its forces deployed in at least nine countries. Some twenty-three hundred private Blackwater troops were spread across the globe along with another twenty-one thousand contractors in its database should the need for their services arise" [2007, 377].

Moreover, Hoppe further contends that a free territory consisting only of private property owners and their insurers could exist with a state nearby, which is by definition more aggressive, and therefore a threat to such owners and their insurers. The latter of course have a strong incentive to neutralize threats coming both from within and from without; thus they would expel criminals from their neighbourhood, as well as control any influx of government agents from outside. Hoppe also argues that a nearby state might have some difficulty in convincing its agents to attack a non-aggressive free territory, since as Hume observed, government depends on opinion rather than on force,and "this maxim extends to the most despotic and most military governments, as well as to the most free and most popular" [2003, 16].

Even if we think that the favourable opinion of his subjects and the possible loss of legitimacy might not be a strong enough bulwark against unilateral aggression, Hoppe reminds us that in a free territory its citizens would not have been disarmed like their state counterparts and therefore more than able to defend their property, with defence contractors supplying more sophisticated weaponry if needed. However, unlike a state, an insurance company cannot afford to allow a counterattack to degenerate into total war, and will therefore confine itself to surgical strikes against particular aggressors, thus minimizing collateral damage. In delivering such a precise response, they could sway public opinion against the state aggressors, perhaps leading to the latter's downfall, and the eventual replacement of state protection by private profit-loss underwriters [ibid., 368] .

5.1.2 Responses to Holcombe.

After canvassing most of the common arguments in support of the state, many of which have been discussed in one form or another above, Holcombe concludes that "all of them have serious problems" [2007, 159]. For example, with respect to the claim that government is necessary to produce public goods, more often

than not government has simply decided to offer unrestrained access to certain goods, not that it was impossible to restrict access. Typically, state production of such goods results in inefficiencies of overproduction- near empty transit buses- or underproduction-20% of the population without a primary care physician. As an example of a public good which the market supplies very effectively, Holcombe cites microcomputer software, which has in practice turned out to be non-excludable because of the ease with which it can be copied. Moreover, if Bill Gates is any sort of paradigm case, "the characteristics of nonexcludability and collective consumption do not rule out profitable production in the private sector" [1996, 111].

On the other hand, if the rationale for government is to control externalities, Holcombe points out that most of those are generated by poorly defined property rights, but rather than expedite the latter, states often place all sorts of stumbling blocks in the way.[6] Indeed as Holcombe argues, there are law and contract traditions antedating the state which have proved much better at internalizing externalities, whereas "government regulations often facilitate the generation of externalities, because they can permit the creation of externalities that are protected by law" [ibid., 155]. As for the view that it is reasonable for us to contract into a government to solve problems which would arise in the absence of one, such a view, Holcombe observes, "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" [ibid., 156].

As we have argued above, various writers have shown that government coercion is not necessary to establishing a cooperative order. Indeed, without cooperation we could not establish a government in the first place. As Holcombe concludes,"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" [ibid., 157]. Although Holcombe agrees with our contention that the standard arguments for the state do not withstand critical scrutiny, he does not think it time to abandon the ship of state altogether. When we ask why governments actually exist, it is because some people have forcibly imposed them on others. If anarchy is not an appealing option, in the absence of government, albeit forcibly imposed, there will be nothing to prevent other predatory gangs plundering from the peaceful citizenry. Were such a Mafia to establish a monopoly in a given area, it would become the *de facto* government, exchanging protection for tribute, as has been the habit of governments throughout history.

Not only does the establishment of a monopoly enforcer bring an end to the cycle of predation, but according to Holcombe, citizens will find it in their interest to constrain the maximizing tendencies of their inevitable rulers by preemptively setting up limited government. However, if governments come about because some manage to impose them by force, then preemptively seizing the reins of government would seem to be the exception rather than the rule. Holcombe thinks something like this happened in the case of the United States, though he agrees, that if the

[6]cf.DeSoto [2000,20].

purpose was to create limited government, the exercise has long since failed,[ibid., 163] with democracy having supplanted liberty as the driving principle of American government [2002, 250].

By arguing that we are better to govern ourselves than have someone even more predatory do it for us, assuming we can reliably separate the more from the less predatory, Holcombe implies that the redistributive game called democracy is a case of governing ourselves, a view we earlier questioned. Even if we thought that one of the good features of democracy as we know it was that it enabled us to ride with the hunt, rather than run with the hounds, or something offering even less opportunity for predation, as we noted above, the churning associated with redistribution does not guarantee that it is invariably Peter who is robbed to pay Paul.

Nevertheless, Holcombe is convinced that "anarchy is not a feasible alternative, so the only liberty preserving option is to create a limited government" Although he admits on the one hand that the US appears to have been much more interested in preserving democracy rather than liberty, he still holds that "it is among the freest places on earth,"[2007, 163] something we have also had occasion to question. We would of course suggest to an advocate of the minimal state, such as Holcombe, that he not only heed Thoreau's motto, "that government is best which governs least," but also what Thoreau thought it implied, namely, "that government is best which governs not at all" [1993, 1, 27]. Indeed, as Narveson concludes: "If we are arguing on the plane of high moral theory, anarchism looks to rule the day. The minimal stater can't urge realism against the anarchist, since his program is just as unrealistic; and it's hard to see how any genuinely principled case can be made for retaining a barely discernible government as against none at all. So the case rests" [2008b, 110].

5.2 Summary

While Edmundson appears to have taken the role of democracy as a source of authority largely for granted, in our concluding discussion we pick up the thread of his argument again, paying particular attention to the third of the fallacies which anarchism allegedly ran afoul of, namely, by declaring an area of private morality off limits to the state. While we have contended that the privately produced good of morality has the ability to render most state activity redundant, our concern has been rather that in the dominant *malum prohibitum* variety of law, the state claims authority to legislate in an area which is off limits to morality. According to Edmundson the state also rightly asserts a duty of non-interference in the administration of its laws, the failure to recognize which is another of anarchism's supposed fallacies. But the duty to obey laws which are moral nullities, consisting as they do of prohibitions having no other rationale than that the state has prohibited them, cannot be a moral one.

In order to respond to this difficulty, some writers such as Nagel proclaim a discontinuity between the morality of individuals and that of the state. In our view, however, the state does not possess moral rationales unavailable to individuals, which is to say we reject any doctrine of *raison d'tat*. While Edmundson claims to deny Nagel's discontinuity thesis, in order to ensure that the law may reach wherever morality does, he also holds that there are moral requirements only the state may enforce, such as rendering aid to those in distress. Indeed the state claims an exclusive right to enforcement, which we also reject, since it appears to have no other foundation than the myth of the supreme ruler of the universe who smiles kindly upon his earthly vice-regents. Anscombe also favours sharply discontinuous state rights, which she insists are not simply rights of self-help writ large. As to how the state pulls itself up by its bootstraps appears to be as much of a mystery as she thought transubstantiation was.

For those of us who hold that individual morality clearly underwrites self-help, without which, moreover, there is no exit from the state of nature, non-coercive solutions are available to questions of both internal and external security, for both of which the state has typically been thought essential. Hoppe proposes an insurance model for defence which is more likely to prevent hostilities escalating than the present statist regime. As to the possible threat posed by a state to an adjacent non-state jurisdiction, defence insurance contracts held by members of the latter, coupled with the fact that they would not have been disarmed by a monopoly protection agency masquerading as a state, should mean that they could neutralize any such threat. Indeed, if anyone is guilty of fallacies, it is statists, like Edmundson, rather than the anarchists he attempts to call to account.

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