

# Defending Liberty

ESSAYS IN HONOR OF DAVID GORDON



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## CONTENTS

Introduction .....	ix
<i>Douglas B. Rasmussen</i>	
1. Laissez-Faire vs. “Flattening the Curve”: Lessons from Government Attempts to Deal with Economic and Health Disasters .....	1
<i>Roger E. Bissell</i>	
2. Nozick and the Natural Duty of Justice .....	39
<i>Billy Christmas</i>	
3. Avoiding the Political Realist-Idealist Dichotomy .....	63
<i>Douglas J. Den Uyl and Douglas B. Rasmussen</i>	
4. Liberals Need More and Better Cognition Theory .....	95
<i>Stephen R. C. Hicks</i>	
5. Epidemics as a Problem for Liberty .....	123
<i>Lester H. Hunt and R. Kevin Hill</i>	
6. Post-Marxist Populism in the Twenty-First Century .....	155
<i>Alejandra M. Salinas</i>	
7. Anarchy, Nozick, and Gordon .....	187
<i>Aeon J. Skoble</i>	
8. The Anti-Liberty Requirements of Affirmative Consent .....	199
<i>Jasmine Rae Straight</i>	
9. Economics and Ethics: Neither Independent nor Intertwined, But Mutually Relevant .....	227
<i>Jakub Bożydar Wiśniewski</i>	
Contributors .....	253
Index .....	257



## Introduction

The American notion [is] that the end of government is liberty, not happiness, or prosperity, or power, or the preservation of an historic inheritance, or the adaptation of national law to national character, or the progress of enlightenment and the promotion of virtue; [and] that the private individual should not feel the pressure of public authority, and should direct his life by the influences that are within him, not around him. . . .

Liberty is not a means to a higher political end. It is itself the highest political end.

—Lord Acton

**A**nyone who discovers that David Gordon is reviewing one's work immediately has two conflicting emotional responses. The first emotion is one of elation because one knows that one's work is going to be given a fair and thoughtful consideration by someone who knows what the important issues and questions are. The second emotion, however, is one of trepidation because one realizes that if one's argument has the slightest trace of ambiguity, or if one has not reasoned carefully, or left too many premises suppressed, then these will be duly noted. Either way for the person whose work is being reviewed, it is a win-win situation because it affords an opportunity to learn and make improvements—even if at times it can be painful.

The interesting thing about David Gordon reviews is that they are also essays, for they afford the reader a chance to not only gain insight about the work being considered but also the general subject matter being examined. This is the case, because David Gordon is a virtual walking encyclopedia, and because of this, he brings a wealth of information and insight to the subject matter that is being discussed. If you have not read Gordon's reviews, examine *An Austro-Libertarian View: Essays by David Gordon*, 3 Vols. (Mises Institute), and you will be well-rewarded for your effort. Here you see the work of an intellectual historian.

Besides being a master reviewer,<sup>1</sup> David is a senior fellow for the Mises Institute where he lectures and conducts colloquia. He is author of the following: *Resurrecting Marx: The Analytical Marxists on Freedom, Exploitation, and Justice*; *The Essential Rothbard*; *The Philosophical Origins of Austrian Economics*; *Introduction to Economic Reasoning*, and *Critics of Marxism*. Further, he is the editor of *Secession, State, and Liberty* and coeditor of H.B. Acton, *The Morals of Markets and Related Essays*.

David Gordon is also editor of the *Mises Review* and *The Journal of Libertarian Studies*. He publishes in such philosophy journals as *Analysis*, *British Journal of Political Science*, *Canadian Journal of Philosophy*, *Ethics*, *International Philosophical Quarterly*, *Journal of Libertarian Studies*, *Mind*, *Political Studies*, *Review of Austrian Economics*, and *Social Philosophy and Policy*. He has published eleven articles in *Analysis*.

To appreciate David's style of writing and method of analysis, one needs only to consider his essay, "Anscombe on Coming into Existence and Causation" (*Analysis* 44.2 [March 1984]: 52–54). Here he carefully shows that in terms of her own suppositions, Anscombe did not succeed in showing that there is a difficulty in supposing that something has come into existence at a particular time

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<sup>1</sup>He also publishes book reviews in the *International Philosophical Quarterly*, *Quarterly Journal of Austrian Economics*, and *Review of Austrian Economics*, as well as several book notes in *Ethics*. He has written approximately three hundred book reviews for his own journal, *The Mises Review*, and also written articles and reviews for *Chronicles* and *The American Conservative*. He has been a reviewer for *Library Journal* from 1979 to the present.



and place without supposing that it has a cause. “That we cannot tell whether something has come into existence without a cause is no reason against thinking that such a circumstance is possible” (p. 54). This essay is classic David Gordon, and one can appreciate it even if one does not have much sympathy for the standard Humean view of causation, which as a matter of fact Gordon does not. His primary concern is whether the argument is sound—are its premises true and its reasoning valid.

David Gordon earned his BA, MA, and Ph. D. in History from UCLA. He is a member of Phi Beta Kappa, and he was awarded the Rothbard Medal of Freedom from the Ludwig von Mises Institute in 2006. David is a powerful intellectual champion for liberty, who understands with the great classical liberal, historian Lord Acton that liberty is indeed the highest political end. He takes his task of defending liberty seriously. He does it with wisdom and style, and we have all benefited by it.

David has a unique intellect and sense of humor. He has been a good friend and intellectual colleague to many over the years. I am pleased to be included in this group, and I am proud to edit this collection of essays in his honor.

All of the essays in this volume cover a wide range of issues that have concerned David in one way or another for some time, and they all endeavor to follow his example when it comes to clarity and careful reasoning. They each do so in a unique way and style, and I have as much as possible tried not to impose unnecessary uniformity on these essays.<sup>2</sup> Here are the authors and their abstracts.

1. Roger E. Bissell, “Laissez-Faire vs. “Flattening the Curve”:  
Lessons from Government Attempts to Deal with Economic  
and Health Disasters”:

David Gordon has recently commented that “Even a small chance that emergency measures will permanently subvert civil liberties needs to be considered.” I concur and argue that despite certain issues concerning temporary inadequate knowledge of the problem’s magnitude and

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<sup>2</sup>I should also express my appreciation for the editorial assistance provided by Jakub Bożydar Wiśniewski and Judith Thommesen.

severity of the current health crisis, the pre-1929 laissez-faire approach to economic recessions should have been more widely employed from the very outset: it is superior in terms of moral and practical outcomes and is, more fundamentally, the only approach consistent with individual liberty.

2. Billy Christmas, “Nozick and the Natural Duty of Justice”:

The two main rival theories of political legitimacy are Lockean consent theory and the Kantian natural duty theory. The Lockean theory says that a political organization may only legitimately coerce if, *inter alia*, it is consented to by those it coerces. The Kantian theory says that we have a duty to the state because it is only through the state that we are able to exercise our duties to respect one another’s freedom. Our obligation to the state is therefore not acquired through any voluntary act, but is rather naturally incumbent upon us. Robert Nozick’s libertarianism is famously Lockean, however, his justification for the state involves no affirmative act on the part of the governed. Instead, he offers an “invisible hand argument” in which we come to have an obligation to the state in virtue of the processes through which that state emerged, even though none of them involve our expression of consent. In this essay I will argue that Nozick’s argument, with a little reconstruction, is a far more plausible alternative to both Lockean philosophical anarchism and Kantian statism. It affirms the normative importance of even imperfectly just coercive institutions that all acknowledge deference to, whilst affirming the normative reality of our rights outside of those contingent institutions. What is missing in Nozick’s account is the assurance problem. Kant thinks that it applied to anarchy; actually it applies to all situations of distrust.

3. Douglas J. Den Uyl and Douglas B. Rasmussen,  
“Avoiding the Political Realist-Idealist Dichotomy”:

So-called “political idealism” has come under attack in recent years from “political realism.” Political idealism was originally connected to the theorizing of John Rawls but

has since come to refer to any theory that does not begin with actual political practice and actors. In this essay we begin by outlining our own approach to political theory and then go on to show how within that framework both realism and idealism are made compatible. Against the realists, our framework allows us to argue both that realists cannot escape idealism completely and that the essence of politics is reconciliation, not conflict. Against idealists, we argue that our classical realist metaphysical and epistemological dispositions would require welcoming the work of realists without having to claim they represent the only theoretical procedure.

#### 4. Stephen R. C. Hicks, “Liberals Need More and Better Cognition Theory”:

When I say that liberalism is best, am I speaking the truth? Do the facts and the evidence and the arguments make my assertion justified? Consequently, is my belief objective—or subjective? Do I know it, or is mine just another opinion? Is it all “just” semantics—or do concepts have real meanings? Do statistics lie or capture probabilities? Is history written by the winners and so dismissible bias, or can we all genuinely learn from it?

In this essay I focus on two mistakes that regularly plague thinking about objectivity. One is the mistake of seeing only two options (intrinsicism and subjectivism) when in fact there are three. The second is making assumptions that implicitly demand omniscience or a view from nowhere—and taking the failure of human cognition to live up to those impossible standards as making objectivity impossible. Instead, we should start with actual human beings and discover how their cognitive capacities work and why objectivity arises as a need for them to strive for.

#### 5. Lester H. Hunt and R. Kevin Hill, “Epidemics as a Problem for Liberty”:

Faced with an epidemic of a deadly disease, humans have often had recourse to coercive non-pharmaceutical interventions (CNPIs), ranging in severity from requiring the wearing

of masks to shutting down all enterprises declared “non-essential” (lockdowns). Which CNPIs are compatible with liberty? It might seem that none are, but in this paper we will assume that “liberty” is actually a framework of person-and-property rights, such as are embodied in traditional Anglo-American common law, and that some coercive measures are not only compatible with such a framework, but actually required by it. Some CNPIs, such as (in some circumstances) isolating carriers of the disease, can easily be justified on the basis of such a framework of rights. Someone who infects another with a dangerous disease is violating their rights, even if the carrier does not know or actually disbelieves that they are infectious: this would mean that they are an “innocent threat” (Nozick) and defensive coercion against a sufficiently menacing innocent threat is justified, not because they deserve it (they are innocent) but because the person being defended has rights and does not have a duty to submit to being killed or injured. Other measures—such as banning large gatherings—can in some cases also be justified within this framework, but in these cases the justification is less straightforward and more constrained. The problem is that in enforcing a rule against large gatherings we are coercing, not only people who pose a threat to others, but in addition people who take adequate safety-steps and pose no threat at all. How can coercing the latter group be justified? It can be justified if the disease is sufficiently dire and the public health benefits of the rule sufficiently great that those people are fully compensated, via implicit in-kind compensation, by the rule itself. In certain dire circumstances, lockdowns can also be justified by such considerations, though here the people who bear the brunt of the rule may have to be compensated with cash payments collected from the people for whom the rule represents a net gain. It may be that the benefit from the rule that goes to those who gain from it is less than the costs inflicted on those it harms. In that case, the gainers would no longer be gainers if they were to compensate the victims of the rule. That would mean it would not be worth their while to do the one thing that is necessary to make the rule a just, non-exploitative one.

6. Alejandra M. Salinas, “Post-Marxist Populism in the Twenty-First Century”:

This essay presents an outline of the basic ideas put forward by the Marxist theoretical family in the last decades, and it analyzes the case of philosopher Ernesto Laclau (1935–2013). It points out the main resemblances and divergences between his work and the other Marxist formulations: the desire for political hegemony and the elimination of capitalism reveals its *Marxist* nature. The rejection of economic essentialism and historical determinism shows its *Post-Marxist* traits. Laclau’s work is ultimately a variety of Marxism in that it advances an anti-capitalist, anti-liberal theory, methodological collectivism, and unlimited State power. His apology for the “subversion and dislocation” of social life, the defense of unbridled political antagonism, and a hegemonic government challenge the core of classical liberal theory: the protection of free cooperative individual exchanges, the rule of law, and the design of a minimal government.

7. Aeon J. Skoble, “Anarchy, Nozick, and Gordon”:

In responding to my discussion of Nozick’s argument as to how the minimal state could arise without violating anyone’s rights, David Gordon objected that I misconstrue the coercive/monopolist status of the dominant protective agency. In this essay I discuss how Gordon’s interpretation of Nozick differs from mine but why in either case Nozick’s argument doesn’t quite succeed in defending the minimal state against individualist anarchism. I also discuss how Nozick’s argument can be repurposed to Gordon’s advantage in the debate between minimal state libertarians and anarchist libertarians.

8. Jasmine Rae Straight: “The Anti-Liberty Requirements of Affirmative Consent”:

The conventional wisdom that influences university policy on what is considered valid sexual consent has undergone radical change over the past twenty years. Valid consent

being the criteria that makes subsequent sexual behavior morally justified because the consent is morally transformative in the way that matters. Affirmative consent policies are now being used increasingly at universities across the country, as well as forming the basis for legislation in some U.S. states. University policies that define affirmative consent are varied, but policies generally require the consent to be voluntary, conscious, unambiguous, and ongoing. The consent can be communicated verbally or behaviorally as long as it is clear and continues throughout the sexual encounter. I will argue against both the unambiguous and ongoing requirements of sexual consent. I contend that we should reject the affirmative model of sexual consent because of the problems with these requirements and I then offer some reasons in favor of returning to a lack of dissent model of sexual consent.

9. Jakub Bożydar Wiśniewski, “Economics and Ethics:

Neither Independent nor Intertwined, But Mutually Relevant”:

This essay argues that the disciplines of economics and ethics are neither strictly interdependent, nor inextricably intertwined, but mutually relevant. Thus, it presents an alternative view to the one suggesting that economics and ethics should be kept strictly separate and the one suggesting that they should be combined into a hybrid discipline. More specifically, the present essay contends that there are four major ways in which economics and ethics can learn from each other while keeping their respective areas of competence intact. Negatively, economics can curb the excessive ambitions of normative theorizing, while positively it can demonstrate the normative potential of cooperative efficiency. On the other hand, negatively ethics can elucidate the normative preconditions of undertaking complex forms of social cooperation, while positively it can illustrate the role of moral resources in addressing various operational challenges. Finally, the essay concludes with the suggestion that the key to the proper understanding of the relationship between economics and ethics may lie in regarding the for-

mer as the meta-ethics of cooperation—i.e., the positive science of normative coordination.

As should be evident, these essays are all concerned in various and complex ways with the cause of individual liberty and of a society in which people practice moral responsibility through exercising their own choices. These essays seek to explain and defend liberty, and in so doing, honor the work and life of David Gordon. We hope that David enjoys them.

—*Douglas B. Rasmussen*





# Laissez-Faire vs. “Flattening the Curve”: Lessons from Government Attempts to Deal with Economic and Health Disasters

*Roger E. Bissell*

There are no libertarians in a pandemic.  
—Derek Thompson

**E**ven if the above tweet by *Atlantic* writer Derek Thompson<sup>1</sup> is not literally correct, liberty is not a free-floating ideal that can simply be waved about like the Gadsden Flag to rally freedom-fighters to the cause—and tossed to the wind when it is perceived that one’s cause is hopeless. Instead, it is a human value and political principle with deep conceptual roots and wide consequential branches; making the full case for it is never easy and often fraught with difficulty. This is rarely more so than now, at a time when the world is locked in a life and death struggle with a deadly virus—the so-called coronavirus, SARS-CoV-2, or COVID-19 for short—and with the accompanying social and economic disruption and damage. Concerns for the preservation, let alone the relevance, of individual liberty have been largely cast aside.

On the other hand, it is not impossible, and there will never be a *better* time than right now, to explore the nature and context of

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<sup>1</sup>March 3, 2020, online at <https://twitter.com/DKThomp/status/1234952340807077892>.

individual liberty and the proper role of government in defending it—and nothing like living through a severe, deliberately induced economic recession and a severe (perhaps also deliberately induced) pandemic to help motivate those explorations.

Conspiracy theories abound, and I will not delve into any of them here, not even the very existential question of whether this is a novel disease epidemic at all, rather than just another flu strain with deaths being borrowed, so to speak, from other disease categories, in order to perpetrate a hoax on the people of the world for political reasons. My own research has convinced me that such claims are false, that there truly *are* “excess deaths” this year, and that the disease and its reported death toll are real; but making that case is beyond the scope of this essay. I also will not examine the extent of the culpability of the People’s Republic of China for the origin and spread of COVID-19 from their country, and what therefore might be an appropriate response by the other countries of the world.

Those issues aside, then, how bad is the COVID-19 crisis? Does it rise to the level of drastic intervention by government in order to defend individual rights? Or, to put it another way, what limits do liberty and individual rights place on the use of government force to deal with the pandemic? These are the questions that we will explore for the rest of this essay.

As in other situations such as economic recessions or severe weather disasters that are met with calls for government action and the inevitable curtailments of individual liberty, the COVID-19 crisis has prompted calls for government to (as the saying goes) *do something*, in some cases ostensibly to mitigate if not completely prevent such damage and to decrease the spread and severity of the pandemic, but also in other cases opportunistically to gain more power and control and to shift the political and social landscape in a more favorable direction. In regard to the latter, the usual ideological warfare accompanying such situations has been considerably intensified in the present instance due to the pandemic’s unfortunate occurrence during not just a quadrennial Presidential campaign, but one of the most contentious ones in recent memory, and one whose results are still being determined as of this writing.

In addition, we are working through a sharp, largely self-induced recession in which unemployment quickly spiked to nearly 15 percent

during April 2020 and has more gradually receded to just under 7 percent at the current time (November 2020).<sup>2</sup> Although voluntary measures by the entertainment, hospitality, and other service sectors had already had a substantial effect on economic activity by late March,<sup>3</sup> that effect was intensified by the federal government's appeal to states and localities to lockdown for "15 days to slow the spread" in order to avoid overwhelming healthcare facilities.<sup>4</sup> This turned into "30 days to slow the spread"<sup>5</sup> and then into an indefinitely longer shutdown in many areas that has only gradually and erratically been lifted.<sup>6</sup> Harsh criticism has been leveled at states like Florida for allegedly reopening their economies and schools too soon (or like South Dakota for not locking down at all).<sup>7</sup> Meanwhile,

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<sup>2</sup>Bureau of Labor Statistics, The U.S. Department of Labor, "The Employment Situation—October 2020," November 6, 2020, online at <https://www.bls.gov/news.release/pdf/empst.pdf>.

<sup>3</sup>See Abigail Devereaux, "Longer Lockdowns Associated with Much Worse Economic Outcomes," *AIER*, August 1, 2020, online at [aier.org/article/longer-lockdowns-associated-with-much-worse-economic-outcomes/](http://aier.org/article/longer-lockdowns-associated-with-much-worse-economic-outcomes/). The United Nations Conference on Trade and Development (UNCTAD) asserted that by mid-April 2020, "strict measures deployed to combat the pandemic have nearly destroyed personal service sectors such as tourism, hospitality and transport." ("Coronavirus deals severe blows to services sectors," *UNCTAD*, April 14, 2020, online at <https://unctad.org/news/coronavirus-deals-severe-blow-services-sectors>.)

<sup>4</sup>President Donald J. Trump and the White House Coronavirus Task Force, "15 Days to Slow the Spread," March 15, 2020, online at <https://www.whitehouse.gov/articles/15-days-slow-spread/>.

<sup>5</sup>Trump et al, "30 Days to Slow the Spread: The President's Coronavirus Guidelines for America," March 30, 2020, online at [https://www.whitehouse.gov/wp-content/uploads/2020/03/03.16.20\\_coronavirus-guidance\\_8.5x11\\_315PM.pdf?](https://www.whitehouse.gov/wp-content/uploads/2020/03/03.16.20_coronavirus-guidance_8.5x11_315PM.pdf?) Also see Tamara Keith, Franco Ordenez, Ayesha Rascoe, and Roberta Rampton, "How 15 Days Became 45: Trump Extends Guidelines to Slow Coronavirus," *National Public Radio*, March 30, 2020, online at <https://www.npr.org/2020/03/30/822448199/how-15-days-became-45-trump-extends-guidelines-to-slow-coronavirus>.

<sup>6</sup>Dan Sinker, "Covid-19 150 Days Out: Trump's 15 Day Plan to Slow the Spread 150 Days Later," *Esquire*, August 13, 2020, accessed online at <https://www.esquire.com/news-politics/a33587951/coronavirus-slow-the-spread-one-hundred-fifty-day-anniversary/>.

<sup>7</sup>Jocelyn Grzeszczak, "Florida Governor Responds After Fauci's Remark About Reopening Too Soon, Says There's 'No Justification to Not Move Forward,'" *Newsweek*, July 11, 2020, online at <https://www.newsweek.com/florida-governor-responds-faucis-remark>

other states still suffer draconian lockdowns—such as California, where the Disney Company has laid off 28,000 employees and Governor Newsom has urged restaurant diners to raise their face masks to cover their mouths between bites of food; and Michigan, where the state Supreme Court has given Governor Whitmer only a partial roll-back of her unilateral shutting down of the state’s businesses, schools, and social gatherings.<sup>8</sup>

As a result, countless businesses have permanently closed, and many so-called non-essential workers are struggling to make ends meet. Massive though sporadic government assistance programs for the unemployed and for small businesses have provided only partial compensation for lost wealth and income, and the collateral damage of deaths due to untreated medical conditions, alcohol and drug abuse, violent crime and domestic violence, and suicide have yet to be tabulated with the same care and precision as the 250,000-plus victims of the pandemic.<sup>9</sup>

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about-state-reopening-too-soon-says-theres-no-1517140; Karma Allen, “South Dakota Gov. Kristi Noem says lockdowns are ‘useless’ as state’s COVID-19 cases soar,” *ABC News*, October 6, 2020, online at <https://abcnews.go.com/US/south-dakota-gov-kristi-noem-lockdowns-useless-states/story?id=73451385>.

<sup>8</sup>Bloomberg, “California theme parks must stay closed for now, Newsom says,” *Los Angeles Times*, October 7, 2020, online at <https://www.latimes.com/business/story/2020-10-07/california-theme-parks-disneyland-reopening-not-imminent>; and Caitlin O’Kane, “California governor’s office tells diners to wear masks ‘in between bites,’” *CBS News*, October 6, 2020, online at <https://www.cbsnews.com/news/gavin-newsom-california-face-mask-restaurant/>; David Eggert and Ed White, “Michigan governor’s virus powers upended with court ruling,” *The Washington Post*, October 2, 2020, online at <https://www.newsweek.com/florida-governor-responds-faucis-remark-about-state-reopening-too-soon-says-theres-no-1517140>.

<sup>9</sup>The Centers for Disease Control says that only about 5 percent of these had no “comorbidities” or predisposing conditions making them significantly more vulnerable to the virus. Had the 2018–19 and 2019–20 flu seasons not been lighter than the 2017–18 season, there would have been thousands fewer medically vulnerable elderly persons to be taken by the coronavirus pandemic, as can be inferred from various graphs on the website of the CDC. See “Excess Deaths Associated with Covid-19,” online at [https://www.cdc.gov/nchs/nvss/vsrr/covid19/excess\\_deaths.htm](https://www.cdc.gov/nchs/nvss/vsrr/covid19/excess_deaths.htm). See also Ivor Cummins, “Viral Issue Crucial Update Sept 8<sup>th</sup>: The Science, Logic, and Data Explained!” September 8, 2020, online at <https://www.youtube.com/watch?v=NxhGch0C6hE>; Cummins, “USA Viral Update—the Latest Data Explained in Brief—Know the Data!” October 10, 2020, online

At the same time, in response to outrage over alleged police brutality, several straight months of rioting, arson, and looting have occurred in over 140 American cities where, despite the cost of the damage already running to an estimated \$1–2 billion,<sup>10</sup> mayors and state governors have for the most part allowed such activities to continue as (so-called) mostly peaceful protests, ordering their police to stand down and/or often releasing rioters shortly after being apprehended. While these demonstrators and/or rioters have been allowed mostly free rein, law-abiding people wishing to attend church or social gatherings have been forbidden by decree to do so as part of state or locally imposed COVID-19 policies.

As the foregoing selectively sketched summary attempts to convey, our current situation is not limited to one easily defined and analyzable issue of liberty or individual rights, but instead is a complex circumstance that includes a major health crisis, a major economic crisis, and severe social unrest and violence. Each of them presents its own cluster of specific challenges, and all of them interact in ways that mutually intensify them and exacerbate attempts to solve them.

In an effort to divide and perhaps conquer,<sup>11</sup> this essay will focus primarily on the COVID-19 pandemic aspect of our present difficulties, highlighting its challenges to individual liberty and exploring ways to communicate the advantages of the laissez-faire approach to solving political, economic, and social problems. In particular, I will argue that, despite certain issues concerning temporary inadequate knowledge of the magnitude and severity of the problem, the

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at <https://www.bitchute.com/video/013L9J7WhuU/>; and Cummins, "Key Viral Update Oct 30<sup>th</sup> – A Riposte to Anonymous Twitter Attacks," October 30, 2020, online at <https://www.bitchute.com/video/TRbtGd70-Ow/>. Cummins makes a parallel case about recent flu seasons in Sweden in "THE Important Lesson from Sweden—Short, Sharp, and Viral!" October 9, 2020, online at <https://www.youtube.com/watch?v=D0KyWBksWrU>.

<sup>10</sup>Jennifer A. Kingson, "Exclusive: \$1 billion-plus riot damage is most expensive in insurance history," *Axios* (September 16, 2020), online at <https://www.axios.com/riots-cost-property-damage-276c9bcc-a455-4067-b06a-66f9db4cea9c.html>.

<sup>11</sup>A vigorous attempt to *unite* and conquer was made by Angelo Codevilla in "The Covid Coup," *The American Mind*, August 8, 2020, online at <https://www.americanmind.org/essays/the-covid-coup/>.

pre-1929 laissez-faire approach to economic recessions should have been more widely employed in the current health crisis from the very outset. It is superior in terms of moral and practical outcomes and is, more fundamentally, the only approach consistent with individual liberty.

## THE PERSPECTIVE AND FRAMEWORK OF MY ARGUMENT

So much good material has been written in defense of a laissez-faire approach to the pandemic, it is tempting to create a pastiche of material from various sources such as the American Institute for Economic Research, the Mises Institute, the Foundation for Economic Education, and the Heritage Foundation and be done with it. However, I think it would actually be more helpful to come at the subject from a much different angle—to view it from 50,000 feet, as it were, defining and carrying out a multi-level approach that incorporates the analytical insights of Chris Matthew Sciabarra, Douglas B. Rasmussen, and Douglas J. Den Uyl.<sup>12</sup>

My methodological orientation is to view such complex issues through the lens of Sciabarra's version of dialectics which he calls "dialectical libertarianism"<sup>13</sup> and which he says is "an indispensable tool for any defense of human liberty."<sup>14</sup> Sciabarra writes of dialectical libertarianism as ideally being "the seamless conjunction of a realist-individualist-libertarian content with a radical, dialectical

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<sup>12</sup>I gratefully acknowledge the value of over 120 combined years of personal and intellectual association with Dr.'s Sciabarra, Rasmussen, and Den Uyl, and I encourage readers to explore the complex, nuanced development of their respective ideas in the works I have cited. I do, however, accept full responsibility for any errors or omissions I have made in interpreting and applying their ideas herein.

<sup>13</sup>Chris Matthew Sciabarra, *Total Freedom: Toward a Dialectical Libertarianism* (College Park: Pennsylvania State University Press, 2000).

<sup>14</sup>Chris Matthew Sciabarra, "Toward a Dialectical Libertarianism" in *The Dialectics of Liberty: Exploring the Context of Human Freedom*, eds. Roger E. Bissell, Chris Matthew Sciabarra, and Edward W. Younkins (Lanham, Maryland: Lexington Books, 2019), p. 26.

method.”<sup>15</sup> I wholeheartedly embrace this synthesis of method and content, and I hope to do it some justice here.

Sciabarra has offered a number of illuminating discussions of the nature of dialectics more generally, which he refers to in simple, non-technical terms as “the art of context-keeping,” and which he roots firmly in the writings of Aristotle, who “presented numerous techniques by which one might gain a more complete picture of an issue by...[shifting] one’s perspective.”<sup>16</sup> He explains: “Understanding the wider context of a single problem by comprehending it from different vantage points and on different levels of generality would make transparent the relationships among diverse problems as both preconditions and effects of the system they jointly constituted.”<sup>17</sup>

One such pair of vantage points that is especially relevant to the COVID-19 crisis is the immediate or short-term vs. long-range consequences of an action or policy. As the great French economist Frédéric Bastiat wrote:

The entire difference between a bad and a good Economist is [that a] bad one relies on the visible effect while the good one takes account both of the effect one can see and of those one must foresee...[A] bad Economist will pursue a small current benefit that is followed by a large disadvantage in the future, while a true Economist will pursue a large benefit in the future at the risk of suffering a small disadvantage immediately. This distinction is also true, moreover, for...the moral code.<sup>18</sup>

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<sup>15</sup>Chris Matthew Sciabarra, *Ayn Rand: The Russian Radical*, 2nd edition (College Park: Pennsylvania State University Press [1995] 2013), p. 18.

<sup>16</sup>Sciabarra, “Toward a Dialectical Libertarianism,” p. 35.

<sup>17</sup>*Ibid.*, p. 21.

<sup>18</sup>Frédéric Bastiat, “What is seen and what is not seen, or political economy in one lesson” [July 1850] in *Selected Essays on Political Economy*, trans. Seymour Cain, ed. George B. de Huszar, introduction by F.A. Hayek (Irvington-on-Hudson: Foundation for Economic Education, 1995). Online at <https://oll.libertyfund.org/pages/wswns>. Bastiat’s thesis was popularized for 20th century readers by Henry Hazlitt, who described his *Economics in One Lesson* (New Rochelle, New York: Arlington House, 1946) as “a modernization, extension and generalization of the approach found in Bastiat’s pamphlet,” p. 10.

Equally important is Sciabarra's insight about how to resolve a conflict between two schools of thought, each of which "in its partiality and one-sidedness, perpetuates a distorted view."<sup>19</sup> The task of the dialectical thinker is "to uncover the common roots of apparent opposites" and to "present an integrated alternative that examines the premises" that underlie the opposition, so that it can be transcended with a more fundamental and complete view.<sup>20</sup> Sciabarra notes that "In some cases, the transcendence of opposing points of view provides a justification for rejecting both alternatives as false. In other cases, the dialectical thinker attempts to clarify the genuinely integral relationship between spheres that are ordinarily kept separate and distinct."<sup>21</sup> Both kinds of cases will be evident later in this essay.

A couple of dialectical tools Sciabarra discusses in his works will be particularly useful in this study. One, shown below, is my own (work-in-progress) modification of Sciabarra's Tri-Level Model of Social Relations.<sup>22</sup> My version combines Sciabarra's Tri-Level diagram with his diagram of spheres and tiers,<sup>23</sup> enlarging upon the

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<sup>19</sup>Sciabarra, *Russian Radical*, p. 148.

<sup>20</sup>*Ibid.*, p. 15.

<sup>21</sup>*Ibid.*, p. 15.

<sup>22</sup>The original version of Sciabarra's Tri-Level diagram is in his *Russian Radical*, p. 278, and an updated version is in his *Total Freedom*, p. 380. There is considerable discussion of the Tri-Level model in each of the above-cited works by Sciabarra. He offers it as a schematization of the kind of social criticism and analysis of statist relations of power that Rand uses throughout much of her social and political commentary. See especially *Russian Radical*, pp. 276–358. There is, of course, nothing magical about the number three. Bertell Ollman, in *Dialectical Investigations* (New York: Routledge, 1993) discusses "seven major levels of generality into which Marx subdivides the world" (pp. 53–67), the first three being roughly equivalent to those in Sciabarra's model. A somewhat different framework, comprising four levels of social analysis, is proposed by Oliver Williamson in "The New Institutional Economics: Taking Stock, Looking Ahead." *Journal of Economic Literature* 38, no. 3: 595–613. Sciabarra cites Institutionalism as adding valuable perspective, complementary to that from Austrian economic analysis (*Total Freedom*, pp. 376–7).

<sup>23</sup>Sciabarra, *Russian Radical*, pp. 298, 338. A sphere in Sciabarra's tiers discussion appears to be equivalent to a level in his previous discussion on p. 278; this served to motivate my combining the two diagrams. It should be noted that the levels in Sciabarra's original version were referred to in somewhat different terms as Level



latter, with the tiers being displayed below horizontally as a set of three “phases” on each level.<sup>24</sup>

	“Phase 1” Implicit/ tacit ideas and values	“Phase 2” Explicit/ articulated ideas and values	“Phase 3” Goal-directed actions and outcomes
Level 3 Institutional- structural	L3-P1 common law (?)	L3-P2 constitution, laws, regulations	L3-P3 procedures, programs, policies, mandates
Level 2 Society qua system	L2-P1 “lifestyle,” predominant collective sense of life	L2-P2 culture’s dominant philosophical outlook	L2-P3 political, economic, social trends
Level 1 Individual qua system	L1-P1 sense of life subconscious	L1-P2 conscious convictions	L1-P3 individual course of action

*Adapted from Sciabarra 2000 & Sciabarra [1995] 2013.  
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The basic purpose of my adaptation is to capture three stages or phases in the unfolding of social interactions on each of the three levels of social structure.<sup>25</sup> Ayn Rand stated the pattern shown in

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3 (L3), Structural (Economic/Political), Level 2 (L2), Cultural (Linguistic/Ideological), and Level 1 (L1), Personal (Psycho-Epistemological/Ethical).

<sup>24</sup>A discussion comparing this modification with Sciabarra’s original version is online at <https://www.facebook.com/photo.php?fbid=10158011099444803&set=p.10158011099444803&type=3>. The original is posted online at <https://chrismatthewsciabarra.com/images/trilevel.jpg>.

<sup>25</sup>To be clear, this is my interpretation of Sciabarra’s tiers, which I see as being in a diachronic, process interrelationship, as against the synchronic, structural relationships between his levels. See also Ollman, *Dialectical Investigations*, pp. 133–45.

the phases contained in the bottom row of the diagram in regard to individual sense of life and then extended it to the sense of life or “life style” of a nation;<sup>26</sup> I have further attempted to extend it to the institutional level. Rand wrote:

In order to form a hypothesis about the future of an individual, one must consider three elements: his present course of action, his conscious convictions, and his sense of life. The same elements must be considered in forming a hypothesis about the future of a nation.<sup>27</sup>

Not represented in this diagram, there are two-way relationships of influence (36 in all) between every pair of the nine aspects (level-phase combinations) of social relations; and the reader is encouraged to visualize arrows connecting each of the nine boxes to each of the others. For the most part, my analysis will focus on things taking place in the four upper-right-hand boxes where L2, L3, P2, and P3 intersect.<sup>28</sup>

Another dialectical tool I will use is the analysis of false alternatives. In the second book of his *Dialectics and Liberty Trilogy*, Sciabarra writes of how Rand “rejected nearly every imaginable dichotomy,”<sup>29</sup> and he more recently has noted that she viewed such false alternatives as often being “variants of the mind-body dichotomy,” among which was “morality versus prudence”—or, in Randian

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<sup>26</sup>See Ayn Rand, *The Romantic Manifesto: A Philosophy of Literature* 2<sup>nd</sup> edition (New York: Signet, 1975), pp. 25–33, and Ayn Rand, *Philosophy Who Needs It* (Indianapolis: Bobbs-Merrill, 1982), pp. 250–62. See also Sciabarra, *Russian Radical*, pp. 297–300.

<sup>27</sup>Rand, *Philosophy Who Needs It*, p. 250. Clearly, the three elements Rand refers to correspond to the boxes labeled L1-P3, L1-P2, and L1-P1, respectively, in the preceding diagram.

<sup>28</sup>One issue that I will *not* be addressing here, but which has great personal and social significance, is the psychological effect that pandemic-related policies (L3-P3) and trends (L2-P3) have on individual sense of life (L1-P1) and social “life-style” (L2-P1), as well as the equally intangible but important influence that the latter have on the former. (We can think of this as the resilience vs. fragility of “the American spirit” in the face of harsh governmental control.)

<sup>29</sup>Sciabarra, *Russian Radical*, p. 420, n. 5.

terms, *the moral vs. the practical*. "Such false dichotomies," Sciabarra says, "obscure the essentially *integrated* nature of human being."<sup>30</sup> Or, as Rand more pointedly put the matter, in life-and-death terms:

If the practical, whatever you must practice to exist, whatever works, succeeds, achieves your purpose, whatever brings you food and joy, whatever profits you, is evil—and if the good, the moral, is the impractical, whatever fails, destroys, frustrates, whatever injures you and brings you loss or pain—then your choice is *to be moral or to live*.<sup>31</sup>

As we will also see, the moral vs. the practical dichotomy in particular has operated in very significant ways during this pandemic to obscure the essentially integrated nature of human *society*, by offering the false choice of *human decency or human prosperity*. Underlying this false alternative is, in Sciabarra's words, "the genuinely integral relationship between spheres that are ordinarily kept separate and distinct"—in the present case, what Henry Hazlitt calls "the ethical and the economic point of view, or...Ethics and Economics," which, as he states, "are, in fact, intimately related."<sup>32</sup> You might never know it, to hear some of the partisans of laissez-faire and lockdowns, who seem to be at fundamental loggerheads over whether or not to lockdown the economy and society, and for how extensively or how long. However, Hazlitt notes, as soon as

we begin to discuss the desirability of one economic *policy* as compared with another...we have entered the realm of Ethics...Ethical conclusions...cannot be arrived at independently of, or in isolation from, analysis of the economic consequences of institutions, principles, or rules of action.

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<sup>30</sup>Sciabarra, "Toward a Dialectical Libertarianism," p. 26.

<sup>31</sup>Ayn Rand, *Atlas Shrugged* (New York: Random House, 1957), p. 1053, emphasis added.

<sup>32</sup>Henry Hazlitt, *The Foundations of Morality* (New York: Van Nostrand, 1964), p. 301, emphasis in original.

There is hardly an ethical problem, in fact, without its economic aspect. Our daily ethical decisions are in the main economic decisions, and nearly all our daily economic decisions have, in turn, an ethical aspect.

Moreover, it is precisely around questions of economic organization that most ethical controversy turns today... [I]t is futile today to defend [capitalism] merely on technical grounds (as being more productive, for example) unless we can show also that the socialist attacks on ethical grounds [of its being materialistic, selfish, unjust, immoral, callous, cruel, etc.] are false and baseless.<sup>33</sup>

Yet another Aristotelian dialectical tool with specific application to this issue is revealed by the nature of *definitions*, which we form, Aristotle says, in order “to make known the term stated, and we make things known by taking...such [terms] as are *prior* and more intelligible.”<sup>34</sup> To Aristotle, this was a “commonplace rule,”<sup>35</sup> and while often unnamed in the tradition, it is variously stated as requiring that definitions be “essential,” “basic,” or “fundamental.”<sup>36</sup> Rand has dubbed this “the rule of fundamentality,”<sup>37</sup> and it is among a number of her epistemological insights that, in Sciabarra’s words, “merit consideration in their own right as texts in *dialectical instruction*.”<sup>38</sup> That Aristotle felt the same way about the dialectical importance of fundamentality in definitions is clear in his recommendation to “get a good stock of definitions; and have those of

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<sup>33</sup>Ibid., pp. 301–2.

<sup>34</sup>Aristotle, *Topics* 141<sup>a</sup>27–29, in *The Works of Aristotle*, volume 1, trans. W. D. Ross; volume 8 of *Great Books of the Western World*, ed. Robert Maynard Hutchins (Chicago: Encyclopedia Britannica, 1952), p. 194, emphasis added.

<sup>35</sup>Ibid., 142<sup>b</sup>20, p. 196.

<sup>36</sup>For a trifecta, there is this by Francis H. Parker and Henry B. Veatch: “Definitions should be essential (fundamental or basic).” *Logic as a Human Instrument* (New York: Harper & Brothers, 1959), p. 59.

<sup>37</sup>Ayn Rand, *Introduction to Objectivist Epistemology: Expanded Second Edition*, Harry Binswanger and Leonard Peikoff, eds. (New York: Meridian, 1990), p. 45.

<sup>38</sup>Sciabarra, *Total Freedom*, p. 138–9, emphasis added.

familiar and *primary* ideas at your fingers' ends: for it is through these that reasonings are effected."<sup>39</sup>

Since, in any given context of knowledge, there can only be one definition of the same thing ("for of each real object the essence is single"<sup>40</sup>), that unique definition is the one stated in fundamental terms—that is, according to priority and intelligibility. Or, as Rand has formulated it: the essential or fundamental characteristic is, metaphysically, "that distinctive characteristic which makes the greatest number of others possible" and, epistemologically, "the one that explains the greatest number of others."<sup>41</sup> The first portion of these formulations is the key to how I propose to use the rule of fundamentality: the idea of primaries trumping things that follow from them or, as H. W. B. Joseph elaborated on the idea that definitions "must give the essence of that which is defined...the attributes included in the definition should always be such as are *the ground of others rather than the consequences*."<sup>42</sup>

With these tools at the ready, what intellectual handiwork can we perform upon the currently pressing matter of individual liberty in the face of a serious health crisis? The general approach in dialectically resolving disputed issues is to first lay out the two (or more) positions on the matter, comparing and contrasting them—then to identify whatever facts one or both positions may not be satisfactorily accounting for and which renders them one-sided and inadequate in dealing with the issue—then identifying the underlying false premise (if any) they may hold in common and the correct premise that they are lacking—and then resolving the dispute in terms of the new perspective uncovered in the preceding process. That is the approach I will follow in the remainder of this essay.

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<sup>39</sup>Aristotle, *Topics*, 163<sup>b</sup>19–21, p. 222, emphasis added.

<sup>40</sup>*Ibid.*, 141<sup>a</sup>32–35, p. 194.

<sup>41</sup>Rand, *Introduction to Objectivist Epistemology*, p. 45.

<sup>42</sup>H. W. B. Joseph, *An Introduction to Logic* (Oxford: Oxford University Press, 1916), p. 111, emphasis added.

**THE CURE VERSUS THE DISEASE:  
DUKING IT OUT IN THE REALM OF THE  
MORAL VS. THE PRACTICAL**

Liberty-oriented thinkers have long studied the attempts of governments to mitigate economic crises and collapses and have a rich data base from which to compare instances in which a hands-off approach was taken with those involving significant government intervention. Situations involving deadly communicable diseases during the past couple of centuries or so have increasingly come under similar scrutiny, and the current pandemic offers a unique opportunity to examine the varied efforts of governments of numerous cities, states, and countries to cope with the difficulties in not one but both areas. As I will show, there is a strong parallel between how economic recessions were handled by the federal government before and after 1929 and how it handled pandemics prior to and during 2020.

Recessions and depressions prior to 1929, even severe ones, were allowed to heal themselves without the government intervening, and while they were often difficult to endure, they were quickly over and done with. As Murray Rothbard notes:

Generally, depressions last a year or two; prices and credit contract sharply, unsound positions are liquidated, unemployment swells temporarily, and then rapid recovery ensues. The 1920–21 experience repeated a familiar pattern, not only of such hardly noticeable recessions as 1899–1900 and 1920–1921, but also of such severe but brief crises as 1907–1908 and 1819–1821. Yet the Great Depression that ignited in 1929 lasted, in effect, for eleven years.<sup>43</sup>

Similarly, Mark Honigsbaum points out in regard to the 1957 influenza epidemic, once outbreaks occurred in the United Kingdom, “while some members of the College of General Practitioners

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<sup>43</sup>Murray N. Rothbard, *America’s Great Depression* (New York: Van Nostrand, 1963), p. 1.

called for the UK Government to issue a warning about the dangers presented by the virus and coordinate a national response, the ministry of health demurred. Instead, the virus was permitted to run its course.” This so-called Asian flu ended up killing over a million worldwide, and approximately 20,000 in the UK and 80,000 in the United States.<sup>44</sup> Honigsbaum also notes that the 1968 influenza epidemic, the so-called Hong Kong flu, killed between one and four million globally, yet “there were few school closures and businesses, for the most, continued to operate as normal.”<sup>45</sup> As for the United States, according to the National Institutes for Health, there was no national pandemic policy until 1978.<sup>46</sup>

Thus, just as “*Laissez-faire* was, roughly, the traditional policy in American depressions before 1929,”<sup>47</sup> so it was the traditional American pandemic policy until 1978—though, for all intents and purposes, until just this year. Similarly, just as economic *laissez-faire* “was the policy dictated both by sound theory and by historical precedent,” but in 1929 “was rudely brushed aside,”<sup>48</sup> so was the precedent of pandemic *laissez-faire* emphatically discarded in 2020. As Jeffrey A. Tucker put it regarding the coronavirus epidemic

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<sup>44</sup>Mark Honigsbaum, “The art of medicine: Revisiting the 1957 and 1968 influenza pandemics,” *The Lancet* 395 (June 13, 2020), p. 1824, online at [https://doi.org/10.1016/S0140-6736\(20\)31201-0](https://doi.org/10.1016/S0140-6736(20)31201-0).

<sup>45</sup>*Ibid.*

<sup>46</sup>John Iskander, Raymond A. Strikas, Kathleen F. Gensheimer, Nancy, J. Cox, and Stephen C. Redd, “Pandemic Influenza Planning, United States, 1978–2008,” *Emerging Infectious Diseases* 19, no. 6 (June 2013), pp. 879–85, online at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3713824/>.

<sup>47</sup>Rothbard, *America’s Great Depression*, p. 167, emphasis in original.

<sup>48</sup>*Ibid.*, p. 168. Also see Robert P. Murphy, “The Depression You’ve Never Heard Of: 1920–21,” *Foundation for Economic Education*, November 18, 2009, online at <https://fee.org/articles/the-depression-youve-never-heard-of-1920-1921/>; Thomas E. Woods, Jr., “The Forgotten Depression of 1920,” *The Intercollegiate Review* 44, no. 2 (Fall 2009), pp. 22–29, online at <https://isi.org/intercollegiate-review/warren-harding-and-the-forgotten-depression-of-1920/>; James Grant, *The Forgotten Depression—1921: The Crash That Cured Itself* (New York: Simon & Schuster, 2014); Ralph Benko, “The Biggest Recession You’ve Never, Ever Heard Of,” *Forbes*, February 2, 2015, online at <https://www.forbes.com/sites/ralphbenko/2015/02/02/the-biggest-recession-youve-never-ever-heard-of/>.

response: “Nothing like this has been tried in the whole history of humanity, certainly not on this scale.”<sup>49</sup>

What kinds of precedent-breaking things were done in each case? In 1929 and following years, Rothbard points out, the federal government, under the leadership of both President Herbert Hoover and President Franklin Roosevelt, carried out “an anti-depression program marked by extensive governmental economic planning and intervention—including bolstering of wage rates and prices, expansion of credit, propping up of weak firms, and increased government spending (e.g., subsidies to unemployment and public works).”<sup>50</sup> In 2020, as Tucker enumerates: “The methods were the same in nearly every country. Ban large gatherings. Close schools. Shutter businesses. Enforce stay-home orders. Mandate human separation. Masks. Travel restrictions.” More: “Billions of lives fundamentally altered. Economies wrecked. Centuries-old traditions of liberty and law thrown out. Police states everywhere.”<sup>51</sup>

We have been told by experts such as Dr. Anthony Fauci that even with stringent mitigation efforts in dealing with the COVID-19 pandemic, “it will be easily by the end of 2021, and perhaps even into the next year, before we start having some semblances of normality.”<sup>52</sup> Notably, however, “we” does not include countries such as Sweden, which received harsh criticism for the light hand it took as it passed through the pandemic phase during the four-month period from mid-March to mid-July, peaking at just over 110 daily deaths in mid-April, the numbers steadily falling off from that point, displaying three bell-curve patterns characteristic of pandemic outbreaks. Here is that diagram, as displayed on February 16, 2020:<sup>53</sup>

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<sup>49</sup>Jeffrey A. Tucker, “The Virus Doesn’t Care about Your Policies,” *AIER*, July 31, 2020, online at <https://www.aier.org/article/the-virus-doesnt-care-about-your-policies/>.

<sup>50</sup>Rothbard, *America’s Great Depression*, p. 168.

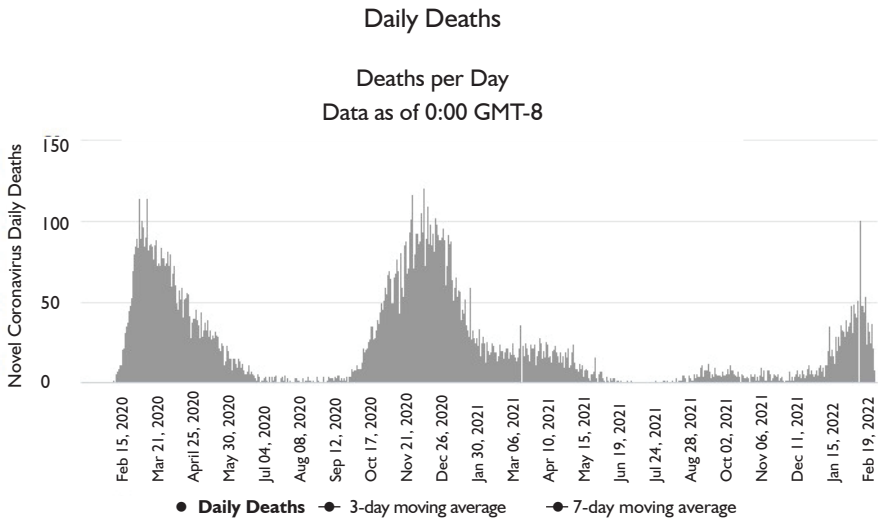
<sup>51</sup>Tucker, “The Virus Doesn’t Care...”

<sup>52</sup>Madeline Holcombe, Holly Yan, and Amir Vera, “US may not be back to normal until 2022, Fauci says,” *CNN*, October 28, 2020, online at <https://www.cnn.com/2020/10/28/health/us-coronavirus-wednesday/index.html>.

<sup>53</sup><https://www.worldometers.info/coronavirus/country/sweden/>.



## Daily New Deaths in Sweden



This pattern was first uncovered in 1840 by a British epidemiologist and statistician, William Farr.<sup>54</sup> He theorized from data about the preceding smallpox outbreak that the infection process during the epidemic was mirrored, after some time-lag, by the resulting deaths, and that, due to inadequate and variable testing for the infection, the peak and fall-off in deaths could be a useful stand-in for the infection process itself. Based on the time-lag between infection and death, the peak and descent of death figures could be used as an indication that the infection had already substantially subsided. This information would aid in the process of safely reopening societies that had been locked down. On the assumption that

<sup>54</sup>See Carl Heneghan and Tom Jefferson, “COVID-19: William Farr’s way out of the Pandemic,” *Center for Evidence-Based Medicine*, April 11, 2020, online at <https://www.cebm.net/covid-19/covid-19-william-farrs-way-out-of-the-pandemic/>. See also William Farr, “Causes of Death in England and Wales: Letter to the Registrar-General,” June 4, 1840, Appendix to *Annual report of the Registrar-General of births, deaths, and marriages in England*. (London: H.M.S.O., 1839-1922), online at <https://babel.hathitrust.org/cgi/pt?id=njp.32101064041955&view=1up&sseq=71>.

the predicted time-lag between COVID-19 infection and deaths is between about 21 and 28 days,<sup>55</sup> the April 15, 2020 peak in deaths, in Sweden, for instance, thus also provides, in retrospect, the useful inference that its COVID-19 outbreak peaked sometime between March 17 and March 25.

After three months at next to zero daily deaths, Sweden has for about three weeks (as of this writing) been in what might be a seasonal “endemic” recurrence of the virus, with about 5–10 daily deaths.<sup>56</sup> By all accounts and all appearances, Sweden is back to “normal,” and it is now barely in the top 20 countries for coronavirus mortality, at one time having been much higher on the list. Most tellingly, reported *The New York Times* in late September, although “many European countries are imposing new restrictions,” in response to new outbreaks, “political leaders, anxious to avoid unpopular and economically disastrous lockdowns, are relying mostly on social-distancing measures, while trying to preserve a degree of normalcy, with schools, shops, restaurants and even bars open. In essence, some experts say, they are quietly adopting the Swedish approach.”<sup>57</sup> Antoine Flauhault, director of the Institute for Global Health, in Geneva, was quoted as saying that although “all of the European countries are more or less following the Swedish

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<sup>55</sup>Heneghan and Jefferson, “COVID-19: William Farr’s way out...”

<sup>56</sup>Ibid. Also on this web site, compare Sweden’s new cases and daily deaths graphs with those of northeastern U.S. states and western European countries also heavily struck by the pandemic in the spring but pursuing considerably more stringent policies—e.g., New York: <https://www.worldometers.info/coronavirus/usa/new-york/>, and Ireland: <https://www.worldometers.info/coronavirus/country/ireland/>. The bell-curves of daily deaths and the steady fall-off to near-zero are strikingly similar, *with and without lockdowns*. In this regard, also see Codevilla, “The Covid Coup;” and Tucker, “The Virus Doesn’t Care...,” who writes: “Prof Isaac Ben-Israel, head of the Security Studies program at Tel Aviv University and the chairman of the National Council for Research and Development, looked at the data around the world and concluded that the virus comes and goes after 70 days regardless of the policies deployed. He found no relationship at all between locking down and transmission and death.”

<sup>57</sup>Thomas Erdbrink, “Vilified Early Over Lax Virus Strategy, Sweden Seems to Have Scourge Controlled,” *The New York Times*, September 29, 2020, online at <https://www.nytimes.com/2020/09/29/world/europe/sweden-coronavirus-strategy.html>.

model...none will admit it." Publicly, however, they continue to call it "inhumane and a failure."<sup>58</sup> Let me underscore this: a pandemic policy that is (more or less) *laissez-faire* is "inhumane and a failure"—or, in other terms: *immoral and impractical*.

This, of course, is the mantra of those who hate the very idea of *laissez-faire* in general, let alone in dealing with depressions or pandemics, and would certainly have been the charge leveled at President Warren Harding, had the 1920–21 depression not resolved so quickly and powerfully as it did. It could have turned out much differently (and worse). Woods notes that: "Secretary of Commerce Herbert Hoover—falsely characterized as a supporter of *laissez-faire* economics—urged President Harding to consider an array of interventions to turn the economy around. Hoover was ignored."<sup>59</sup> (Though, not completely, as Grant points out: "One of the top items on Harding's legislative agenda was the creation of a new, cabinet-level department of public welfare...The Harding proposal went nowhere," after critics chimed in that "the government was under a prior obligation to live within its means."<sup>60</sup>)

Instead, as Benjamin Anderson so laconically put it: "In 1920–21, we took our losses, we readjusted our financial structure, we endured our depression, and in August 1921 we started up again."<sup>61</sup> It was widely agreed, Grant says, that "the slump was inevitable, unstoppable and even salutary," so that even though "many Americans were suffering," a Hippocratic Oath-like, "do no harm" approach was called for: "The government ought not to make things worse by costly or ill-conceived intervention."<sup>62</sup> Instead, it was decided to follow the traditional approach of:

balancing the federal budget, raising interest rates to protect the Federal Reserve's gold position, and allow-

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<sup>58</sup>Ibid.

<sup>59</sup>Woods, "The Forgotten Depression of 1920."

<sup>60</sup>Grant, *The Forgotten Depression—1921...*, p. 165.

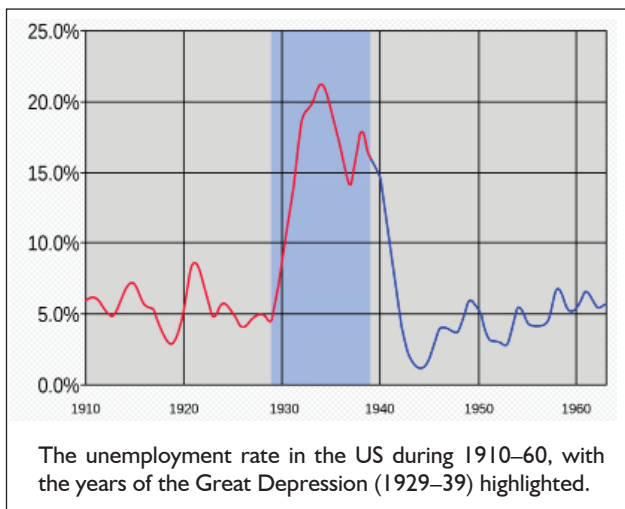
<sup>61</sup>Benjamin M. Anderson, *Economics and the Public Welfare: A Financial and Economic History of the United States, 1914–1946* (Indianapolis: Liberty Press, 1979 [1949]), p. 92.

<sup>62</sup>Grant, *The Forgotten Depression—1921...*, p. 164.

ing prices and wages to find a new, lower, level. Critically, what it would not do was what the Hoover administration so energetically attempted to do a decade later: there would be no federally led drive to maintain nominal wage rates and no governmentally orchestrated work sharing.<sup>63</sup>

Hoover had his chance, beginning in late 1929, when an economic crisis erupted after he had been in the White House for less than a year. While “Presidents Wilson and Harding, each for his own reasons, had met the depression of 1920–21 with inaction,” Grant states, Hoover instead “chose a whirlwind of intervention” in response to the 1929 stock market crash and subsequent events.<sup>64</sup> As a result, states Ralph Benko, in 1929 and following years, “The aggressive measures implemented by President Hoover and then by FDR...protracted what otherwise might have been a short downturn into a decade of perhaps the longest era of economic misery America has experienced.”<sup>65</sup>

In this connection, see the graph of the U.S. unemployment rate during 1910–60,<sup>66</sup> and note especially that the unemployment took



<sup>63</sup>Ibid., pp. 72–72.

<sup>64</sup>Ibid., p. 213.

<sup>65</sup>Benko, “The Biggest Recession...”

<sup>66</sup>[https://en.wikipedia.org/wiki/Great\\_Depression](https://en.wikipedia.org/wiki/Great_Depression) .

about 3 years (1920–1923) to rise from 5 percent to 8.5 percent and back down to 5 percent, while it took 13 years (1929–1942) to rise from 5 percent to 21.5 percent and back down to 5 percent.

The contrast is stark: the mitigated unemployment of the Great Depression took about four times as long to return to normal (5 percent) as unmitigated unemployment in the depression a decade earlier. Compare this graph also to the one referenced above<sup>67</sup> for Sweden's pandemic phase of COVID-19, and note that Sweden returned to normal in *four months*, as against some estimates (by Fauci and others) that normalcy will not return for 18–24 months in other countries. These data suggest that, as a very rough rule of thumb, vigorous governmentally imposed mitigation efforts may quadruple the crisis-and-recovery processes of both depressions and pandemics.

This could all have been avoided by instead following the policy articulated so well by Rothbard in regard to economic depressions, with adaptations appropriate for disease pandemics:

If government wishes to alleviate, rather than aggravate, a depression, its only valid course is *laissez-faire*—to leave the economy alone. Only if there is no interference, direct or threatened, with prices, wage rates, and business liquidation will the necessary adjustment proceed with smooth dispatch.<sup>68</sup>

The question in each case is, then: why subject people to such a protracted period of misery? Perhaps not surprisingly by this point, the answers are fundamentally the same. The following comment about economic downturns by Benko could as easily have been phrased in terms of disease epidemics:

A severe economic downturn causes immense human suffering. The estimable quality of empathy beckons those in authority to alleviate such suffering...*It now may be*

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<sup>67</sup>See note 53.

<sup>68</sup>Rothbard, *America's Great Depression*, p. 167.

*intolerable, politically, for a government to do nothing to alleviate the deep misery associated with a recession.*<sup>69</sup>

Of course, Woods's observation about the 1920–21 depression could equally well apply to Sweden's response to COVID-19: "The conventional wisdom holds that in the absence of government countercyclical policy, whether fiscal or monetary (or both), we cannot expect economic recovery—at least, not without *an intolerably long delay*. Yet the very opposite policies were followed during the depression of 1920–1921, and *recovery was in fact not long in coming.*"<sup>70</sup>

As already noted, it was in 1978 that it officially became "intolerable, politically" for the U.S. federal government to "do nothing to alleviate the deep misery associated with" a pandemic. However, several epidemics—HIV/AIDS (1981), SARS-CoV (2002), H1N1 (2009), and MERS-CoV (2012)—came and went without worldwide mobilization, which only occurred for the first time this year with COVID-19 (which is also known as SARS-CoV-2).

The official goal of health experts for COVID-19 (and for epidemics in general) is *population immunity* (also referred to as "herd immunity" or "community immunity") which, as Ray Bhopal explains, is the protection from a contagious disease that results when "a high proportion of people are immune, thereby impeding transmission of infection from person to person."<sup>71</sup> The politically accepted way to attain immunity is through vaccination, which takes longer and may also require stringent social and economic measures such as community or neighborhood lockdowns, suspension of social activities, and business closures. Immunity also occurs naturally from infection and is in fact the only way that immunity will result without an effective vaccine. However, as Bhopal points out, "Allowing the pandemic to unfold uncontrolled would rapidly produce population immunity, but this is *not a palatable public health*

<sup>69</sup>Benko, "The Biggest Recession..." emphasis added.

<sup>70</sup>Woods, "The Forgotten Depression of 1920," emphases added.

<sup>71</sup>Raj S. Bhopal, "COVID-19 zugzwang: Potential public health moves towards population (herd) immunity," *Public Health in Practice* 1 (November 2020), p. 1, online at <https://www.sciencedirect.com/science/article/pii/S2666535220300306>.

*response...*<sup>72</sup> The reason, of course, is the “immense human suffering” (as Benko puts it) that results in rapidly escalating death tolls and the accompanying fear and anguish in the community. Even though the infection process characteristically peaks and subsides rather quickly, it is widely held to be much preferable to “flatten the curve,” to spread the suffering and deaths over a longer period of time, in hope that some may be spared who otherwise might have died, as well as avoid possibly overloading and breaking down the healthcare system and to buy time for development of effective therapeutic treatments and vaccines.

The problem with this approach, Bhopal says, is that although lockdowns shield those at highest risk, immunity is acquired much more slowly, and such a drawn-out process “may cause more morbidity and mortality than COVID-19.”<sup>73</sup> He insists that we should “evaluate the health consequences of lockdowns, assessing the benefits and costs” and that we should quantify “the balance between the damage caused by COVID-19 and that caused by lockdowns.”<sup>74</sup> In particular, since the risk to children and young people with no serious underlying health conditions is very low, Bhopal suggests that we should “consider allowing young people without underlying disorders to get COVID-19 naturally while shielding those most at risk through continued social distancing and isolation.”<sup>75</sup> Even though such an approach is “currently taboo,” provoking “hostility and controversy” for reasons already noted, it may well be the case that “population immunity is the only long-term solution.”<sup>76</sup>

Allowing the young and healthy to naturally acquire COVID-19, Bhopal argues, is (1) the safest way to achieve population immunity, while (2) “protecting those most at risk and maximising benefits for society, whether in terms of the economy or achieving the full potential of future generations,” and most importantly (3) allowing young people to “make decisions that are logical for them

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<sup>72</sup>Ibid., p. 3, emphasis added.

<sup>73</sup>Ibid., p. 3.

<sup>74</sup>Ibid., pp. 3, 1.

<sup>75</sup>Ibid., p. 5.

<sup>76</sup>Ibid., pp. 1, 4.

given their risks and life circumstances,” recognizing that *everyone* “has the right to balance risks and benefits in relation to their own quality of life.”<sup>77</sup> Jayanta Bhattacharya expressed it in more general terms: based upon the actual deadliness of COVID-19, the degree of risk to various population groups, and the degree of harm of the widespread lockdowns, the appropriate *rational* response should be to “protect the vulnerable, treat the people who get infected compassionately, develop a vaccine. And while doing these things *we should bring back the civilization that we had so that the cure does not end up being worse than the disease.*”<sup>78</sup>

Unlike most other countries, Sweden bucked the taboo and took a more Hippocratic approach, proceeding roughly along the lines suggested by Bhopal and Bhattacharya, and may, as a consequence, have achieved population immunity without having to go through prolonged lockdowns with the attendant collateral deaths and socio-economic damage suffered elsewhere. Although the acrimony directed toward Sweden for its relatively lax policy toward COVID-19 was a European as well as an American phenomenon, it is impossible to quantify how much of the political intolerance toward Sweden’s relatively *laissez-faire* approach was ideologically and morally driven, as opposed to being an aspect of partisan maneuvering and manipulation during the quadrennial U.S. presidential election. In any case, the former is the principal concern of this discussion.

To relate the preceding to the ideas discussed in the methodology section, it will be helpful to think of the contending points of view in terms of those favoring lockdowns (LD) vs. those favoring *laissez-faire* (LF). LD and LF are two primarily ethical positions in the L2-P2 sector of the Tri-Level diagram shown again below, but they manifest in policy agendas in the L2-P3 sector.

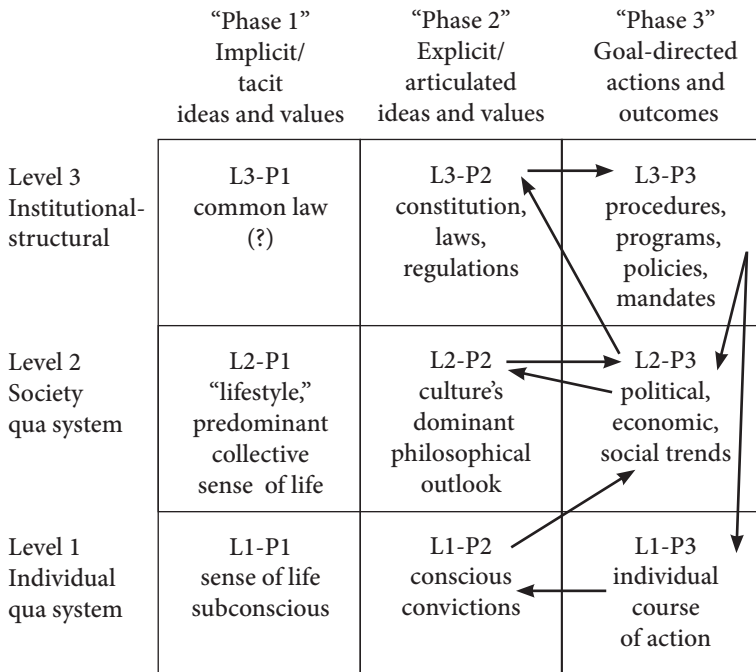
Both groups then apply pressure on behalf of their agendas upon the people in charge of the political-legal structure in L3-P2, which has various laws as well as emergency powers available that, when applied, have outcomes affecting the economy and society in

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<sup>77</sup>Ibid., p. 5.

<sup>78</sup>Jayanta Bhattacharya, “A Sensible and Compassionate Anti-COVID Strategy,” *AIER*, November 4, 2020, online at <https://www.aier.org/article/a-sensible-and-compassionate-anti-covid-strategy/>, emphasis added.





*Adapted from Sciabarra 2000 & Sciabarra [1995] 2013.  
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L3-P3. This results in a zig-zag pattern in the diagram from L2-P2 over to L2-P3, then up through L3-P2 and over to L3-P3. (There are also effects of the outcomes on individuals in L1-P3 and groups in L2-P3, and these feed back up through Level 3 in an ongoing loop, as long as there is contention between the opposing perspectives.)

A false alternative is being claimed by LD proponents between their view, which they portray as one of moral decency and caring about lives, and that of the LF advocates, who are said to be more willing to take unwise risks in order to enjoy their freedom and property. In fact, however, we are not immaterial ghosts who can subsist on good thoughts and feelings. Our freedom and property (Hazlitt’s Economic point of view) are just as much an essential and integral—and *moral*—part of our lives as our physical survival and well-being (the Ethical point of view). As Rasmussen and Den Uyl express the matter:

...since we are beings whose conceptual powers allow us to create, control, and use relationships, *the exploitation of opportunities in the world is a fundamental expression of what and who we are.*

Taking control of another's property against that other's wishes can now be seen as nothing less than taking control of one of the central relationships that constitute a human being's life. There is and can be no dichotomy between a human being's natural right to life and liberty and his or her natural right to private property. The latter is the expression of the metaphysical fact that human beings are material things that live and flourish through the exploitation of opportunities in the material world.<sup>79</sup>

Moreover, the vantage point of long-range consequences (Bastiat's "unseen") is omitted or falsely represented by LD proponents. As a result, they assert that shutting down society is both moral (humanitarian) and practical (preventing the healthcare system from overload and collapse), while keeping society open is both impractical (because medical services will be swamped) and immoral (because many people will die).

In reality, however, LF advocates have it right: locking society up is both impractical (shortages of needed jobs, goods, and services) and immoral (deaths are shifted from pandemic victims onto victims of drug and alcohol abuse, suicide, and physical abuse and onto those deprived of needed medical care in deference to pandemic victims).<sup>80</sup> Keeping society open, on the other hand, is both practical (the economy keeps producing needed goods and services and people have jobs) and moral (non-pandemic victims are not forced into deaths from despair, abusive treatment, or deprivation of medical care).

Thus, rather than the clash being between Ethicists (the moral who are also practical) and the Economists (the immoral who are also impractical), it is actually between Bad Economists and Good Economists. The former see only the alleviation of suffering and

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<sup>79</sup>Rasmussen and Den Uyl, *Norms of Liberty*, p. 106.

<sup>80</sup>See Peter C. Earle, "What Economists Can Teach Epidemiologists," *AIER*, July 11, 2020, online at <https://www.aier.org/article/what-economists-can-teach-epidemiologists/>.

death that lockdowns provide to some and fail to see the accompanying shift in suffering and death, which makes them also Bad Ethicists. The latter, however, are willing to accept greater short-term suffering accompanying a laissez-faire approach, as a cost of ensuring that there will be less overall damage to society and a quicker return to normal life, which makes them also Good Ethicists—both from a utilitarian perspective and from the perspective of not treating non-pandemic victims unjustly and subjecting them to harm.

The clearest mark of this ethical clash between LD and LF is in the issue of shifting the incidence of suffering and death from pandemic victims to the uninfected. It is, in effect, a socialization of human lives, an attempted *redistribution of death*, but actually an egalitarian *spreading of death*—not only not resulting in significantly fewer pandemic deaths, but also needlessly causing more deaths among the uninfected. The latter are more difficult to detect and tabulate and tend to go unnoticed by those observing or reporting on the pandemic, while every presumably saved COVID-19 victim is a relatively conspicuous occasion for joy. At root, this indicates that the basic clash is not between ethical and economic points of view, but between two ethical perspectives: collectivism-socialism (LD) and individualism (LF).

With all of this having been said, however, the ethically motivated battle over outcomes is *not* the fundamental issue at stake in identifying how individual liberty is to be defended in pandemics, economic depressions, and other crises.

## **LIBERTY AS A CONTEXTUAL ABSOLUTE: LIMITS ON GOVERNMENTAL POLICY TOWARD DEPRESSIONS AND PANDEMICS**

As I noted in a recent discussion comparing Aristotle's and Ayn Rand's ethical views,<sup>81</sup> Rand argues that while happiness and self-benefit are both legitimate goals for one's ethical actions, neither is

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<sup>81</sup>Roger E. Bissell, "Eudaimon in the Rough: Perfecting Rand's Egoism," *The Journal of Ayn Rand Studies* 20, no. 2 (December): 452–78.

a *moral primary* or an appropriate *standard* for ethics.<sup>82</sup> While they are very desirable and worthy things to strive for, and more often than not *follow from* doing what is in your rational self-interest, I observed, if you treat either of them “as your basic guideline in ethics,” you may instead “be undercutting your rational self-interest and your long-term happiness and well-being...Instead, they are properly viewed as *consequences* of and *derivatives* from the standard of man’s life.”<sup>83</sup> Or, in Randian terms,<sup>84</sup> “the relationship of cause to effect cannot be reversed,” which is what happens when either happiness or self-benefit is elevated to the status of ethical primary and standard of value in ethics. Centering ethics on such outcomes would be a form of utilitarianism or consequentialism, which is eschewed by Rand’s Objectivism. Instead, fundamentally, she views ethics as rooted in rational self-interest which, however much it tends to lead to superior results in producing happiness and self-benefit, is a *non-consequentialist* ethical principle.

Similarly, just as certain non-fundamental ethical outcomes (happiness, self-benefit) are wrongly taken by some as primaries for ethical action, certain non-fundamental *social* outcomes—such as material prosperity or moral excellence—are wrongly treated by some theorists as *political* primaries, as the litmus test for good or bad in political policy. Instead, in political philosophy, it is *rights* that are fundamental: As John Stuart Mill wrote:

*The moral rules which forbid mankind to hurt one another (in which we must never forget to include wrongful interference with each other’s freedom) are more vital to human well-being than any maxims, however important, which only point out the best mode of managing some department of human affairs...It is their observance which alone preserves peace among human beings...a person may possibly*

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<sup>82</sup>See Ayn Rand, *The Virtue of Selfishness: A New Concept of Egoism* (New York: Signet, 1964), pp. viii, x; 32–34.

<sup>83</sup>Bissell, “*Eudaimon* in the Rough,” pp. 464–5.

<sup>84</sup>Rand, *Virtue of Selfishness*, pp. x, 34.

*not need the benefits of others; but he always needs that they  
should not do him hurt.*<sup>85</sup>

Just as ethics takes on a utilitarian cast when it is formulated non-fundamentally in terms of outcomes, “the problem of a utilitarianism of rights,” Rasmussen and Den Uyl note, “arises when the social order is conceived in an ‘end state’ fashion—that is, as pursuing some practical outcome or goal.”<sup>86</sup> Instead, they state, “Rights are certainly *nonconsequentialistic* ethical principles...”<sup>87</sup> Thus, as they affirm: “While we would certainly agree, and indeed insist, that following rights leads generally to a better and richer society and that a political/legal order based on such rights is ethically preferable to others, we do not assume that observing rights necessarily or even always leads to worthwhile consequences for or good moral practices by everyone.”<sup>88</sup> Instead, they argue that there is a valid basis for claiming rights, “even if worthwhile consequences did not immediately follow from observing them.”<sup>89</sup>

In other words, the purpose of liberty, individual rights, and properly limited government is not to guarantee some outcome or other—neither good, happy individual lives or some equivalent mass utilitarian good or happiness, nor morally better or more cooperative people—and particularly, in the present situation, neither moral decency, consideration, compassion, health, or physical survival, nor socio-economic flourishing and prosperity. Instead, their purpose is to secure the condition necessary for any human

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<sup>85</sup>John Stuart Mill, “On the Connection between Justice and Utility,” in *American State Papers; The Federalist; J. S. Mill*; volume 43 of *Great Books of the Western World*, ed. Robert Maynard Hutchins (Chicago: Encyclopedia Britannica, 1952), pp. 473–4, emphasis added.

<sup>86</sup>Douglas B. Rasmussen and Douglas J. Den Uyl, *The Realist Turn: Repositioning Liberalism* (New York: Palgrave Macmillan, 2020), p. 68, emphasis in original, citing Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974); see especially Nozick, p. 30.

<sup>87</sup>Douglas B. Rasmussen and Douglas J. Den Uyl, *Norms of Liberty: A Perfectionist Basis for Non-Perfectionist Politics* (University Park: Pennsylvania State University Press, 2005), p. 266, n. 1 (emphasis in original).

<sup>88</sup>Rasmussen and Den Uyl, *The Realist Turn*, p. 119.

<sup>89</sup>*Ibid.*, pp. 118–19.

action whatever “to qualify as moral”—the condition, that is, which “must be present for moral responsibility to occur,” namely, *self-directedness*.<sup>90</sup> And since self-directedness or “self-direction cannot exist when certain people direct others to purposes to which they have not consented,” the purpose of “the individual right to liberty is to ban legally [the initiation of physical force] in all its forms.”<sup>91</sup> Hence, a political framework of liberty, individual rights, and properly limited government.<sup>92</sup>

How, then, does this framework—of principles, not desired outcomes—apply to the COVID-19 crisis? In such a situation, how are rights defended *and* liberty maintained, without conflict? Whose natural rights are threatened by other people during the COVID-19 crisis, and what is the appropriate governmental remedy?

For the present discussion, a crucial issue to clarify about natural rights and individual liberty is the limits and context within which they apply. As Rasmussen and Den Uyl explain, “natural rights apply...whenever human social and political life is possible, and the social and political community is possible, then, whenever it can secure its purpose—namely, provide a context in which people might live among each other *and* pursue their highly individualized and self-directed well-being.”<sup>93</sup>

It is important to note, however, that the “whenever” in their description is a “when and only when.” As they state: “...when social and political life is not possible, when it is in principle impossible

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<sup>90</sup>Douglas J. Den Uyl and Douglas B. Rasmussen, *The Perfectionist Turn: From Metanorms to Metaethics* (Edinburgh: Edinburgh University Press, 2016), p. 94. See Rasmussen and Den Uyl, *Norms of Liberty*, where they define self-directedness, or self-direction, as “the act of using one’s reason and judgment upon the world in an effort to understand one’s surroundings, to make plans to act, and to act within or upon those surroundings,” p. 89.

<sup>91</sup>Rasmussen and Den Uyl, *Norms of Liberty*, pp. 89–90.

<sup>92</sup>Rasmussen and Den Uyl present detailed discussions of the components of their argument for individual rights in *Norms of Liberty*, pp. 269–83, and, more briefly, in *The Realist Turn*, pp. 41–43. In these same two works, on pp. 284–339 and pp. 97–129, respectively, the authors address numerous objections to their argument.

<sup>93</sup>Douglas B. Rasmussen and Douglas J. Den Uyl, *Liberty and Nature: An Aristotelian Defense of Liberal Order* (La Salle, Illinois: Open Court, 1991), pp. 144–5, emphasis in original.

for human beings to live among each other and pursue their well-being, consideration of individual rights is out of place; they do not apply.”<sup>94</sup>

In other words, the fact that rights are social co-existence conditions does *not* mean that they attach to you whenever and wherever someone else is in your presence but, very specifically, only when it is not “*in principle* impossible for people to live together and flourish.”<sup>95</sup> There must be time or opportunity to do *something* other than simply “attempt to escape from the desperate situation.”<sup>96</sup> If there is, then rights continue to exist and should be defended against violation by the appropriate use of force, whether by individuals, groups, or governments. If not, then (in such thankfully rare situations) the social context is broken, at least temporarily and, for that length of time, rights are not operative.

Now, suppose a society’s governmental leaders see such a situation looming, a societal collapse, where the very possibility of continued social coexistence is seriously and credibly threatened. Since their function is (or should properly be) to defend rights, and that situation threatens the very existence of the condition for rights that they are authorized to defend, they would understandably (if not legitimately) want to declare a “clear and present danger” of the society’s collapsing and to take “reasonable and proper” actions to prevent that from happening. Even if those actions temporarily abridged people’s liberty, that abridgement would properly be for only the duration of the general emergency and on the premise that normal conditions and fully functioning rights would then be restored—like a surgeon stopping a patient’s heart temporarily in order to perform life-saving surgery so that the heart can beat again healthily.

At least, that is the rationale we were presented in late March of 2020 for the nuclear option: let’s all agree to shut down the society and the economy for “fifteen days to slow the spread,” in order to keep COVID-19 from overwhelming the healthcare system and decimating the population. We were persuaded to go along with this

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<sup>94</sup>Ibid., p. 146.

<sup>95</sup>Ibid., p. 149, emphasis in original.

<sup>96</sup>Ibid., p. 149.

because, as Angelo Codevilla states, the belief (or argument) was that “COVID-19 is so infectious as well as plague-like in its lethal danger to the general population, that a wave of desperately ill and dying patients would submerge American hospitals unless its natural course were slowed.”<sup>97</sup> But, of course, despite lurid accounts and photographs of stacked dead bodies and the like, COVID-19 wasn’t nearly that deadly, not even in the areas that had the worst outbreaks, such as the northeastern United States and western Europe.

So, in May, once the daily death count had peaked and then steadily subsided in those areas, Fauci quietly discarded his counterfactual rationale of avoiding the overcrowding of hospitals and catastrophic obliteration of the population, replacing it with the new claim “that extending the lockdowns was necessary to prevent so many apparently healthy young people from eventually infecting the old and infirm.”<sup>98</sup> The switch part of Fauci’s bait-and-switch is the idea that asymptomatic-though-infected people are (or may be) “super spreaders” who can transmit a deadly disease through the population in a manner similar to that of the infamous Typhoid Mary of long ago.<sup>99</sup> School-age children, who are least susceptible to the virus, are (it is claimed) most likely to present a menace to the rest of the society, including not only their teachers, but also older members of their households.

Was this reasonable? Perhaps, but it should be remembered that this is the same Fauci who in the mid-1980s created a panic about HIV/AIDS by suggesting that although prenatal transmission of the virus was possible, “[p]erhaps more important is the possibility that routine close contact, as within a family household, can spread the disease,” adding that if “nonsexual, non-blood-borne transmission is possible, the scope of the syndrome may be enormous.”<sup>100</sup> Although

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<sup>97</sup>Codevilla, “The Covid Coup.”

<sup>98</sup>Ibid.

<sup>99</sup>Veronique Greenwood, “The Frightening Legacy of Typhoid Mary,” *Smithsonian Magazine* (March 2015) online at <https://www.smithsonianmag.com/history/the-frightening-legacy-of-typhoid-mary-180954324/>.

<sup>100</sup>Anthony Fauci, “The Acquired Immune Deficiency Syndrome: The Ever-Broadening Clinical Spectrum,” editorial for *Journal of the American Medical Association* 249 (1983), p. 2375.



Fauci recanted this hypothesis the following year, as Daniel Payne and John Solomon point out, “the paranoia and fear surrounding the vulnerability of the general population to AIDS persisted for years afterward. In New York in 1985, for instance, 85 percent of schoolchildren at one public elementary school stayed home during opening week, while hundreds of parents demanded the school system bar any HIV-positive children from attending classes.”<sup>101</sup>

But sure, let’s consider this issue a bit more closely, for here we have not necessarily just a moral clash over desired outcomes between those wanting the moral decency and presumed safety associated with mandatory widespread sheltering in place (the LD’s) and those wanting the sociality and material prosperity associated with risk-taking and free association (the LF’s)—but perhaps instead or also the concern about whether the natural rights of some individuals are being jeopardized by the inadvertent, thoughtless, or negligent acts of others (those others being infected-but-asymptomatic schoolchildren and their parents who selfishly want to work and support their families).

When the allegation is made that someone has caused harm to another, the burden of proof is on the person making the allegation. In identifying Typhoid Mary as a super-spreader, medical and scientific inferences were made to identify her as the vector of the disease.<sup>102</sup> Imagine the horrific infection-tracing challenge of ferreting out potentially millions of young COVID-19 Marys.

However, such an indirect process is thankfully not necessary, since for months now we have had testing available to identify those who were infected even though free from symptoms of COVID-19. Now that rapid testing is available, it’s nearly as simple as a breathalyzer test for detecting drunk drivers and taking them off the streets.

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<sup>101</sup>Daniel Payne and John Solomon, “Fauci Files: Celebrated doc’s career dotted with ethics, safety controversies inside NIH,” *Just the News*, July 23, 2020, online at <https://justthenews.com/accountability/political-ethics/fauci-says-americans-should-trust-doctors-himself-his-career>. See also the discussion of how Fauci needlessly raised alarm in 2016 about possibility of a global epidemic of the Zika virus which never materialized.

<sup>102</sup>See Greenwood, “The Frightening Legacy...”

That, I submit, should be sufficient to satisfy the demands of both the preservation of individual liberty of uninfected individuals and the protection of each individual's natural rights from violation by infected people. The appropriate policy for dealing with COVID-19 should be: shelter the vulnerable (especially the aged and/or those with medical vulnerabilities), quarantine the infected, and let everyone else go about their businesses, their careers, their schooling, and their lives.

As Andy Craig has said, what is needed in such situations is not "big government" rather than "small government" (another false alternative) but, as always, "a government limited in scope but sufficient to meet that scope...Government has a role to play in responding to the pandemic in much the same way it is the government's job to prosecute murderers or defend the country from invasion."<sup>103</sup> He adds that "[e]mergency powers should be limited in duration and limited to directly addressing the present situation based on the facts as best we know them" and "repealed at the earliest feasible opportunity," not "larded up with a pre-existing wish list of unrelated concerns" (such as fiscal bail-outs and social mandates).<sup>104</sup>

And that, with all due respect to Derek Thompson, is how one applies libertarianism to pandemics.

**CONCLUDING UNSCHOLARLY POSTSCRIPT:  
WHAT THE HELL DO WE DO,  
GIVEN THE CONDITIONS THAT EXIST?**

Context is *so* important. Short of an impending complete collapse of society, the existing government should *not* suspend constitutional/natural rights in order to "protect" people against (or bail them out from) various and sundry forms of misfortune, whether disease, fire, earthquake, bad weather, or whatever. Instead, everything that government does should be aimed at, and only at, defend-

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<sup>103</sup>Andy Craig, "Libertarianism and the Coronavirus Pandemic," *Cato at Liberty*, March 25, 2020, online at <https://www.cato.org/blog/libertarianism-coronavirus-pandemic>.

<sup>104</sup>*Ibid.*

ing people's rights against violation by others. The question then is: how do we justify curtailing people's freedom when there's no "probable cause" that they're going to harm others? Or is a pandemic *automatically* a "probable cause" situation?

There's a *conflation* that we should be careful to avoid between the *ethics* of emergencies and the *politics* of emergencies—by which I mean, what should *people* voluntarily do (and not do) vs. what should *government* make people do (and not do)? Rand's 1963 essay on emergencies is fine for the former,<sup>105</sup> as are Hazlitt's contemporaneous thoughts;<sup>106</sup> and we've seen many people and businesses take such measures before any mandates were issued—while other people continued to behave more hedonistically or self-centeredly and without concern for disease spread. But as Rumsfeld famously said, "you go to war with the army you have"<sup>107</sup>—which translates into: if you don't have a free society and free economy that has a well-functioning medical and research system, but instead one hobbled by government intervention and distortion, you still have to do the best you can *in the context*, just like in regard to retirement (Social Security) or medical care for the aged and poor (Medicare/Medicaid).

As my friend Chris Sciabarra recently told me in personal correspondence: with regard to operating in the real world, we have principles, but we also have realities. For instance, on the one hand, we have Rand's pointed suggestions about how to live a rational life in an irrational society<sup>108</sup>—we have Rasmussen and Den Uyl's clarifying framework of natural rights based on human nature but distinct from the ethical norms by which we live our lives among others—we have the hard-won insights of the Austrian school about how best to deal with economic recessions—and so much more. But on the other hand, everything gets filtered through the realities of our politics and the political system. In this case, as with any emergency,

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<sup>105</sup>See Rand, *Virtue of Selfishness* (New York: Signet, 1964), pp. 49–56.

<sup>106</sup>Hazlitt, *Foundations of Economics*, pp. 92–127.

<sup>107</sup>Eric Schmitt, "Iraq-Bound Troops Confront Rumsfeld Over Lack of Armor," *The New York Times* (December 8, 2004), online at <https://www.nytimes.com/2004/12/08/international/middleeast/iraqbound-troops-confront-rumsfeld-over-lack-of.html>.

<sup>108</sup>See Rand, *Virtue of Selfishness*, pp. 79–92.

we must fight it with the “army,” i.e., the structures, we have—and some of these structures may save lives, while others will kill people, and the whole thing might further damage an already awful situation with regard to individual rights.

I’ve seen libertarians get all tangled up in how to apply individual rights and limited government ideas to such a *mixed* polity and economy as we have. They try to be ethical and principled—but with one hand tied behind their backs. To be fair, it is not easy to sort out how to move forward in a compromised society—one that is compromised in terms of *ethics* (altruism vs. utilitarianism vs. egoism vs. eudaimonism etc.), where collectivist and altruist catch-phrases and ad hominem attacks like “you’re selfish and out of control and will kill us all” and “you’re self-righteous and controlling and will kill us all” get hurled around with reckless abandon—and compromised as well because of the fact that a *lot* of the back and forth about policy and blame is driven by the fact that this is an *election year*. In order to get the broad, big picture in focus, you have to take one big step backward, and then at least one more—but then, of course, some people will accuse you of being cold-blooded and not caring about the fact that two people are dying each day in Sweden because of their monstrous policy. (Actually, they are just as likely to brush this inconvenient fact under the rug.)

This points to a moral issue people don’t consider often enough: the Hippocratic Oath, by which medical people swear to “do no harm.” This means, above all, to not take any action that *causes* deaths. So, if in order to save x-thousand lives, they implement or cooperate with things that end up destroying x-thousand or x-plus-y-thousand lives, have they kept their oath—or have they violated it? We might be charitable and chalk it up to the operation of the Law of Unintended Consequences—except that these medical professionals and public officials must certainly *know* that there will be collateral deaths in addition to the lives they save. True, those deaths fall in someone else’s category of responsibility: poverty deaths—social workers; drug overdose and alcohol deaths—behavioral psychologists; suicides—mental health. However, the buck has to stop somewhere. I suggest that epidemiologists and policy makers, as well as their defenders, should not be allowed to turn a blind eye to

all of this, and instead should be urged not to impose policies that make the cure worse than the disease.

In one respect, this is a really bad topic for an essay about defending individual liberty, considering that one would like to write something that is, on the one hand, cogent and coherent and principled and yet, on the other hand, humanitarian and sensitive to the horrific circumstances so many, especially in crowded urban areas, face with friends and loved ones dying all around them. There is no ethical Archimedes to show us where to stand to place our lever so that we can move the world, without immediately being branded a moral monster or a heartless sociopath—or someone who is naïvely or cynically demanding that government do *something*, even if it is ineffective or, worse, counterproductive.

It has been said that war is the health of the state. More generally, it is clear that *fear* is the health of the state. Fear has fueled countless ill-considered and disastrous and *immoral* government programs and wars, and they have all led to greater government control over our lives and greater loss of individual liberty. Unfortunately, it is *not* true, as Franklin Roosevelt claimed, that “we have nothing to fear but fear itself.” We most assuredly *must* fear, and fight at every turn, those who would exploit others’ fears, real or concocted, for the purpose of controlling others and destroying those whom they hate but who have done no harm to them other than opposing their agendas. The current situation is no exception, and we could use another Patrick Henry now more than ever. And we must watch those people like hawks. Another Thomas Jefferson would be helpful, too. David Gordon’s comment that “Even a small chance that emergency measures will permanently subvert civil liberties needs to be considered”<sup>109</sup> applies equally well to economic freedom—and considering the permanent subversions of liberty that have accumulated over the centuries, the need for this issue, liberty as an endangered species, to be “considered” is an understatement, indeed!

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<sup>109</sup>David Gordon, “Posner (Again) Blesses Statism” (review of Richard A. Posner, *Law, Pragmatism, and Democracy*), in Gordon, *An Austro-Libertarian View, Volume 1: Economics, Philosophy, Law* (Auburn, Alabama: Mises Institute, 2017), p. 256.

We are *not* living in a libertarian utopia—nor, thank God, in a totalitarian hellhole. We live in a country of mixed moral and political premises, swept by sharply conflicting crosscurrents of demands for more freedom and more control, and ne’er the twain shall meet, it seems. We are living in a wonderful, feisty, troubled, amazing, beautiful, angst-ridden country that we absolutely do *not* want to see go down the drain. Yet, at the time of this writing, with the triple threat of pandemic, recession, and civil chaos all occurring during a very ugly, contentious election campaign, we could see all of our fervent hopes and our fond projects swamped and swept away by some combination of forces over which we have absolutely no control. If that’s not enough to make you want to jump off the nearest bridge or pier like Ayn Rand’s Cheryl Taggart in *Atlas Shrugged*, what would be! But here we are, anyway, trying to turn enough of our attention off of the craziness surrounding us so that we can get some work done and have some fun and enjoyment with our friends and loved ones—and, especially, pay tribute to the honoree of this volume. So, with that, I say, “L’Chaim!” And on we go...

CHAPTER 2

## Nozick and the Natural Duty of Justice

*Billy Christmas*

Individuals have rights, and there are things no person  
or group may do to them (without violating their rights).

—Robert Nozick, *Anarchy, State, and Utopia*

**T**he debate over the role of the state within libertarianism as a political philosophy has been done to death. However, I want to resurrect it because I think that an idea in Kant’s *Doctrine of Right* contains valuable resources that have not yet been brought to bear on it in its past life. My somewhat bold intention is to lay it to rest swiftly after having resurrected it; I do not intend to create a Kantian zombie.

Most libertarians are roughly Lockean inasmuch as they believe that the state could only have moral authority over us—that which it claims—if we consented to its rule. Of course, we do not consent, so it has no authority. Anarchist libertarians stop there and suggest various ways in which admittedly essential state functions could be

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<sup>1</sup>An early version of this essay was presented to the *Colloquium on Market Institutions and Economic Processes* at NYU, and the Political Theory research group in the department of Political Economy at King’s College London, in 2020. I am very grateful to both audiences for their helpful feedback and the discussions that ensued. Special thanks are due to Carmen Pavel for written comments.

provided without a state, and therefore without involving the concomitant injustices of the state.

Others proceed to believing that the state may be justified since we do not immediately have anything better on hand. Maintaining some degree of the status quo may avoid the greater injustice of what might happen if the state were to disappear, and therefore is all things considered justified, at least in certain areas of its operation. This is what John Simmons, the authority (excuse the pun) on Lockean consent theory, calls *philosophical anarchism*.<sup>1</sup> On this view, under certain circumstances, states can justly monopolise coercion, but they do not have authority.<sup>2</sup> Authority presupposes a general obligation of obedience, and therefore gives the state the moral power to create specific obligations. When a state lacks authority but justly monopolises coercion, it may only enforce natural duties, it cannot create new ones. Our obligation to such a state is merely to defer to it when it comes to the enforcement of rights, but not to defer to it in legislating the moral law.

Robert Nozick, typically regarded as a Lockean, offers an account of how a state can emerge through just processes without our consent such that so long as the state limited itself to the monopolisation of rights enforcement, and that monopolisation was de facto in origin, it would be justified.

Whilst Nozick's account has not garnered widespread support even within libertarian political philosophy, I believe that it offers a plausible synthesis of the strongest aspects of two otherwise implausible rival accounts of state legitimacy: Lockean consent theory and Kantian natural duty theory.

The Lockean theory is that individuals come into the world with natural rights and that governments, if they exist, come into

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<sup>1</sup>A. John Simmons, *Moral Principles and Political Obligations* (Princeton: Princeton University Press, 1981); A. John Simmons, *On the Edge of Anarchy: Locke, Consent, and the Limits of Society* (Princeton: Princeton University Press, 1993); A. John Simmons, *Justification and Legitimacy: Essays on Rights and Obligations* (Cambridge: Cambridge University Press, 2000).

<sup>2</sup>Ralf M. Bader, 'De Facto Monopolies and the Justification of the State', in *The Routledge Handbook of Anarchy and Anarchist Thought*, ed. Gary Chartier and Chad Van Shoelandt (New York: Routledge, 2021).



the world as a result of the choices of these right holders. Where right holders consensually transfer their natural power to enforce their own rights to a common third party, that third party is a state, and may legitimately coerce right-holders because they have already consented to its actions. The Kantian theory is that we come into the world with a need for rights, yet those rights are not real until and unless we create a state that coerces us in-line with these rights and correlative duties. Our most urgent duty is therefore to create a state so that our rights can become real.

What I will argue, is that Nozick's argument for the legitimacy of coercing non-consenters in a state of nature into surrendering their right of self-enforcement and to paying for the dominant protective association, so long as that protective association protects its rights in every other way, succeeds. And I will use elements of Kant's natural duty theory to show that this is so, without abandoning the Lockean commitment to the reality of natural rights in the state of nature. First, I will outline in greater detail the Lockean and Kantian respective theories of political legitimacy, with a view to highlighting at least the *prima facie* plausibility of Nozick's approach.

## LOCKEAN CONSENT THEORY

Locke regards everyone as moral equals insofar as no one has natural authority over anyone else. This gives everyone a right to acquire private property freely and unilaterally in the state of nature.<sup>3</sup> Much of the divergence between Locke and Kant's respective theories of legitimacy can be ascribed to subtle divergences in their views of the relationship between equality and property acquisition.

Illustrative of this natural equality is that no one comes into the world as an owner of the Earth or any part of it. In contrast to Robert Filmer who argued that the heirs of Adam are born into inheritance of the territory of their Kingdoms,<sup>4</sup> Locke argues that no one enters

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<sup>3</sup>John Locke, *Two Treatises of Civil Government*, ed. Thomas Hollis (London: A. Millar, 1764), bk. 2 chaps 1–8.

<sup>4</sup>Robert Filmer, *Patriarcha: Of the Natural Power of Kings* (London: Richard Chiswell, 1680).

the world with any property. Moral relations of equality also mean we do not need permission from anyone else before we go about engaging in world-interactive projects, which render parts of the world parts of us. The idea of *mixing labour* with hitherto unowned resources is how Locke understands unilateral acquisition. The purposive connection of persons with external resources through unilateral activity means that respect for persons requires respect for their property acquisitions.<sup>5</sup> At least, so long as we do not use that property to subordinate others thereby violating natural equality.<sup>6</sup>

Unilateral acquisition of property is required for humans to be free in two ways. First, when humans freely act, their actions extend over the physical environment in a way which just makes it the case that for others to interfere with that space is for them to interfere with the former's actions. Interference in another's actions violates her freedom and defies the natural authority she has to do as she wishes without permission from any putative superior.<sup>7</sup> Second, property is a sphere in which one can act without the permission of anyone else, so it only makes that freedom more robust if individuals get to construct that sphere of freedom freely.<sup>8</sup> Without the power to particularise their freedom without permission

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<sup>5</sup>Locke, *Two Treatises of Civil Government*, bk. II chap. 5. Whether the acquisitive action is really "labour" or not is irrelevant. Labour should be regarded as a placeholder for any activity that involves the subsumption of external resources into one's ongoing projects. Judith Jarvis Thomson, 'Property Acquisition', *Journal of Philosophy* 73 (1976): 665; John T. Sanders, 'Projects and Property', in Robert Nozick, ed. David Schmidtz (Cambridge: Cambridge University Press, 2002); Billy Christmas, 'Ambidextrous Lockeanism', *Economics and Philosophy* 36 (2020): 193–215.

<sup>6</sup>Bas van der Vossen, 'As Good as "Enough and as Good"', *The Philosophical Quarterly* Online first (2020).

<sup>7</sup>Bas van der Vossen, 'What Counts as Original Appropriation?', *Politics, Philosophy and Economics* 8 (2009): 355–73; Bas van der Vossen, 'Imposing Duties and Original Appropriation', *The Journal of Political Philosophy* 23 (2015): 64–85; van der Vossen, 'As Good as "Enough and as Good"'; Billy Christmas, 'Hugo Grotius and Private Property', *Raisons Politiques* 73 (2019): 21–38; Christmas, 'Ambidextrous Lockeanism'; Billy Christmas, *Property and Justice: A Liberal Theory of Natural Rights* (London: Routledge, 2021).

<sup>8</sup>van der Vossen, 'Imposing Duties and Original Appropriation'; van der Vossen, 'As Good as "Enough and as Good"'.

from others, it is not clear that their rights are really their own, but rather something that can be granted or revoked by some superior power or the community as a whole. In Hohfeldian terms,<sup>9</sup> unilateral acquisition means that we have an *immunity* with regard to our own property, which safeguards the claims, liberties, and powers therein. And a reflective *disability* with regard to the property of everyone else. These respective spheres of individual authority over ourselves and our own projects and affairs reflects our natural equality—no one naturally has any right over the life of another. We are equal inasmuch as we have authority over ourselves.<sup>10</sup>

All that has to happen, therefore, for a person to have rights and correlative duties she is bound to respect is for her to *exist*. And these rights and duties develop more refined and detailed content when we *act*. Unilateral action by individuals is sufficient for having full blown rights to person and property that no one else may revoke. Before there is a state, then, there is a moral law that all individuals must comply with.

According to Locke, individuals are free to enforce their rights against those who threaten them.<sup>11</sup> Again, if one was not free to unilaterally protect one's freedom from third party encroachment, then one was not really morally free in the first place. The moral law protects one's freedom, but it cannot do so without also permitting you to protect yourself when you need to. Some have argued that it is internal to a claim right that its holder may enforce it,<sup>12</sup> or that

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<sup>9</sup>Wesley Newcomb Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning', *The Yale Law Review* 23 (1913): 16–59.

<sup>10</sup>Roderick T. Long, 'Equality: The Unknown Ideal', *Mises Daily* (blog), 2001, <https://mises.org/library/equality-unknown-ideal>; Roderick T. Long, 'Liberty: The Other Equality', *Foundation for Economic Education* (blog), 2005, <http://fee.org/articles/liberty-the-other-equality/>; Billy Christmas, 'Social Equality and Liberty', in *The Dialectics of Liberty: Exploring the Context of Human Freedom*, ed. Roger E. Bissell, Chris Matthew Sciabarra, and Edward W. Younkins (Lanham: Rowman and Littlefield, 2019).

<sup>11</sup>Locke, *Two Treatises of Civil Government*, bk. II chap. 2.

<sup>12</sup>H. L. A Hart, *Essays on Bentham* (Oxford: Oxford University Press, 1982), chaps 7–8; H. L. A Hart, *The Concept of Law*, 2nd ed. (Oxford: Clarendon Press, 1994); Joel Feinberg, 'The Nature and Value of Rights', in *Rights, Justice and the Bounds of Liberty: Essays in Social Philosophy* (Princeton: Princeton University Press, 1980); Carl

it must have counterfactual robustness of some kind.<sup>13</sup> For example that if it is violated one has some recourse to seek restitution or punish the violator. Locke seemed to have believed something like this. The moral law, then, fully accounts for individual rights in a state of nature.

Locke does note certain “inconveniences”<sup>14</sup> of a state of affairs in which each individual is afforded the sole right to enforce the moral law on their own behalf. People will often interpret the moral law somewhat in their favour, even in good faith. They will regard harms done *to* them somewhat more serious than equal harms committed *by* them. They will want to extract a bit more compensation than they are really due, and feel they owe a little less than they really do. Whilst the moral law does provide a determinate moral standard for the just ordering of actions, the state of nature does not yet contain anything that is intersubjectively ascertainable that can be pointed to, to overcome the disagreements and conflicts that arise out of such divergences of judgement. All there is are rival interpretations, the holders of which respectively believe correspond to the genuine moral law. Given the potentially insurmountable disagreement over the conclusion of any given conflict, there will always be uncertainty over whether any given matter is in fact settled. To overcome this inconvenience, there must be something which binds all persons that is not only accessible through the individual agent’s moral reasoning and judgement, but rather

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Wellman, *Real Rights* (Oxford: Oxford University Press, 1995); Wellman; Carl Wellman, ‘Review of A Debate Over Rights by Matthew H. Kramer, Nigel E. Simmonds, and Hillel Steiner’, *Mind* 106, no. 436 (2000): 954–56; Nigel Simmonds, ‘Rights at the Cutting Edge’, in *A Debate Over Rights: Philosophical Enquiries*, ed. Matthew H. Kramer, Nigel E. Simmonds, and Hillel Steiner (Oxford: Oxford University Press, 1998); Hillel Steiner, ‘Working Rights’, in *A Debate Over Rights: Philosophical Enquiries*, ed. Matthew H. Kramer, Nigel E. Simmonds, and Hillel Steiner (Oxford: Oxford University Press, 1998); David Frydrych, ‘The Theories of Rights Debate’, *Jurisprudence* 9, no. 3 (2018): 566–88; David Frydrych, ‘What Is the Will Theory of Rights?’, *Ratio Juris*, Forthcoming.

<sup>13</sup>Daniel Layman, ‘Republican Liberty as Liberty within Rights’, in *Oxford Studies in Political Philosophy*, ed. Peter Vallentyne, Steven Wall, and David Sobel, vol. 8, 2022.

<sup>14</sup>Locke, *Two Treatises of Civil Government*, sec. II.13.

something that is intersubjectively ascertainable—something public like a written document or an individual person's spoken ruling, or the like. Something which, while it may imperfectly express the moral law, is something that all persons are bound to for the sake of overcoming the potential effects of divergent interpretations of how the moral law applies to their own case. Locke believes that interpretation and enforcement of rights by a common third-party arbitrator would solve the inconvenience. But how could this agent make final pronouncements on justice without the consent of all affected parties? An agent's arrogating themselves with the normative ability to determine how other persons rights are to be enforced would involve a presumption of natural authority over those person's rights; a natural authority Locke believes no one has. Therefore, such an agent could only be legitimate if everyone whose rights they administered *consented* to them.<sup>15</sup>

In other words, Locke believes that freedom involves no natural duty to form a state. We are entirely at liberty to voluntarily join or not to join any given commonwealth. Our rights are our own, and not the state's or the community's, and any duty we have to the state is strictly contingent and acquired, not natural.

## KANTIAN NATURAL DUTY THEORY

Kant's starting position is similar to Locke's. He also believes that each person has an innate right to freedom, where freedom is understood as independence of the will of any other person.<sup>16</sup> He also believes, like Locke, that property both particularises our individual freedom, and protects our exercise of our freedom. However, he has

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<sup>15</sup>Locke tells an unconvincing story about why he thinks, actually, we kind of *have* consented to the state under which we live. (Locke, bk. II chap. 8.) This is a very useful foil for teaching students to think seriously about consent, but we need not get into that here, since nobody is actually convinced by it. One of the few things political philosophers agree on is that John Simmons is right about consent theory, even if other aspects of his philosophical anarchism are open to challenge. (Fabian Wendt, 'Against Philosophical Anarchism', *Law and Philosophy*, Forthcoming.)

<sup>16</sup>Immanuel Kant, *The Metaphysics of Morals*, ed. Mary Gregor (Cambridge: Cambridge University Press, 1991), sec. 6.238.

deep concerns about the status of property in a state of nature. Concerns which result in a very different theory of political legitimacy. Kant believes our rights not to have our bodies physically interfered with in a state of nature is clear enough, so we can at least be said to have a right to freedom from assault. Moreover, we may enforce this right ourselves—rights are essential authorisations to use force. But a fully-fledged right to external freedom is one that is merely provision until we have a state. There are a number of steps to this argument.

Firstly, a mere right against having our bodies interfered with is insufficient for full external freedom. External freedom means not only that we are respected in our physical integrity and possession of our bodies (and anything physically attached to our bodies, like chattels we can hold in our hands), but also respected in our *intelligible* possession of external objects. Our physical possession of our bodies and external objects we physically possess is protected by our basic rights not to be physically interfered with. However, this means that if one were to initiate some activity with regard to an external object, the moment the physical connection between one's body and the object is severed, one's possession of it is no longer protected by one's bodily rights. If one started building a house, as soon as one lays a brick atop some mortar, sets down one's trowel, and walks away, one relinquishes any protected claim that others are duty bound to respect with regard to the brick. Kant thinks this will not do for freedom, and yet it is the most we can have in a state of nature. In order for our sphere of freedom to extend beyond the physical body (and whatever is attached to it), intelligible possession must be protected. That means that we have a right to recover physical possession of external objects not currently in our physical possession at any given time. That means, a right to external objects that excludes others, regardless of our purposes with regard to it—*property*.<sup>17</sup>

Why can one not claim external objects as one's property in a state of nature in the way Locke thinks, according to Kant? The problem for Kant is that the moral law is partially indeterminate as to the *particular* property rights of any given individual. Whilst the moral law is clear that everyone has a right to property, it is

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<sup>17</sup>Kant, sec. 6.245–6.255.

not clear which particular property rights any particular person has. Property is *indeterminate* in a state of nature. This problem is compounded when such rights need enforcing. When I enforce my interpretation of my rights against you—the moral law as I see it—I am subjecting you to my will by imposing my own interpretation of rights upon you. This violates your freedom inasmuch as you are no longer independent of my will. Interpretation and enforcement of rights in a state of nature is *unilateral*. Furthermore, a situation in which everyone imposes coercion upon one another in accordance with their own private judgements of justice, we are in a state of constant threat and vulnerability to one another. This vulnerability licences each of us to use unilateral coercion to pre-emptively protect ourselves from being subjected to the will of others.<sup>18</sup> The lack of *assurance* of our rights generates a state of affairs in which no assurance can emerge.<sup>19</sup>

In a state of nature, we cannot particularise our freedom without rendering one another unfree. Where there is no property, there is no freedom, but when we try to create property, we simultaneously subordinate one another to private power. We're damned if we do, and damned if we don't. What is required, is for there to be an authority that can create and enforce some schema of rights in external objects without thereby subjecting us to any person's private will—a *public* authority. Whilst the individual agents of the state necessarily act on their own will even when they execute the state's laws, those subjected to their coercion are not subjected in a way that renders them unfree. Coercion that is executed in accordance with laws that apply to all equally with the function of creating external freedom for all, does not constitute an imposition of any individual's unilateral will but rather the *omnilateral* will.

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<sup>18</sup>It is often argued that these three problems are independent of one another. I have argued elsewhere that they are all parasitical on indeterminacy (Billy Christmas, 'Against Kantian Statism', *The Journal of Politics*, 2021.)

<sup>19</sup>Kant, *The Metaphysics of Morals*, sec. 6.256–6.257; Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Cambridge: Harvard University Press, 2009), chap. 6; Louis-Philippe Hodgson, 'Kant on Property Rights and the State', *Kantian Review* 15, no. 1 (2010): 57–87.

In order for our freedom to be real we must, as a matter of priority, establish and obey a state. Our respective innate right to freedom, then, cannot be acted on until there is a public authority that lays down a uniform codification of rights. Outside of a state we cannot wrong each other by invading one another's external freedom, yet we "do wrong in the highest degree" by remaining in that state.<sup>20</sup>

Kant believes we have a natural duty to establish and obey a state.<sup>21</sup> We entirely lack rights and correlative duties until we join a commonwealth. Our rights are merely provisional, waiting to be realised in the coercive authority of the state. Our duty toward that state is necessary and natural, rather than contingently acquired. Kantian freedom involves deep anxieties about the state of nature—it is devoid of justice, and a place in which we cannot be fully human. Where we cannot be assured of our rights whatsoever, we lack the full status of rights-bearing individuals. What Locke wrote off as mere inconveniences to our rights, Kant believes penetrates to our very status as rights-bearers whatsoever.

## NOZICKIAN INVISIBLE HAND THEORY

Nozick affirms the Lockean commitment to the reality of rights in a state of nature, whilst denying that consent is necessary to a legitimate state. Nozick's is a *contingent* derivation of a non-voluntary state, where Locke's is a contingent derivation of a voluntary one, and Kant's a necessary derivation of a non-voluntary one. Whilst many libertarians (and with them, almost all political philosophers<sup>22</sup>) reject Nozick's derivation of the state, I think that at least as far as it rejects the aspects of the Lockean and Kantian respective accounts that are too strong, it has plausibility. I will

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<sup>20</sup>Kant, *The Metaphysics of Morals*, sec. 6.307.

<sup>21</sup>Jeremy Waldron, 'Special Ties and Natural Duties', *Philosophy and Public Affairs* 22, no. 1 (1993): 3–30; Jeremy Waldron, 'Kant's Legal Positivism', *Harvard Law Review* 109, no. 7 (1996): 1535–66.

<sup>22</sup>For example, Samuel Freeman takes it to be constitutively illiberal to ground political institutions in private contracts. See Samuel Freeman, 'Illiberal Libertarians: Why Libertarianism Is Not a Liberal View', *Philosophy and Public Affairs* 30, no. 2 (2001): 105–51.



reconstruct Nozick's derivation of the state here and supplement it with some important Kantian insights to show how they support Nozick's claims (and how we should soften Kant's).

In his invisible hand argument for the state, Nozick is self-consciously positioning himself against the quasi-Lockean, individualist anarchism of Benjamin R. Tucker<sup>23</sup> and Lysander Spooner<sup>24</sup> that he was exposed to through his contemporaries Murray N. Rothbard,<sup>25</sup> David Friedman,<sup>26</sup> and Morris and Linda Tannehill.<sup>27</sup> These anarchists, like Locke, believed that we have a right to freedom that we may self-enforce in the absence of any political institutions we have consented to. Indeed, they believed the more likely consensual scenario was not a single voluntary political association at all, but a plethora of protection associations operating simultaneously, protecting their respective clients with whom they individually contract. Nozick intended to show that a non-voluntary state could emerge from a system of market anarchy in a way that nonetheless did not violate anyone's rights. He did not believe that we consented to any actually existing state, but he wanted to show that it was in principle possible for a certain kind of state to emerge non-consensually and yet without violating our rights.

The starting point from which Nozick departs in his speculative derivation of the state, then, is that of market anarchy—a system in which a given geographical territory inhabited by a society contains a number of protective associations competitively seeking contracts to enforce the rights of individuals. Nozick believes that agencies who disagree over whose client was in the wrong, or

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<sup>23</sup>Benjamin R. Tucker, *Instead of A Book, By A Man Too Busy to Write One* (Boston: Benjamin R. Tucker, 1888).

<sup>24</sup>Lysander Spooner, *No Treason No. VI: The Constitution of No Authority* (Boston: Self-Published, 1870); Lysander Spooner, *A Letter to Grover Cleveland* (Boston: Benjamin R. Tucker, 1886).

<sup>25</sup>Murray N. Rothbard, *For A New Liberty: The Libertarian Manifesto*, 2nd ed. (Auburn: The Ludwig von Mises Institute, 2006).

<sup>26</sup>David Friedman, *The Machinery of Freedom: A Guide to Radical Capitalism*, 2nd ed. (LaSalle: Open Court Publishing Company, 1989).

<sup>27</sup>Morris Tannehill and Linda Tannehill, *The Market for Liberty*, 2nd ed. (Auburn: The Ludwig von Mises Institute, 2007).

over how much restitution is owed, etc. will enter into “battle.”<sup>28</sup> Since they cannot agree on right, they must resort to might. Nozick believes such battle can tend toward any one of three outcomes. (1) One agency tends to win more often than the other, and eventually grows in power due to clients of the vanquished agency transferring their subscription to the evidently stronger agency, in which case all but the most dominant agency remain, and everyone is either a member of that association, or they are independent—members of *no* association. (2) The victories of respective agencies tend to correlate by geographical region, meaning a similar effect as the above, except each smaller subregion has its own dominant agency. The competing agencies find comparative advantage closer to home, and the geographical area we started with is balkanised. (3) There is rough equality in the violent capacities of the respective agencies, and none distinguishes itself as dominant. To avoid further costly violent conflicts, these agencies recognise it to be in their own self-interest to agree to nominate a third-party arbitrator to rule where they cannot find agreement bilaterally. In each one of these cases, a dominant protective association emerges either monolithically over an area, or one dominates each subregion, or one is generated by an agreement among the competing associations. The reason why protective associations tend toward monopolisation is because the value of membership of the larger association grows with its size whilst the value of membership of the smaller shrinks with its size. The greater the number of clients a given association has, the higher the value of its product, since its product facilities protection from a larger volume of co-associates.<sup>29</sup>

In each case, the dominant association has not *quite* got the characteristics of a minimal state. A minimal state limits itself to protecting rights but does not permit any other agent to unilaterally engage in rights protection. Moreover, it reserves the right to

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<sup>28</sup>Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), 16.

<sup>29</sup>Nozick, 17. My understanding of the subtleties of Nozick’s argument here have been greatly assisted by Gerald F. Gaus, “Explanation, Justification, and Emergent Properties: An Essay on Nozickian Metatheory,” in *The Cambridge Companion to Nozick’s Anarchy, State, and Utopia*, ed. Ralf M. Bader and John Meadowcroft (Cambridge: Cambridge University Press, 2011).

extract payment from *everyone* within its jurisdiction, not just its voluntary subscribers. As yet, the dominant association does not have the right to tax, nor may it prohibit self-enforcement of rights by non-subscribers.

Nozick then goes on to say that the entrance of a competitor agency (notwithstanding its likely economic unviability) would introduce *risk* relative the status quo—risk of violence towards the members of the dominant association. As a rights-protector, then, the dominant association may prohibit entry into the rights-protection market simply as an extension of their duty to protect their members. At this point, the dominant association now takes the form of an “ultra-minimal state.” It monopolises legitimised violence in that it prohibits competitors, yet there would still be those who choose not to subscribe, and it would lack any power to coercively extract payment from them and does not extend protection to them. So, it is a monopoly, but lacks a power to tax and does not provide general protection.<sup>30</sup>

Nozick then considers how the presence of independents raises problems for members of the dominant agency.

An independent would be allowed to proceed to enforce his rights as he sees them and as he sees the facts of his situation; afterwards the members of the protective association would check to see whether he had acted wrongly or overreacted. If and only if he had done so, they would punish him or extract compensation from him.

But the victim of the independent’s wrongful and unjust retaliation may be not only damaged but seriously injured and perhaps even killed. Must one wait to act until afterwards? Surely there would be some probability of the independent’s misenforcing his rights, which is high enough (though less than unity) to justify the protective association in stopping him until it determines whether his rights indeed were violated by their clients? Wouldn’t people choose to do business only with agencies that offer their clients protection, by announcing they will punish

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<sup>30</sup>Nozick, *Anarchy, State, and Utopia*, 26.

anyone who punishes a client without first using some particular sort of procedure to establish his right to do this, independently of whether it turns out that he *could* have established this right?<sup>31</sup>

Nozick seems to be relaxed about the prospect of misenforcement of rights by members of the dominant association because they have already voluntarily transferred their right to enforce their own rights to that agency. Of course, they *might* enforce their rights themselves, even misenforce them, it is just that the agency is authorised to pre-emptively stop them from doing so and has presumably been successful in extinguishing the potential for self-enforcement among its members. Since the dominant agency is authorised to pre-emptively stop all self-enforcement, it a fortiori avoids all misenforcement. It is not authorised to do this with independents, it must wait and see if they misenforce before the use of force on their part is authorised.

Nozick believes that it is important not merely that our rights be protected, and that when they are violated restitution is made.<sup>32</sup> It is also important that we *know* that our rights are already secured ex ante as far as possible. It is not enough that it is possible and permissible to exact retribution or extract restitution after one's rights are violated, it is far more important that we know they not be violated. Such ex-post remedies do not erase the rights-violation, they are simply the best one can do once the damage is done. The residue of wrongdoing remains in two sense. The first is that restitution or retribution trivially do not *undo* the fact that one's rights were violated. Restitution may be a fine, but is not a fee. The second is that the absence of knowledge that one's rights will not be violated is itself a kind of harm.

Although it is not a rights *violation* (in the absence of a rights *violation*), there is some significant moral cost to us when we rightly believe ourselves to be vulnerable. Firstly, because we are not safe to actually make use of our rights; to get the full value of our freedom. Without the actual ability to safely act on our rights, it is almost as if we do not have them. Secondly, it is not clear that our moral status as the kinds

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<sup>31</sup>Nozick, 55–56.

<sup>32</sup>Nozick, 57–63.

of being who bear rights is reflected in the social reality in which we live. It is not a rights-violation for one's rights to not be given a fully-fledged social recognition, but it is certainly a kind of downgraded wrongful status one is left in that we should be concerned about for the same reason we should be concerned with rights at all.

This is why Kant believed that in a state of nature we could take pre-emptive action against one another; we were all presumptive threats, and given that there are no social institutions in place to extinguish that collective and mutual threat, we are licenced to protect ourselves as a last ditch effort to protect our status as rights-bearers.<sup>33</sup> Even though (indeed, perhaps *in virtue of* the fact that) we are all entitled to pre-emptively attack one another for the sake of our own security, this state is not a state where we really have rights. In failing to institute a social state of affairs in which we can act on our rights in the knowledge that others will not violate them, we do not wrong one another, but we nonetheless do wrong “in the highest degree.”<sup>34</sup>

Whatever the nature of the wrong, two things are clear. It is not a violation of anyone's rights, but it is still supremely wrong due to the normative importance of rights. Nozick concludes that the dominant agency may impose itself upon the independents at this point and prohibit their unilateral enforcement of their own rights—they must defer to the agency. Given that they benefit from the relative security provided—now to all—by the agency, the agency may force them to pay for the protection received.

Most interpretations of Nozick say that he has compromised the notion of rights he starts out with; a notion of “side-constraints” rather than maximally valuable consideration to feed into cost-benefit analysis. Nozick rejects what he calls a “utilitarianism of

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<sup>33</sup>One's duty to one's “rightful honour” is an internal duty because it is something no one else can enforce upon you. Kant, *The Metaphysics of Morals*, sec. 6.237; Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy*, 37–38.

<sup>34</sup>Kant's claim here, I think, is that we do not commit any kind of *directed* wrongdoing such as a rights violation, since there are as yet no rights to violate. Nonetheless, that condition in which there are rights that we can speak of as respected or violated is itself a morally valuable condition (independently of the value of rights being respected) because it enables moral ordering. So, it is a form of wrongdoing, it is just that it is not a way of wronging a particular person or persons.

rights.”<sup>35</sup> That is, the idea that an action that violates rights can be deemed rightful when its consequences are the avoidance of a larger numerical volume of, or more serious kinds of, rights violations. Rights are not a master value to be fed into utility calculus, they are a side-constraint on our pursuit of all other values.

Nozick’s idea that membership of a protective association can be forced upon a group (in pro tanto violation of their rights) so long as the membership assures them of robust protection of their rights in all other regards, is normally read to mean that it is permissible to violate someone’s rights so long as you provide them a stream of benefits that more than make up for it. The result is a Pareto improvement because the imposition is Kaldor-Hicks optimal, it is just that the currency is the frequency of the non-violation of rights, rather than units of welfare.

I think that David Gordon’s interpretation<sup>36</sup> is the right one: Nozick thinks that, in some sense, unsecured rights are no rights at all. Even if it is not what Nozick himself meant, I think it makes a plausible amendment to the theory, not only because it maintains faith to rights as side-constraints,<sup>37</sup> but also because it makes sense of a problem that Nozick leaves vague. The problem of not knowing whether independents plan to violate your rights or not, and not knowing if they will unilaterally try to extract too much compensation from you if you violate theirs. It is not that rights turn out to be less deontic than we thought, and we can violate them in marginal cases for the sake of their protection in general cases. Rather, it is that rights are *so weighty*, that we ought not have a wait-and-see attitude about whether or not they will be violated in

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<sup>35</sup>For example, see Eric Mack, ‘Nozickian Arguments for the More-Than-Minimal State’, in *The Cambridge Companion to Robert Nozick’s Anarchy, State, and Utopia*, ed. Ralf M. Bader and John Meadowcroft (Cambridge: Cambridge University Press, 2011).

<sup>36</sup>David Gordon, *Nozick’s Argument for the Minimal State* (The Ludwig von Mises Institute, 2006), <https://mises.org/library/nozicks-argument-minimal-state>; David Gordon, *Robert Nozick’s ‘Anarchy, State, and Utopia’* (The Ludwig von Mises Institute, 2018), <https://www.youtube.com/watch?v=31pTBdm5qLk>.

<sup>37</sup>As well as Nozick’s remarks regarding duties of fair play Nozick, *Anarchy, State, and Utopia*, 90–95.

certain kinds of social contexts. Those social contexts are ones in which we have some reason for thinking rights are systematically at risk—where the assumption that individuals are not threats to one another unless and until they initiate some ostensive action constitutive of a threat directed at another agent, vanishes. It is not that the association provides a benefit and recoups payment for it. It is that this arrangement is necessary for one to have the status of a rights-bearer whatsoever. It is a deontic claim, not a utilitarian one.

Respect for rights is something that is too important for us to make it a baseline assumption, rather than something requiring the positive presence of particular kinds of institutions. This, I think, echoes Kant's assurance problem. For Kant, where there are no state legal institutions, we are automatically threatening to one another. This is not purely because in lieu of enforcement we may (in the physical possibility sense of "may") invade one another's rights, potentially leaving behind irreparable harms. Rather, Kant believes that we need a state legal system even if we are all morally perfect; so, it cannot be a worry about mere physical security. Rather, it is that whatever physical security there may be, it is not security we can mutually have knowledge of the effectiveness of—we cannot trust in it. Where there are no legal institutions, Kant thinks, we have nothing other than hope that others will both know what justice consists in,<sup>38</sup> and be motivated to act justly. Hope is not the same thing as trust. When we have to hope that our rights are known and acted on by others, this not only shapes the way we use our freedom, such as it is, but also undermines our status as rights-bearers. That is not to say that Kant is right that only a state-like entity could provide this assurance, only to say that where assurance is lacking, we lack full standing. When our abstract rights are not given fully-fledged social reality, embedded in patterns of action across the society through which we move, our status is

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<sup>38</sup>Kant also thinks that even well motivated agents will act on different interpretations of justice, each of which is equally reasonable, and that this offers further grounds for the need for a unified legal system. There needs to be one version of justice we are all compelled toward, rather than acting on a variety of interpretations as if our own is the legally binding one. See note 39 below for why this does not push in favour of the state versus stateless legal institutions.

damaged. Facing one another as rights-bearers is what gives reality to our status as persons of equal moral status—it gives reality to the abstract humanity which we share. Living in social circumstances where rights are systematically insecure and unrecognised, as they are wherever we lack knowledge that others recognise our rights, as a life that is not fully human. As humans, we have a duty to overcome these circumstances and create institutions that recognise our status as moral equals and mutually protect our rights to be free. The rights to be free come *after* the institutions are created. Therefore, whatever institutions best secure our rights, we have a prior duty to uphold them. This is why a dominant protective association might be justified in imposing itself upon independents, so long as it really is the best way to secure our rights—and that it protects the rights of those it imposes itself upon would be partial evidence of that.

The idea that it can never be justified to impose institutions for the protection of rights upon parties without their consent is founded in the maxim of the presumption of innocence. Independents who have not actually initiated any overtly threatening actions towards members of the dominant association have not done any wrong; they have not initiated any rights-violating action that would render them liable to having their own rights defensively invaded by agents of the association. However, Kant and Nozick have a notion of threat that goes beyond individual actions, but that can include collective omission.

Of course, individuals can initiate threats that constitute rights violations, and these render them liable to defensive force where necessary and proportionate. However, certain kinds of social environments can themselves be threats to rights generally, apart from any identifiable agent's actions. It is possible that moral agents are threatened as such simply by existing in a certain institutional setting, not because any particular person has engaged in a positive act that itself directs a threat toward any one in particular. Kant thinks that all states of affairs apart from a *state* represent these circumstances. Nozick thinks that a lack of shared rights-protection association does, since he thinks that the default for co-members is one of security and the default between members and independents is one of hostility. In failing to overcome a state of affairs in which



the default assumption is rightful hostility, Kant describes us not as doing wrong against any particular person in the sense of constituting a rights violation, but of “doing wrong in the highest degree” by failing to take positive actions that would create a state of affairs in which we can recognise each other as rights-bearing equals.

I do not intend to argue that only a state can overcome that state of affairs, or that states necessarily can overcome such states of affairs. I intend to argue that it is justified to coercively deprive individuals of their rights of self-enforcement when and if that is necessary to overcome that state of affairs. And the provision of security to those agents is an implication of the justificatory fact that such institutions are the best for securing our status as rights-bearing equals. What I argue then is that we have a *contingent* duty of justice to establish and obey as far as necessary institutions that facilitate reciprocal trust between agents, such that they know that they are regarded as rights-bearers and will be treated accordingly as a default assumption. Deference to an enforcement and arbitration agency that is common to all agents may be the best way of securing such trust in some circumstances. The duty is not natural because the circumstances it evades are not necessarily natural. There should be no default assumption about what the default assumption is regarding the threat posed by other persons. It all depends upon the social context. However, if and where social institutions (or lack thereof) are such that individuals are not justified in holding a default assumption that other members of society will respect their rights, then all members of society acquire a duty to change those institutions and comply with ones that do provide such security. This is consistent with political anarchism, since stateless institutions could in principle do the work necessary to secure rights.<sup>39</sup> Consent to the institutions that are best for securing justice is not itself a requirement of justice.

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<sup>39</sup>It requires the adoption of “methodological anarchism,” of suspending belief that the state or any other particular institution is necessary in lieu of empirical evidence. Jason Lee Byas and Billy Christmas, ‘Methodological Anarchism’, in *The Routledge Handbook of Anarchy and Anarchist Thought*, ed. Gary Chartier and Chad Van Shoelandt (New York: Routledge, Forthcoming).

## MARKET ANARCHISM

Market anarchists are unconvinced by the case Nozick makes.<sup>40</sup> They argue that it is not necessarily the case that a single association would become the dominant one, and that it would nevertheless be unjust and possibly unnecessary to compel the obedience of independents. I will reconstruct these arguments below and argue that they cannot escape the potential need to impose compliance with a rights-protecting institution upon non-consenting agents, and whether or not that institution is a state or not is not particularly important.

The market anarchist denies the necessary truth of Nozick's claim that competing associations that disagree would necessarily resort to physical battle. Indeed, they make heavy work of Nozick's third suggestion that they may have the foresight to agree to a third-party arbitrator. They deny however that there must necessarily be a single third-party arbitrator to all pairs of disputing associations. It is a fallacy of composition to affirm that since all disputes need third party arbitration, there must be one third party arbitrator to all disputes. What happens when two or more among this plurality of arbitrators have an incommensurable disagreement? Well, hopefully there are some social norms in place that act as constitutional constraints such that when appropriate procedures are not followed arbitrators are sanctioned. However, such norms could solve the problem at a more basic level; before we even need to resort to third party arbitration. There could simply be social norms that emerge that ensure that the associations themselves are sanctioned when they do not comply with explicit or implicit agreements over how to proceed in cases of disagreement. Such norms fill the juridical void that statist tend to think must be filled by a state. Instead of a state appointed judge and written constitution, you simply have effective and stable informal

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<sup>40</sup>Michael Huemer, *The Problem of Political Authority: An Examination of the Right to Coerce and the Duty to Obey* (London: Palgrave Macmillan, 2013), pt. 2; Roderick T. Long, 'Market Anarchism as Constitutionalism', in *Anarchism/Minarchism: Is a Government Part of a Free Country?*, ed. Roderick T. Long and Tibor R. Machan (Aldershot: Ashgate Publishing, 2008); Aeon J. Skoble, *Deleting the State: An Argument About Government* (LaSalle: Open Court Publishing Company, 2008).

norms.<sup>41</sup> The norms have de facto juridical monopoly rather than any one of the particular agencies as such.<sup>42</sup>

Where such norms effectively generate trust, Nozick's worries about the effects of insecurity fall away. We could, in principle, secure our rights under anarchy, and have well-placed faith in that security.<sup>43</sup>

However, I think there is still the conceptual space for Nozick's worries to re-emerge. What if an association emerged that defied the norms; would it be legitimate for the other associations to impose the norms upon them coercively? If the answer is yes, then it looks like these other associations are behaving like a state (even if they do not consolidate into a "single" agency). If the answer is no, then should the members of the norm-abiding associations not fear for their rights in the same way they did with the independents?

To this, the anarchist reply is that such problems are present within a state as well. State agents might break the law as much as independents break the norms in a stateless society. Perhaps Nozick is wrong to assume that members of the same association can trust one another, as well as the enforcement agents. The *point* however is surely that we would concede that if a state agent broke the law and misenforced someone's rights we would think that the state had failed in doing something that was not merely permissible for it to do but was also duty bound to do—to ensure that misenforcement did not take place. The same should go for the independent who

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<sup>41</sup>Harrison P. Frye, 'Freedom without Law', *Politics, Philosophy and Economics* 17, no. 3 (2018): 298–316.

<sup>42</sup>This is why the additional Kantian concern with justice being made univocal by law does not add any further grounds for requiring a state versus statelessness. What is required is a single set of procedural norms, and there need not be a legal monopoly for that, it is just that law cannot be consensual (cannot be consensual? Why?—because some will not consent to just norms, and others will consent to unjust norms. Justice requires that their consent not matter in such cases). See Christmas, 'Against Kantian Statism', for my argument against the claim that concerns with the indeterminacy of rights offer a priori grounds for there needing to be a state.

<sup>43</sup>Indeed it is trust that is implicit in Nozick's claim that openly aggressive outlaw associations will be unable to attract clients. Nozick, *Anarchy, State, and Utopia*, 19.

breaks the norms of procedure that avert the danger of misenforcement; coercive measures should and could have been employed to prevent it from happening.

The second objection levelled by market anarchists is that we are not permitted to initiate coercion against those who *might* violate our rights; we are only permitted to use force to counter the actual initiation of force. No one has any duty to defer to an agency they have not consented to purely because *other people* might be violating one another's rights. So protective agencies do wrong when they deny the right to self-enforcement to independents because it is they who initiate the use of force. Moreover, why should I get my hands dirty in obeying and supporting an agency that uses coercion against those who are only seeking to enforce their own rights—as is their right? Well, I think there are two things that can be said in response to this.

The first is that the normative power that threats to one's rights have in authorising the use of defensive force does not need to come from the positive actions of anyone in particular. Social states of affairs can be hostile without any identifiable individual initiating a threatening action against any particular person. Hostility can be an emergent feature of collective action or of collective *omission*. Security of rights is not necessarily natural, but in some contexts requires the positive presence of institutions. However, even if this is denied there is another problem. It is true that we have a duty not to aggress against others or violate their freedom. And it is true that one can abstain from violating rights without joining, obeying, or supporting any particular set of institutions that positively protect the rights of others. Inaction on one's own part *does* guarantee that one does not violate rights. However, it does not guarantee that rights are not violated. Hence the duty to defer to a common agent to secure rights is not one that directly correlates with the rights of others, but it is one that has to be implied by the existence of rights at all.

An account of rights that says it is more important to avoid getting our hands dirty than contributing to a social order in which rights are realised is not a kind of anarchism that can have a stable relationship with liberalism. Liberalism seeks freedom on Earth among sinners; and that means adjusting our behaviour in light of that sin, even if we ourselves are good. Keeping your hands clean

may get you into heaven but not into a free society. If seeking the Kingdom of God is to be reconciled with social life, it cannot require that we not get our hands dirty, as is often believed to be the correct implication of Matthew 6:33; that one *first* seek the Kingdom of God.

## A SYNTHESIS OF LOCKEANISM AND KANTIANISM

Locke believed that legitimacy was something states acquired only when they were consented to. Kant believed that legitimacy was something states necessarily had because of the kind of thing they are. What seems more plausible is that states are legitimate if and when they generate the assurance of rights better than any alternative.

If there is an argument for the state, it is that deferring to its enforcement of rights is the best way of enjoying our rights among others. But it is not because there is anything *conceptually* to do with the state being “one” agency or a monopoly as such; legitimacy does not attach to those properties per se. It must be that through those things it is able to generate a situation of trust among rights-bearers. A state is legitimate, then, if that legitimacy functions to protect our rights. The use of coercion in a stateless society, however, is also legitimate if it functions to protect our rights. The distinction between anarchy and statehood is not particularly morally interesting, since legitimacy in both is simply achieved through providing better assurance of rights than there would be sans their coercion. Nozick’s position—or my reconstruction of it—is superior to the Kantian one because it does not say we have no rights of justice outside of institutions that give them a social reality. Rather, it says that we do have such rights, and they are so important that it is legitimate to non-consensually deprive some of the right to self-enforcement for the sake of rights generally. It does not deny that independents have a right outside of their incorporation into the dominant agency; it just denies that merely because they do not initiate any positive action that constitutes a threat, that their non-incorporation does not constitute a threat. One can play a role in generating an unsafe environment through one’s omissions, and not only through one’s

actions. Kant's notion that abstaining from entering a civil condition undermines our status as rights-bearers, and that such a situation is so inhumane that we have a duty to depart from it is a plausible one that I think Nozick shared. But Kant is wrong to think that a state is *necessarily* the only way to do this. The market anarchists are right to say that in principle, non-monopolistic organisations could provide the kind of security needed for our rights to have social reality, but they are wrong to think that this thwarts any need to non-consensually impose any institutions whatsoever upon non-consenting parties. Refusal to do the latter may very often leave our rights at systematic risk.

Whilst our rights do in fact exist in a state of nature, and we are all compelled by the moral law of justice not to invade one another's rights, we *also* have a duty to take whatever positive action might be required for the sake of the protection of rights generally; this might mean giving up our prima facie right of self-enforcement if abstaining from doing so when generalised presents such a threat to others that their status as rights-bearers is undermined.

It is important, I think, to note that on this view, the problem (when there is a problem) with statelessness is not that the use of force to protect rights is *unilateral* as Kant was concerned. It is that we cannot trust that force will be used justly.<sup>44</sup> When unilateral force is used justly enough such that we can all trust that we face one another as rights-bearing equals, or as much so as is possible, that force is legitimate. Perhaps at the point of development of the dominant agency, the state, or the nexus of overlapping competing agencies, where rights are secured and there is substantively just rule of law, the use of force can be said to be omnilateral. But the whole point is that it will have to start out as unilateral. Justice cannot be secured suddenly and all in one go, by an institution that has legitimacy prior to its actual securing of rights. The functionality of rights protective institutions is retro-actively legitimising.

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<sup>44</sup>Billy Christmas, 'The Indispensability of Unilateral Coercion', *200-Proof Liberals* (blog), 2020, <https://200proofliberals.blogspot.com/2020/08/the-indispensability-of-unilateral.html>.

## Avoiding the Political Realist-Idealist Dichotomy

*Douglas J. Den Uyl*  
and *Douglas B. Rasmussen*

The members of a human group are not parts of a single organism, like the hands or feet of an animal, who have no will of their own, nor are we like bees, ants, or even herd animals whose strong natural instincts can be counted on, at least in some areas, to be powerful enough to assure more or less harmonious coordination. Rather, humans, even in the most repressive societies we know, grow up to be individuated creatures who are separate centres for the formation, evaluation, and revision of beliefs, attitudes, values, and desires, and for the initiation of action that puts these beliefs and desires into effect. So coordination of action in our societies, either of a negative kind (that I don't act so as to thwart your plans) or of a positive kind (that I act so as to maximize the attainment of some goal that can be reached only by joint effort) is always a social achievement, and it is something attained and preserved, and generally achieved only at a certain price.

—Raymond Geuss, *Philosophy and Real Politics*

The sole use of statistics in political economy is to supply examples and illustrations of general principles. They

can never be the basis of principles, which are grounded upon the nature of things; whereas statistics, in the most improved state, are only an index of their quantity.

—J. B. Say, *A Treatise on Political Economy*

**T**he debate between advocates of political realism and political idealism is a messy one, because the crucial concepts are not clear. Indeed, William A. Galston in his most helpful essay, “Realism in political theory,”<sup>1</sup> which is an attempt to identify the main areas of disagreement between the political idealist and political realist, describes his text as having an “an air of *bricolage*.”<sup>2</sup> Nonetheless, it seems that we can say that the central figures<sup>3</sup> around which this debate revolves, or at least those whose views initially precipitated this dispute, are John Rawls<sup>4</sup> and Bernard Williams.<sup>5</sup> Rawls’s approach to political philosophy is seen as an example of political idealism,<sup>6</sup> while Williams’s is seen as political realism, and

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<sup>1</sup>William A. Galston, “Realism in political theory,” *European Journal of Political Theory* 9.4 385–411. DOI: 10.1177/1474885110374001

<sup>2</sup>*Ibid.*, p. 386.

<sup>3</sup>See Robert Jubb, “Realism,” in Adrian Blau, *Methods in Analytical Political Theory* (Cambridge: Cambridge University Press, 2017), pp. 112–30; Amartya Sen, *The Idea of Justice* (Cambridge, MA: Belknap Press of Harvard University Press, 2009), which is principally a critique and revision of John Rawls’s claim that we need an ideal of justice, and Edward Hall, *Value, Conflict, and Order: Berlin Hampshire, Williams and the Realist Revival in Political Theory* (Chicago and London: University of Chicago Press, 2020). Hall argues that the ethical pluralism advanced by Isaiah Berlin, John Gray, Stuart Hampshire, and Bernard Williams can be used to make a case for what might be called “weak political realism.” The idea here is not to disavow the possibility of any connection between ethics and political philosophy or theory—that is, at least in regard to providing a source for political normativity, for “no realist worth taking seriously seeks ‘a political theory cleansed of all moral content’” (p. 13).

<sup>4</sup>See John Rawls, *A Theory of Justice* (Cambridge, MA: Belknap Press of Harvard University Press, 1971) and *idem*, *Political Liberalism* (New York: Columbia University Press, 1993).

<sup>5</sup>Bernard Williams, “Realism and Moralism in Political Theory,” [hereinafter *RMPT*] in Geoffrey Hawthorn, ed., *In the Beginning Was the Deed: Realism and Moralism in Political Argument* (Princeton and Oxford: Princeton University Press, 2005), pp. 1–17.

<sup>6</sup>However, Justin Tosi has suggested to us that there might be reasons for not con-



the fundamental issue dividing them is whether one begins by ethical theorizing and then applies its conclusions to the political order or whether one begins with an existing state of political activity (usually in conflict) and draws conclusions from there—conclusions that must be of value to actual political actors.<sup>7</sup> The divide results because it is assumed that one option rules out the other. We think, however, that both can coexist—and in many cases do coexist despite claims to the contrary—and thus we do not embrace the dichotomy. Each can have entirely different functions, and indeed both may be necessary.

Possibly a more vivid way of stating the problem is: Does political realism allow one to do political theory who is not a social scientist and who does not begin political theorizing with social science? Is the whole tradition of political philosophy (e.g., the *Republic*, *Leviathan*, *Origins of Inequality*, etc.) ruled out? Would it be beyond the pale, for example, if someone in the middle ages theorized something like the US Constitution and the reasons for it, because during that epoch it had no chance of implementation? We think not.

Our view of this issue will be to argue that there is a sense in which both political realism and political idealism are compatible. We will in Part I of this essay reprise the basic themes of our approach to political philosophy and ethics<sup>8</sup> in order to show how that approach constitutes a middle ground between political realism and political

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sidering Rawls as primarily a political idealist, but instead as a “realistic utopian.” See John Rawls, *Justice as Fairness: A Restatement*, ed., Erin Kelly (Cambridge, MA: Belknap Press of Harvard University Press, 2001), pp. 37–38 where Rawls notes the importance of issues regarding the implementation of a conception of justice. Be this how it may, the issue of whether ethical ideals and principles can have a role for political philosophy and theory remains, and this issue is a major concern of this essay.

<sup>7</sup>See Robert Jubb, “Realism,” pp. 112–30.

<sup>8</sup>See Douglas B. Rasmussen and Douglas J. Den Uyl, *Norms of Liberty: A Perfectionist Basis for Non-Perfectionist Politics* (University Park: Pennsylvania State University Press, 2005) [hereinafter *NOL*]; Douglas J. Den Uyl and Douglas B. Rasmussen, *The Perfectionist Turn: From Metanorms to Metaethics* (Edinburgh: Edinburgh University Press, 2016) [hereinafter *TPT*]; and Douglas B. Rasmussen and Douglas J. Den Uyl, *The Realist Turn: Repositioning Liberalism* (Cham, Switzerland: Palgrave Macmillan, 2020) [hereinafter *TRT*]. Some material used in this essay is adapted from these works.

idealism.<sup>9</sup> How this is so will become clear as we explain the sense in which our approach is realistic and the sense in which it is idealistic. This will also involve us arguing against the claim that what is essential about politics is conflict and in favor of the claim that what is essential in politics is reconciliation. In Part II, we will consider aspects of Gerald Gaus's thoughtful and important argument against political idealism. We will argue that ethical ideals cannot be avoided by the political philosopher and in fact Gaus, like others, seems to tacitly adopt a version of what in this debate is called "moralism." Next, we will briefly examine Robert Jubb's account of political realism and its guidelines for political philosophers regarding the ideals, for example egalitarianism, they seek to implement. We will note that this advice is well and good, but it is not anything that should require the rejection of ethical ideals in political philosophy, especially when the political ideal is considered not in terms of making society good, but in terms of differentiating and legitimating the positive law of a society from merely the use or threat of physical force. Finally, we note that the metaphysical realist<sup>10</sup> approach we adopt provides the context for a rejection of the political realist-idealist dichotomy.

## I

### WHY WE ARE POLITICAL REALISTS

Despite his Marxian sympathies, we think that Geuss's statement expressed in one of our epigraphs is on to something, because it comes remarkably close to accurately depicting a central and basic issue of political philosophy that is immediately recognized, though not always fully grasped, by a political liberal—particularly a classical liberal or a libertarian. This issue is the problem of integrated political diversity. This problem can be illustrated by the following set of questions:

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<sup>9</sup>The beginnings of our approach to the political realist-idealist controversy can be found in Chapter 8, "The Importance of Metaphysical Realism," *TRT*, pp. 239–57.

<sup>10</sup>Metaphysical realism holds that there are beings that exist and are what they are apart from our cognition and that we can know both the existence and nature of these beings.

How ... is the appropriate political/legal order—the order that provides the overall structure to the social/political context—to be determined? What is its ethical basis? Since the structure provided by the political/legal order will rule over all equally, how can the universalism of *political/legal* structural principles square with the pluralism and self-direction required by human flourishing? Hence, how is it possible to have an ethical basis for an overall or general social/political context—a context that is open-ended or cosmopolitan—that will not require, as a matter of principle, that one form of human flourishing be preferred to another? How, in other words, can the possibility that various forms of human flourishing will not be in structural conflict be achieved?<sup>11</sup>

These questions constitute a problem whose solution involves features of both political idealism and political realism.

We have also called the issue these questions raise “liberalism’s problem,”<sup>12</sup> and we have endeavored to show that solving this problem involves recognizing that it is not an ethical problem in the usual sense.<sup>13</sup> The solution to this problem is not concerned to direct human conduct—that it is to say, it is *not* concerned to provide guidance in how to pursue goodness, virtue, justice, or generally engage in right conduct or even in how to avoid evil, vice, injustice, or generally evade wrong conduct. Rather, it is concerned to regulate conduct in a certain way. In this respect, then, our concern is similar to Williams’ in holding that the paramount problem for political philosophy is “securing of order, protection, safety, trust, and the conditions of cooperation,”<sup>14</sup> and that answering the question of what it is that differentiates a solution to this problem from that of simply domination is nothing less than an answer to the question of what it is that

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<sup>11</sup>*TRT*, p. 27.

<sup>12</sup>We have called this set of questions “liberalism’s problem,” because since at least Locke, liberalism has been, by and large, the only political tradition to appreciate fully its fundamentality and importance.

<sup>13</sup>We hold that is a problem that requires an ethical metanorm. We explain this below.

<sup>14</sup>*RMPT*, p. 3

legitimizes a political/legal order.<sup>15</sup> We hold, however, that though this is a problem that is uniquely political, this does not mean that there is not an ethical basis for solving it *distinct* from the practice of politics itself. Indeed, the meaning of such terms as “order,” “safety,” “trust,” “conditions of cooperation,” and “domination” require an ethical grounding if they are to be of any use in solving this problem. We argue that the type of regulation of human conduct that is required will have the aim of securing a condition that will protect *the possibility that people might themselves pursue* moral conduct when among others and thus provide the precondition for these terms having any ethical meaning. The focus of such regulation of human conduct is to protect the possibility of self-direction by establishing a political/legal order that protects an individual’s basic, negative natural rights to life, liberty, and property.<sup>16</sup> This approach to solving liberalism’s problem requires, then, not only rejecting that political philosophy is simply the institutionalization of ethics—that is, ethics writ large—but also recognizing that liberalism’s problem is fundamentally political in character.

Aristotle notes that human beings are by nature political animals, and by this he primarily means that their human flourishing cannot be achieved outside of the “polis.”<sup>17</sup> His use of the term *polis* has two senses: one refers to social or community life and the second refers to the political/legal order, which we usually call the “state.” Aristotle conflates these two senses,<sup>18</sup> and this conflation remains a part of political philosophy to this very day and requires of political theorists and philosophers that they always make clear exactly to what sense they refer when speaking of the “political.” Thus, we have argued that it is true that being social in some fashion or manner is required for human flourishing, but it is something quite dif-

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<sup>15</sup>Ibid., p. 5

<sup>16</sup>*NOL*, Chapter 4 and 11; and *TRT*, Chapter 2.

<sup>17</sup>*NOL*, pp. 141–42.

<sup>18</sup>“The end of the polis *qua* society is the virtuous and happy life, but it does not follow that the function of the polis *qua* state is to use coercive force against its citizens so as to make them virtuous and happy.” Fred D. Miller, Jr. *Nature, Justice, and Rights in Aristotle’s “Politics”* (Oxford: Clarendon Press, 1995), p. 358.

ferent and more nuanced when it comes to explaining the importance of belonging to a given political/legal order.

Nonetheless, we have been able to accept both senses of the term *political* when we say that liberalism's problem is fundamentally a political problem, because this problem results in part from the social character of human flourishing and its solution requires a political/legal order of a certain makeup. In other words, liberalism's problem results from a consideration of how the overall structure of the social order handles the pluralistic and individualized, and sometimes conflicting, character of human flourishing of each and every human being.<sup>19</sup> And since it is the political/legal order that eventually determines the overall structure of the social order, which involves primarily and ultimately the use of physical force in regulating human conduct,<sup>20</sup> the solution to liberalism's problem must not prejudice the structure of that order more toward some forms of human flourishing than others. It must instead find a solution that is based on an equally applicable and common critical element that is necessary to each individualized form flourishing.<sup>21</sup>

We have argued that the common critical element that is necessary to each and every individualized form of human flourishing is self-direction, and by self-direction we mean only "the act of using

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<sup>19</sup>This is especially important when one realizes that human sociality itself comes in various forms—from small communities, often each with their own unique ends, to larger ones, and to ultimately cosmopolitan societies that do not have a determinate end. See our discussion of Oakeshott's distinction between enterprise and civil associations in Douglas B. Rasmussen and Douglas J. Den Uyl "Norms of Liberty: Challenges and Prospects," in Aeon J. Skoble, ed. *Reading Rasmussen and Den Uyl: Critical Essays on Norms of Liberty* (Lanham, MD: Lexington Books, 2008), pp. 177–244; and Douglas J. Den Uyl and Douglas B. Rasmussen, "The Myth of Atomism," *The Review of Metaphysics* 59 (June 2006): pp. 843–70. Finally see, Michael Oakeshott, *On Human Conduct* (Oxford: Clarendon Press, 1975), chapter II, "On the Civil Condition," pp. 108–84.

<sup>20</sup>Though it is certainly true the markets can coordinate human conduct without the need for a central plan, it is nonetheless the case that markets require the existence of private property and contracts, and this requires the existence of a political/legal order.

<sup>21</sup>In doing so, no doubt forms of non-flourishing will occur as well. The structural form of the social political order concerns itself with a necessary feature of flourishing but not flourishing itself as we note below.

one's reason and judgment upon the world in an effort to understand one's surroundings, to make plans to act, and to act within or upon those surroundings."<sup>22</sup> The reason self-direction is key is because it must be present for moral responsibility (and thus human flourishing) to occur; and yet, it does not in itself require any particular form of human flourishing. Protecting the possibility of self-direction does not seek to determine the object of self-direction but only its exercise, and thus its protection is compatible with the plurality of forms of human flourishing.

As should be clear, there is nothing about being self-directed that guarantees that one is flourishing or self-perfecting; so, there is nothing about the protection of the possibility of self-direction among others, which a political/legal order based on an individual's basic, negative, natural rights to life, liberty, and property<sup>23</sup> affords, that guarantees, or even makes probable, that people will engage in flourishing or self-perfecting activities. The concern of such a political/legal order is not with how acts will turn out, but rather with setting the appropriate context for the possibility of self-directed action in the first place. However, since the single most basic and threatening encroachment on self-direction, and thus the possibility of moral action,<sup>24</sup> is the use of physical force, a political/legal order that protects these rights by prohibiting initiatory use or threat of physical force in any or all of its various forms<sup>25</sup> is the solution to liberalism's problem.

There is, then, a sense in which the approach to political philosophy and defense of individual rights that we have championed is not primarily a matter of individual or social ethics, but is basically

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<sup>22</sup>*NOL*, p. 89. Self-direction should not be confused with autonomy in either the Kantian or Millian sense, and it is certainly not human flourishing or self-perfection. In other words, it is the exercise of both speculative and practical reason, but it is not necessarily the exercise of speculative or practical wisdom.

<sup>23</sup>Hereafter, we will refer to these types of rights as simply "individual rights."

<sup>24</sup>See our discussion of the case of Alexandr Solzhenitsyn in the Gulag, *NOL*, pp. 94–95.

<sup>25</sup>All forms of encroachment on self-direction by others have their basis in physical compulsion. For a detailed account of this point and discussion of related matters, see *NOL*, pp. 89–90 n15, p. 90 n16, pp. 279–80, and pp. 303–11

and irreducibly political. We think that this sense is captured, surprisingly enough, by Ayn Rand when she made the following statement about the common good of the political community.

It is only with abstract principles that a social system may *properly* be concerned. A social system cannot force a particular good on a man nor can it force him to seek the good: it can only maintain conditions of existence which leave him free to seek it. A government cannot live a man's life, it can only protect his freedom. It cannot prescribe concretes, it cannot tell a man how to work, what to produce, what to buy, what to say, what to write, what values to seek, what form of happiness to pursue—it can only uphold the principle of his right to make such choices .... It is in this sense that “the common good” ... lies not in *what* men do when they are free, but in the fact *that* they are free.<sup>26</sup>

In this case, statecraft is not soulcraft. Rather, statecraft is securing liberty for human beings so that they might fashion for themselves their own souls, be that good or bad, and this is the function or aim of a political/order based on individual rights. Individual rights provide a structure that constitutes the common good of the political community, for they provide the ethical basis for a solution to liberalism's problem. Individual rights are “the link between the moral code of a man and the legal code of a society.”<sup>27</sup>

So, as strange as it may seem, the approach towards political philosophy that we advocate can be seen as a form of political realism, because this approach does not try to reduce political philosophy, particularly finding a solution to liberalism's problem, to a matter of employing normative ethics. Nor does this approach argue that individual rights are a necessary component in the actions needed to achieve human flourishing or even that these rights are fundamental moral principles that somehow trump all others in guiding

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<sup>26</sup>Ayn Rand, “From My ‘Future File,’” *The Ayn Rand Letter* 3, no. 26 (September 23, 1974): 4–5 (first emphasis added).

<sup>27</sup>Ayn Rand, “Value and Rights,” in John Hospers, ed., *Readings in Introductory Philosophical Analysis* (Englewood Cliffs, NJ: Prentice-Hall, 1968), p. 381.

human conduct.<sup>28</sup> As already noted, individual rights do not guide human conduct but only regulate it, and then only in regard to providing a solution of liberalism's problem. This approach seeks merely to have people follow laws that protect individual rights. It does not even try to develop the moral dispositions of persons to respect individual rights.<sup>29</sup> Its aim is to have people follow the laws that protect such rights, not engage in the employments of practical wisdom in the attainment of virtue. Hence, the aim of our approach is extremely limited and non-utopian.

### WHY WE ARE POLITICAL IDEALISTS

Since at least Plato, there has been the classic question of whether there is a basis for distinguishing between the legitimate use of political/legal power and its *de facto* use. This question has also been asked in other ways: Is there in principle a way to distinguish right from might? Is positive law more than merely orders backed by threats? What is the nature of the connection between the ethical order and the political/legal order? What is the standard for political legitimacy? We too have asked this classic question when we addressed liberalism's problem.

As we have argued elsewhere,<sup>30</sup> human flourishing or self-perfection is an agent-relative, individualized, inclusive, and self-directed activity. It is not a one-size-fits-all reality, and when it is coupled with the open-ended, natural sociality of human beings together with the basic nature of political/legal action, liberalism's problem arises. So, it is the character of human good—understood in terms of human flourishing or self-perfection (and as explained in our account of individualistic perfectionism)<sup>31</sup> that gives rise to liberalism's problem, and it is also to the basic character of human

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<sup>28</sup>*NOL*, pp. 265–68; *TRT*, pp. 46–57,

<sup>29</sup>The task of creating a culture that respects individual rights is vital. However, it does not follow from this truth that this is a task for the political/legal order. See our reply to communitarianism, *NOL*, pp. 242–44.

<sup>30</sup>*NOL*, Chapter 6; *TPT*, Chapter 1.

<sup>31</sup>*Ibid.*



flourishing or self-perfection to which we have appealed in finding the basis for a solution to that problem. Thus, our approach to political philosophy is certainly not free from ethical considerations.

Moreover, our view of liberty is an ethical notion in that we reject that liberty can be merely doing whatever one wants free of external impediments with no regulation on what one may do. Rather, we have aligned ourselves with Locke's claim that "no one ought to harm another in his life, health, liberty, or possessions .... And that all men may be restrained from invading others' rights, and doing hurt to one another ...."<sup>32</sup> For us, liberty is not opposed to there being an ethical regulation on what people may do to one another, and this is what legitimates the political/legal order and makes positive law ultimately more than orders backed by threats. Indeed, liberty only exists within the context of such regulation by a political/legal order. As we have noted, the regulations that define liberty can be expressed in the language of individual rights. So again, our approach is certainly not free of involvement with ethical considerations.

However, the crucial difference between our approach and that of many idealist approaches to political philosophy is that we have clearly rejected what we have termed "*equinormativity*"—that is, the idea that ethical norms are all of one type or have the same function.<sup>33</sup> Rather, we have argued that the function of an ethical norm can vary with the problem that is being faced. Ethical norms are a response to issues and problems that reality presents to human beings. *The type of ethical norm that is appropriate to the problem of attaining a worthwhile life—that is, the quest for human flourishing or self-perfection—is quite different from the type of ethical norm appropriate to legitimating the political/legal order and finding a solution to liberalism's problem.* As we observed in *TPT*:

The paradox is that the more increasingly acute one becomes at ethical reasoning and conduct, the less is transferable from oneself to others—that is, the less

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<sup>32</sup>John Locke, *Two Treatises of Government*, ed. Peter Laslett (Cambridge: Cambridge University Press, 1988), Book II, chapter 2, Paragraph 6, p. 271.

<sup>33</sup>*NOL*, pp. 38–39; *TPT*, pp. 92–94; and *TRT*, pp. 30–33, 44–57.

universal the principle upon which one may be acting becomes. By contrast, we would argue, the better one gets at political reasoning, the more universal the principles must be.<sup>34</sup>

Therefore, the sense in which our approach to political philosophy can be classified as idealistic depends on understanding the basis for this paradox.

In order to understand better this paradox, we need to examine briefly the vital differences between (1) the basis for the type of norm needed for attaining a flourishing or self-perfecting life and (2) the basis for the type of norm needed for legitimating the political/legal order and finding a solution to liberalism's problem.

(1) We have argued that human flourishing or self-perfection can be defined as the exercise of one's *own* practical wisdom.<sup>35</sup> This definition of human flourishing means that ethical norms are tools employed by moral agents *not* first and foremost for regulating human conduct but instead for attaining human good in circumstances that are particular and contingent. The determination of what ought to be done<sup>36</sup> is not achieved by merely following moral norms but requires insight by the agent that is often informed by exemplars of human conduct and common experience. Accordingly, ethical norms that are involved in the pursuit of human flourishing or self-perfection do not primarily consist in a litany of prescriptions or proscriptions but, rather, are open-ended principles coupled with dispositional goals that are designed to facilitate action in a variety of unknown circumstances as coordinated by an individual exercising her own practical wisdom. The fundamental idea behind this account of human flourishing or self-perfection is that individual human good is always and necessarily a unique type of reality, not some abstraction or universal or impersonal form. This is a view that more accurately respects objectivity regarding the nature of the

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<sup>34</sup>*TPT*, p. 70. See also David Gordon, "Rothbard and the Problem of Rules," *Mises Wire* November 13, 2020), <https://mises.org/wire/rothbard-and-problem-rules>.

<sup>35</sup>*Ibid.*, Chapter 1.

<sup>36</sup>Even the determination of what ought not to be done requires the employment of practical wisdom.

human good because it does not substitute an abstraction about the good for that good itself.

Since human flourishing is not some abstract, universal, or impersonal form, it is not concretely the same and thus equally applicable across flesh-and-blood persons. Nor is the ability to universalize “‘person<sub>1</sub> ought to pursue her good’ to ‘Any and every person ought to pursue her own good’ sufficient either to establish that person<sub>1</sub>’s and person<sub>x</sub>’s goods are the same or to give a reason for either person<sub>1</sub> or person<sub>x</sub> to sacrifice her pursuit of her good for the other’s good.”<sup>37</sup> Indeed, there can be morally legitimate differences among human beings. In other words, even if all human beings acted in a totally morally righteous manner, there could be ethically legitimate differences—sometimes conflicting—among them. Human flourishing is not a common good and cannot be achieved in a universal manner.<sup>38</sup> Therefore, the very character of human flourishing precludes it from being the proper aim of a political/legal order that seeks to have laws that are equally applicable to all, not structurally biased in favor of one form of human flourishing (or constituent activity) over another, and protective of the possibility of each person’s self-directed pursuit of human flourishing.<sup>39</sup>

It should be emphasized that we differ from many contemporary liberal theorists, because we hold that liberalism’s problem is not merely the result of people having different perspectives (sometimes conflicting ones) of human flourishing, but rather that human flourishing is as a concrete reality different for each person, and indeed can in certain cases be conflicting.<sup>40</sup> Hence, when it comes to solving

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<sup>37</sup>*TRT*, p. 41, slightly reworded. Also, it should be noted, that there is a vital difference between something being universalizable and something being universal. See *TPT*, pp. 75–85.

<sup>38</sup>This is not to say that we cannot abstractly talk about what all people need to do, but the whole point of emphasizing such a neo-Aristotelian approach to normative ethics is to make clear the vital importance not to conflate abstractions with realities.

<sup>39</sup>See *NOL*, chapter 11, for a full account and defense of this claim.

<sup>40</sup>It should be noted, however, that this sort of value pluralism, as Isaiah Berlin insists, is not equivalent to ethical relativism. Moreover, though there are many objective ends that constitute human good, that does not mean that one cannot speak of their “generic character,” as Berlin also insists (see *NOL*, pp. 170–71).

liberalism's problem, appealing to norms for human flourishing is a nonstarter, because its norms are neither universal nor impersonal.

(2) We have already noted that it is the open-ended, natural sociality of human beings, combined with the agent-relative, individualized, and self-directed character of human flourishing or self-perfection coupled to the nature of political action that gives rise to liberalism's problem. Further, we have already noted that it is the self-directed character of human flourishing that provides the key to solving liberalism's problem and that this requires a political/legal order based on individual rights. However, individual rights are a different type of ethical norm from the type found in the quest for human flourishing, and this point can be more readily grasped by explicitly considering the basic criteria that determine the type of ethical norm needed to solve liberalism's problem. These are as follows:

- a. It must not *structurally* prejudice the overall social context in favor of some forms of human flourishing over others;
- b. It must be universal or equally applicable to all forms of human flourishing—that is, it must be social in the open-ended or cosmopolitan sense;
- c. It must be *concretely* present in any and every form of human flourishing—that is, it must be grounded in some common critical element that runs through any and all forms of human flourishing (or its pursuit); and

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Whether the plurality of ends must lead to incompatibility cannot be determined by simply an appeal to some abstract account of human good or morality, but rather is a matter for practical wisdom. So, we too reject an ethical rationalism that does not recognize the crucial importance of an individual's nexus and the particular and contingent circumstances in determining what ought to be done. Nevertheless, unlike Berlin, Gray and others, value pluralism is not its own starting point or defining context, must be understood through a framework of human nature, as we point out throughout our works. As we have sought to make clear, we think these considerations make an important difference to not only how we consider the ethical enterprise but the political one as well. Finally, it should be noted that largely in light of our commitment to human nature as setting the context for these concerns, we consider and critique John Gray's dismissal of any form of perfectionism and his claim that liberalism as a political philosophy can no longer be sustained (see *NOL*, pp. 173–83 and pp. 244–50).

- d. It must appeal to some aspect of human flourishing in which every person has a necessary stake.<sup>41</sup>

These criteria do *not* constitute the basis for an ethical norm that guides persons in seeking human flourishing, for there is no consideration of the particular situation, culture, or nexus<sup>42</sup> of persons. Rather, the concern is with the overall structure of the social context for the individualistic, self-directed pursuit of human flourishing when among others. Thus, the type of norm that is needed will be one that regulates conduct so as to establish conditions that secure and maintain the possibility that people might for themselves pursue their own form of human flourishing when among others. Individual rights protect this possibility. As we have noted:

Individual rights are concerned with providing the ethical basis (or rationale) for the framework (or backdrop) necessary for the possibility of social life in which any and every person might be self-directed and thus might pursue a self-perfecting life. Individual rights are concerned with justifying and determining the context necessary for the possibility of social life in which persons and groups can conduct themselves according to normative principles.<sup>43</sup>

They are the ethical norm for the structural framework (or backdrop) that secures *the* general social context for the pursuit of one's human flourishing. They are a condition-*setting*, as opposed to a condition-*seeking*, norm. *As such, their concern is transcultural, transpersonal, universal, and hence impersonal.*<sup>44</sup> We call such an ethical norm a

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<sup>41</sup>NOL, p. 272.

<sup>42</sup>That is to say, the circumstances, talents, endowments, interests, beliefs, and histories that descriptively characterize the individual.

<sup>43</sup>NOL, p. 285.

<sup>44</sup>“To our way of thinking, the sort of respect owed to persons in a rights context is different from that in the normal moral case. In the former, one gets a kind of respect for the kind of being they are—in the latter, for what they do with themselves. In a way, as Kant again saw (though for perhaps different reasons), rights do not even require the presence of another person—only the potential presence. What one is actually respecting is not persons, but the generic property of personhood, as just

“metanorm,” and its difference from other ethical norms can be illustrated by noting that it is concerned with establishing the rules for playing the moral game among others as opposed to establishing the rules that provide guidance for playing that moral game well.<sup>45</sup> As such, a metanorm pertains to a different ethical order than the type of norm that pertains to various practices of human flourishing or self-perfection.

It is here, however, that we need to make clear how our approach to solving liberalism’s problem is different from how it might appear to someone who looks at this problem from a Rawlsian perspective—the main perspective these days regarded to be the quintessential form of ideal theory. First, Rawls’s view of justice-as-fairness might seem to be a metanorm because the description of the hypothetical situation from which rational contractors are asked to choose principles of justice—namely, the “original position” with its veil of ignorance—is most certainly impersonal. The veil of ignorance precludes particular knowledge of one’s social reality, natural assets, abilities, strengths, psychology, life-plan, and conception of the good. Indeed, Rawls notes that “we think of the original position as the point of view from which noumenal selves see the world.”<sup>46</sup> The reason for this approach seems to be the assumption that in order to find universal principles of interpersonal justice, then one must proceed from an impersonal account of not only human beings but also human flourishing.<sup>47</sup> Our approach is, however, embedded in a metaphysical realist approach in

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noted. It is not that this sort of respect is unimportant. . . . [It] is not that there is no respect here, but rather that there is a respect for *persons*. . . . Persons are more than their generic properties, and significant portions of the moral enterprise—indeed, the most significant—are those non-generic characteristics. To say that respecting rights is respecting a person is about like telling a friend that your relationship with her is completely captured by your generic need for friendship. *TPT*, pp. 329–330.

<sup>45</sup>See *TRT*, pp. 30–32.

<sup>46</sup>Rawls, *A Theory of Justice*, p. 255.

<sup>47</sup>Rawls seems to be mistaken in thinking that philosophical abstraction can by itself offer a solution to liberalism’s problem. This error applies not only to the use of such abstraction in the original position in *A Theory of Justice* but also to his appeals to the ideal of free and equal citizenship in *Political Liberalism*. Both attempt to ignore the character of human flourishing and thus the limits it places on what might be attained by the political/legal order.

which both human nature and human flourishing are individualized realities that are also profoundly social in nature. Neither of these features can be ignored when attempting to solve liberalism's problem,<sup>48</sup> and it is by finding the necessary feature of human flourishing that meets the basic criteria for solving liberalism's problem that we are able to find an impersonal norm that is not incompatible with either the individualized or social character of human nature and human flourishing.<sup>49</sup> As we have stated more than once, this feature is the self-directed character of speculative and practical reason, and it is this feature, which is fundamentally necessary to human beings being the kinds of beings they are, that enables us to find an impersonal ethical principle—an ethical metanorm—and avoid the need for adopting an impersonalist ethical foundation. In other words, we can find a solution to liberalism's problem without needing to adopt equinormativity.<sup>50</sup>

Second, Rawls states, “[A] moral conception may condemn the world and *human nature as too corrupt* to be moved by its precepts and ideals.”<sup>51</sup> For Rawls, if one is to ethically evaluate the world and human beings, the basis for a moral conception's precepts and

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<sup>48</sup>See *NOL*, pp. 299–301.

<sup>49</sup>We have made this point slightly differently: “Rule impersonalism does not imply ethical impersonalism, though ethical impersonalism is likely to imply rule impersonalism all the way down. Another way to put it is that agent relativity in value does not preclude rule impersonalism or transpersonalism. But agent neutrality seems unable to allow for personalism at all—only circumstantial pluralism.” Douglas J. Den Uyl and Douglas B. Rasmussen, “Two Dogmas of Egalitarianism,” *Journal des Economistes et des Etudes Humaines* (August 28, 2020): 23 n36, <https://doi.org/10.1515/jeeh-2020-0010>.

<sup>50</sup>“It takes a return to a neo-Aristotelian ethics such as individualistic perfectionism to show that the political/legal order can be ethically legitimated without requiring that ethics itself become juridical or legislative in character. This is so because the structure of typical ethical arguments today (as found in both Kantian and utilitarian ethical theory) is integrally like the structure of most normative political arguments in that it is assumed that universality and agent-neutrality of obligations are the *sine qua non* of normative ethics or any fundamental ethical ideal. In effect, it is generally assumed that all ethical norms must be of the same type—that equinormativity is true.” *TRT*, p. 44.

<sup>51</sup>John Rawls, *Justice as Fairness: A Restatement*, p. 184 (emphasis added). This statement by Rawls is noted by Galston, “Realism in political theory,” p. 409 n9.

ideals cannot be found in the natural order, particularly human nature, and instead a constructivist approach to ethical knowledge is to be adopted. We, however, reject this assumption and suggested approach to ethical knowledge. It is not necessary for us to give up political idealism, because we are making the norm we use to solve liberalism's problem subservient to needs of flesh-and-blood persons and are in no sense requiring persons to improve themselves. It is perfectly possible to have an ethical principle that will deal with liberalism's problem and indeed the basic question of legitimating the political/legal order without taking on the task of attempting to provide guidance for the moral improvement of people's lives or in general trying to make the world better. Further, it is not necessary to assume that ethical norms are constructed and are in no way based on the nature of human beings. Our approach is to argue that ethical norms are indeed so grounded, but that does not mean that they cannot provide a basis for either the guidance or regulation of human conduct. Human nature can determine what is ethically needed *and* at the same time set limits on what is ethically possible, and this means that one can have a basis for a realistic idealism when it comes to the respective domains of normative ethics and political philosophy. It is not necessary to accept equinormativity in order to apply ethical norms.

It is clear from what we have said above that in a certain sort of way we are guilty of "moralism." It is still from an ethical context that the metanorms gain their legitimacy even if they do not function to direct us towards flourishing directly. We saw, for example, that liberty itself is a moralized notion. The central truth of idealism is precisely its insistence that legitimacy is grounded in some way in an ethical context. That we allow for different types of ethical norms does not change the fact our individualist eudaimonistic ethics is providing the broad framework for reflection on these matters. The centrality of moving within an ethical context when thinking about political matters is why we remain defenders of traditional political philosophy.

Before closing out this section, we might take a moment to note another implication of our approach which differs from the typical realist and allows us some sympathy for the idealist. We can perhaps see this best by looking at Edward Hall's discussion of Stuart



Hampshire's views on compromise.<sup>52</sup> Hall suggests that realists, following Hampshire, would endorse compromise because they regard the essence of political life to be conflict. What follows from this is that conflict should not be regarded as a "defect or a malfunctioning" but as normal. So, our task becomes one of managing conflict over competing goods, to the end that conflict does not result in violence. Secondly, we need to purge ourselves of the idea that compromises on matters of principle are to be scorned and avoided. Once we purge ourselves of that attitude, we will be able to effectively manage conflict. Thirdly, once we realize that conflict is perpetual and ever present as part of the nature of politics, we will realize that the job of political theory is to theorize about how to manage it—and not to theorize about how to remove it. That realization, namely that conflict is the essence of politics, is the *sine qua non* of political realism. Finally, the task in the end then becomes one of finding those institutions "that the member of a polity can come to affirm and acquiesce to."

Some clarifications are in order. First, a diversity of values is not necessarily a conflict of values. Markets are a good indication that not only is cooperation possible in social life, but it is arguably society's essential telos. Indeed, diversity and cooperation are natural bedfellows in that both wealth and alternatives diminish conflict. Of course, the response to this claim would be that our subject is politics and not commercial life, so we have not shown that conflict is not the essence of politics even if it is not the essence of other aspects of social life. We will be back to that issue momentarily. Secondly, there is a possible confusion here between ideals and principles. We discuss this distinction fully elsewhere,<sup>53</sup> but the main point now is that principles can be weighted whereas ideals are not. One principle outweighing another is ipso facto not a compromise, but a likely expression of an endeavor in practical wisdom. If so, compromising principles would be to abandon them because they would no longer be action guiding. Ideals can be "compromised" in

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<sup>52</sup>Hall, *Value, Conflict, and Order*, pp. 111–14. Hall himself, faced with these defenses of compromise, actually ends up much like ourselves as described here and in the next section.

<sup>53</sup>*TRT*, pp. 83–89.

the sense of being altered. But if this alteration is devoid of principle, one has pragmatism because nothing is left to constrain any further alterations. It is conceivable then that principles and ideals, though different, can and should go together.

Next, we should note that the Carl Schmittian view that seems to be accepted by most realists—namely that politics is essentially characterized by conflict between enemies—is a picture of a political order in decline or chaos and not a representative statement about the essence of political order. What is essential about politics is reconciliation, not conflict.<sup>54</sup> And in this regard, it is especially important to realize that reconciliation does not *imply* conflict. People who are not necessarily in conflict can be reconciled. That is precisely what the solution to “liberalism’s problem” does. It is premised on recognition of diversity but does not *require* that diversity to be conflictual. Rather, all that is required is that the diversity in some way constitute a unity: *e pluribus unum*. Indeed, the solution to liberalism’s problem calls for the “affirmation and acquiescence” to its institutional expression—namely the affirmation of, and acquiescence to, a respect for individual rights. Such a political order is one grounded in a principle, namely the principle of respecting and enforcing individual rights. Taking that principle away, or compromising it, may leave one with an *ideal* of individual rights, but it would at the same time open the door to violent conflict; for as we have just suggested, the assertion of ideals devoid of any instantiation as principles, or instantiation according to principles, becomes a kind of dogmatism that may actually encourage social conflict and violence when confronted by other ideals.

However, principles disconnected to ideals offer us no basis upon which to weigh them. They come out as either deontic rules or get abandoned. Ideals are the basis for organizing and weighing principles. A healthy political order is thus defined necessarily by both. Hence, we should reject both the idea that politics is primarily and by nature about friends and enemies as well as the notion that principles should be compromised. *Politics is about a unity in a context of diversity according to some guiding principle of social interaction.* In our case

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<sup>54</sup>See *NOL*, pp. 333–38.

individual rights is the primary political principle.<sup>55</sup> We are not suggesting in saying this that accommodations (“compromises”) cannot be made or that choices in weighing principles will be easy. One need only recall the choice the American Founding Fathers made between union on the one hand and the continuation of slavery on the other during the development of the US Constitution. While hindsight may make it easy to conclude that some of the choices made then were the wrong ones, the chance to institutionalize, to some extent at least, the principles expressed in the Declaration of Independence may have seemed then the paramount principle. In any case, our point is that in politics ideals and principles are meant to work together if we want both acquiescence and affirmation. Absent principles and left only with ideals, we would lose acquiescence in favor of conflict. Absent ideals, we would lose affirmation in favor of pragmatism.

## II

### WHY WE ARE NEITHER REALISTS NOR IDEALISTS

One of the most sophisticated and sustained attacks on ideal theory is to be found in Gerald Gaus’s *Tyranny of the Ideal*.<sup>56</sup> Like many other attacks, Rawls figures most prominently as an object of Gaus’ concern. As we have noted already, however, our focus here is not particularly with Rawls or fads in contemporary political theory. The attack on ideal theory seems to us to be at least partially an attack upon traditional political philosophy generally, and as just mentioned we seek to defend that tradition. We say “partially” because much of traditional political philosophy does at least some of what modern day “realists” want to do in place of ideal theory. However defective such reflections may appear to modern day social science analysts, those thinkers did not simply wish a normative structure

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<sup>55</sup>There can, of course be others. Candidates historically have been some standard of merit, democracy, family lineage, and the like.

<sup>56</sup>Gerald Gaus, *The Tyranny of the Ideal*, (Princeton, NJ: Princeton University Press, 2016). References in the following pages to this work will be placed in the text.

upon the world, but looked into the nature of social action in reflecting upon their more normative conclusions. Our position here, as elsewhere, is that there is room for both “realism” and “idealism,” and that something like ideal theory is of value to, and necessary for, political philosophy. Part of our claim about its necessity is that despite efforts to purge political philosophy of ideal theorizing, it never leaves: it is either presumed or smuggled in. We are not claiming that ideal theory, or realist theory, cannot be done without focus upon the other. Our claim is rather that both can and do contribute to political philosophy and that therefore ruling out specialization is not one of our points here. Rather our purpose here is to defend ideal theory as having necessary value in political philosophy.

Gaus ironically does seem to give ideal theory a role to play at first, but he notes that the endeavor to put it into practice relegates that ideal to virtual incoherence. As he puts it in a way that also states the essence of his project:

In order to be successful and robust, the Open Society, I have tried to show, must be based on a moral constitution that provides the basis of a practice of responsibility and accountability among a maximally wide array of perspectives, allowing us to reap the fruits of the cooperation and competition that diversity allows. This is the truth retained from the idea of a well-ordered society: we must indeed have a common public moral framework by which to resolve our disputes and hold each other accountable. But this is a working convergence on a common framework from multiple, deeply different perspectives, which are based on very different ideals of justice, not a normalized perspective on justice (246).

Just prior to these remarks, Gaus notes:

I have tried to show that such an ideal is ultimately a mirage, yet one that tyrannizes over our thinking and encourages us to turn our backs on pressing problems of justice in our own neighborhood. It is a mirage because even if we actually had full confidence and complete agreement about the principles of justice, we would disagree about what social states best satisfied them (246).

At first glance, on the basis of the first passage cited, it looks as though Gaus is simply smuggling in his ideal, namely the “Open Society.” After all, we need a “common moral framework” to resolve disputes and to hold people accountable. Isn’t that just another ideal, albeit one that may differ in some ways from Rawls or other traditional ideals? And even if that ideal is “mirage,” does that make it any less of an ideal that by his own admission is necessary? Before answering “yes,” it is important to understand why Gaus would answer “no.” The main reason is that the moral structure is *endogenous* to social activity and not an exogenous product calling upon society to conform to its norms.

Thus, although having an “Open Society” sounds like an ideal, it is really more a process than an ideal. Yet even though any result of the process may evaporate eventually, can we not say that when that result is extant it still functions like an ideal? Gaus gives us some reason in the passages above to think the result does function like an ideal in the sense that it regulates. However, such regulatory norms do not function like other ideals because they are emergent and not imposed. They are, in a sense, already regulating as they emerge. It is important to note again here that for us as neo-Aristotelians and metaphysical realists, moral norms are also embedded in practices, and that includes justice, perhaps often in just the way Gaus imagines justice ought to function. We are not, for example, predisposed against the process of common law. Nevertheless, even in an evolutionary process we would argue that there is an ineluctable remainder of “moralism.”

One initial way in which the ideal of justice must come into the picture is through the individual. Gaus notes that in his favored “Open Society” each individual “is free to pursue his or her own inquiry into justice, exploring the terrain of justice as he or she sees it...” (149) The reason this is not an instance of ideal theory is that the ideals are only held by individuals. There is no overall ideal functioning for society as a whole—there is simply the interplay of the various ideals held by individuals. Yet it is worth noting that the ideals held by the individuals are themselves most often ideals for the whole society—something Gaus accepts (177). Take that away from them and one is left simply with competing interests. Consequently, ideal theory is what separates what is theoretical from what reduces

simply to interest, whatever the level of consideration in which it is being posited. Hence, in this regard, the difference between John Rawls on the one hand and any ordinary person on the other is simply that Rawls is better at developing his ideal than the ordinary person would be. Otherwise, they both equally have ideas of the good society that generalize across society and separate themselves from a picture simply of competing interests. Ideals are thus necessary at the micro level, but always concern the macro.

Of course, one is tempted to ask why the “Open Society” and the defense of it is not just another form of ideal theorizing. It is admitted that we need a moral framework, so the question falls on whether there really is a significant difference in the nature of being an ideal between a “‘comprehensive perspective’ and the ‘public social world’ of rules and institutions that is collectively created by members of a society” (177). The difference as just noted supposedly rests on the difference between an evolving body of norms versus an imposed one. But the preference of one of these over the other is itself an ideal, or is at least populated with ideal values. The fact that one favors process over a “comprehensive perspective” does not lessen the fact that both present an ideal picture of a social order and have characteristics that are measured in terms of a set of prior values which idealize a certain pattern or patterns of action by providing a standard for their evaluation. In other words, those practices have to conform to a set of norms brought to the measurement of actions in an Open Society every bit as much as any other type of ideal. *The difference is the way they are instituted, not necessarily the way they are conceptualized as normative standards.*

Gaus makes a lot of how the ideals of traditional political philosophy are not, and cannot be, fully realized because the attempt to impose them never results in actual circumstances that match the ideal. But if history is any indication, the Open Society will fare little better on this score. Our concern is not to object to Gaus’s vision of an open society, but rather to point to the inescapability of “moralism” it imposes upon us as well. In the Aristotelian tradition we adopt, there is no expectation that practice will be a simple mirroring of some ideal without further consideration of circumstances, histories, and capacities. Aristotelians draw their norms from experience. We are fans of the open society also, and for many of the reasons Gaus cites;

but for us there is always an “ideal” framework regulating at least the boundaries of acceptable practice. That regulatory function is a practical one. Furthermore, a regulatory ideal covers its practical domain without supposing it can define every aspect of it. That is the nature of an Aristotelian realist form of abstraction. It is not so much, then, whether practice looks like the ideal but how they interface with each other keeping in mind that both are necessary.

Gaus notes that “the Open Society invites all to share their ideals and show other perspectives how our common life can be made more just” (218). Much like an open market creates a better quality and variety of products, so a market in ideals of justice will do the same. Yet this analogy simply points to the same issue we have been raising. A free market in shoes certainly creates better shoes and more diverse types of shoes. A Soviet style uniformity of imposed production procedures is definitely not going to do so. Yet even in the highly pluralistic market of shoes, we still know we’re talking about shoes. They have a nature and function that regulates what will qualify as an example of a shoe and no doubt as an example of a good shoe. The same holds for justice. First, we cannot assume that all social interactions are about justice any more than we can assume all productions are about making shoes. We have to sort justice claims from other sorts of claims. Gaus, like so many others as we have noted elsewhere,<sup>57</sup> is very reluctant to define the nature of justice because that would press against the emergent nature of justice he wishes to defend. The danger there is, then, that justice becomes merely what we say it is as the social process evolves the concept. Even that, however, supposes we have some idea of what we’re talking about, that we can separate conclusions of justice from other sorts of conclusions. And to say that justice is the set of norms that govern us politically through a process of sifting divergent and competing claims about it is simply to beg the question.<sup>58</sup> Why are those sets of conclusions to be categorized as conclusions about justice and why should we accept them as decisive? We cannot leave it with whatever view or views come to be commonly referred to

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<sup>57</sup>*TRT*, Chapter 8, pp. 239–57.

<sup>58</sup>Gaus likes the Sen mountain peak analogy which we have discussed elsewhere. *Ibid.* pp. 243–45.

as justice are thereby justice. That would be to confuse identifying an outcome with establishing a principle.<sup>59</sup> However open or complicated a process may be—and Gaus has standards for what must take place for outcomes to lead to acceptable conclusions about justice<sup>60</sup>—we either smuggle in an ideal about the quality of the end product or we smuggle in a pattern of ideals about a process that will justify accepting an emergent result. But in the latter case we would still need some sense of an ideal of justice to even define the universe of what qualifies as just acts or policies as well as whether the values posited to lead us to justice are suitable to the task.<sup>61</sup> The values Gaus prefers, such as pluralism, diversity, and inclusiveness are not self-justifying. Whatever the flaws of traditional political theory may be, those theorists were at least in part attempting to paint establish standards that should be used to identify and justify claims about justice—not just impose their favored order on the rest of us.

As noted, Gaus is especially keen to point out that ideals are never realized in practice in the way they are pictured when considering the ideal alone. In this regard he claims that the pursuit of ideals forces us into “The Choice” where we “must choose between relatively certain (and perhaps large) local improvements in justice and pursuit of a considerably less certain ideal, which would yield optimal justice” (82). In some cases, the more we strive for the optimal the farther away we become from actually being able to change things locally for the better. And likewise, the more we concentrate on what we can accomplish locally, the less reliance we place on the ideal to the point where the original ideal becomes incoherent in the light of current circumstances, or useless as a guide to change. Assuming we can tell what qualifies as an advance in justice locally, Gaus would also want to note that we cannot respond by saying that we must know and utilize the ideal (the “optimal”) in order to decide what are acceptable trade-offs between pursuit of

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<sup>59</sup>Indeed, it might even be considered as an example of the genetic fallacy.

<sup>60</sup>We discuss some of this process in *TPT*, pp. 137–58.

<sup>61</sup>It might be claimed that identifying the nature of X (e.g., justice) is different from having an ideal of justice. However, justice is an inherently normative term, so to identify it is to in some fashion idealize it.



the ideal and achieving local advancements. Gaus would likely deny we actually have that choice. Instead, focusing on the pursuit of the ideal only serves to evaporate the ideal, because the ideal alters as it fails to live up to itself in practice. The ideal is either not recognizable as an ideal for the circumstances at all, or it splinters so badly there is nothing clearly left to trade off against. There is then, nothing to trade off. Consequently, because of this distraction towards the ideal, we would be left with less than could have been achieved locally. Better to just abandon the ideal from the beginning.

The problem here has again something to do with the nature of abstraction. A principle like justice, if it has any grounding in reality, functions neither as a blueprint nor as something against which trade-offs are made. *A principle of justice, like other moral principles, serves to illuminate appropriate courses of action according to the circumstances in which they are to be undertaken. Their value and necessity in this regard are not diminished one iota because practical experience varies and is more or less susceptible to change.* In some ways Gaus is a victim of what comes of accepting modern moral paradigms—that norms of justice are deontic-like rules meant to dictate precise conformity of action irrespective of practical concerns. This need not be how moral principles are to be understood. And while it is true that the strictly political context may need rules like this, that is to be understood in light of the nature of the situation (what we call “liberalism’s problem”), and not because this is the nature of moral principles. In addition, moving to the other side and ignoring principles in favor of consequences alone butts up against what we have been discussing above, namely defending the standards for measuring consequential success. It is no wonder that morality seems to take us nowhere with these two paradigms of deontology and consequentialism as our choices. It is no wonder that Gaus looks outside of traditional normative applications in political theory for answers. What is missing from what we would regard as virtual caricatures of morality is judgment—a central feature of a classical ethics. So “the choice” is not a binary one between local success and an optimal ideal. It is instead the interplay of both of these mediated by judgment. The interplay Gaus speaks of between the various perspectives on justice is in consort with the interplay between principle and practice, and for similar reasons—both must

issue in judgment, and judgment is inherently normative. The role of judgment is exactly what is missing from both the deontological and consequentialist understandings of morality.

Part of the desire to move away from “moralism” is the belief that we learn more about practice through social science modeling than through typical ethical reflection. The former looks to real time events while the latter conducts armchair ruminations. No doubt there is truth and value to social science modeling. But models are themselves like ideals, that is, subject to interpretation, disconfirming evidence, competing conceptions, and practical unreality. In a sensible world (and we are by no means suggesting that Gaus is not part of such a world) the applicability and limitations of models would itself be subject to judgment. As Aristotle noted long ago, practical wisdom is at the center of all this. We suggest that the endeavor to remove it in favor of rules, prescriptions, commands, algorithms for measuring consequences, cause and effect, and like measures that are devoid of judgment is what cuts off ideals from practical reality. The normative cannot be mindless.

## **WHY WE ARE NEITHER IDEALISTS NOR REALISTS**

In a particularly useful article by Robert Jubb, entitled “Realism,”<sup>62</sup> which surveys the realist positions, we are given various reasons to accept realism and reject “moralism.” According to Jubb, political realism recognizes that political philosophy is more than just the application of principles of normative ethics to politics. This is so because political philosophy faces the problem of dealing with conflicting views of the ethical life and indeed conflicting visions of human good, or what we have called “human flourishing.” As noted above, however, we hold that this problem, which we identify as the problem of integrated political diversity, is not merely a matter of reconciling competing perspectives or visions but is grounded in the very character of human flourishing—indeed one that is grounded

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<sup>62</sup>See Robert Jubb, “Realism,” in Adrian Blau, *Methods in Analytical Political Theory*.

in an account of human nature. That political philosophy is more than simply ethics writ large, then, is ultimately a matter of human nature, not the so-called liberal conception of the person. This is a problem that applies across cultures and times.<sup>63</sup> So, we regard the irreducibility of political philosophy to normative ethics as fundamental and not just the result of Modernity.<sup>64</sup> In this sense, we think political realism is spot on.

Jubb offers six guidelines, which he thinks helps to define political realism and thus contrasts it to what has been called “moralism.” These are:

1. A realist account of a political value must be based on an interpretation of the political situation in which the value is to be realized.
2. That interpretation of the situation must be plausible, not least in avoiding both relentless despair and utopian hope.
3. The value being theorized must be one that agents can be expected to respect as the theory requires without becoming moral saints.
4. Actual agents should also be able to see something of their expectations or aspirations in the theory that is being offered for their political situation, even if they may have more expansive hopes than it makes room for.
5. That theory should not rely on controversial interpretations or rankings of values, but try to make use of the evaluative and normative material the situation presents.
6. When connections are drawn between different normative or evaluative claims, as they will have to be, these connections must be based on plausible theories of and claims about how human life actually operates.<sup>65</sup>

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<sup>63</sup>To think of a problem and its solution without thinking of where and when it exists does not mean that they can exist apart from such considerations. Abstract considerations need not ignore such specifications. In fact, they require them and are a part of their extension. See *TRT*, Chapter 7.

<sup>64</sup>However, to recall what we said earlier, we call this problem “liberalism’s problem” because this tradition in political philosophy recognizes its importance and attempts to deal with it directly.

<sup>65</sup>Jubb, “Realism,” p. 125.

Frankly, we see nothing in these guidelines, at least abstractly considered, that precludes the type of political idealism or moralism that is part of our approach to political philosophy. To what these guidelines amount depends in large part on what one is trying to achieve by politics, and this is a matter of what standard for political legitimacy one defends. Moreover, these guidelines seem more directed to the processes of implementing a legitimate political/legal order than the task of determining what legitimates, if anything, such an order. One needs to know what determines which interpretation is being used, what is plausible, what is being asked of agents, and what is controversial—to mention just a few of the crucial concepts noted in these guidelines—and this requires a theory of political legitimacy. Finally, when Jubb illustrates how these guidelines might be applied when implementing egalitarianism, it is clear that no argument for this ideal has been provided or even an account of that in terms of which equality is to be measured.<sup>66</sup> To the extent political realism requires an account of what it is that legitimates a political/legal order, then something more than these guidelines is required, which at times Jubb seems to admit.<sup>67</sup>

The impetus behind political realism's rejection of "moralism" appears to involve ignoring two differences. The first is the difference between political philosophy and applied normative ethics. The second is the difference between determining what it is that legitimates a political/legal order and determining how to implement or maintain a legitimate political/legal order. There appear no good reasons to deny these differences, and further, it does not follow from political philosophy being more than the application of normative ethical principles that there is no ethical solution to the problem of integrated political diversity—more particularly, that there cannot be a kind of ethical norms and set of principles that address this problem, as we have argued in various works. Even more, it does not follow that determining what legitimates a political/legal order cannot be differentiated from how one implements such an order. Or, as we have put it, it can be argued that equinormativity is false and the

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<sup>66</sup>See Douglas J. Den Uyl and Douglas B. Rasmussen, "Two Dogmas of Egalitarianism," *Journal des Economistes et des Etudes Humaines*.

<sup>67</sup>Jubb, "Realism," p. 112.

type of ethical norm needed to solve the foundational problem of political philosophy is different from what is required for the ethical life, and this is the entry point for understanding and justifying the notion of basic negative rights we spoke of earlier.

## CONCLUSION

We might note that good political philosophy is not just about justice as seems to be the current supposition among many political theorists. Justice may be the central political concern, but political philosophy is by no means limited to it. As a recent book notes, there can be things like “virtue politics” which concerns more than the virtue of justice alone.<sup>68</sup> Historically it would be odd to think of justice apart from its relationship to other virtues. Indeed, it would be odd to think of “ideal” political systems as simply ideals of justice. Ironically, to say that political philosophy is about justice and virtually nothing else is to already give political philosophy a liberal bias. Liberalism may wish to claim that the political order should limit itself to justice alone, but “soul crafting” has long been a part of political philosophizing, and soul crafting has its eye on other virtues. Certainly, one can make a case against a soul crafting political order (as we do), but that is different than starting off with the liberal bias of justice being the only concern of political philosophy. In general, political philosophy is about the good society, and “good” can certainly encompass more than simply a focus upon justice. Even in liberal orders, other concerns, such as benevolence, have a place in formulating any political ideals or determining legitimate processes. There is, obviously, nothing wrong with limiting one’s attention to justice alone, but it is likely that the ideals of justice were never meant to stand on their own in isolation from other related ideals.

In addition, ideals of justice, or otherwise, are not just institutionally aspirational in the sense of aspiring to be put into practice. Ideals are motivationally aspirational as well. There seems to be among many critics of ideal theory the supposition that ideals are only concerned with putting themselves into practice in the sense

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<sup>68</sup>James Hankins, *Virtue Politics: Soulcraft and Statecraft in Renaissance Italy* (Cambridge, MA: Belknap Press of Harvard University Press, 2019).

of structuring the world according to the characteristics of the ideal. Yet the motivational, indeed teleological, nature of an ideal as an end serves practice too as we have tried to suggest above. The debate here may be a version of the old one of whether we can successfully envision a world without final causes, which brings us to the importance of metaphysical realism, and our claim, which we have defended in other places,<sup>69</sup> that political philosophy is radically deficient, like so many other areas of contemporary thinking, when the wider need for such a metaphysical context is not acknowledged.<sup>70</sup> We have suggested that those various final causes creep in to virtually any theoretical account and serve a purpose; but should they be purged entirely we may be left with the Parmenidean conclusion that all we can say is “what is, is.”

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<sup>69</sup>We argue for the importance of metaphysical realism for ethics and political philosophy in *TPT* and *TRT*.

<sup>70</sup>This essay has benefited from feedback on an earlier version from a workshop for the Free Market Institute at Texas Tech University on October 30, 2020.

## Liberals Need More and Better Cognition Theory

*Stephen R. C. Hicks*

First the Buddhist talked of the ways to calm, the mastery of desire, the path of enlightenment. The panelists all said “Wow, terrific, if that works for you that’s great.” Then the Hindu talked of the cycles of suffering and birth and rebirth, the teachings of Krishna and the way to release, and they all said “Wow, terrific, if that works for you that’s great.”

And so on, until the Catholic priest talked of the message of Jesus Christ, the promise of salvation and the way to life eternal, and they all said “Wow, terrific, if that works for you that’s great.”

And he thumped the table and shouted: “No! It’s not a question of if it works for me! It’s the true word of the living God, and if you don’t believe it you’re all damned to Hell!”

And they all said: “Wow, terrific, if that works for you that’s great.”

—Simon Blackburn, “Relatively Speaking,”<sup>1</sup>

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<sup>1</sup>Simon Blackburn. “Relatively Speaking,” *Think* 1 (2): 83–88 (2002).

Thus is the challenge for making the case for liberalism in a skeptical or post-truth age. By *liberalism* I mean the social philosophy that makes foundational the liberty of the individual in all areas of life—artistic, religious, economic, sexual, political, familial, scientific, and so on. By *skeptical* and *post-truth* I mean the view that on principle nothing can be known and/or that cognitive success concepts such as *truth*, *objectivity*, and *certainty* should be abandoned.

So what of the claim that *Free-market liberalism is best*?

As with the insistent religious panelist, the liberal faces a double challenge. One is that socially liberalism resists imposing itself on others, valorizing individual judgment as the final court of appeal for each. So it makes room within itself for diversity of belief and urges tolerance—both of which make for a temptation not to pass cognitive judgment upon illiberal beliefs. *I think liberalism is best but maybe illiberalism works for you.* The second challenge is that establishing the truth and objectivity of such constituent general and abstract beliefs as liberalism requires—*Individual rights are universal, Constitutional principles should be absolute, Free markets are win-win for all participants*, and so on—is not only a difficult positive cognitive achievement on its own but also requires an effective response to negative attacks on every element that goes into complicated cognitive achievement: perception, data gathering, conceptualization, proposition-formation, and the analytic and synthetic tools of mathematics and logic.

So: When I say that *Free-market liberalism is best*, am I speaking the *truth*? Do the *facts* and the *evidence* and the *arguments* make my assertion *justified*? Consequently, is my belief *objective*—or *subjective*? Do I *know* it, or is mine just another *opinion*? Is it all just *semantics*—or do concepts have *real meanings*? Do statistics *lie* or capture probabilities? Is history *written by the winners* and so dismissible bias, or can we all genuinely *learn* from it?

The cognitive territory is rich and complicated, and liberalism needs good cognitive theory as much as it needs good value theory, good economic theory, and good political theory.



## THE PLAN

In this essay I plan to respond to two mistakes that regularly plague objectivity. One is the mistake of seeing two options only when in fact there are three. A comedian once said he felt guilty about his girlfriend's death because they were at a party and she'd had too much to drink. She wanted to leave and asked him to drive her home, but he was having great fun and wanted to stay. She insisted, and they got into an argument. He really didn't want to leave, he said—so he shot her. In logic we call this the fallacy of False Alternative, though in philosophy the fallacy is rarely committed crudely.

In the case of *objectivity*, the fallacy is committed in holding that the only alternative to a naïve *intrinsicism* about knowledge is some kind of philosophical *subjectivism*.

The second mistake is not to spot an assumption that in fact drives the whole argument. In philosophy, hidden premises are often killers. Another comedienne quipped, *Of course he's a chauvinist pig. He's a male, isn't he?* In logic we call this the fallacy of Implicit Denial—it's the false implicit premise that needs to be made explicit and challenged—though again it's rarely committed crudely. It is, though, committed in dozens of particular ways, when a fact that gives rise to the need for objectivity is implicitly taken as making objectivity impossible.

For example, one reason we need objectivity is that our cognitive processes are not automatic. We make choices about how to process information, so we need to attend to how we are making those choices. But an implicit dismissal argument will say *We make individual choices when thinking so it's all subjective*. The killer assumption is that choice makes objectivity impossible.

So I will give a range of examples and analyses of the two mistakes, along with quotations from representatives. Then with the ground cleared, I will sketch a positive account of objectivity with special attention to its role in the case for liberalism.

The short statement of the problem is: If we abandon reason and objectivity, we get subjectivism; and if we get subjectivism, then we get relativism; and if we get relativism without recourse to reason, then we get brutality. Since brutality is incompatible with liberal society, it is morally imperative for liberals to seek and preserve objectivity.

But that's a long philosophical road compactly stated. Further, that long philosophical road needs a map of its highways and byways. So let's go over the territory by putting ourselves in the position of a skeptic against the claims of liberalism. We'd speak as follows:

### **THE LIBERALISM-AS-MERELY SUBJECTIVE ARGUMENT**

Liberals often claim that their social philosophy is based upon compelling empirical and theoretical argument. They also claim that liberalism should be applied to all human beings. That is, they present their case as if objectivity and universality were possible to achieve.

Liberalism also seems to require much confidence in the power of reason. It leaves common citizens free to make their own major life choices about friendships, marriage, and religion. Economically, it leaves them alone to make their own transactions in a free market, and politically it urges them to participate in some sort of a democratic republic. The assumption is that in all of those areas of life individuals are capable of assessing their circumstances objectively and so on balance making good decisions.

Liberalism also requires much confidence in the more sophisticated reason of its theorists. It presupposes that they can assess the historical and contemporary evidence accurately, that it can use the tools of mathematics and the scientific method more generally, and that it can logically integrate all of that into an objective theory that is universally true and good.

The "truth," though, is that objectivity and universality are myths. All claims to evidence, logic, and rational argument are shot through with subjectivity and relativity.

For centuries, many of our strongest religious thinkers have argued that reason is incompetent. Reason, they concluded, fails to prove the existence of God and even purports to show that religion is inconsistent or worse. Reliance upon reason thus leads people away from God. St. Augustine berated the sin of intellectual pride of those who learn natural philosophy: "they that know it, exult, and are puffed up; and by an ungodly pride departing from Thee, and failing of Thy light, they foresee a failure of the sun's light, which

shall be, so long before, but see not their own, which is.”<sup>2</sup> And John Calvin argued that “[o]ur reason is overwhelmed by so many forms of deceptions, is subject to so many errors, dashes against so many obstacles, is caught in so many difficulties, that it is far from directing us aright.”<sup>3</sup> So if people turn away from God, the weakness of their own reason will lead them to nihilism. Liberalism depends upon reason, but reason leads to subjectivism, which leads to relativism, which leads to nihilism.

So, they concluded, to avoid nihilism, we must commit to a strong *faith* in higher authority. Human beings need the submission and obedience of faith, not hubristic independence and confidence in the power of reason. But that defense of faith in God first requires an offensive against reason.<sup>4</sup> Søren Kierkegaard for example, asserted that faith requires “a crucifixion of the understanding.”<sup>5</sup>

Yet such faith involves a subjective leap, and many intellectuals are unable to make themselves commit to it. Even so, many will continue to advocate religion publicly for political reasons. While they personally do not need to believe, they judge that most people cannot get through life without some sort of religion. Religion is the common person’s philosophy, giving them personal structure and a reason to follow society’s rules. So on prudential grounds a society’s intellectual leaders should encourage widespread belief in the gods or a God. Even if a religion is not true, it is better for society that most people believe that it is true.<sup>6</sup>

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<sup>2</sup>St. Augustine, *Confessions*, 397–400 CE, Book 5, 3.3.

<sup>3</sup>John Calvin, *Institutes of the Christian Religion*, 1536, 2:2:25.

<sup>4</sup>Immanuel Kant on the value of showing reason incapable of knowing reality: “But, above all, there is the inestimable benefit, that all objections to morality and religion will be forever silenced, and this in Socratic fashion, namely, by the clearest proof of the ignorance of the objectors.” (*Critique of Pure Reason*, 1781/1787, Bxxxii).

<sup>5</sup>Søren Kierkegaard, *Concluding Unscientific Postscript to Philosophical Fragments*, 1846, translated by H. V. Hong and E. H. Hong (Princeton University Press, 1992), p. 564.

<sup>6</sup>Plato suggests that a society’s guardians are justified in noble lies: “The rulers then of the city may, if anybody, fitly lie on account of enemies or citizens for the benefit of the state.” (*The Republic*, 389b).

Of course, apologists for faith and “noble lie” theorists are merely expressing their subjective preferences for a certain kind of society. Even so, but a wide variety of considerations support the belief in deep subjectivity.

One is the distinction between *fact* and *value*, *is* and *ought*, *descriptive* and *normative*, a commonplace in modern philosophy. From any set of *factual* statements no *value* statements follow. Purportedly objective truths about how the world *is* do not imply any conclusions about how the world *ought* to be.<sup>7</sup> Values are only subjective preferences.<sup>8</sup> Even propositions of logic and mathematics are empty and merely reflect subjective choices.<sup>9</sup> As a result, no amount

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Alexis de Tocqueville argues that citizens of a democracy need dogmatism in religion even if the religion is not true: “I have laid it down in a preceding chapter that men cannot do without dogmatical belief; and even that it is very much to be desired that such belief should exist amongst them. I now add, that of all the kinds of dogmatical belief the most desirable appears to me to be dogmatical belief in matters of religion.” (*Democracy in America*, 1835, “Of the Manner in Which Religion in the United States Avails Itself of Democratic Tendencies,” 2.1.5).

Sigmund Freud is an atheist who is contemptuous of religion—“the whole thing is so patently infantile, so foreign to reality”—but he argues that the common man needs religion as he is not sophisticated to seek a meaningful life through the more demanding pursuits of art and science. (*Civilization and Its Discontents*, 1927, Chapter 2).

<sup>7</sup>David Hume notes wryly about those who make this mistake: “In every system of morality, which I have hitherto met with, I have always remarked, that the author proceeds for some time in the ordinary way of reasoning, and establishes the being of a God, or makes observations concerning human affairs; when of a sudden I am surprized to find, that instead of the usual copulations of propositions, is, and is not, I meet with no proposition that is not connected with an ought, or an ought not.” (“Moral Distinctions Not Derived from Reason,” *A Treatise of Human Nature*, 1738, 3.1.1).

<sup>8</sup>Professor C. L. Stevenson: “‘This is good’ means *I approve of this; do so as well.*” (“The Emotive Meaning of Ethical Terms,” 1937, in A. J. Ayer, editor, *Logical Positivism*, The Free Press, 1959, pp. 264–281).

<sup>9</sup>Ludwig Wittgenstein: “Theories which make a proposition of logic appear substantial are always false.” (*Tractatus Logico-Philosophicus*, 1922, 6.111).

A. J. Ayer: “The principles of logic and mathematics are true universally simply because we never allow them to be anything else” *Language, Truth, and Logic* (1936, Dover edition), p. 77).

of objective data, hard mathematics, and logical argument about liberalism can support the view that liberalism is good or desirable.

Further, human beings' perceptual capacities are subject to occasional illusions and regular relativities—what is sweet to you is bland to me, and what is appealing to eat when one is healthy is repulsive when one is sick.<sup>10</sup> So there is never any guarantee that even our basic observational data are objective or even mutually consistent.

Further still, all interpretations of the data are shaped by prior theoretical commitments. Anyone's theory about the world or a part of it has built into it assumptions about what is real and what is not, what is possible and what is not, what to look for and what to ignore. Necessarily, therefore, our ideological priors infect our interpretations with bias. Even our basic perceptions of the world are laden with theory and so subjective.<sup>11</sup>

Further yet still, human beings are *emotional* as well as rational. We often see and hear only what we want to hear, and the deepest sources of our wants are often unknown to us. Consequently, our beliefs and our value decisions are largely passion-driven rather than the result of reason.<sup>12</sup>

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<sup>10</sup>Heraclitus: "The sea is the purest and the impurest water. Fish can drink it, and it is good for them; to men it is undrinkable and destructive." (Fragments, B61).

<sup>11</sup>Professor N. R. Hanson: "theories and interpretations are 'there' in the seeing from the outset." ("Observation," Chapter 1 of *Patterns of Discovery*, Cambridge University Press, 1958).

Karl Popper: "*there is no sense organ in which anticipatory theories are not genetically incorporated.*" And: sense organs "incorporate, more especially, theory-like expectations. Sense organs, such as the eye, are prepared to react to certain selected environmental events—to those events which they 'expect', and *only* to those events. Like theories (and prejudices) they will in general be blind to others: to those which they do not understand, which they cannot interpret (because they do not correspond to any specific problem which the organism is trying to solve.)" (*Objective Knowledge*, Oxford University Press, 1972, pp. 72 and 145).

<sup>12</sup>Blaise Pascal: "The heart has its reasons, which reason does not know." (*Pensées*, 1670, p. 277).

Hume: "Reason is, and ought to be the slave of the passions." (*Treatise*, 2.3.3.4).

And further yet still, human beings are *social* beings, and they acquire beliefs and values and the very language they think in from their society. What is “rational” is socially conditioned, and since societies vary widely, what is rational is also socially relative.<sup>13</sup>

The point is that *any* theory that bills itself as objective and true is a non-starter,<sup>14</sup> and any political theory that requires a general rationality of its members is naïve.

Instead, we face only a variety of arbitrary subjective options.<sup>15</sup>

*Liberals* will sometimes grant that everything is subjective and relative—but argue that in order to make social living possible we should all agree to disagree when necessary. That is to say, we should accept *toleration* as our governing principle. We cannot expect or demand that everyone agree on *substantive* values, but we can push for a universal *procedural* principle: *Live, and let live*. That is admittedly to make an exception by insisting that we treat one principle as generally and objectively true. But in the interest of social peace, the principle of tolerance is the minimally necessary and achievable social objective.

Or if we are of a *Pragmatic* disposition, we will reject robust liberalism as being too absolutist about its principles. Instead, the best

Nietzsche: “It is our needs that interpret the world; our drives and their For and Against. Every drive is a kind of lust to rule; each one has its perspective that it would like to compel all the other drives to accept as a norm.” (*The Will to Power*, p. 481).

<sup>13</sup>Cass Sunstein: “For the individual agent, rationality is a function of social norms. A norm-free conception of rationality would have to depend on a conception of what peoples’ rational ‘interests’ are in a social vacuum. Since people never act in a social vacuum, such a conception would not be intelligible.” (*Free Markets and Social Justice*, Oxford University Press, 1997, p. 54).

Michel Foucault: “I claim that reason is a long narrative, which ends today and makes room for another, and makes no sense.” (*Foucault Live*, p. 251).

<sup>14</sup>Thomas Kuhn: “We may, to be more precise, have to relinquish the notion, explicit or implicit, that changes of paradigm carry scientists and those who learn from them closer and closer to the truth.” (*The Structure of Scientific Revolutions*, University of Chicago Press, 1962, p. 170).

<sup>15</sup>Professor Brian Medlin: “it is now pretty generally accepted by professional philosophers that ultimate ethical principles must be arbitrary.” (“Ultimate Principles and Ethical Egoism,” *Australasian Journal of Philosophy* 35:2. 1957, pp. 111–118).

we can do is make case-by-case judgments about what works rather than expecting universal principles to apply in all cases. Even toleration may work in some circumstances but not in others. We need *flexibility* rather than mechanical rules, and we need to understand that individuals, societies, and the world at large *evolve* over time. What works therefore itself evolves, and we should not be bound by allegedly timeless principles. Admittedly, “what works” is a subjective and relative criterion, but that is our human condition.

Or if we are a *Conservative* of a religious temperament, we will agree that the failures of reason make critical our need for *faith* in a set of absolute, timeless principles. Some beliefs and actions cannot be tolerated socially. And giving ourselves and our political leaders license to do whatever whoever thinks “works” is to abandon society to a free-for-all of depravity and decay. Faith does admittedly require a subjective leap, but perhaps it is our only escape from nihilism.

Or we can, as *Postmoderns* do, feel that the above choices and others are conditioned by our racial, gender, class, and ethnic origins. Advocates of liberal capitalism in particular are very often white, male, prosperous, and of European background. So their liberalism is merely an expression of *their* socially-subjective conditioning. But if we are of some *other* culture or subculture, then we are under no universalist imperative to suppress or give up the values that shape our social identities and replace them with liberal ones. Such social subjectivism does admittedly lead to a harsher and unending conflict of cultures, but at least we are not pretending that objective universality is possible.

At most, consequently, liberalism is merely one more subjective option to be considered in the mix of possible systems, and anyone’s choice among the possibilities is itself a subjective preference.<sup>16</sup>

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<sup>16</sup>Joseph Schumpeter: “We may, indeed, prefer the world of modern dictatorial socialism to the world of Adam Smith, or vice versa, but any such preference comes within the same category of subjective evaluation as does a man’s preference for blondes over brunettes.” (*A History of Economic Analysis*, 1954.)

## STARTING OVER ON OBJECTS AND SUBJECTS

Against such corrosive skepticism and its collapse of the case for liberalism into mere personal preference, let's clear the field and begin again.

We use *objective* and *subjective* in two different but related ways. One is to distinguish what is *out there* from what is *in here*. Out there is *objective* reality, made up of rocks and rivers, planets and people, and much more. In here is *subjective* reality, made up of perceptions and memories and concepts and more. In this usage, *subjective* is a metaphysical concept, denoting a certain type of being. Reality is made up of many objects, and some of them are objects that are subjects. So we can speak of *subjective* as meaning anything that subjects are and do.

The second way we use *objective* and *subjective*, though, is narrower and focuses on what subjects do during their cognitive activities. Is the subject trying (and hopefully succeeding) at keeping his or her cognition in relation to objective reality by attending to the evidence and argument? If so, the subject's cognitive process is objective. Or is the subject not attending to the evidence and argument and, perhaps, actively ignoring evidence, sabotaging argument, and letting emotion alone decide? If so, the subject's process is subjective. Here *objective* and *subjective* are used as *epistemological* concepts.

So *subjective* has two meanings. In one meaning, the metaphysical one, it is merely to say that a subject is involved. In the other meaning, the epistemological one, it is to say that the subject is out of relation cognitively to objective reality and is making itself primarily or solely determining of its content.

*Objective* has two parallel meanings. In one meaning, the metaphysical one, it is to designate some aspect of reality. In the other, the epistemological, it is to designate what subjects do cognitively to form and maintain their connection to reality. *Using one's mind objectively* is a description of the process, and *objective belief* describes the result.

So *subjective belief* could mean two different things. It could mean merely that any belief is a property or state of a subject. Or it could mean that the belief in question is disconnected from reality,



i.e., that objective processes were not followed in arriving at or holding the belief.

The next issue is the big one: Is epistemological objectivity even possible? Human cognition is an extraordinarily complicated process, and psychology, linguistics, neurology, and cognitive science more broadly are still in their infancy. Even so, some quick-and-dirty philosophical temptations are to be resisted. One is a fast flight to the most difficult cases in cognition and taking confusion there as showing general impossibility. For example, it is still a complicated and ongoing project to discover what objectivity entails in complicated and cutting-edge science or in interpreting literary texts with multiple layers of meaning and thematic richness. So we should start with simpler cases to work out the criteria of objectivity and then scale up to the complicated cases. By analogy, if we're looking at robins and chickens and hawks and defining the concept of *bird* but we immediately jump to *What about penguins!?!—*then we're setting ourselves up for frustration. A variant temptation is the philosopher's sin of taking the lack of a good theory as implying the phenomenon we're trying to explain does not exist. Objectivity can be complex, but not right now being able to come up with a cognitive theory that explains it all should not lead one to set aside its reality. Mary Kay Ash makes the point pithily: "Aerodynamically, the bumble bee shouldn't be able to fly, but the bumble bee doesn't know it so it goes on flying anyway." The same holds for objectivity: We are and can be much more objective than much philosophical theorizing gives us credit for.

In the bulk of this essay, though, I will focus on two widespread and seductive challenges to objectivity. One is taking some form of intrinsicism—i.e., the view that for knowledge objective reality alone should be operative and stamp itself upon a passive subject's mind—as one's standard for objectivity, and when that intrinsicist view fails (as it must) to conclude that only subjectivism is the alternative. Objectivity is a third alternative and distinct from both intrinsicism and subjectivism.

The second challenge is the common practice of taking facts that give rise to the need for objectivity—e.g., finite awareness, perspective, choice, background influence, bias, emotions, etc.—and using

them to conclude objectivity is impossible. The reasons why humans need objectivity should not be disqualifiers of objectivity.

## THE ONLY-TWO-ALTERNATIVES PROBLEM

In short, the problem arises for those who have difficulty integrating the two facts: *Both* a subject and an object are involved in cognition. Consciousness is a *relational* phenomenon. One of the only-two-alternatives sides wants to reduce knowledge to the object-side only (intrinsicism); the other wants to reduce it to the subject only (subjectivism).

Objectivity is the practice of maintaining the relationship between consciousness and reality, with reality setting the basic terms. Consciousness has an active role to play in gathering and processing data about reality, but that consciousness doesn't get to make up the terms. Consciousness is first a response-to-reality or in-relation-to-reality phenomenon. Objectivity thus is in broad contrast to two other metaphysical-epistemological positions in the history of philosophy, intrinsicism and subjectivism.<sup>17</sup>

Intrinsicism holds that reality alone sets the terms, that consciousness is such a passive and derivative phenomenon that when we want to talk about the nature of reality, or knowledge of reality, we should understand consciousness as some sort of a mirror held up to nature such that reality writes upon it or that all consciousness does is reflects things that nature shines upon it. To change metaphors, consciousness is like a lump of plasticine upon which reality stamps its identity. A standard interpretation of Plato, for example, takes him to be a kind of intrinsicist: knowledge is a matter of one's mind passively receiving impressions from the perfect Forms.

Subjectivism is the other option, which holds that consciousness alone sets the terms for knowledge. This position sees the subject's consciousness as active-processing phenomenon, but sees consciousness's active processing as making reality's input diminished

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<sup>17</sup>Recommended much fuller development of these issues is David Kelley, *Lectures on Epistemology*, The Atlas Society, 2015. Accessed online at: <https://www.youtube.com/watch?v=AVBgfamJxFk&list=PLnHOyZsmJrozETJ9zzryDhW0kliZkbIsu>.

or non-existent. Our minds are seen as adding or subtracting or altering features of reality's data-input to the point that as conscious beings we cannot tell what is real from what has been subjectively made up.

So we face a hard alternative: Either we try to minimize entirely the subject's identity and activity so as to maximize intrinsic reality's input. Or we accept that reality is merely a product of our subjective consciousness—because we cannot from our personal conscious perspective separate out what we've added from that which comes from reality itself.

Friedrich Nietzsche gives us a clear statement of both: “The objective human is indeed a mirror: he is accustomed to submit before whatever wants to be known.” He is “only a delicate, carefully dusted, fine, mobile pot for forms that still has to wait for some content and substance in order to ‘shape’ itself accordingly—for the most part, a man without substance and content, a ‘selfless’ man.”<sup>18</sup> That is, to be objective only what is intrinsically out there in reality could be operative. Yet, Nietzsche easily points out, subjects are operative in cognition. Consequently, he swings to the opposite extreme and embraces a subject-alone subjectivism: “*Genuine philosophers, however, are commanders and legislators: they say, ‘thus it shall be!’ ... Their ‘knowing’ is creating, their creating is a legislation, their will to truth is—will to power.*”<sup>19</sup>

But objectivity means that neither reality alone nor subjects alone yield cognition. Reality sets the terms but consciousness is active in gathering the data, manipulating the data in various ways in order to reach conclusions. And as long as that consciousness keeps its reality orientation, objectivity as possible. We can make many sorts of mistakes in processing the data, so the concepts and criteria of truth and falsity become important. But if we use our conscious apparatus properly, objective knowledge is possible.

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<sup>18</sup>Friedrich Nietzsche, *Beyond Good and Evil* (Stanford University Press, 2014), section 207.

<sup>19</sup>Friedrich Nietzsche, *Beyond Good and Evil*, section 211.

## EXAMPLE: GRADING STUDENT ESSAYS

Consider the difference between objective and subjective grading. Three positions develop.

The intrinsicist disposition holds that if I am a professor who's reading and evaluating a student's work, then the nature and worth of the student's essay should all by itself impress itself upon my mind. If it really is a B+ paper, the B+-ness of the paper will be obvious and reveal itself to my mind. And the role of the professor is merely to *register* the B+ quality of the paper and acknowledge it. Sometimes intrinsicists will contrast machine grading to human grading. The idea is that if we take the human being out of it—obviously a simple machine doesn't have consciousness—we get the intrinsic value of the student's work.

Contrast the subjective grading we may have experienced (or perpetrated), in which cases the grade says more about what is going on in the professor's mind than about the actual qualities of the student's work. Rather than attending to the points that the essay is making and noticing how the argument is constructed, or how the rhetoric flows or doesn't—the professor has biases, preconceptions about the student, or disagrees with the content of the paper, and so down-grades—or perhaps up-grades—the essay independently of its actual merits. So, while the failure of subjective grading is to make only the mind of the professor decisive in determining the grade, the hope of intrinsic grading is to take the professor's consciousness out of the process entirely.

To draw this analogy for objectivity: the professor is a *necessary* part of the process in assigning a grade, but the professor's commitment is to evaluating the *actual qualities* of the paper. Both reality and consciousness are involved, and objective grading is the professor's maintaining his or her consciousness's connection to reality so that the judgment of grade fits the facts of the essay. He or she reads the essay carefully, attends to the points that are being made, assesses the arguments, evaluates the quality of the sources, and so forth. The reality is that some essays make points that other papers do not make. Some are structured in ways that are different from the way other papers are structured. The essays have actual features and the professor becomes aware of them. Objectivity in grading is

an active process of a professor's consciousness directed toward the actually existing features embodied in the essay and yielding a judgment about the essay that acknowledges those features.

To generalize from this example: We need to get past the historical divide that has often plagued aspects of the history of philosophy: between those who see reality itself as stamping itself on passive minds and minds as having to be passive if knowledge is to be possible *versus* those who see the actions of consciousness as necessary to the whole knowledge process and so see reality as necessary dropping out of it. Yet objectivity is a third option distinct from intrinsicism and subjectivism: consciousness is a relational phenomenon, and objectivity is about using our consciousness to maintain our reality orientation.<sup>20</sup>

It is one thing macroscopically to conceptualize objectivity as a third alternative to intrinsicism and subjectivism, but the devil is in the details of cognition. As one scales down microscopically to each of the many conscious processes—sensation, perception, conception, memory, emotion, and so on—maintaining the awareness of the three alternatives' implications for cognition is an ongoing challenge. The challenge is heightened by an additional problem.

## THE IMPLICIT-PREMISE PROBLEM

It is normal in ordinary and uncontroversial situations not to state much background knowledge and to rely upon it as unspoken assumption. We'll argue that *All humans are mortal, so Socrates is mortal* and leave implicit the knowledge that Socrates is human. Or in everyday example: *You should take your umbrella today because it*

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<sup>20</sup>A near-contemporary of Nietzsche's, philosopher W. P. Montague of Columbia University, articulated a relational theory of consciousness: "Recently, several philosophers have independently suggested that the relational category should be applied in the study of consciousness as well as in the study of its objects, that the phenomenon of consciousness, of awareness, should be correlated with such relations between other phenomena as will best explain its function and its origin. The relational theory of consciousness, however, implies a realistic theory of sensible qualities, both primary and secondary. And, conversely, when once this realism is recognized, there is no temptation to relapse into either of the idealistic or non-relational conceptions of consciousness."

*might rain.* That works with a series of implicit premises: *Rain makes you wet, You don't want to get wet, Umbrellas prevent rain from making you wet.* But one need not labor those points unless one is teaching a child.

Implicit premises also work well as comedic devices, as in *Of course he's a chauvinist pig—he's a male, isn't he?* Making the assumption explicit both kills the humor and reveals the false premise:

Explicit premise: *He is male.*

Implicit Premise: *All males are chauvinist pigs.*

Conclusion: *He is a chauvinist pig.*

As matters become more serious and complicated, the logical technique of making all implicit premises explicit becomes invaluable in avoiding the many errors that can follow from a mistaken assumption. Though sometimes difficult due to the subtlety of the assumption, it is essential to make the hidden assumption explicit and ask: *Is it true?*

## EXAMPLES OF MAKING OBJECTIVITY IMPOSSIBLE BY IMPLICIT DEFINITION

Here is a set of a dozen ways in which implicit premises are taken to rule out objectivity. The set includes exemplars from a variety of fields. In each case, a fact about human cognition that either *enables* or *gives rise to* the need for objectivity is taken as the *enemy* of objectivity.

1. *The human cognitive apparatus has structure.* A neo-Kantian argues: "The mind has a structure, and that structure means the mind can never objectively grasp reality."<sup>21</sup>

Explicit premise: *The mind has a structure.*

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<sup>21</sup>"Kant persuasively argued that the human inquisitor's mind is not a see-through structure with a mere reflective function. Rather the human process of knowing the external world is through the senses and these senses themselves have impactful structures and causal processes. Thus, reason can only be presented with an internal representation of external reality. Direct experience of the material world is impossible to the subjective effect of the knower's essentially sequential and influential operations." (John Brown, "Post-Postmodernism," *Lies, Trickery, Obfuscation*, 2021 ms.)

Implicit Premise: *Only a structure-less mind could objectively grasp reality.*

Conclusion: *The mind can never objectively grasp reality.*

To see the falseness of the implicit premise—or at least how the argument would be challenged—note the *grasp* metaphor, which suggests a parallel absurdity: “A human hand has a structure, and that structure means the hand can never really grasp objects in reality.” The implicit assumption would be that only a structure-less hand would be able truly to grasp, which is absurd. In both cases, the argument takes a fact—structure—that makes an action possible—grasping—but turns the fact into the enemy of the action.

2. *Human minds think in abstraction*: Entrepreneur Gabriel Scheare: “Rights are just abstractions (thoughts in people’s heads) so they cannot possibly be objective. You choose to respect the property of all other peaceful humans and so you say that we have property rights but we don’t actually ‘have’ anything. It’s just a policy in your mind.”<sup>22</sup> Assumption: *To be objective, rights would have to be concrete possessions not in your mind.* In this case, the cognitive need that humans have—to identify conceptual principles upon which to act and to formulate them in abstract terms—is assumed to disqualify such principles from being objective.

3. *We use language*: Economist Steve Horwitz: “I see it as a focus more on language than concepts per se. We can’t ever get ‘behind’ language to some objective reality, so we must use conversation and persuasion to understand the world. The question is whether we can reach intersubjective understanding (the more hopeful version) or whether power dynamics and what Will calls ‘identity-relative discourse’ mean such understanding is impossible (the later, more pessimistic version).”

Explicit premise: *Our minds use language.*

Implicit premise: *Only a language-less mind could get to objective reality.*

Conclusion: *Our minds can never get behind language to objective reality.*

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<sup>22</sup>Gabriel Scheare, Tweet accessed online at: <https://twitter.com/scheare?lang=en>.

Rather than seeing language as the *tool* our minds use in conceptual awareness of reality, language is seen as a *barrier* between our minds and reality.

4. *Humans have social identities*: Connor Wood diagnosing postmodernism's social subjectivity and its rejection of objectivity: "all strains of postmodern thought insist that knowledge is really a function of social identity and location; that it's impossible to separate a speaker's point of view from her beliefs."<sup>23</sup> Assumption: *To be objective, one would have to have no social identity.*

5. *We make selections*. A graduate student in a Media Studies class arguing that documentaries are not objective: for any documentary, "whoever is choosing what they're putting in and what order they're putting everything. So you can't take away human involvement from the process."<sup>24</sup> Assumption: *Only if no there were no human involvement could there be objectivity.* This is a huge one: Objectivity is a commitment and a method precisely of human beings, yet the mere fact of humans doing something is taken to rule out objectivity.

6. *Human subjects make decisions*: A professor of education, Ohmer Milton: "Cease using the term 'objective.' M-c [multiple-choice] questions are not objective. Those questions do not come from thin air—especially those in manuals accompanying textbooks. A person decides to question this rather than that and then writes—subjective processes. The term 'objective' misleads both students and the public. Correct students when they use 'objective.'"<sup>25</sup>

Explicit premise: *Questions do not come from thin air.*

Implicit premise: *Only questions that came from thin air would be objective.*

Conclusion: *Questions are not objective.*

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<sup>23</sup>Connor Wood, "Why Postmodernism and Science Can't Stand Each Other," *Patheos*, November 29, 2018. Accessed online at: <https://www.patheos.com/blogs/scienceonreligion/2018/11/postmodernism-science-cant-stand-each-other/>.

<sup>24</sup>Unknown graduate student. Accessed online at: [https://www.youtube.com/watch?time\\_continue=86&v=mJ109-BvQV4](https://www.youtube.com/watch?time_continue=86&v=mJ109-BvQV4). See time stamp 18:00 minutes.

<sup>25</sup>Ohmer Milton, "Course Tests: Integral Features of Instruction." *The Professional and Organizational Development Network in Higher Education*, Vol. 2, No. 5, 1990–1991.



The “thin air” metaphor is a version of intrinsicism, with its assumption that the cognitive item would have to be arrived at by methods that involve nothing on the part of the subject. Again, rather than seeing objectivity as a type of process that knowing subjects engage in, objectivity is assumed to be an entirely subject-less happening.

7. *Interpretation is involved.* Historian Ole Bornedal: “History is not a fact. There is always going to be an interpretation of what history is.”

Explicit premise: *History is always interpretation.*

Implicit premise: *Anything that involves interpretation cannot be a fact.*

Conclusion: *History is not factual.*

8. *Construction is involved.* Historian Hayden White deconstructing history: “Many historians continue to treat their ‘facts’ as though they were ‘given’ and refuse to recognize, unlike most scientists, that they are not so much ‘found’ as ‘constructed’ by the kinds of questions which the investigator asks of the phenomena before him.”<sup>26</sup> Consequently, White argues, the “objectivity” standard of the “empiricist paradigm” does not exist—and so history should be reconceived as the telling of stories based on subjective interests.

Explicit premise: *Facts are constructed only on the basis of questions raised by the investigator.*

Implicit premise: *Objective facts would be unconstructed and prior to questions raised by the investigator.*

Conclusion: *Objective facts do not exist.*

9. *Humans change their minds individually and across time:* Paraphrasing libertarian historian Thaddeus Russell from a debate: *We can’t say any view is objectively true because people have changed their minds about it over the years and centuries.*<sup>27</sup>

Explicit premise: *Humans have changed their minds.*

<sup>26</sup>Hayden White, “The Burden of History,” *History and Theory* 5:2 (1966), p. 127.

<sup>27</sup>Thaddeus Russell, SoHo Forum debate with Stephen R. C. Hicks, New York City, July 2019. Accessed online here: <https://www.youtube.com/watch?v=loGG5nrVIsM>. See timestamp 1:18:00.

Implicit premise: *A belief would be objectively true only if all humans at all times have believed it.*

Conclusion: *No belief is objectively true.*

In this case, rather than seeing objectivity as a self-correcting process we must engage in—and that acknowledging errors despite past best efforts is part of being objective—that fact of cognitive change is taken as ruling out objectivity.

10. *We use conceptual schemes.* Philosopher D.W. Hamlyn: “We can raise the question of what is objective or otherwise only within the conceptual scheme that we have, given our form of life, since to ask whether something is objective is to ask whether it is objective as a such-and-such. To have classified something as a such-and-such is already to have invoked and applied a set of concepts; we cannot get outside these concepts altogether to raise questions about objectivity independent of them. ... [Consequently] there are no standards of objectivity but all is subjective or a matter of human convention.”<sup>28</sup>

Explicit premise: *The human form of life uses classifications that invoke a set of concepts.*

Explicit premise: *Humans cannot get outside these concepts to independent objectivity.*

Implicit premise: *Only an independent-of-human-concepts standard could be objective.*

Conclusion: *There is no objective standard.*

11. *We have opinions.* An art historian critiquing another art historian: “Objectivity is a cardinal rule in the discipline of art history. Mr. Johnson’s book, by contrast, abounds in strong opinions.”<sup>29</sup>

Assumption: *Opinions cannot be objective.*

Instead of seeing opinions as views held by individuals about which there is real controversy and about which the individual recognizes that the evidence and argumentation may not yet be conclusive—i.e., an objective assessment of the partial state of knowl-

<sup>28</sup>D. W. Hamlyn, *The Theory of Knowledge* (Garden City, N.Y.: Anchor books, 1970), pp. 720–73.

<sup>29</sup>Eric Gibson, “Bold Strokes, Strong Opinions,” *The Wall Street Journal*, October 3, 2003. Accessed online at: <http://www.opinionjournal.com/la/?id=110004095>.

edge—the partial and/or contested state of knowledge is removed from the realm of objectivity.

12. *Humans have a brain.* Economist Jeffrey Sachs: “If psychology has any core premise, it is that we do not observe or make sense of the world unmediated. Our brains ‘get in the way’, both for good and for ill. Our biases, habits, and biologies shape what we’re willing to do, say, or believe.”<sup>30</sup> Reconstructing this to draw out the full argument, we get:

Explicit premise: *Humans have brains.*

Explicit premise: *A brain has biologies, habits, and biases.*

Implicit premise: *Only a brainless being could have unmediated observation.*

Intermediate conclusion: *Humans cannot observe the world unmediated.*

Implicit premise: *Only unmediated observation could be objective.*

Implicit conclusion: *Humans cannot know the world objectively.*

In this case, rather than seeing brains as a human’s means of observing and making sense of the world, brains “get in the way” of doing so. *If only we didn’t have a brain! Then maybe we could access reality!*

That of course makes the position seem ridiculous—and that will be my point. Seductive and easy-to-make but ultimately ridiculous assumptions do lead to absurdity.

Other variations of the same general pattern are ubiquitous:

- Humans have values, so they can’t be objective. Assumption: *Only non-valuing beings could be objective.*
- Humans have limited awareness, so they’re un-objective. Assumption: *Only a being with unlimited awareness could be objective.*

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<sup>30</sup>Jeffrey Sachs, November 2, 2018. Tweet accessed online at: <https://twitter.com/JeffreyASachs/status/1058412303727685632/>.

- Humans view the world from a perspective, so they're necessarily subjective. Assumption: *Only a perspective-less being or one with a "view from nowhere" could be objective.*
- Human cognition is always bounded. Therefore, cognition is subjective. Assumption: *Only unbounded cognition is or could be objective.*
- As a human, I see the reality *I* see. Therefore, I don't see reality objectively. Assumption: *Only cognition not involving an I could see reality objectively.*
- Human beings are emotional creations and so not objective. Assumption: *Only emotionless beings can be objective.*

If we put all of the above together, we get an account of what objectivity would have to be if it were to exist.

Objectivity is possible for a being that (1) has no values, (2) has unbounded, unlimited awareness, (3) is beyond perspectives, (4) has no opinions, (5) uses no language, (6) uses no abstractions, (6) has no conceptual schemes, (7) does not make choices or (8) engage in selectivity or (9) construct anything, (10) has a brain or mind with no structure, (11) never interprets, (12) never has to change its mind, (13) has no I, (14) has no emotions, and (15) has no social identity.

Now come the big questions: Why on earth *assume* that this is what objectivity would require? *From where or whence* was such a conception derived? Why set a standard for objectivity that is *obviously impossible* for humans beings to achieve?<sup>31</sup>

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<sup>31</sup>Paul Feyerabend notes the impossible standard for objectivity that has been urged by many philosophers and concludes that only a "miracle" could enable the "abyss" between intrinsic reality and subjectivity to be bridged: "For while the earlier concepts took dependencies for granted and expressed them in various ways, the concepts of the 'philosophers' (as the first theoretical scientists called themselves) and their seventeenth-century refinements were 'objective'—that is, detached from those who produced them and from the situations in which they were produced and therefore in principle incapable of doing justice to the rich pattern of interactions that is the world. It needs a miracle to bridge the abyss

That set of implicit premises, individually and collectively, simply sets humans up for failure at the outset, as well as for one of the great dualities that has plagued the history of ideas. If in our pursuit of objectivity we are to conceive of a being that is beyond perspectives, has unlimited awareness, never needs to change its mind, and so on, then clearly we're talking about a god-like being. And the thrust of the above analysis is that only a god-like being could have objective knowledge—never humans. The religiously minded then say: *Yes! We are inadequate and so must rely upon a god-like being to dispense knowledge to us.* By contrast, the skeptically minded then say: *No gods exist! And we're only human, so no knowledge exists.* Yet both accept the same standard for what would count as objectivity—even though that standard from the get-go assumes objectivity into impossibility.

That is precisely the assumption that should be rejected and replaced with a new standard—what I think of as objectivity for actual human beings. Rather than setting an impossible standard and dismissing humans as contenders, we should start with human beings as they are and work out how their cognitive capacities work and why objectivity arises as a need for them to strive for.

## OBJECTIVITY FOR ACTUAL HUMAN BEINGS

We have lots of knowledge. We don't necessarily yet have a good theory of knowledge. Yet we shouldn't let the current lack of a good theory of knowledge imply that we don't have knowledge. Suppose I know that Smathers killed Biff, and you ask me how I know. I say I saw him do it with my own eyes. But you've read some philosophy books and point out to me that eyes can be subject to illusions and hallucinations and ask how I know I wasn't experiencing an illusion at the time. I don't have a good response. Should I conclude

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between subject and object, man and nature, experience and reality that is the result of these conceptual 'revolutions'—and creativity leading to wonderful castles of (philosophical and/or scientific) thought is supposed to be that miracle. Thus the allegedly most rational view of the world yet in existence can function only when combined with the most irrational events there are, namely miracles." Paul Feyerabend. "Creativity—A Dangerous Myth." *Critical Inquiry* (Chicago: University of Chicago Press, 1987), p. 709.

that I don't know that Smathers killed Biff? I have a justification for my belief, but I don't have a justification for my justification. While such philosophical skepticism is very old and cognitive science is a young discipline, we should take the skeptical arguments as a set of challenges to be met in developing a positive account of cognition.

The positive account of objectivity should begin by observing actual humans and asking what gives rise to their need for objectivity.

A primary reason is that human cognitive processing is not automatic and can go awry. Consequently, humans need to attend to their cognitive processes and commit to procedures. A useful contrast to cognition is to another human need: digestion. Digestive processing sorts the nutritious from useless and dangerous stuff. Cognitive processing sorts the informative from useless and false stuff. But while digestion is *unlearned* and *automated*, cognition is *learned* and *volitional*. Objective processes are what each human needs to learn and process to sort the informative from the useless and the false.

All of the other facts cited above about human cognition also give rise to the need for objectivity.

Humans have cognitive faculties with limitations. One sees within color ranges and at a distance and from an angle. One can hold in one's mind a limited number of items at a time. And so on. At the same time, one learns about one's cognitive limitations. So one learns that to make a judgment about something beyond one's immediate cognitive limit one needs to do extra work—to see an object from different angles and distances and under different lighting conditions before making a judgment about its features. One can form snap judgments, but one can also recognize and pursue the objective principle of taking as many perspectives as is necessary.

Humans have intellectual commitments, and those can lead one to ignore new data and counter-arguments. At the same time, one can learn that new data and arguments can bear upon one's existing beliefs and so commit to being open to new data and arguments. Further, as in the above grading example, a professor can believe that what a student is arguing in an essay is false but nonetheless choose to see that the student has researched and marshalled facts

and claims into arguments worthy of a high grade. Objectivity's open-mindedness when appropriate takes effort but is possible.

Humans have emotional commitments, and those can make one want to ignore undesirable facts and imagine fantasies to be true. At the same time, one can learn that one's emotions can lead one into temptation and that one needs to learn to use emotions rather than be used by them. I can, for example, be emotionally invested in my sports team and let my desire for them to win cloud my judgment. But I can also put my emotions in abeyance and objectively assess their rival team and, say, place a bet on the rivals to win. I can be in love and so blind to faults in my paramour—but I can also learn that love has that effect and correct for it by looking explicitly for red flags and, if they appear, choosing to assess them and perhaps to end the relationship.

Humans can make mistakes. At the same time, they can learn what those mistakes are and what processes led to them. They can then change their cognitive processes so as not to make those mistakes again. Objectivity is a self-correcting commitment.

In complex situations, humans can select elements and put them together in different ways. At the same time, they can recognize that they have many selection options and that the first way they try to put the elements together is not necessarily the best. Hence they learn the need to devise tests for which packaged selections are better. Jigsaw puzzle pieces, for example, can be put together many ways and one always has many options about where to begin, but the picture on the front of the box sets the standard and objectivity includes the trial-and-error selection-and-testing process of assembling the pieces in a way that matches the cover picture.

And so on.

Put negatively: objectivity means not engaging in wishful thinking or rationalization or evasion or dogmatism or hasty judgment or laziness. All of those are possible for us, and all of them contribute to our need for objectivity—precisely for us to learn of those negative possibilities and how to avoid them. Objectivity is both a commitment to reality-connection processes and a realistic goal to achieve. Just as digestion can fail but can also succeed, cognition can fail or succeed. The difference is that our stomachs and intestines do what

they do automatically and so “objective” digestion does not happen, while objective cognition is a result of learning and commitment.

One final comment about the epistemology: Objectivity is not a guaranty of success and *objectivity* is one success concept only along with *knowledge, truth, and certainty*, each of which picks out a different aspect of cognition. Being objective is necessary for knowledge, truth, and certainty, but objective individuals can remain ignorant about many things, make mistakes, and achieve probabilistic degrees of justification less than certainty. The cognitive terrain is rich, and more specification is needed to determine when objective processes yield knowledge, when they yield truth, and where upon the possibility-probability-certainty spectrum one’s judgment lies.

The concluding point for liberalism is that just as economic theory, value theory, and political theory are both difficult and necessary to making the case, so is cognitive theory. A complete case for liberty will integrate all of them, i.e., it will be a full philosophical justification that both makes the positive case and insulates it from the negatives of skepticism, relativism, and philosophical subjectivism.

### EPIGRAPH: ON “INTERSUBJECTIVITY”

“Objectivity . . . is now conceived as inter-subjectivity. Inter-subjective norms are not agreed to by the members of a society because they are objective, but, in effect, become objective because they are jointly accepted.”

—Henry D. Aiken, *The Age of Ideology*

*Inter-subjective* is a halfway house between the failure of old-fashioned theories of objectivity as kind of naïve realism and a consequent feared slide into absolute skepticism and hence solipsism.

The process starts with a philosophical concept of *truth* as *knowledge of reality*, such knowledge being arrived at by *objective* means and *justified* by those means. And since all humans presumably have the same cognitive equipment, the truth is in principle *universal*.

But what happens when one comes to have serious doubts about objectivity? One learns the skeptical objections to successfully connecting mind and reality. That raises the specter of solipsism: Maybe



what I call reality is only a subjective creation of my mind independently of any outside-existing reality.

There is the just-plain weirdness of the individual assertion of subjectivity: *Reality is whatever I will it to be*. And that in turn leads to some strange moral and political consequences: *What if everybody believes and acts as if they are their own creator-of-reality gods?* Some such god-wannabes are rather dark and disturbed individuals.

So can we effect a compromise? What if we grant the need to abandon old-fashioned objectivity but retain the assumption of universality? If all humans have the same equipment and we combine that with subjectivity, we get: *Reality is whatever we will it to be*.

The claim then is that collective subjectivity—re-labeled as “new-fashioned objectivity”—gives us both a shared framework of beliefs and a check on the weirdo individuals among us.

Such a halfway house is unstable and ultimately a failure.

How does anyone know that all human beings have the same cognitive equipment? To establish that universally presupposes that one can establish it as an objective fact about reality. But the inter-subjectivists have rejected that possibility on principle. Hence universality can for them be only an article of faith.

And who are the members of society collectively authorized to generate the acceptable norms? If we (arbitrarily) include some people in the collective but exclude others, then generate a group relativism, as the excluded others can form their own group with their own norms. Who is then to say which group's is truer or better?

Further: Within any (arbitrarily) decided group, what of the dissenter individuals? Are they to be pressured to believe and do as does the majority—thus preserving the society's universalism but making it tend to conformism? Or are the dissenters to be excommunicated from the group—again preserving the remaining members' universalism but shrinking its own scope and increasing the size of out-groups with their own rivalrous “truths.”

So we are left with the challenge of re-thinking the corrosive skepticisms that undercut objectivity in the first place.



## Epidemics as a Problem for Liberty

*Lester H. Hunt and R. Kevin Hill*

First, do no harm

—Attributed to Hippocrates

**H**ow should we respond to epidemics of serious disease?<sup>1</sup> Some possible responses pose serious ethical problems for liberty, while others do not. Probably the ideal response to any such disease is to be found in pharmaceutical interventions (PIs): vaccines and other medicines that either reduce the likelihood that one will contract the disease or, once it is contracted, either cure it, alleviate its symptoms, or otherwise makes it less severe than it would have been. Though PIs can raise ethical issues (for instance, if a “live virus” vaccine actually causes people to suffer from the disease in a certain percentage of cases), these are not the sort of issues that will concern us here. Again, there are a range of non-pharmaceutical interventions (NPIs) that likewise do

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<sup>1</sup>By “epidemic” we mean an infectious disease that has spread throughout the population of a given geographical area or is in the process of doing so. A pandemic is an epidemic that has affected an entire country, several countries, or the whole world. As this distinction is irrelevant to the sorts of issues we will discuss here, we will use only the more inclusive of the two terms, epidemic, unless the extensive spread of the disease is relevant.

not raise problems of this sort. These include, rather obviously, individual, voluntary wearing of masks in order to avoid either becoming infected or infecting others and individual, voluntary social distancing practiced for the same reasons. These are obviously exercises of freedom, not infringements of it. The ethical problems we have in mind are raised by any action or policy that does appear to infringe liberty: since every such infringement requires a justification, those that cannot be adequately justified are unjust and morally wrong. Epidemic policies that raise this sort of issue include the entire range of coercive non-pharmaceutical interventions (CNPIs), such as: 1) required wearing of masks, 2) required social distancing, 3) isolation (that is, confining people who are infectious to a limited area, such as their homes) and quarantine (similarly restricting the movements of those who might have been exposed to the disease while waiting to see if they become sick), 4) erection of a *cordon sanitaire* (limiting entrance into or exit from a given geographical area, such as a city or an entire country), 5) various coercive measures designed to limit the size of crowds (such as requiring staggered hours of operation for certain businesses), 6) closing down some or all public transportation, 7) banning large meetings, with or without exceptions (for instance, for religious services), 8) closing schools, 9) closing all businesses and government offices except for ones declared to be “essential,” 10) requiring everyone to stay in their homes except for certain purposes (such as to do “essential” work, or to get medical help or food). Our question here will be: which CNPIs are justified and which are not? Obviously, we will not be able to discuss adequately all ten of the CNPIs we just described, but we do hope to sketch a set of principles that might plausibly distinguish between the justified and the unjustified.

We should emphasize that we will be addressing ethical issues only. We will not be commenting on which CNPIs are epidemiologically effective and which are not. Discussions of the opposite sort, where only epidemiological issues and considerations are raised, with no explicit acknowledgment of ethical ones, are common. This raises the possibility that some would object to our approach. “Isn’t it irresponsible,” they might ask, “to worry about ethical niceties when there is a deadly epidemic on the loose? Surely, when thousands, even millions of lives are at risk, only epidemiological

considerations are relevant!” We think the purely epidemiological perspective that this objection seems to assume is one that normal human beings never actually employ. Consider, as evidence for this, the simple fact that, in recent debates about policy responses to the SARS-CoV-2 virus, no one has mentioned the following possible policy: simply round up those who are infected, execute them, and dispose of their bodies using some safe and sanitary method. Surely, it is very unlikely that anything like this even occurred to anyone while seriously thinking about policies that might be a good idea. Why not? Such a policy *might* kill more people than the disease would have killed, but that is not obvious, at least if the policy were carried out sufficiently early and quickly. More important, where does our revulsion at the thought of these surplus deaths come from? Since they are not caused by disease, epidemiology has absolutely nothing to say about them. Surely the source of this recoil of ours lies in ethical concerns about human life. The point of view that does not even consider such cruel policies is epidemiologically impure. It is, to some extent, a moral point of view.

So far, of course, this is consistent with the idea that, where many lives are at stake, the only ethically relevant consideration is the minimization of fatalities—all other ethical considerations are irrelevant and concern with them is frivolous and irresponsible. One version of this idea is the suggestion that the correct ethical view of epidemics is to apply what Ayn Rand called “the ethics of emergencies”<sup>2</sup>:

It is important to differentiate between the rules of conduct in an emergency situation and the rules of conduct in the normal conditions of human existence. ... An emergency is an unchosen, unexpected event, limited in time, that creates conditions under which human survival is impossible—such as a flood, an earthquake, a fire, a shipwreck. In an emergency situation, men’s primary goal is to combat the disaster, escape the danger and restore normal conditions (to reach dry land, to put out the fire,

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<sup>2</sup>James Peron, “Rattigan, Rand and Pandemic Emergencies,” *The Radical Center*, accessed 9/14/2020, <https://medium.com/the-radical-center/rattigan-rand-and-pandemic-emergencies-a2591cdf732f>.

etc.). ... Men can live on land, but not in water or in a raging fire. Since men are not omnipotent, it is metaphysically possible for unforeseeable disasters to strike them, in which case their only task is to return to those conditions under which their lives can continue. By its nature, an emergency situation is temporary; if it were to last, men would perish.<sup>3</sup>

The idea here seems to be that if an individual, community, or the whole world falls into a situation in which humans cannot survive—her examples being finding oneself immersed in a body of water without a viable watercraft or in the midst of a raging fire—the sole imperative is to do what is needed to get out of that situation. Other principles and values may be set aside, if necessary.

This idea is certainly a defensible one. If the city is about to be destroyed by a catastrophic fire, we will dynamite blocks of buildings without asking the owners' permission. If the Titanic is sinking and there are not enough lifeboats for everybody, we will not use the property rights of the owners as a guide to deciding who gets in and who does not: these rights would not even mean that the owners would be allowed to get in. But this idea, plausible as it is, does not apply to epidemics *per se*. To take the case that at the moment is closest to home: As we write, COVID-19 has spread around the world. This is a serious emergency, but it is not the sort of catastrophic emergency that Rand describes. It does not threaten the survival of the human race. The present emergency is not midnight on the Titanic. If there is a good argument for the notion that deadly epidemics, *per se*, justify setting aside all ethical considerations other than the preservation of life, this is not it.

Again, consider the following argument, which is related to the Rand-derived one but is more plausible as applied to the present crisis: "Whenever we have a chance to save a large number of lives, we should set aside ethical considerations other than the preservation of human life insofar as doing so will save lives. The most important right is the right to life. If we have to violate lesser rights in order

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<sup>3</sup>Ayn Rand, "The Ethics of Emergencies," in *The Virtue of Selfishness* (New York: New American Library, 1964), p. 47.

to defend against violations of a greater one, that is justified.” This argument is also dubious, especially if “preservation of human life” means *net* preservation. Suppose we have captured a terrorist who has planted a ticking time bomb somewhere in the city. Our technical advisors tell us that the strategy most likely to reveal the location of the bomb is to kill members of the terrorist’s family, one at a time, in some very vivid and convincing way, until we either run out of victims or the terrorist reveals the location of the bomb. Surely it is not frivolous to say that such a strategy would be impermissible. Such a strategy would also be, in our current legal system, against the law, as would be the strategy of torturing the terrorist himself/herself. Recognizing constraints that rule out such a course of action are well within the realm of common-sense morality.

At this point, it seems a natural move to amend this argument: “Of course we mustn’t kill innocent members of the terrorist’s family: that would violate the right to life. The entire purpose of the policy recommended here is to defend against violations of that right.” But notice that the right to life, in that event, is being treated as a constraint that can require us to forego a greater quantity of the very thing—people living rather than becoming the victims of homicide—that the right is apparently supposed to protect. Why? As Robert Nozick pointed out some years ago, rights as constraints express the Kantian idea that human beings are not to be used as mere means: in this case, it bars us from killing one person simply to benefit other individuals, even if the benefit is preventing more than one death.<sup>4</sup> But there is precisely the same sort of reason for recognizing the various other rights, the ones that are being set aside here in defense of the right to life. This argument would justify us in exploiting individuals for the benefit of others in every way short of killing them. It seems irrational to accept such a thing and yet stop short of killing for the greater good. Since that is an unacceptable alternative, it surely seems best to treat all basic human rights, and not the right to life alone, as constraints.

In what follows, we will seek to understand which CNPIs are consistent with the basic principles of a free society. Our goal is to

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<sup>4</sup>Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), pp. 30–31.

limit CNPIs to ones that are morally defensible and as friendly to human freedom as is reasonably possible.

We will begin by looking at Anglo-American common law, in particular the law of torts and of contracts as a possible source of CNPIs that might deal satisfactorily with epidemics. This seems a good place to begin the search for freedom-friendly policies. Consider the nature of tort law: dealing with wrongful use of force against persons and property is one of its central concerns. This can be seen easily by considering the intentional torts: trespass to land, trespass to chattels (non-consensual but temporary use of another's personal property), and conversion (theft) involve violation of property rights. Assault (which in tort law means threatening battery), battery (nonconsensual harmful bodily contact), false imprisonment, and wrongful death: all these implicate one's rights to life, liberty, and bodily integrity. There are other intentional torts (e.g., defamation, invasion of privacy, intentional or negligent infliction of emotional distress, etc.), but they raise ancillary issues which are not relevant to the question of the permissibility of CNPIs. In addition to intentional torts, an act may be tortious if it involves *negligence*, that is, acting without sufficient care in a way that causes harm. There is also a special category of torts involving strict liability for harms caused, regardless of whether sufficient care is taken, but the types of activities which qualify for this treatment are very limited and unusual (e.g., the use of explosives). The rights recognized by tort law are person-and-property rights, immunities against coercive interference which the individual possesses against other individuals. There are no victimless torts. Taking dangerous drugs or practicing prostitution are not torts, nor is reading the *Koran*, *The Communist Manifesto*, or *The Tropic of Cancer*. If force is the province of tort law, contract law deals with its ugly little brother: fraud. What is most important for our purposes, contract law also empowers citizens to, by mutual consent, create new rights and obligations for themselves and their contracting partners, rights and obligations that have the force of law. This immeasurably expands the freedom of individuals to create solutions to mutual problems that would be unavailable under a predetermined set of rights and obligations imposed from above. Together, the rights recognized by tort and contract law are the sorts of rights that would be recognized



by a polity that sees its function as protecting citizens from force and fraud while enabling them to freely cooperate in pursuing their diverse visions of the good life. These are the sorts of rights that can be the basis of a free society.

Could such a system produce CNPIs that would provide a sufficient basis for a satisfactory policy response to epidemics? We begin with some obvious facts and some obvious questions. Clearly, infectious diseases can cause bodily damage and even death. Further, these are inflicted on the sufferer by other people. Bodily injury and death caused by other people is just the sort of thing that tort law is about. The obvious questions, then, are: Can spreading an infectious disease be a tort and, if it could, would that be satisfactory as the coercive element of society's response to epidemics?

There were at one time several United States jurisdictions which had laws prohibiting the intentional or negligent transmission of HIV. Since this is just an instance of common law battery, such laws appear to be consistent with the sort of framework we are using here. But it is worth noting that during most of the time such criminal statutes were in operation, infection was readily ascertainable through testing, casual transmission was almost impossible, the kinds of activities which could lead to transmission were voluntary, and in the event of infection, contact tracing is at least feasible. Lastly, effective treatments for HIV infection are now available, making it easier to avoid having the disease. Given that such a law could be made to work, we can also infer that a tort suit for battery in such cases would also be possible. And in that case, it is very hard to see what could possibly justify further CNPIs to prevent the spread of HIV where these background facts obtain, as they have done now for many years. Under these kinds of facts—that is, difficulty of transmission, the consensual nature of the acts that enable transmission, ease of testing, feasibility of contact tracing, and availability of effective treatments—the state can confine itself to enforcing the rights that exist under tort law and has no need for more drastic coercive measures.

Other fact patterns are possible, and some of them are relevantly different. Contrast the case of HIV with that of the common cold. With the latter, there is no testing possible, and thus until people are symptomatic, they have no way of knowing whether they are

infected and contagious or not. Transmission is easy and casual, rendering contact tracing almost impossible. Does this kind of case justify isolating—*coercively* isolating—the infected? Clearly not, not because the harms of the common cold are redressable through tort law, but because the harms of the common cold are trivial or, as the law sometimes says, *de minimis*. There is no point in redressing it: it's not worth the candle in administrative costs to do so.

The interesting kind of case for our purposes, however, are infectious diseases which combine elements from both sorts of cases. Consider COVID-19. It is potentially lethal, and quite a bit more quickly than HIV is, and thus cannot be ignored like the common cold. But like the common cold, for many weeks into the pandemic of 2019–20, testing was not widely available in the United States, making it impossible to know whether one should isolate oneself. Transmission was extremely easy under normal social conditions, and it was apparently possible either while one was asymptomatic or before symptoms became sufficiently noticeable to arouse concern. There is still at the time of writing no vaccine, and available treatments are of limited effectiveness. Obviously, the market is not *yet* in a position to solve this problem with PIs, though it may eventually do so.

Is tort law able to address the problem? Not in any obvious way, for two reasons. First is *the problem of the unknown tortfeasor*: given the ease and character of transmission, who will you sue when you become ill? A reverse class action against the whole of society? How will you prove your case? Second is *the problem of individual insignificance*. Some harms are the cumulative result of repeated applications of some harmful event or agent. There could be a number of agents who contributed to this effect, no one of which is sufficient to bring the harm about, while all of them combined are sufficient. This can be true of toxins, which is one thing that stands in the way of effectively dealing with pollution as a tort. It can also be true of infectious diseases. In virus-borne diseases the size of the inoculum, the load of viral particles introduced by contact with carriers, is a predictor of whether one catches the disease, how severe it is, and whether it is fatal. An initial dose below a certain level might even bring about immunity. There is evidence that this is true of

COVID-19.<sup>5</sup> This compounds the problem of the unknown tortfeasor, as individual contributions might be very small, making those who contributed harder to find, and it adds another problem as well: if a given individual's contribution to the harmful effect is actually too small to cause it, then how do we justify holding that individual responsible for it, even if we can identify them?

We will argue, nonetheless, that the case for satisfactory CNPIs is not lost, not even if we limit the state, as we propose to do, to protecting the rights that individuals have under the common law of torts and contracts. In addition to staying as far as possible within the bounds of these person-and-property rights, we will forego any advantage that may be derived from another source: namely, utilitarianism. Utilitarianism proposes to choose between actions, policies, or rules by aggregating the good or bad effects of everyone affected by it and choosing the one with the most favorable aggregate result. It has a built-in propensity to sacrifice the interests and liberty of the individual to this aggregate good. Since there is no super-individual entity that enjoys this aggregate good, this means sacrificing the good of the individual, not to some superior being that might be entitled to sacrifices, but simply to other individuals. Common law rights are a much more liberty-friendly framework.

How are they related to coercive measures against infectious diseases? They, after all, are rights, and they include rights against unconsented invasions of one's body that result in injury or death. Mary Mallon, better known as "Typhoid Mary," was an asymptomatic carrier of typhoid fever. She is known to have infected at least forty-seven people, all of whom had a far more severe form of the disease than she did, and to have killed at least three.<sup>6</sup> Those people had rights against being injured or killed, by anyone, including Mary Mallon. Nonetheless, she did inflict these things. That she did not do so maliciously, and probably never understood that she had

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<sup>5</sup>Amanda D'Ambrosio, "Does Virus Dose or Load Predict How Sick You Get With COVID-19?—Initial Exposure, Strength of Virus Infection Both Seen as Contributors to Illness Severity" *Medpage Today*, September 18, 2020, accessed 10/19/2020, <https://www.medpagetoday.com/infectiousdisease/covid19/88692>.

<sup>6</sup>Judith Walzer Leavitt, *Typhoid Mary: Captive to the Public's Health* (Boston: Beacon Press, 1996), pp. xvii–xviii.

the disease,<sup>7</sup> is relevant to whether she should have been punished or held liable for damages. But unless there is some argument that her ignorance and lack of malice caused her victims' rights against her to wink out of existence, they are not relevant to whether she violated their rights. Further, these rights seem to be just the sort of right that justifies the use of coercion. Suppose that I know that Typhoid Mary is about to come into some possibly infectious contact with me (perhaps she is about to touch me in some hazardous way with her contaminated hands). Suppose in addition that the only way I can avoid this contact—perhaps she falsely believes she is not infected, as the historical Mary probably did, and that she is not a carrier—is to use some sort of physical coercion against her. Surely I would not be wrong in using coercion. This is simply an instance of the right of self-defense. In a case like this, it would be self-defense against what Nozick called an “innocent threat”<sup>8</sup>: someone who is on a course to kill or injure one through no fault of theirs. Surely coercion against innocent threats is justified. The only alternative to such a view would be, in a case like Mary Mallon's, to accept a duty to submit to a substantial risk of infection, and this seems too onerous a duty by any reasonable standard. The right of self-defense, understood in this way, is not based on the guilt of the threatener, but on the existential imperative of the defender: he or she must be free to defend life and liberty against imminent threats.<sup>9</sup>

Though the case for isolating the infectious seems so far to be straightforward, even within the narrow ethical constraints we have accepted, it does raise at least one thorny side-issue. This is the nature of the “hazard” or “risk” that can justify forcible self-defense and coercive state actions like forced isolation. It is natural to think of this risk in purely probabilistic terms, as the enhanced likelihood of suffering injury or death. The problem is that among thinkers that take a strongly pro-liberty position there is some disagreement about whether risk, conceived in this probabilistic way, can justify coercion by itself. Nozick held that one may legitimately use force

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<sup>7</sup>Leavitt, *Typhoid Mary*, pp. 11, 162–63.

<sup>8</sup>Nozick, *Anarchy*, pp. 34–35.

<sup>9</sup>Eric Mack, “Elbow Room for Self-defense,” *Social Philosophy and Policy* (2016): pp. 18–39.

to defend against risk. He took it as obvious that one may legitimately use force against someone who tries to play Russian roulette on one's head, even if the weapon had 100,000 chambers, only one of which is loaded. He also thought that the same sort of consideration can justify the state in prohibiting a manufacturer from using an efficient but risky manufacturing process that imposes danger on people in the vicinity of the factory. In addition, he believed, the state may rightly prohibit someone, for reasons of risk-prevention, from doing some valuable activity that others are allowed to do—his example is an epileptic who wishes to drive a car—though in that case it has an obligation to compensate them for the disadvantage such a prohibition would impose on them.<sup>10</sup> Murray Rothbard, on the other hand, argued that merely exposing another person to risk of harm (apparently regardless of the degree of the risk) is not something that can be resisted by force. The legitimate occasions for forcible defense are limited to imminent violent attacks which include at least one overt act. He argued that the risk-alone view lay behind one of the principal arguments for alcohol prohibition in the U.S., which was that imbibing alcohol made it more likely that one would do something violent and that prohibiting it was simply a defensive action against violence. We can imagine, he said, that someone could make an argument today for making vitamin supplements compulsory on the grounds that certain vitamin deficiencies make people more irritable, and that irritability makes it more likely that one will be violent. Even if the facts alleged were the case, he held that they would not be just grounds for compulsion.<sup>11</sup>

These two ideas are probably not as different as they at first appear. Limiting Nozick's idea that risk can justify coercion so that it does not apply to being a risky sort of person (a consumer of alcohol, say, or a non-consumer of supplements) seems like a friendly amendment and indeed seems to be a move he does make elsewhere in his book.<sup>12</sup> It also seems like a good idea, since the practice of

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<sup>10</sup>Nozick, *Anarchy*, pp. 79–84.

<sup>11</sup>Murray Rothbard, *The Ethics of Liberty* (New York: New York University Press, 1998 [orig. pub 1982]), p. 78.

<sup>12</sup>See Nozick, *Anarchy*, pp. 142–46. There he discusses preventive restraint—the practice of preventing people from doing things (such as buying a gun) deemed

coercing people who may never do anything wrong simply for being, so to speak, a wrong sort of person, can easily lead to abuse and may well be intrinsically unjust. On the other hand, the overt acts that Rothbard has in mind include ones that merely threaten—have not yet actually done—harm.<sup>13</sup> This would mean that the reason such an act can be coercively prohibited is the risk of harm it poses to others. This would mean that the risk produced by an act can justify coercively preventing it. In what follows, we will assume this to be correct: actions that pose an imminent risk of harm or death justify a coercive response.

This idea is sufficient to justify isolating the infectious in certain circumstances. We have a right to use coercion to fend off potentially infectious contacts, and it is likewise just for the state to exercise this right in our behalf. Such defensive state action would take the form of prohibiting such contact, with some sort of penalty attached, even if the penalty consists merely in official disapproval of acts that violate the prohibition. As with any use of coercion, it is important that it be limited to the mildest form capable of achieving the appropriate level of deterrence. Depending on the degree of harmfulness of the disease, its level of contagiousness, and the trustworthiness of the carrier, the best practice might be to simply ask detected carriers to self-isolate. This practice has often been followed in the current COVID-19 epidemic. On the other hand, officials might rightly decide that we cannot afford to trust a carrier of a disease to follow the proper practices. This is how officials saw the case of Mary Mallon. Originally, after she was found to have infected at least twenty-two

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to make them more dangerous people—and preventive detention—which is the practice of imprisoning people because they are deemed significantly more likely than the average person to commit a crime. He says, among other things, that such practices might seem legitimate if we see some people as incapable of making a decision or incapable of deciding against acting wrongly. Otherwise, coercion is ruled out if no rights violation will occur unless the coerced person makes some (further) decision to do wrong. In addition, “even if” coercion in such cases is permissible, it would only be so if the coerced person is compensated for any disadvantages the coercion would impose upon them.

<sup>13</sup>“It is important to insist, however, that the threat of aggression be palpable, immediate, and direct; in short, that it be embodied in the initiation of an overt act.” Rothbard, *Ethics*, p. 78.

people and killed one, she was confined for a period of three years. Then, on humanitarian grounds, a judge freed her after extracting from her a promise to permanently quit her erstwhile profession as a cook. She had by that time achieved a reputation as a capable cook for prosperous families in the New York area. Unfortunately, food preparation is one of the main ways in which typhoid fever is spread. After her release, she worked for a while in a laundry, but apparently decided she could not make a living away from her original profession, so she returned to it. By the time she was apprehended again, she had infected twenty-five more victims and killed two others. She was sent back to her original place of isolation.<sup>14</sup> Mallon's case was admittedly an extreme one—a highly unreliable carrier of a highly contagious and very dangerous disease—but this extreme case is perhaps enough to bring out the obvious truth of a crucial principle: that coerced confinement can be necessary to sufficiently deter a carrier from committing acts of battery and would in such cases be justified. It is sometimes the only way we can with sufficient assurance prevent such right-violating acts.

Of course, this only means that compulsory isolation is *sometimes* justified. How do we draw the line between cases in which it is justified and those in which it is not? As we have already suggested, both degree of contagiousness and degree of harmfulness (especially, lethality) are relevant, as is the reliability of people identified as carriers. Isolating someone for having a cold (highly contagious but not harmful enough), as for having AIDS before there were effective treatments (very deadly but not very contagious), would be *morally wrong*: such measures would amount to depriving someone of their liberty without just cause. This surely applies to Cuba's notorious policy, during the AIDS epidemic of the 'eighties, of subjecting everyone found to be HIV-positive to a life sentence in a system of special prison camps.<sup>15</sup> Beyond commenting about extreme cases

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<sup>14</sup>Leavitt, *Typhoid Mary*, p. xviii.

<sup>15</sup>The regime called them sanitariums, which internally is what they were, except that, like a prison, inmates were barred from leaving. It may well be, as the *New York Times* tells us, that this policy “had a huge damping effect on the early epidemic,” but this merely illustrates a point we have already made, that epidemiological considerations are not the only ones that are relevant here. These

such as these, there seems to be little that can be established in a philosophical essay like this one about how these three considerations should be weighed in deciding cases and formulating policies as to where to draw the line.

The same sorts of considerations that justify coercion in the case of isolating the infectious also justify two further CNPIs without which such isolation might be of little avail as a defense against dangerous diseases. These are contact-tracing—that is, requiring people believed on good evidence to be carriers to divulge the names of people with whom they have had potentially infectious contact—and compulsory testing of this secondary category of individuals. Depending on the circumstances and the nature of the infection, “testing” might comprise simply looking for patently observable symptoms or limited-term quarantining to find out whether symptoms become observable as well as, if available, laboratory tests such as the polymerase chain reaction test for the SARS-CoV-2 virus. In all these cases, the degree of certainty needed—*will* this person cause sufficiently serious physical harm?—is lower than that required to justify the use of coercion involved in punishing someone for a crime. Even in criminal court, the standard falls short of absolute certainty—“beyond a reasonable doubt” does not mean beyond any doubt one could have—but it is considerably higher than the standard for justifying defensive coercion, such as isolating the infectious and these two ancillary practices. This is partly because criminal matters are about events that have happened, whereas defensive measures are remedies for things that have not happened—yet—and may indeed never happen. Not everyone for whom Mary Mallon prepared food developed typhoid fever. In human affairs, the degree of certainty that is attainable for anticipating future events is typically much lower than the degree available for judging of the past.

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facilities eventually closed due to budgeting problems when the Soviet Union imploded, and Soviet foreign aid collapsed. See Donald G. McNeil Jr., “Cuba’s Fortresses against a Viral Foe,” *New York Times*, May 7, 2012, <https://www.nytimes.com/2012/05/08/health/cubas-aids-sanitariums-fortresses-against-a-viral-foe.html>, and Rebecca Sananes, “Love, Loss, and Beauty Pageants: Inside a Cuban HIV Sanitarium,” March 26, 2016, *NPR*, <https://www.npr.org/sections/goatsand-soda/2016/03/26/471765424/love-loss-and-beauty-pageants-inside-a-cuban-hiv-sanitarium>.



More importantly for our purposes, the ethical considerations are very different, and in relevant ways. Those who produce decisions in a criminal proceeding have a duty to avoid the very grave injustice of punishing the innocent, so far as that is possible. This places a heavy burden on those who decide the case to find that the evidence conclusively shows that the accused does indeed deserve punishment. On the other hand, defensive coercion is not a punishment and is not based on the judgment that the individual being coerced deserves it: if it were, coercion against innocent threats would be unjust. If a reliable test shows that someone is a carrier of a dangerous disease, that by itself justifies some sort of coercive response. The reason is that the grounds for coercion do not lie in the moral responsibility of the person coerced, but in the rights of the person who is being defended against harm. As we have said, those who are not yet infected do not have a duty to wait for carriers to injure or kill them before coercive remedies become available. All that need be shown is that a given person poses a significant risk to others, and that is established by the reliability of the test and by our knowledge of the disease. With the practices of contact-tracing and compulsory testing of contacts, we are also responding to mere risk of harm, rather than actual harm. In these cases, the level of risk is somewhat lower than in the case of those already known to be carriers, but the degree of coercion is also lower, often much lower. The grounds for these CNPIs are obviously strong, just as it is for isolating the infectious—provided, to repeat, that the disease is sufficiently contagious and harmful and the infectious person cannot be relied on to avoid transmitting the disease to others.

That these practices are justified, even from a rigorously pro-liberty point of view, might not surprise many people. Less obvious, and frankly more interesting, are the issues raised by CNPIs directed, not at the infectious and their contacts, but at the general population. What about requirements of mask-wearing and social distancing? Banning large gatherings? Locking down a major portion of the economy? As we suggested at the outset, there are a wide array of such policies that might be considered and, indeed, throughout history many such CNPIs have been used. What are the relevant principles and guidelines for evaluating such measures?

First, it is important to realize that, in an epidemic, anyone who is not a member of one's own household represents some finite risk of infection. You could even say that this is what *makes* it an epidemic. This simple fact already justifies *some* CNPIs directed at the general population. Depending on the particular disease and the way in which it is transmitted, there are often simple precautions that individuals can take to substantially reduce the risk they are imposing on others. For instance, typhoid fever is communicated mainly via the feces-and-urine-to-mouth route, especially via food preparation with unwashed hands, and COVID-19 is spread mainly through droplets expelled and sent through the air with one's breath. Consequently, a significant portion of the risk can be avoided by simple measures such as, in the one case, hand-washing before preparing food and, in the other, staying six feet or more from people who are not members of one's household and, when this is not possible, wearing effective mouth-and-nose masks. Measures that—depending on the circumstances—either require or urge individuals to take such safety-steps are just, even in many cases morally obligatory. Admittedly, even in an epidemic the risk posed by other individuals is often small, and the risk avoided by these measures is even smaller, but this is a risk of *killing* someone or inflicting serious bodily injury. In this way, failing to take such measures resembles Nozick's example of playing Russian roulette with a one hundred thousand chambered revolver. While Nozick's revolver is a fanciful imaginary object, the risk of infecting someone, unfortunately, is not. It is also, intuitively, the sort of risk that can justify coercion. Indeed, failure to enact such measures can constitute a very serious moral wrong. That said, it is well to keep in mind, that the penalties by which this sort of CNPI is backed up can simply amount to official disapproval of violators. Given the ease of compliance, and the fact that compliance protects not only friends and loved ones but, in some cases, one's own health and safety, such mild penalties may be sufficient.<sup>16</sup>

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<sup>16</sup>During the COVID-19 epidemic, the state of California passed a typical six feet or face mask rule, but failed to attach any penalties for non-compliance. In Plumas County, where one of the present co-authors lives, local businesses put signs saying that they are complying with the guidelines and that people without face

How does this sort of justification apply to another class of CNPIs directed at the general population: namely, ones aimed at preventing people from congregating in large groups by, for instance, banning meetings of more than a certain number of people, or by closing schools? Large gatherings can be spreader events: One survey of the literature found 72 large gatherings that were found to spread infectious diseases, such as measles, mumps, and Influenza A H1N1. However, these all seem to be events—such as summer camps where people live in close quarters—in which people were not taking the sorts of precautions that we have just been discussing.<sup>17</sup> Perhaps the strongest reason for CNPIs that prohibit people from congregating in large numbers is that these are situations in which it is difficult to make sure that people do take basic precautions and consequently create opportunities for each person to have numerous potentially contaminating contacts in a short period of time. This sort of consideration might be strongest as a justification for school closings, since children are notoriously bad at social distancing. In addition, officials might know that in the adult population, even apart from large gatherings, many people simply are not consistently taking reasonable precautions, and meeting bans might be an attractive way to minimize the effects of their careless behavior.

If this is the rationale for such bans, they do not seem to be entirely consistent with the sort of justification that we have just presented for requiring basic hygienic precautions. That justification was individualistic, in that the principles and reasons given were applied to individuals and not to groups as such. The question – does this act violate rights?—was treated as providing the answer to the further question: May we prohibit this act? An affir-

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coverings would not be admitted. Anecdotally, compliance with the guidelines in public places appears to be over 90%. See California Department of Public Health, “Guidance for the Use of Face Coverings,” accessed 9/25/2020, [https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/COVID-19/Guidance-for-Face-Coverings\\_06-18-2020.pdf](https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/COVID-19/Guidance-for-Face-Coverings_06-18-2020.pdf).

<sup>17</sup>Jeanette J. Rainey, Tiffani Phelps, Jianrong Shi, “Mass Gatherings and Respiratory Disease Outbreaks in the United States—Should We Be Worried? Results from a Systematic Literature Review and Analysis of the National Outbreak Reporting System,” *Plos One*, August 18, 2016, accessed 9/26/2020, <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0160378>.

mative answer to the first question was taken as giving an affirmative answer to the second one. Here the justification for coercion is that it prevents individuals from doing a rights-violating act, but the coercive measure does so by prohibiting *everyone* from attending gatherings of more than a certain size. This presents a problem for the rigorously individualistic point of view: We seem to be contemplating a policy of deterring a rights-violating act by coercing people who would otherwise commit that act and *also* people who are completely innocent, would behave responsibly and—let us assume, in order to avoid raising more than one issue at a time—would as individuals pose no threat to anyone. We seem to be deterring the disease-spreading threat posed by the *group* attending the event, as a group. But this would include prohibiting individuals who (we are assuming) would not be committing a right-violating act. Thus, the CNPI of placing a ban on congregating in large numbers cannot be justified in the way that we have justified requiring basic hygienic measures.

This is a problem because, to cite just one reason, there can be circumstances in which those same responsible individuals might well *want* a rule that coerces them in precisely the way such a ban would. After all, a spreader event inserts more of the disease organisms into the general population, which raises the probability that any given person, including some responsible individuals, will be interacting with them. Given that it is impossible for an individual to know who is a carrier and who is not and, further that it is likely to be impossible to protect oneself perfectly against infection from unknown carriers, it seems that there must be a plausible ethical justification for banning large gatherings in some circumstances. But how exactly would this justification go, and exactly what sorts of measures would it justify?

At this point, an approach that some people would find appealing would be to opt for utilitarian reasoning: gathering bans are justified when the aggregate total benefit for everyone affected by it, in the form of infection abatement, exceeds the total aggregate cost of abridging everyone's freedom of assembly. We have already said that we will be avoiding such appeals to the collective good here. In addition to the reason that we have already given for doing so, there is an additional reason that applies to this particular ethical issue:

we have already seen reason for thinking that meeting bans might not involve, at least not in every case, the sacrifice of the interests of some individuals for the benefit of others. Does this mean that there can be an individualist defense of gathering bans? We think it does, but to adequately explain why, we need to first make some general comments on theories of rights.

It has long been a commonplace in discussions of rights that a right can be protected either by a property rule or by a liability rule.<sup>18</sup> For rights that place limits on the behavior of others, a property rule says those others may not cross that limit except with the permission of the holder of the right, while a liability rule says they may not cross it unless due compensation is paid to the holder. In the stereotypical case, compensation is paid with a literal payment—that is, with money. To use Joel Feinberg’s example: caught in a blizzard, you break into a mountain cabin and take life-saving shelter there, unavoidably damaging the cabin in the process; later you identify the owners and send them a check.<sup>19</sup> Your taking steps to fully compensate the owners contributes to making your damaging their property an innocent act. But this is not the only form that compensation can take. As Richard Epstein pointed out some years ago, if we recognize that compensation can include “implicit in-kind compensation,” we can see that compensation can be brought about by rules of conduct as well as by actions. More precisely, it is possible for a rule, which imposes costs on those to whom it applies, to also compensate them for those costs. His example is the “live and let-live rule,” which states, roughly, that one should tolerate certain low-level nuisances produced by others’ use of their property—such as smoke from a neighbor’s barbecue pit or smells produced by emptying a cess-pool—because the same rule gives one the same freedom to use one’s own property, incidentally, producing these same nuisances oneself. The nuisances that the rule imposes on one are trifling, and the freedom of action and enjoyment of one’s own property one gains

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<sup>18</sup>The distinction was introduced in Guido Calabresi and A. Douglas Melamed, “Property Rules, Liability, and Inalienability,” *Harvard Law Review* 85, no. 6 (1972): pp. 1089–1128.

<sup>19</sup>Joel Feinberg, “Voluntary Euthanasia and the Inalienable Right to Life,” *Philosophy and Public Affairs* 7, no. 2 (1978): p. 102.

in return are substantial, more than compensating for those trifling costs.<sup>200</sup>

It is easy to see how a ban on large gatherings during an epidemic can provide sufficient implicit in-kind compensation. Depending on how contagious the disease is and how harmful, even a slight decrease in the probability of infection can be a substantial benefit, even for people who take reasonable precautions but who—as may well be the case—cannot achieve complete safety as they make their way through the general population. On the other hand, the cost might well be trivial by comparison. Perhaps the gardening club has to meet as two smaller groups rather than one larger one, or the steering committee meeting has to take place virtually, on the internet. Under a liability rule approach to rights, a large gathering ban, under fact patterns such as these, can be fully justified.

At this point, there are some problems we need to solve, if possible. One involves the problematic nature of the liability rule approach itself. The other has to do with a serious ethical complication that arises when the notion of implicit in-kind compensation is applied to actual cases.

Eric Mack has subjected the liability rule conception of rights to some searching criticisms. First, compensation addresses the harm done by violating a right, but not the wrong done. Harm and wrong are very different things. Compensation might erase the harm caused by violating a right, but if it was a right at all, violating it is wrong. Second, the liability rule conception is inconsistent with Nozick's attractive explanation of rights, which is that they express the idea of the dignity of the individual human being by blocking the individual from being used as a tool. If we violate someone's rights because we can gain enough by it to afford compensating them for the damage done, we are using them *and* paying them for it, but we are still using them. Third, it is also inconsistent with Nozick's answer to H. L. A. Hart's principle of fairness, the principle that individuals who have taken on certain burdens in the course of some benefit-conferring activity have a right against all beneficiaries of that activity that they share in those burdens, on the grounds that "[o]ne cannot, what-

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<sup>20</sup>Richard A. Epstein, "Nuisance Law: Corrective Justice and Its Utilitarian Constraints," *The Journal of Legal Studies* 8, no. 1 (1979): pp. 82–87.

ever one's purposes, just act so as to give people benefits and then demand (or seize) payments."<sup>21</sup> Why isn't this simply advance compensation, Mack asks, which makes the forced imposition of these burdens blameless? Fourth and last, under a liability rule theory of rights, all forced exchanges that leave all parties at least as well off as before would be permissible. For instance, suppose that a man is captured in Africa and shipped to America to be a slave for life, and that his tribe is subsequently wiped out by a horrific tropical disease. He lives out a terribly hard life, but that is (let us suppose) better than dying of the disease. That would on this theory mean that what the slave traders did was morally permissible.

These are certainly weighty objections, especially the second one, which charges, plausibly, that a liability rule conception of rights is inconsistent with the very basis of rights in the idea of human dignity. But three of them—the second through the fourth—are directed at the liability rule idea as a theory of rights in general, or at least rights that constrain one's treatment by others. That is, they are directed at the notion that all such rights may be infringed provided only that there is due compensation for the harm done. *That is why the liability rule approach is inconsistent with human dignity: if the liability idea is conceived as a quite general understanding of rights, then rights can no longer serve as blocks to being used. We propose to work around the last three objections by severely restricting the application of the liability rule approach to the context in which Nozick himself applies it: to the prohibition of risky activities and, further, only to some risky activities.*<sup>22</sup> As we will use it, the notion of

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<sup>21</sup>Nozick, *Anarchy*, p. 95.

<sup>22</sup>Following earlier discussions by Peter Railton and David Sobel, Mack claims that Nozick opts for a quite general liability rule conception of rights in "Prohibition, Compensation, and Risk," Ch. 4 of *Anarchy*, pp. 54–87. Mack, "Elbow Room," p. 204, n. 11. See also Eric Mack, "Nozickian Arguments for the More-Than-Minimal State," in *The Cambridge Companion to Nozick's Anarchy, State and Utopia*, eds. Ralf Bader and John Meadowcroft (Cambridge: Cambridge University Press, 2011), pp. 100–03. The interpretation presented in the latter paper seems to be that the relevant part of the argument of Ch. 4 goes like this: first, Nozick asserts, apparently arbitrarily, that rights are only protected by liability rules and then presents two arguments—one concerning difficulties in finding the correct amount for the compensation, and one showing that compensation does

liability rules will have a narrowly circumscribed application, with many blocks to using persons as tools left standing.

As Nozick has pointed out, prohibiting-but-compensating an action is a sort of middle ground between permitting it and simply prohibiting it.<sup>23</sup> Where in this range of appropriate responses do risky activities belong? Clearly, an infected person's failing to take appropriate precautions is (again, given appropriate levels of contagiousness and harmfulness) simply prohibitable. Such a failure is analogous to Nozick's example of playing unconsented Russian roulette on another's head with a pistol with 100,000 chambers. In some historic epidemics the analogous weapon would have far fewer chambers than that. A person who, in an epidemic, does not know whether they have been infected or not, and yet does not take precautionary measures is at one remove from that: it is like playing Russian roulette without knowing whether the gun is loaded or not. We have been assuming that a CNPI requiring them to take precautions is legitimate, though perhaps the somewhat attenuated nature of the wrong that the CNPI would be prohibiting should be reflected in relatively mild penalties for non-compliance. Now consider the case of responsible individuals who wish to attend a large gathering and, again, suppose that their precautions would indeed mean that they would not themselves contribute to the spread of the disease. May we legitimately ban the gathering, knowing that this would mean prohibiting them from attending? This is behavior that

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not prevent the fear one experiences about the possibility of some rights-violating acts—to the conclusion that some rights should be treated *as if* they are property rule rights. This is pretty clearly a misinterpretation. When Nozick asks (*Anarchy*, p. 57) whether those who transgress the boundaries of others are “*permitted to perform such actions provided that they compensate the person whose boundary has been crossed?*” (italics in the original) it is a real question, not a rhetorical one, and the arguments about problems in calculating compensation amounts and about fear are *partial* answers to it, and are explicitly presented as such. At the end of this part of Ch. 4 (p. 71), he says: “Other considerations converge to this result [that is, that not all rights can be liability rule rights]: a system that permits boundary crossing, provided compensation is paid, embodies the use of persons as means....” He gives a reason for rejecting the general liability rule theory of rights that is identical to the one presented by Mack in his second objection to that theory.

<sup>23</sup>Nozick, *Anarchy*, p. 83.



is one step further removed from the category of the simply prohibitable. On the one hand, we can (depending on the disease) have good enough reason for thinking that the gathering would increase the risk of infection for the general population, and that we can only avert this increment of risk by banning it. On the other hand, in the situation we are now assuming for the sake of the argument – this would have to include prohibiting attendance by people who are not actually exposing others to the risk, along with those who are. Coercing people who pose no risk, and giving risk abatement as the reason for it, would ordinarily be wrong, except that here there is (we are supposing) substantial risk that can be avoided *in no other way*.

This seems an appropriate occasion for the middle-level response of prohibit but compensate. What Nozick says of the rationale for his own use of the idea seems applicable here, despite the fact that he applies it to cases quite different from ours, such as the epileptic driver:

[P]rohibition with compensation ... is not a “split the difference” compromise between two equally attractive alternative positions, one of which is correct but we don’t know which. Rather, it seems to me to be the correct position that fits the (moral) vector resultant of the opposing weighty considerations, each of which must be taken into account somehow.<sup>24</sup>

Since we have no practicable way of identifying these unoffending but banned individuals, the implicit in-kind compensation, brought about by the same rule that we are imposing on them, is apparently the only available way compensation can be brought about. Clearly this is entirely possible. Because the increment of risk abatement is distributed through the general population, this benefit falls upon the banned but unoffending individuals along with everyone else. Depending on the nature of the disease being fought, these benefits can be significant and the cost of the ban comparatively trivial. In that case, these individuals receive adequate implicit in-kind

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<sup>24</sup>Nozick, *Anarchy*, p. 146.

compensation. We have not interfered with their liberty of action without good reason. And because these reasons are adequate even from the point of view of their own interests, these interests have not been sacrificed for the benefit of others. This seems to answer the first of Mack's objections, that compensation erases harm but not the wrong that causes it. The attendance of the banned but unoffending individuals represents a special case, a moral middle ground between the permissible and the simply prohibitible.

It is important to realize that this way of justifying CNPIs places a certain sort of constraint on them. CNPIs that prohibit the innocent and unoffending but cannot be justified in this way are, so far, unjustified. An example taken from actual events might help clarify what this means in practice. The Madison Marriott West in Middleton Wisconsin is a ten story, two hundred and ninety-two room hotel. It is also the second largest convention center in the Madison area, with a number of large meeting rooms and auditoriums. It specializes in large-scale events, often involving hundreds of people. This means—given that a large gathering ban is still in effect as we write, seven months after its onset—that its core business is now illegal in the state of Wisconsin. Before the ban, it had around one hundred twenty-five employees. After it, the number has fluctuated between ten and fifteen. There is no janitorial or cleaning staff at all. The elaborate array of meeting rooms lies empty, though still requiring tax and mortgage payments. Though it is impossible to gather accurate numbers about this, it is a safe bet, given the state of the economy, that nearly all of the over one hundred people who lost their jobs (which included *all* of the lowest paid employees) are still unemployed as we write this. Did the ban afford these people adequate implicit in-kind compensation for the heavy burdens it imposed on them? It is impossible to give a definitive answer to that question here, but it is surely a very realistic possibility that it did not. The benefit of the rule that falls on everyone is merely the avoidance of a certain interval of risk, and like every other safety measure, its value is finite and may well be very small compared to the economic and psychological burdens of seven months (so far) of unemployment. The fact that the risk thereby abated is a risk of injury, suffering, and death does not mean that its value will be enormous. The same thing is true of smoke detectors in one's house,

yet consumers still do consider the price of detectors when deciding how many (if any) to buy. The evils avoided have to be discounted by the probabilities involved.

However, supposing in a particular epidemic the people who become unemployed due to a ban on large gatherings are not afforded adequate implicit in-kind compensation, that does not mean (yet) that such bans are unjustified. Such in-kind compensation is not the only kind of compensation available to us. We can also compensate them by paying them directly, and finance these payments with taxes collected from those who benefit from the ban, which of course is the general population of the area affected by the epidemic. The interesting question of how much compensation is sufficient is one we will not be able to discuss here.<sup>25</sup> It should suffice to say that compensating them adequately is the only way to avoid coercively exploiting them for the good of others. It might happen that the taxpayers signal (in the voting booth or by some other means) that they find the amount of the compensation too large and object to paying it, but that would be good evidence that the ban is a bad idea because the benefits it affords for the many are not worth the costs it imposes on the few.

It is probably obvious by now that the approach we have just taken to bans on large gatherings can be used to decide whether any CNPI is morally justified. First, consider whether the CNPI prohibits individuals from doing some act that violates the rights of others by exposing them to risk of infection by a (sufficiently serious) disease. If the answer is yes, the measure is so far justified. Second, in

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<sup>25</sup>See Nozick, *Anarchy*, Ch. 4, *passim*. Nozick discusses three different types or levels of compensation. Full compensation for a particular cost is an amount sufficient to make one as well off as one would be if the cost had not been imposed. Market compensation is the amount that the individual accepts, or would have accepted, as an inducement to voluntarily accept the cost. Disadvantage compensation is an amount sufficient to make one as well off as those in the general population who have not had this particular cost imposed on them. Given that the sort of rule we are considering here probably imposes costs that everyone must share, where these costs are distinct from the special ones for which this individual is being compensated, disadvantage compensation is apt to be less than full compensation, which is very likely to be less (possibly much less) than market compensation.

order to prohibit these risky actions, must it also prohibit acts that do not pose such a risk? If the answer is no, the measure is justified. If it is yes, it is unjustified unless one of two things is also true: either the measure itself affords these additional prohibited individuals adequate implicit in-kind compensation, or they are compensated directly at the expense of the people who do benefit from the measure. For the sake of illustration, we will look at two such measures, one easy to justify, and the other very difficult.

During the Influenza Epidemic of 1918, the New York Board of Health established a timetable mandating staggered opening and closing hours for businesses and government offices in order to decrease rush hour congestion, especially on public transportation. The object was to slow the rate at which the deadly disease spread.<sup>26</sup> Such a mandate, which applies to everyone doing business in the city, will necessarily coerce a number of people who, as individuals, are not a threat to others. But the costs it imposes on them are light, amounting to no more than inconveniences. Given how contagious and how deadly the “great influenza” was—informed opinion estimates that it killed between 2.5 and 5 five per cent of the population of the Earth<sup>27</sup>—if it was at all effective at slowing the spread of infection, everyone was adequately compensated for their inconveniences by the same mandate that imposed them. If that is so, the measure is justified.

A much more complex set of issues is presented by a policy of “lockdown,” like the one imposed by various state governments during the COVID-19 epidemic: namely, forced closures of businesses and offices that the government has declared “non-essential.” There are at least two sorts of issues raised by such policies. One is obvious, given things that we have already said. The number of those unemployed surged by more than 14 million, during recent widespread lockdowns, from 6.2 million in February 2020 to 20.5

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<sup>26</sup>See Francesco Aimone, “The 1918 Influenza Epidemic in New York City: A Review of the Public Health Response,” *Public Health Reports*, 125, Supplement 3 (2010): pp. 71–79. Available online at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2862336/>.

<sup>27</sup>Laura Spinney, *Pale Rider: The Spanish Flu of 1918 and How It Changed the World* (New York: Public Affairs, 2017), p. 4.

million in May.<sup>28</sup> One study found that in May through September of that year, 8 million Americans slipped into poverty.<sup>29</sup> Some of this damage was an inevitable consequence of the disease, as people sought to protect themselves from the virus by avoiding places of business, such as restaurants. But some of it was deliberately caused when the government declared many people's places of employment non-essential. Did these measures afford these people adequate in-kind compensation for losing their jobs? It is certainly arguable that, if the disease involved is as contagious and as harmful as the Black Death (bubonic plague) of 1347–50, such a thing would indeed be the case. Any significant decrease in a substantial likelihood of catching a disease that is nearly always fatal would seem to compensate one for being unemployed. But COVID-19, though very contagious and nothing to make light of, is far less deadly than the Black Death was. If the increment of safety from this disease is not enough to compensate the many victims of the shutdown policy, that would mean that they were forced to take a net loss of well-being in order to produce a net gain for others. This would be an injustice. In that case, by analogy with the case we have already made in regard to bans on large gatherings, the injustice can be erased by compensating these victims.

However, if there is good enough reason that the policy *would* provide sufficient benefit in terms of risk avoidance, then common-sense decency would seem to require that responsible officials make this claim in public and make a case for it. Otherwise, even if the victims are not sure they are being forcibly exploited for the good of others, they will get the clear impression that those responsible

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<sup>28</sup>Rakesh Kochhar, "Unemployment rose higher in three months of COVID-19 than it did in two years of the Great Recession," *Pew Research Center*, June 11, 2020, accessed 10/13/2020, <https://www.pewresearch.org/fact-tank/2020/06/11/unemployment-rose-higher-in-three-months-of-covid-19-than-it-did-in-two-years-of-the-great-recession/>.

<sup>29</sup>Zachary Parolin, Megan Curran, Jordan Matsudaira, Jane Waldfogel, Christopher Wimer, "Monthly Poverty Rates in the United States during the COVID-19 Pandemic." *Poverty and Social Policy Working Papers*, October 15, 2020, accessed 10/17/2020, <https://static1.squarespace.com/static/5743308460b5e922a25a6dc7/t/5f87c59e4cd0011fabd38973/1602733471158/COVID-Projecting-Poverty-Monthly-CPSP-2020.pdf>.

for the policy do not think it matters whether the victims are being exploited or not. The idea that it is unjust to force some people to accept welfare losses simply in order to provide benefits to others is hardly a radical one: it is simply a matter of common-sense morality. If officials do not seem to think that the case for the fairness of the lockdown needs to be addressed, that will no doubt be noticed by those who are forced by the policy to accept real hardship. To claim that the policy is justified by the fact that the livelihoods of these people are not “essential” may amount to backing up an injustice with an insult.

The fairness problem raised by the COVID lockdowns is exacerbated by the fact that the harm done by the disease, and consequently the benefits of avoiding it, vary dramatically from one age-group to another. Here is one account of (as we write) a very recent set of numbers from the Centers for Disease Control:

The CDC’s latest death counts indicate that the crude case fatality rate is around 28 percent for patients 85 or older and 18 percent for 75-to-84-year-olds. That rate falls to about 8 percent for 65-to-74-year-olds, 2 percent for 50-to-64-year-olds, 0.6 percent for patients in their 40s, 0.2 percent for patients in their 30s, 0.06 percent for patients in their late teens and early 20s, 0.02 percent for 5-to-17-year-olds, and 0.04 percent for children 4 and younger.<sup>30</sup>

If we assume that death rate is a good proxy for the harmfulness of the disease (which in this case includes other effects besides being killed), then the harmfulness of the disease, and consequently the value of reducing the risk of catching it, will vary widely with age. The likelihood that workers in their early 20s will die of the disease, if they test positive for it, is 0.06 per cent. The value of lockdown for them is a function of this number, discounted by a downward shift, probably of only a few per cent, of the likelihood that they will

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<sup>30</sup>Jacob Sullum, “The Latest CDC Estimates of COVID-19’s Infection Fatality Rate Vary Dramatically With Age,” *Reason.com*, September 29, 2020, accessed 10/14/2020, <https://reason.com/2020/09/29/the-latest-cdc-estimates-of-covid-19s-infection-fatality-rate-vary-dramatically-with-age/>.

indeed test positive. This is a benefit, but is it more valuable than the months of employment that have been taken from these people in order to produce it? Perhaps a case can be made that it is, but it is far from obvious that it will be successful. Also very worrying, from an ethical point of view, is the distribution of costs and benefits among age groups. The lion's share of the risk of death from infection—and consequently the lion's share of the benefit from lockdown—falls on people aged 65 and over. But these are the people who are least likely to directly bear the costs of the lockdown, as they are unlikely to be part of the work force. They are unlikely to be among the 14 million who lost their jobs. This is a very serious problem with the fairness of the lockdown policy. It may well be that those who benefit from such a policy owe compensation to those who bore, and continue to bear, the costs.

Finally, we should say a few words about a likely source of resistance to the position we have taken here. The principles we have sketched out here are rather restrictive on state action. On any very likely account of the facts, the widespread lockdowns enacted in the United States early in the COVID-19 epidemic might very well be ruled out, and the brutally unfair way they were administered certainly would be. Does that mean these principles are *too* restrictive? Given how difficult it would be, according to our position, to justify something like the lockdowns that were widely in effect in the US during the outbreak, someone who is not quite convinced by our arguments might be more impressed by the lives that might be saved by such measures. Though we admittedly have no way to lay such concerns to rest here, we do think we can make one fairly simple point that might blunt their effect.

First, a true story: Seven years ago, a friend of ours was in a west African country, serving as an advisor to its government regarding responses to a deadly Ebola outbreak that was spreading there. When he was done, he flew back to the US and was surprised when he was called off the plane by customs officials and taken directly to a medical examination (something that had not happened to him in Africa). They somehow knew, without his volunteering the information, that he had been in west Africa. They gave him a radio-connected thermometer, with instructions to take his temperature daily, which the device would transmit to a public health official.

Two days later, in Florida, he was visited in his hotel by a state official, who told him that Florida did not believe the federal guidelines in these matters were strong enough, and subjected him to another examination. A few years later, in March 2020, he was in Europe, where many responsible individuals feared that the rapidly spreading COVID-19 epidemic would swamp their hospitals with cases. When he landed in New York again, he was again surprised—this time, because nothing happened. No officials appeared to monitor his health, no one seemed to care that he was arriving from a public health hot spot. There seemed to be no trace of the earlier responses to the preceding pandemic.

Apparently, the institutional memory of the last alarming epidemic seems to have been very weak. Unfortunately, this was hardly unusual. As COVID-19 surged to pandemic levels, nation states around the world were surprised and unprepared, almost as if they had not expected another serious epidemic to reach them. There were at least two exceptions, however. Taiwan began screening passengers arriving from Wuhan, China, where the COVID-19 was first identified, on December 31, 2019, while it was still the subject of limited reporting in the West. Taiwanese medical workers confirmed their first case on January 21, two days before Wuhan itself went into full lockdown. Taiwan continued to pursue its policy of testing—testing people they had some reason to think might be infected, as opposed to mass indiscriminate testing such as was practiced in China—and rigorous contact-tracing and quarantining of contacts. The reason Taiwan was able to act so swiftly was instructive: The island nation was hit hard by an earlier epidemic of respiratory disease from China, Severe Acute Respiratory Syndrome (SARS), in 2003. After that disturbing episode, the government set up the Central Epidemic Command Center, to coordinate various government offices, and invested in tests, personal protective equipment such as masks, as well as in effective contact-tracing.<sup>31</sup>

Another early responder to COVID-19 was South Korea. In their case, their readiness for a quick response was a result of the nation's

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<sup>31</sup>Joshua Berlinger, "Taiwan just went 200 days without a locally transmitted Covid-19 case. Here's how they did it," *CNN World*, October 30, 2020, accessed 11/4/2020, <https://www.cnn.com/2020/10/29/asia/taiwan-covid-19-intl-hnk/index.html>.



experience with Middle Eastern Respiratory Syndrome (MERS) in 2015. The death toll from that disease (39 deaths) was widely regarded as a national disgrace and led the National Assembly to amend their Infectious Disease Control and Prevention Act to allow the government to collect personal information from people who test positive for epidemic diseases for purposes of efficient contact-tracing and testing of contacts. The information was to be garnered from such sources as surveillance-camera footage, smartphone location data, and credit card purchase records. In addition, during the current COVID epidemic, they used these data to transmit, via smartphone messaging, information about the location and movements of known or likely carriers of the disease, with the identity of the individuals concealed, to people known (by means of their phones) to have been nearby. This enabled people to avoid known hotspots and monitor their own health so they could take the necessary steps if they found they had been infected.<sup>32</sup> The policy on large gatherings has generally shifted with changing circumstances, banning various sorts of gatherings—such as religious meetings—when and if they become spreader events. In both countries, moreover, wearing masks is common.

The simple point we wish to make is that by means of early action Taiwan and South Korea have avoided the general lockdowns that have been so common in other countries, and have avoided closing their borders—and yet they have done relatively well in combating the disease. This is especially true of Taiwan, which at this writing has recently marked its 200<sup>th</sup> day in a row without a single locally transmitted case.<sup>33</sup> There is evidence, then, that testing, contact-tracing, isolation and quarantine—the most clearly ethical CNPIs if judged by the person-and-property rights we have been assuming—are *alternatives* to the draconian lockdowns that have been widely practiced and defended, and that they are comparatively effective ones.<sup>34</sup> Admittedly this may well only be true if such measures are

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<sup>32</sup>Wudan Yan, “What Should the U.S. Learn from South Korea’s Covid-19 Success?” *Undark*, October 5, 2020, accessed 11/5/2020, <https://undark.org/2020/10/05/south-korea-covid-19-success/>.

<sup>33</sup>See footnote 31, above.

<sup>34</sup>It is true that South Korea as we write has had increased trouble with a second

pursued efficiently and, most important, early in the progress of the epidemic. But surely such promptness and efficiency are themselves ethically imperative. For the nation-states of the world—at least ones that have highly active ties of trade and travel with countries like China—to continue to act like the previous deadly epidemic will be the last one is simply irresponsible.<sup>35</sup>

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wave of the COVID epidemic, due in significant part to public resistance and disobedience to some large gathering bans—especially bans of in-person religious meetings—but this in a way reinforces the point we are suggesting here. It seems likely such disobedience would be greater if the government had *also* attempted to lockdown a major portion of the economy, which of course they have not done. See Choe Sang-Hun, “New Covid-19 Outbreaks Test South Korea’s Strategy,” *The New York Times*, October 2, 2020, accessed 11/6/2020.

<sup>35</sup>We would like to thank Imtiaz Moosa and Nathaniel Hunt for discussing these issues with us, and Ross Levatter and Scott Horton for useful comments on an earlier draft.

## Post-Marxist Populism in the Twenty-First Century

*Alejandra M. Salinas*

One who knows the enemy and knows himself  
Will not be endangered in a hundred engagements.

—Sun Tzu

Since the mid-1980s, the demise of the Soviet-bloc regimes accelerated a number of diverse intellectual reactions which had been in the works during the preceding decades, in an attempt to offer a revision of the shortcomings and/or to explain the discrepancies between historical practices and theoretical Marxism. The latter can be grouped into four main perspectives: the classical, rooted in a strict defense of Marxist economics; the Neo-Marxist approach to cultural analysis; the Analytical, which emphasizes normative considerations, and the Post-Marxist, anchored in the political construction of social antagonism. Although they differ in their evaluative and normative premises, all groups share an ultimate goal: the examination of possible avenues to advance the main ideal of Marxism, a society where capitalism disappears or is subject to stringent political controls.

With this intellectual scheme in mind, we present an outline of the basic ideas put forward by these groups; secondly, we analyze the particular case of philosopher Ernesto Laclau (1935–2013), pointing

out the main resemblances and divergences between his theory and the other Marxist formulations. Last, we offer a reading of his work, arguing that his proposition that political action be considered as the “subversion and dislocation”<sup>1</sup> of social life and the architect of a permanent antagonism confronts the core of classical liberal theory: the defense of free cooperative individual exchanges, the culture of legality, and the design of a limited government. Looking at his subversive political philosophy might help explain the global growth of violent protests, aggressive public discourses, growing civic disorder, and a growing sensation of uncertainty about the future of liberal democracy.

## THE MARXIST THEORETICAL FAMILY

Classical or orthodox Marxism was built upon a set of basic premises tied to philosophical materialism, economic determinism, history as the unfolding of class struggles, the case for revolution, and the faith in the possibility of the advent of a communist society. Such were the views originally advanced, to use Kolakowski terms, by the “Founders” and their followers of the “Golden Era” (Marx, Engels, Lenin, Trotsky *et al.*)<sup>2</sup> In the case of Marx, his “Theses on Feuerbach” posits materialism as a “sensuous human activity,” social change as a “revolutionary practice,” human essence as “the ensemble of the social relations,” a “rational solution” to human practical problems, and the mandate for philosophers to change the world.<sup>3</sup> Concordantly, his economic outlook was based on the materialistic content of value as measured by the labor input, and a critique of social relations of exploitation, alienation, and subordination, that he associated with capitalism. In said system, he argued, laborers are

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<sup>1</sup>Ernesto Laclau, “Dislocation and capitalism, social imaginary and democratic revolution,” in David Howarth ed., *Ernesto Laclau: Post-Marxism, populism and critique* (London and New York: Routledge, 2015), p. 46.

<sup>2</sup>Leszek Kolakowski, *Main Currents of Marxism: The Founders, The Golden Age, The Breakdown*, 3 Vol. (Oxford: Clarendon Press, 1978/1981).

<sup>3</sup>Karl Marx, *Marx/Engels Selected Works*, vol. 1 (Moscow: Progress Publishers, 1969), pp. 12–15. URL: <http://www.marxists.org/archive/marx/works/1845/these/these.htm>.

exploited by property-owners, who obtain their profits from the difference between the labor paid for, and the sales of the product of that labor. Such profits are not only unjustifiable, so the argument goes, but the whole process would lead to widespread impoverishment, on the grounds that capital accumulation and technological innovation would cause growing unemployment and social revolts.<sup>4</sup> Despite the inevitability of its internal contradictions, the collapse of capitalism had to be “shortened, simplified and concentrated” by means of “revolutionary terror,”<sup>5</sup> after which the (finally) rational organization of society would ensue. The Communist Manifesto is a compendium of these ideas and a call to the working class to lead social struggles.<sup>6</sup> On Marx’s terms, it was a “law of all history” that the working class would get impoverished up until the advent of Communism. Once “the springs of co-operative wealth flow more abundantly” in the future society, the distribution of wealth would be finally just: “from each according to his ability, to each according to his needs!”<sup>7</sup>

In this century, classical Marxism has remained loyal to the conviction that social demands have a materialistic basis (seen as a determinant of social life), that class struggle is a central notion, and that the inequality of wealth would disappear in the higher phase of the communist society.<sup>8</sup> After the failure of 20th century communist experiences, orthodox Marxists dropped the insistence on comprehensive state social control, but they retained its hope and

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<sup>4</sup>David Prychitko, “Marxism,” *The Concise Encyclopedia of Economics* (2010), accessed online at: <https://www.econlib.org/library/Enc/Marxism.html>.

<sup>5</sup>Karl Marx, “The Victory of the Counter-Revolution in Vienna,” *Neue Rheinische Zeitung*, No. 136 (1848), accessed online at: <https://www.marxists.org/archive/marx/works/1848/11/06.htm>

<sup>6</sup>Karl Marx and Friedrich Engels, *Marx/Engels Selected Works*, vol. 1 (Moscow: Progress Publishers, 1969), p. 18, accessed online at: <https://www.marxists.org/archive/marx/works/download/pdf/Manifesto.pdf>.

<sup>7</sup>Karl Marx, “Critique of the Gotha Programme” (1875), accessed online at: <https://www.marxists.org/archive/marx/works/1875/gotha/ch01.htm>.

<sup>8</sup>Alain Badiou, “The Communist Hypothesis,” *New Left Review* 49 (2008). Étienne Balibar, “The Idea of Revolution: Yesterday, Today and Tomorrow,” University of Columbia Law Blog (2016), accessed online at: <http://blogs.law.columbia.edu/uprising1313/etienne-balibar-the-idea-of-revolution-yesterday-today-and-tomorrow/>.

its spirits: they call for an “anti-capitalist revolutionary movement” followed by the “social command over both the production and distribution of surpluses”, and they believe in the possibility of an economic organization where production and self-realization are best achieved “in service to others.”<sup>9</sup>

Underlying these premises is, as Hayek puts it, the “scientific” conviction that social processes can be studied as objective “wholes” determined by intelligible laws, and that they can be directed by “conscious” human control and centralized planning: “Marxism more than any of the others has become the vehicle through which this result of scientism has gained so wide an influence.”<sup>10</sup> This rationalistic pretense to organize social institutions describes the classical Marxist mentality, but it also permeates the literature of Neo-Marxism, initially associated with the work of the Frankfurt School (Adorno, Horkheimer, Marcuse *et al*), and later extended to include thinkers such as Lukács, Sartre and Althusser, who remained committed to the communist project. Most Neo-Marxist authors employ methodological collectivism, but they discard the postulates about the materialistic and deterministic nature of social life. Consequently, they move away from economics and closer to philosophy, sociology, and psychology in order to explore the cultural traits of Western society and to uncover the alleged processes of oppression, alienation and false-consciousness underlying its dynamics.<sup>11</sup> What Neo-Marxism retains from classical Marxists is the disposition “to know the whole”, and a belief in “the essential unity of mankind” and its “common destiny;” therefore, they look at history as the unfolding of a structured “totality.”<sup>12</sup> However, Neo-Marxists replace the

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<sup>9</sup>David Harvey, *The Enigma of Capital and the Crisis of Capitalism* (Oxford: Oxford University Press, 2010), pp. 223–233.

<sup>10</sup>F.A. Hayek, *The Counter-Revolution of Science: Studies on the Abuse of Reason* (London: The Free Press of Glencoe, 1964), pp. 38, 53–56, 74, 87–88.

<sup>11</sup>Andrew Levine, “A Future for Marxism?” in *Handbook of Political Theory*, eds. Gerald F. Gaus and Chandran Kukathas (London, Thousand Oaks, and New Delhi: Sage Publications, 2004), p. 87.

<sup>12</sup>Martin Jay, *Marxism and Totality: The Adventures of a Concept from Lukács to Habermas* (Berkeley and Los Angeles: University of California Press, 1984), pp. 47, 59, 61–63, 527.

economic lens of totality with an outlook about the irrationality underlying social relations and cultural manifestations, in the face of which they promote a critical theory to bring these alleged dark aspects of modern Western life to light.<sup>13</sup> In Fromm's vision, to take an example, individuals unconsciously demand social settings that may provide a sense of security and protection and, to that end, he believes that social and economic central planning would ensure more desirable results than under free social exchanges.<sup>14</sup>

There was a later revision of traditional Marxism, of its methodological collectivism and historical inevitability, as well as of its economics based on the labor theory of value and the falling rate of profit. The Analytical Marxists, as they are known, reject these orthodox premises and explore issues about freedom, justice, and equality.<sup>15</sup> In this regard, they were influenced by the "Rawlsian turn,"<sup>16</sup> which put normative considerations in the center of political philosophy. A quick comparison of Analytical Marxists with Rawls presents indeed some shared understanding of the nature and functioning of current economic arrangements. In *A Theory of Justice* Rawls agrees with them in that exploitation is a moral concept, and that "persons are exploited by market imperfections." However, unlike many Analytical Marxists, in terms of institutional prescriptions Rawls accepts said imperfections on the basis that "what really counts is the workings of the whole system and whether these defects are compensated for elsewhere."<sup>17</sup> As is well known, the compensation he has in mind refers to a mechanism of redistribution within a restricted redistributive state. On this front Rawls' vision

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<sup>13</sup>Karl R. Popper, *The Myth of the Framework: In Defense of Science and Rationality*, ed. M. A. Notturmo (London and New York: Routledge, 1994), p. 66.

<sup>14</sup>Erich Fromm, *The Fear of Freedom* 2nd ed. (London: Routledge, 2001).

<sup>15</sup>For some of the pioneer works see Jon Elster, "Exploitation, Freedom and Justice," *Nomos*, 26 (1983), pp. 277-304; G. A. Cohen, "Reconsidering Historical Materialism," *Nomos*, 26 (1983), pp. 227-251; Robert van der Veen, "The Marxian Ideal of Freedom and the Problem of Justice," *Philosophica*, 34, 2, (1984), pp. 103-126.

<sup>16</sup>Levine, "A Future for Marxism?," p. 78.

<sup>17</sup>John Rawls, *A Theory of Justice*. Revised edition (Cambridge: Harvard University Press, 1999), p. 272.

contrasts, to take one example, with Van Parijs' defense of communism to be achieved by means of a basic universal income financed with the redistribution of the "whole social product" (regardless of each person's contribution).<sup>18</sup> Neither communism nor a universal income belong to the thought of Rawls, who seeks to combine free markets with a political structure inspired by social justice. Instead, Analytical Marxists deny that social justice is compatible with the operation of free markets.

David Gordon's book on Analytical Marxists presents a good summary and analysis of the thought of Roemer, Elster, and Cohen in regard to the issues of exploitation, freedom and alienation under capitalism. Roemer holds that capitalist exploitation does not arise from the process of production in itself but from initial inequalities in ownership that originate class differences; in a class society, he argues, the better endowed will be parasitic on the work of others.<sup>19</sup> In the case of Cohen, his claim is that workers under capitalism are "collectively unfree" to leave the proletariat (due to lack of job alternatives, *inter alia*), so he calls for a "liberation from class" and the provision of "leisure" in a socialist economy (as opposed to a work-oriented society).<sup>20</sup> In turn, Elster shares the diagnosis about the ills of the market economy but differs about the possible solutions to the problem. Along the lines of the theory of alienation, which is an attempt to explain how capitalism distorts the worker's consciousness, Elster embraces the ideal of worker cooperatives and participatory decision-making processes as the best arrangement to promote a more creative, self-fulfilling work.<sup>21</sup>

There are two interesting critiques to Analytical Marxism that I want to address here. The first one holds that, since Analytical Marx-

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<sup>18</sup>Philip Van Parijs, *Marxism Recycled* (Cambridge: Cambridge University Press, 1993), pp. 3–4, 163.

<sup>19</sup>David Gordon, *Resurrecting Marx: the Analytical Marxists on Exploitation, Freedom, and Justice* (New Brunswick and London: Transaction Publishers, 1990), pp. 71–72.

<sup>20</sup>Gordon, *Resurrecting Marx*, pp. 104, 111, 116.

<sup>21</sup>Gordon, *Resurrecting Marx*, pp. 123, 128. See also Erik Olin Wright, "Transforming Capitalism through Real Utopias," *American Sociological Review*, 78, (2013), pp. 6–8.



ists take as incorrect the orthodox economic assumption of exploitation (for them, exploitation becomes only a normative concern about equality), the case for Marxism is weakened, if not “tacitly abandoned.”<sup>22</sup> In response to this observation, we could argue that Analytical Marxism does fall within Marxism, even if it differs from or contradicts orthodox assumptions. In other words, despite its unorthodox assumptions, Analytical Marxism is still Marxism. The desire for complete social equality and the elimination of capitalism reveals some kind of Marxist argument, even if it fails to substantiate its case, and even if it offers an incomplete or partial account of how their proposals would work in practice (as is the case with proposals for workers’ joint ownership, which for Nozick overlook important issues such as the entrepreneurial and innovative skills needed to succeed<sup>23</sup>).

The second objection to Analytical Marxism deals with the issue of the initial unequal distribution of endowments as exploitation. Such is Roemer’s view, reconstructed as follows: “if people start off with unequal amounts of property or skills, the better endowed will not have to work as hard as the worse-endowed to gain the same bundle of goods.”<sup>24</sup> According to Gordon, this argument does not show why this situation amounts to exploitation since it is only a description of a given state of affairs; nor does Roemer make the case for the moral undesirability of inequality.<sup>25</sup> The objections seem to be right about these two omissions, which weaken Roemer’s case for a revision of classical Marxists’ explanation of exploitation. To this, we would only add that it is this type of omission that ironically moves Roemer away from the Analytical pretense and closer to a Post-Marxist stance in which, as we will see below, terminology replaces argumentative logic.<sup>26</sup>

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<sup>22</sup>Levine, “A Future for Marxism?” p. 76.

<sup>23</sup>Robert Nozick, *Anarchy, State and Utopia* (New York: Basic Books, 1974), pp. 255–256. For Nozick, workers cooperatives are one of many “patterned communities” and may only be accepted within a libertarian framework, alongside other economic arrangements that individuals may freely choose (p. 316).

<sup>24</sup>Gordon, *Resurrecting Marx*, p. 74.

<sup>25</sup>Gordon, *Resurrecting Marx*, p. 75.

<sup>26</sup>I paraphrase here Popper’s indictment of Adorno and Habermas that he was a

Post-Marxist thinkers find that it is not in the economic or the ethical field where social relations are anchored, but in the realm of language, culture and politics. Against the orthodox stance, Post-Marxism rejects all or most of the following items: the proletariat as the protagonist revolutionary subject; the assertion that social life has a materialistic essence, which leads to economic structural determinism; an eschatology tied to the inevitable realization of a communist order, and dialectics as a logic of “necessary transitions” towards such realization.<sup>27</sup> There are also substantive differences between Post-Marxist and Neo-Marxist stances: while the latter relates to knowing the whole, the essential unity of mankind, and history as a totality, the former relates to anti-foundationalism, social division and not unity, and history as the fragmented and contingent register of diverse social divisions.

Some Post-Marxists focus on the sexual, racial, and ethnic configurations of modern Western societies, and they replace the terms of dictatorship and the bourgeoisie with those of “patriarchy,”<sup>28</sup> “subalternity,”<sup>29</sup> and “decoloniality,”<sup>30</sup> to anchor their vision on social relations based on the exploitation of women, of marginal populations, and of underdeveloped countries, respectively. Along these lines, for J. Butler capitalism is designed to regulate both the mode of production of merchandise and the mode of social reproduction; in such context, gender struggles belong to the cultural as much

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“positivist,” against who he writes: “Terminology does not matter, however. Only it should not be used as *an argument*” (*The Myth of the Framework*, p. 76, italics in the original).

<sup>27</sup>Ernesto Laclau, “Identity and Hegemony: The Role of Universality in the Constitution of Political Logics,” in *Contingency, Hegemony, Universality. Contemporary Dialogues on the Left*, J. Butler, E. Laclau and S. Žižek (London: Verso, 2000), pp. 58–60.

<sup>28</sup>Maria Mies, *Patriarchy and Accumulation on a World Scale: Women in the International Division of Labour* 3rd ed. (London: Zed Books Ltd, 2014).

<sup>29</sup>Gayatri Spivak, “Can the Subaltern Speak?” in *Marxism and the Interpretation of Culture*, eds. Cary Nelson and Lawrence Grossberg (Urbana Champaign: University of Illinois Press, 1988), pp. 271–313.

<sup>30</sup>Walter D. Mignolo and Catherine Walsh, *On Decoloniality: Concept, Analytics, Praxis* (Durham: Duke University Press, 2018).

as to the political camp, since they relate to issues such as a revolt against unpaid work and the need for militant activism.<sup>31</sup>

Briefly put, Post-Marxists focus on the political and ideological tasks tied to the configuration of a new social order, and they regard orthodox Marxism as the “old singular unilinear model [whose] particular historical class at a particular stage of economic development has proven inadequate; there are many groups excluded from this class [women, the elderly, the young, etc.]”<sup>32</sup> Such is the claim, for instance, of Cultural Studies, an interdisciplinary perspective meant to produce new social meanings by dismantling or opposing the established ones. According to Marchart, the cultural paradigm is mostly concerned with what he calls the “micro-political forms of resistance” (he gives the example of the hippies) as opposed to the experience of “antagonization” associated with the “macro-political” level (e.g. as anti-systemic protest).<sup>33</sup> Following Marchart’s classification, among the macro-political readings Negri and Hardt defend a decentralized resistance against what they consider a globalization that is predatory of “the various forms of the common—ecological, social and biopolitical.” They believe there is potential for the configuration of social relations by means of a global movement united “by internal bonds of solidarity and intersection among struggles.”<sup>34</sup>

Macro-political Post-Marxism is also found in Rancière’s idea about political practices labelled as “dissensus.” The latter should not be understood as pre-existing interests or opinions that are put in a dialogue between opponents, but as a radical division between social groups. In this light, the call for consensus is considered to be the elimination of politics and the triumph of liberal institutions. Liberal contractualism is a fiction, he argues, since it reduces politics to the State, instead of acknowledging that it is rather an “opposition between logics,” a confrontation between those who are part

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<sup>31</sup>Judith Butler, “Merely Cultural,” *New Left Review* I, 227 (1998).

<sup>32</sup>Raymond Williams, *Resources of Hope: Culture, Democracy, Socialism* (London and New York: Verso, 1989), pp. 301–305, 308–309.

<sup>33</sup>Oliver Marchart, “Elements of Protest: Politics and Culture in Laclau’s theory of populist reason,” *Cultural Studies*, 26, 2–3 (2012), pp. 225, 237–238.

<sup>34</sup>Antonio Negri and Tony Hardt, “Empire, Twenty Years on,” *New Left Review* 120 (2019), pp. 82–83.

of the community, and those who pass as the “unaccounted” (say, illegal immigrants today).<sup>35</sup>

Another form of macro-political Post-Marxism, but more oriented towards praxis, is the one put forward by Laclau and Mouffe, who have been recognized by their peers as the most influential thinkers in advocating a political Post-Marxist stance.<sup>36</sup> In their path-breaking book published in 1985, *Hegemony and socialist strategy*, the authors contest the model of proletarian struggle and revolution as the foundation of socialist thought. Against the “classic Jacobinism and its different socialist variants”—as they label orthodox Marxism—they defend a radical democracy on the grounds that liberalism is “not the enemy to be destroyed”; if anything, they see the need to extend “the democratic struggles for equality and liberty to a wider range of social relations.”<sup>37</sup> The radical politics they advocate wants “to put an end to capitalist relations of production, which are at the root of numerous relations of subordination,” although the economy is just one area of dispute that joins other fights in the juridical, educational, and cultural spheres towards a comprehensive social reform. In this sense, socialism is only one of the components of their project.<sup>38</sup>

Laclau’s and Mouffe’s proposal takes inspiration in the writings of Gramsci, who believed that the basic socialist concern is not how to access and keep power by revolution, but how to construct a consensus so that the political leader could be passively accepted and supported by the people. Gramsci used the concepts of “hegemony”, “historical block”, “war of position” and the “collective will” as the building blocks for an ideological unity to be achieved through a “moral and intellectual” leadership in charge of the articulation of diverse political, economic, social and cultural elements.<sup>39</sup>

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<sup>35</sup>Jacques Rancière, *Dissensus: on Politics and Aesthetics*, ed. and trans. Steven Corcoran (New York: Continuum, 2010), pp. 32–42, 79–85.

<sup>36</sup>Göran Therborn, *From Marxism to Post-Marxism* (London: Verso, 2008), p. 141.

<sup>37</sup>Ernesto Laclau and Chantal Mouffe, *Hegemony and socialist strategy. Towards a radical democratic politics* 2nd ed. (London and New York: Verso, 2001), pp. 177, 184–185.

<sup>38</sup>Laclau and Mouffe, *Hegemony*, pp. 178, 185, 192.

<sup>39</sup>Chantal Mouffe, “Hegemony and Ideology in Gramsci,” in Ch. Mouffe, ed.

Perhaps the most relevant concept of the radical project derived from the influence of Gramsci is the one of hegemonic articulation, which replaces the orthodox accent on the mode of production.<sup>40</sup> The hegemonic operation consists in the construction of social identities and actors at the institutional and ideological levels. Against economic essentialism and historical determinism, the Post-Marxist hegemonic logic is tied to an absolute contingency in regard to the choice of the historical and ideological avenues to achieve socialism and social reform. For Laclau and Mouffe, hegemony is a self-funded political decision, one that recognizes “a form of politics which is founded not upon dogmatic postulation of any ‘essence of the social’, but, on the contrary, on affirmation of the contingency and ambiguity of every ‘essence’, and on the constitutive character of social division and antagonism.”<sup>41</sup>

The attempt to put forward a strategy based primarily on contingent, non-essentialist premises was a frontal departure from other theories of Marxism. Against the Neo-Marxist notion of a ‘false consciousness’ permeating individual psychology, and the view of a “true consciousness” in which humanity is “reconciled with itself,” for Post-Marxists consciousness and ideology are the result of a political construction devoid of any appeal to the notion of truth. Besides, the concept of alienation or false consciousness presupposes an individual subject, which is alien to Post-Marxist thought.<sup>42</sup> The case for hegemony also presents a number of arguments against the classical Marxist view: the economy is not “a self-regulated space,” social classes are not “the necessary location of historical interests,” the language of objective interest is “arbitrary,” social actors “lack an ultimate rational identity,” and history follows no necessary movement nor eschatological conception.<sup>43</sup>

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*Gramsci and Marxist Theory* (London, Boston & Henley: Routledge / Kegan Paul, 1979), pp. 189–193.

<sup>40</sup>Laclau and Mouffe, *Hegemony*, pp. 65,175.

<sup>41</sup>Laclau and Mouffe, *Hegemony*, 193.

<sup>42</sup>Ernesto Laclau, “Ideology and post-Marxism,” *Journal of Political Ideologies*, 11, no. 2, (2006), pp. 106, 114.

<sup>43</sup>Laclau and Mouffe, *Hegemony*, pp. 83–85.

Some critics may think that post-Marxism is just another set of theories advocating greater social inclusion in the existing democratic system. In this sense, the articulation of different demands such as gender equality, racial and religious integration, economic regulation and environmental protection could be seen as an operation within liberal democracies. However, this is not the case since Post-Marxists contest and seek to change current political and economic arrangements. Despite any claim to the contrary, their proposal is not an extension of liberal democracy, either in its limited (classical liberal) or in its unlimited (welfarist) versions. The defense of social antagonism and the logic of hegemony are outrightly incompatible with the idea of liberal democracy and the logic of republican institutions, which are the foundations of contemporary Western political systems. For this very reason, Post-Marxism is self-labeled as radical and can be adapted to any commitment driven by attempts to change those systems. One of those attempts is found in Laclau's populist theory that we analyze below.

## POST-MARXIST POPULISM

Laclau's writings caught ample attention inside and outside the academy, both among his apologists and his detractors.<sup>44</sup> His work presents two major aspects to be analyzed in this section: a critique

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<sup>44</sup>For apologetic readings of Laclau applied to present-day politics see John Judis, "Rethinking Populism," *Dissent*, 2016. URL: <https://www.dissentmagazine.org/article/rethinking-populism-laclau-mouffe-podemos>; Judson C. Abraham, "The 2016 Bernie Sanders Campaign: American Socialist Populism," *disClosure: A Journal of Social Theory* 29, N°10, (2020) pp. 79–88. URL: <https://uknowledge.uky.edu/disclosure/vol29/iss1/10>.

Among the socialist detractors see Benjamin Arditì, "Post-hegemony: politics outside the usual post-Marxist paradigm," *Contemporary Politics*, Vol. 13, 3, (2007), 205–226; Pedro M. Rey-Araújo, "Ernesto Laclau's Oblivion of Political Economy: Capitalism and Institutions in Post-Marxist Discourse Theory," *Rethinking Marxism*, Vol. 32, No. 2 (2020), pp. 187–206.

Among the non-Marxist detractors see Jan-Werner Mueller, "Getting a Grip on Populism," *Dissent*, 2011, accessed on line at: <https://www.dissentmagazine.org/blog/getting-a-grip-on-populism>; Tom Palmer, "The Terrifying Rise of Authoritarian Populism," *Reason Institute*, July 14th, 2019, accessed on line at: <https://reason.com/2019/07/14/the-terrifying-rise-of-authoritarian-populism/>.

of classical Marxism, and an elaboration of a populist theory that pivots around the notions of discourse, antagonism and hegemonic leadership.

During the period when he published his main books, between 1977 and 2005,<sup>45</sup> the successive demise of communist regimes, the strengthening of capitalism and the reemergence of populist regimes (particularly in Latin America), required the development of a theory that could accompany these historical trends. Given that classical Marxism had failed to comprehensively explain them, Laclau's efforts were directed "to go beyond" while at the same time remain "within the horizon opened by Marxist theorization."<sup>46</sup> To that end, the basic tenets had to be challenged, arguing instead that: a) history follows no teleology, but "is rather a discontinuous succession of hegemonic formations that cannot be ordered by a script transcending their contingent historicity;"<sup>47</sup> and b) social life is not an expression of underlying economic movements, it is in the political realm that the ideologies, interests, and affections are confronted and articulated. Against Marxist materialism, in "post-foundational thought"<sup>48</sup> there is no ultimate substance or principle that serves as a foundation of human existence; social relations and institutions are historically and culturally determined, and always subject to variability and contingency.

Along these lines, the notions of class struggle and dialectical materialism as the explanatory devices of history are discarded as "empty metaphysical propositions."<sup>49</sup> Likewise, social profiles and interactions are not defined by the modes of production or other economic activity but are introduced by politics. It is this centrality of politics that constitutes a radical turn in respect to Marxist

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<sup>45</sup>See in particular E. Laclau, *Politics and Ideology in Marxist Theory: Capitalism, Fascism, Populism* (London: New Left Books, 1977); Laclau and Mouffe, *Hege-  
mony*, and E. Laclau, *On Populist Reason* (London and New York: Verso, 2005).

<sup>46</sup>"An interview with Ernesto Laclau: questions from David Howarth," in Howarth, *Ernesto Laclau*, p. 258.

<sup>47</sup>Laclau, *On Populist Reason*, p. 226.

<sup>48</sup>J. Martin, "Post-Foundational Political Thought: Political Difference in Nancy, Lefort, Badiou and Laclau," *Contemporary Political Theory*, 8, (2009), pp. 111–113.

<sup>49</sup>Laclau, "Constructing Universality," p. 305.

economic determinism, a turn accompanied by the displacement of industrial workers in social struggles. It should be noted, however, that the Marxist preeminence of conflict and the holistic method, in which the individual is replaced as a unit of analysis by collective concepts (“class” for the Marxists, the “people” for the Post-Marxists) are left intact.<sup>50</sup>

In general lines, Laclau rejects two forms of rationality that characterize classical Marxists: “a total revolutionary event bringing about the full reconciliation of society with itself,” and “a mere gradualist practice that reduces politics to administration.”<sup>51</sup> The beliefs that the revolution and the post-revolutionary administration would be adequate means to resolve conflicts ignore the impossibility of eradicating the antagonism inherent to political life. In particular, Saint-Simon’s motto—“from the government of men to the administration of things”—adopted by Marxists to describe the future communist society,<sup>52</sup> is a naive understanding that must be left behind. Laclau uses euphemistic expressions such as “bureaucratic rule” and “bureaucratic elites” to highlight the administrative aspects of the major problems with communist regimes in Eastern Europe and in some decolonized African countries.<sup>53</sup> The association of communism with bureaucracy might seem to bear similarity with classical liberal readings of the phenomenon, like Mises’, who writes in this respect: “The Leninist or Russian pattern of socialism is purely bureaucratic. All economic enterprises are departments of the government, like the administration of the army or the postal system.” Hayek shares this diagnosis and upholds the thesis of the

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<sup>50</sup>“Individuals are not coherent totalities but merely referential identities which have to be split up into a series of localised subject positions (...) the very notion of ‘individual’ does not make sense in our approach” (Laclau, “Populism, what’s in the name?” in Howarth, *Ernesto Laclau*, p. 152).

<sup>51</sup>Laclau, *On Populist Reason*, p. 225.

<sup>52</sup>Laclau, *On Populist Reason*, p.225. For the influence of Saint Simon on modern socialists, see Hayek, *The Counter-Revolution of Science*, pp. 151–152, 163–167.

<sup>53</sup>Laclau, *On Populist Reason*, pp. 95, 130. In a similar fashion, Cohen does not believe that Soviet experiment was actually socialist, since “it was not ruled by the associated producers, but by the leaders, and sometimes just the leader, of the Bolshevik Party” (G.A. Cohen, “Marxism after the Collapse of the Soviet Union,” *The Journal of Ethics*, 3, no. 2, 1999, p. 101).



incompatibility between “the extension of the administrative technical direction of the economy,” the rule of law and personal freedom.<sup>54</sup> Yet despite this apparent similarity, Laclau is only criticizing the style of the Communist Party in power, rather than expressing his worries about the ungranted extension and inefficiency of State bureaucracy. In this subject, he also stands aside from current classical Marxist proposals that show no worries, or rather strategically overlook, the possibility of governments acquiring a stifling bureaucracy of their own in future communist experiments. Against this, Laclau’s Post-Marxism offers a distinctive way of thinking about the political. In what follows we will address three concepts in his populist theory: discourse, antagonism, and leadership.

### *Discourse theory*

In Laclau’s logic, social values, norms, and practices are introduced by means of discursive processes (which include narratives, myths, symbols, etc.). In discourse theory, the meaning of a term arises from its relation to other terms, and relations among terms are governed by combinations and substitutions that obey no underlying or permanent principle of structuration. When applying discourse to politics, the author affirms “the radically relational character of all identity.”<sup>55</sup> More specifically, it is in regard to political differences that discourse takes place; political life is an arena where contenders compete for the attribution of different meanings to disputed political terms. The expression “empty signifier” refers to words such as freedom, rights, equality, etc. which are devoid of any a priori substantive meaning, and which refer to a variety of possible contents arising from opposing political visions. In all cases, whatever meaning is assigned to the word, it always represents an ideal, a horizon, a plenitude “which is constitutively absent.”<sup>56</sup>

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<sup>54</sup>Ludwig von Mises, *Human Action: A Treatise on Economics* (Auburn: The Ludwig von Mises Institute, 1998), p. 713; F.A. Hayek, *The Constitution of Liberty* (Chicago: The University of Chicago Press, 1960), pp. 239–240.

<sup>55</sup>Laclau, “Community and its paradoxes: Richard Rorty’s Liberal Utopia,” in Howarth, *Ernesto Laclau*, p. 253.

<sup>56</sup>Laclau, *On Populist Reason*, pp. 96–97.

Along these lines, the specific content of the word “justice” will be drawn from different discourses. For example, the proposal to socialize the means of production is regarded as a promise to bring about justice by putting an end to “the unfair distribution of income, inequality in access to the means of consumption, unequal opportunities for access to employment, social discrimination, etc.”<sup>57</sup> It seems relevant to highlight that this type of promise of justice does not invoke any principle offering reasons to justify why we should accept it as just. The sheer enunciation of a promise (or a plan, a program, etc.) is equivalent to assigning a particular desirable content to empty signifiers. In Laclau’s words: “This is the moment of ethical investment in the normative.”<sup>58</sup> This assertion about ethical “investment” (as opposed to a recognition of ethical norms) comes as no surprise, since it reflects the absence of specific and permanent normative views, that is, a denial of ultimate groundings for social interaction. This absence of principles applies both to the political and the ethical camps; to use Rasmussen and Den Uyl’s distinction, it applies both to the “meta-normative” level (that sets the proper political conditions for individuals to pursue their goals and interact without permanent conflict) and the “normative” level (which refers to norms that regulate individual moral conduct).<sup>59</sup> In this regard, Laclau’s post-foundationalism confronts with classical liberalism’s claim for the universal applicability of the principle of individual negative rights, on the one hand, and with the old Marxist universalist aspiration to impose a classless social organization around the globe, on the other.<sup>60</sup> Instead, it speaks about the possibility that any particular demand may be universalized temporarily with a

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<sup>57</sup>Laclau, “Ethics, Normativity and the Heteronomy of Law,” in Sinkwan Cheng (ed.), *Law, Justice and Power: Between Reason and Will* (Stanford: Stanford University Press, 2004), p. 183.

<sup>58</sup>Laclau, “Ethics, Normativity,” p. 183.

<sup>59</sup>Douglas B. Rasmussen and Douglas J. Den Uyl, *Norms of Liberty: A Perfectionist Basis for Non-Perfectionist Politics* (University Park: Pennsylvania State University Press, 2005), pp. 35, 39, 78-79.

<sup>60</sup>The distinction between universal and universalist is taken from Douglas B. Rasmussen and Douglas J. Den Uyl, “In Search of Universal Political Principles: Avoiding Some of Modernity’s Pitfalls and Discovering the Importance of Liberal Political Order,” *The Good Society*, Volume 19, Number 1, (2010), pp. 84-85.

political purpose: “We have here the emergence of the people as a more universal historical actor, whose aims will necessarily crystallize around empty signifiers as objects of political identification.”<sup>61</sup> To press the terminological distinction, in contrast to the liberal language of universal individual rights, and in contrast to the universalist communist pretension, Post-Marxist discourse carries no permanent or predetermined content, and no relation to a human essence or nature. Post-Marxism is ultimately a variety of Marxism in that it defends an anti-capitalist, anti-liberal theory, and in the sense that its tenets are social antagonism, methodological collectivism, and unlimited State power. The prefix “Post” refers mainly to its anti-foundationalism, which is why it discards any essentialism, that is, universal and fixed contents, even a “political” one.

Laclau’s post-foundationalism is reflected also in the under-determination of political actors and processes. In this regard, some critics explain the absence of substantive views on justice among radical socialists as a result of a certain commitment not “to preempt the voice of the democratic community (...) The ideal of the just society as one with equality of power explains the common socialist enthusiasm for extending democratic decision-making throughout all social life.”<sup>62</sup> Two comments are in order about this interpretation. First, in Laclau’s post-foundationalism, there is not one pre-existing collective voice nor one single community that demands to be acknowledged and heard. On the contrary, any emerging voice can be considered legitimate and accepted in the political arena to lead a revolt or antagonize others. Second, democratic decision-making is not a regulative ideal to be found in Laclau. His take on democracy does not focus on the need to empower people to make decisions; it only looks at the purpose sought by a political speech. For him, democratic is any speech that seeks to incorporate the people into political life through a process of articulating their demands, but this articulation does not include the right of the people to participate in any decision-making processes.

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<sup>61</sup>Laclau, “Why constructing a people is the main task of radical politics,” in Howarth, *Ernesto Laclau*, pp. 172–173.

<sup>62</sup>Cf. Gerald F. Gaus, *Political Concepts and Political Theories* (Boulder: Westview Press, Year: 2000), pp. 219–220.

*Social antagonism*

What is distinctive in Laclau's discourse theory is that it aims at fostering social antagonism, a feature that sets it apart from other appeals to discursive practices, such as deliberative theories. The latter show a commitment to improving the quality of politics by enhancing public deliberation. Deliberative authors are guided by the ideal of a rational consensus, whilst it is the contention of post-Marxism not only that the consensus is factually impossible, but that: a) the deliberative ideal is "self-refuting" given that the realization of a complete consensus would imply the end of pluralism;<sup>63</sup> and b) by privileging rationality, deliberation leaves aside the affective dimension, which is crucial in politics.<sup>64</sup>

Leaving aside pluralism and affections, the deliberative view conveys or assumes an epistemic concern absent in Laclau's texts. In this regard, it has been argued that deliberation has an epistemic value in that it broadens one's knowledge of the moral reasons behind collective decisions, and that it enhances impartial attention to the interests of others.<sup>65</sup> On the contrary, post-Marxist discourse is not presented as a vehicle for improving discussion and moral knowledge, nor is it designed to attend the interests of others; rather, it works as a device to engage in a struggle for the fixing of political meanings. Consequently, argumentative logic is dismissed and replaced with the use of persuasion to cover all aspects of social life. From this angle, to persuade is to make somebody "change her opinion without any ultimate rational foundation (...) to convert [her] to my belief."<sup>66</sup>

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<sup>63</sup>Laclau and Mouffe, *Hegemony*, pp. xvii– xviii.

<sup>64</sup>Chantal Mouffe, *The Democratic Paradox* (London and New York, Verso, 2000), quoted in Laclau, *On Populist Reason*, p.168.

<sup>65</sup>Carlos S. Nino, *The Constitution of Deliberative Democracy* (New Haven: Yale University Press, 1996), pp. 119–121.

<sup>66</sup>Laclau, "Community and its paradoxes," pp. 248, 251. Laclau invokes discursive persuasion because his theory addresses a post-communist world that left behind subjugation via violent revolutions. For this reason, he appeals to discursive and not physical antagonism. That said, he allows for violence if need be, but not as a default position.

Laclau calls for an all-encompassing discursive political articulation. In giving permanent priority to politics over economics and culture he may be accused of being inconsistent with his declared anti-foundationalism.<sup>67</sup> However, it is plausible to argue that considering politics as the dominant or “architectonic” factor (to use an Aristotelian tone) embracing all other areas of social life is a formal, not a substantive, claim. That is, politics is seen as a pervasive phenomenon in society, but its particular contents vary with each social, historical and geographical context. This latter claim is consistent with anti-foundationalism.

In any case, the tools of persuasion are not based on logical skills but on the correspondence of sentiments between the speaker and those who constitute the people. This “libidinal constitution of groups” or “affective investment” is a crucial aspect in populism.<sup>68</sup> Populist affection would work at a double level: as the expression of solidarity and symbol of the love between the leader and the people, and as resentment or anger against their antagonists. This latter trait is common to other radical democrats, who call for an effective mobilization of “outrageous resistance” and criticize Laclau for not offering a concrete training program to that end.<sup>69</sup> However, as noted before, we should not expect to find this kind of agenda in Laclau’s texts, for he does not aim at developing the capacity of the people to become self-empowered political actors or to channel their anger through civic involvement; his theory of populist affection is limited to provide cement for the people to accept the discursive construction of antagonism towards an enemy.<sup>70</sup>

It is this inescapable antagonistic feature that distinguishes populism from other anti-systemic political positions. To take two historical cases, the demands of the suffragettes in the early 20th century were anti-systemic in their critiques of the legal exclusion of women from suffrage, but they were not populist, because the

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<sup>67</sup>I thank the reviewer for calling my attention to this objection.

<sup>68</sup>Laclau, *On Populist Reason*, p. 57, 116.

<sup>69</sup>Laura Grattan, *Populism’s Power: Radical Grassroots Democracy in America* (Oxford: Oxford University Press, 2016), p. 32.

<sup>70</sup>Laclau, *On Populist Reason*, pp. 92, 116, 162

premise was to achieve more inclusive electoral institutions, not to ignore or eliminate them altogether. To take another example, the civil rights movement of the mid-20th century in America was anti-systemic in that it questioned racial segregation and social exclusion, but it cannot be considered populist because its leader defended non-antagonism in the form of non-violent resistance against cultural and legal discrimination.<sup>71</sup>

As a last point of comparison, most non-populist anti-systemic groups and parties do not define their own identity by means of an antagonism introduced by the hegemonic representative, but on the basis of values and principles that guide and limit the outreach of the discourse of whoever occupies the position of leadership.

### *Populist Leadership*

The question that arises at this point is who will be the populist leader in charge of persuading others about the meaning of justice, or other terms, and about the political identity of the people. Laclau analyzes the relation between the leader and the people on the basis of philosophical, linguistic, and psychoanalytical theoretical contributions. In his view, populism emerges when a leader assumes the representative role of a series of social demands and unites them under the term “the people.”<sup>72</sup> The process followed by the leader consists in the hegemonic formation of an “equivalential chain” by which she unites diverse social demands and portraits them under a common antagonism with the establishment.<sup>73</sup> Just like the words freedom, equality, and justice, the “people” is taken to be an empty

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<sup>71</sup>Curiously, Laclau himself forgets this when he includes the US civil rights movement in the populist logic, on the grounds that it “made possible the incorporation of previously excluded underdogs into the public sphere.” (Laclau, “Why constructing a people,” in Howarth, *Ernesto Laclau*, p. 191). As we know from his previous analysis, including the “underdogs” is not the only requisite to identify a populist speech, the latter also has to be antagonistic, and permanently so.

<sup>72</sup>Herein on we use “the people” in the political sense of a group distinguished from and opposed to the elites, not in the sense of nations or sovereign bodies. See Margaret Canovan, *The People* (Malden: Polity, 2005), p. 2.

<sup>73</sup>Laclau, *On Populist Reason*, pp. 189, 202.

signifier, one with no specific preexisting content but whose singularity emerges by the union of heterogeneous elements.<sup>74</sup>

Since these unions depend upon the leader's discourse, the quality of a good populist leadership is not related to exerting effective power over a body of citizens but to the capacity of creating a people, not in a sociological or cultural sense but in a political-rhetorical one. Given its creative capacity, the leader's discourse is endowed with an "attributive-performative" nature.<sup>75</sup> Populist leadership for Laclau is also of a democratic nature, in that: a) it seeks to incorporate extensive groups into political life through a process of articulation of their demands,<sup>76</sup> and b) leaders can come from any sector: social movements, political parties, unions, the army, business groups, etc.<sup>77</sup> The leader is simply the one who stands out and occupies the role of creating and sustaining a popular identity.

A second question arises at this point: is there any specific trait common to the people that the leader can invoke in his constructivist task?<sup>78</sup> In the case of America, Kazin calls into question the capacity of populism to "mobilize the dizzying plurality of class, gender, and ethnic identities."<sup>79</sup> This suspicion focuses on the positive characteristics which are expected to be present in social groupings (social status, cultural traditions, gender issues, etc.). However, what unites heterogeneous demands under Post-Marxist populism is not a shared "positivity" but rather a "negativity," a concept drawn from Freud: "The leader or the leading idea might also, so to speak, be negative; hatred against a particular person or institution might operate in just the same unifying way, and might call up the same kind of emotional ties as positive attachment."<sup>80</sup> This negativity

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<sup>74</sup>Laclau, *On Populist Reason*, pp. 126–127.

<sup>75</sup>Laclau, *On Populist Reason*, pp. 166, 97.

<sup>76</sup>Laclau, *On Populist Reason*, pp. 80–87, 161–162.

<sup>77</sup>Laclau, *On Populist Reason*, p. 150.

<sup>78</sup>We use the term "constructivist" not in the Hayekian sense, as synonym of a rationalist pretense, but in a discursive sense as enunciating and defining a political actor previously undefined.

<sup>79</sup>Michael Kazin, *The Populist Persuasion: An American History* (Ithaca and London: Cornell University Press, 2017), p. xvi.

<sup>80</sup>Laclau, *On Populist Reason*, p. 60.

is fueled by the leader when she mobilizes the people against the enemy. Thus we are presented with two political logics: “the logic of difference (which organizes the positivity of the social) and the logic of equivalence (which introduces negativity and social division).”<sup>81</sup>

The following concluding remarks summarize the core of Laclau’s populist vision: “I have presented a structural explanation of popular identity formation in which antagonistic frontiers are grounded in equivalential logics. Frontiers are the *sine qua non* of the emergence of the ‘people’: without them, the whole dialectic of partiality/universality would simply collapse. But the more extended the equivalential chain, the less ‘natural’ the articulation between its links, and the more unstable the identity of the enemy (located on the other side of the frontier).”<sup>82</sup> Since he belongs to the Marxist family, it is natural for the author to find the most stable enemy in the global market economy.

## THE STABLE ENEMY OF POPULISM

The centrality of capitalism as the main stable enemy of populism is justified not because the economy is the determining foundation of all social relations, as Classical Marxists argue, but because “the material reproduction of society has more repercussions on social processes than what happens in other spheres.”<sup>83</sup> Laclau affirms that the configuration of the global economy produces deleterious effects, and that ties must be extended and a common language used to articulate the different anti-capitalist demands.<sup>84</sup> This section analyzes his opinion on other Marxist accounts on the subject, and his description of the functioning of the global economy and its social effects.

Several central assumptions of classical Marxism about capitalism remain unchanged in Neo-Marxism: that it is based on the exploitation of labor, that it produces alienation, and that its trans-

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<sup>81</sup>Laclau, “On ‘real’ and ‘absolute’ enemies,” in Howarth, *Ernesto Laclau*, p. 227.

<sup>82</sup>Laclau, *On Populist Reason*, p. 231.

<sup>83</sup>Laclau, *On Populist Reason*, p. 295.

<sup>84</sup>Laclau, *On Populist Reason*, pp. 285–287.



formation can only take place as a result of the development of the logic of the system itself.<sup>85</sup> Contra these assumptions, for Laclau in the economic relationship between the employer and the worker they both obtain what they seek, that is, to buy and to sell work respectively. This analysis is aligned with classical liberal views on the nature of free economic exchanges, although it differs on the evaluation of the effects of those exchanges. For classical liberals, free economic exchanges make it possible to improve the relative positions of the agents, and they benefit the whole of society. In this latter regard, as societies get richer the collective provision of certain goods such as social security and free public education also tends to increase.<sup>86</sup> On the contrary, populist theory posits the multiplication of groups that are increasingly excluded from the production processes, and of the related negative effects such as “ecological crises, imbalance between different sectors of the economy, massive unemployment, and so on.”<sup>87</sup>

In this light, capitalism is seen as “domination” in that it operates much like colonialism, forcing or imposing a deleterious situation upon those who are excluded from the dynamics of the world economy.<sup>88</sup> The lexicon is clearly Gramsci’s, for whom domination is synonym of coercion, power, and force, whilst hegemony is “equilibrium, persuasion, consent, and consolidation.”<sup>89</sup> As a consequence, this domination would always bring about the oppression of the excluded, and the criterion to decide who belongs to the group of the excluded will be dictated by the leader’s efforts at a populist articulation.

Despite disagreeing with the orthodox and Neo-Marxist takes on the nature of the processes of the market economy, Laclau accepts their portrait of its sociological consequences, a “commodification, bureaucratization and the increasing dominance of scientific and

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<sup>85</sup>Laclau, “Dislocation,” in Howarth, *Ernesto Laclau*, p. 39.

<sup>86</sup>Hayek, *The Constitution of Liberty*, pp. 257–258.

<sup>87</sup>Laclau, *On Populist Reason*, p. 150.

<sup>88</sup>Laclau, *On Populist Reason*, pp. 236, 150.

<sup>89</sup>Gwyn Williams, “The Concept of ‘Egemonia’ in the Thought of Antonio Gramsci: Some Notes on Interpretation,” *JHI* 21, (1960), pp. 591, 593, 594.

technological planning over the division of labour.”<sup>90</sup> However, contra accounts calling to resist and fight against those consequences due to their negative effects, he offers an instrumental perspective of these processes: “Any transformation of capitalism opens up a range of possibilities that are not just determined by the endogenous logic of capitalist forms, but also by the latter’s constitutive outside and by the whole historical situation in which those logics operate. The construction of an alternative project is based on the ground created by transformations, not on opposition to them.”<sup>91</sup> The alternative arrangements remain vaguely sketched since the specific aspects of each alternative will be open to the leader’s discretion. What is clear for him, though, is that the battle must be fought on political, not economic grounds; thus, for example, wage demands and the like should be introduced by political discourse.<sup>92</sup>

The populist idea that a social division must be created shows what has been a persistent Marxist thread: the opposition to capitalism on the basis of an antagonistic feeling independently of the working of those institutions. This feeling is frequently combined with some sort of utopian alternative (workers cooperatives, a society without classes, etc.) about which scant details are offered. Laclau escapes the romantic disposition of utopia proposers but he does share with them a suggestive silence about data refuting the alleged negatives effects of capitalism or showing its capacity for the creation of wealth, social inclusion and self-realization. This attitude confirms that, despite their self-proclaimed inclination to praxis, most members of the Marxist family show disregard for real data about economic performance.<sup>93</sup> Having said that, while the lack of said data in classical Marxists is without a doubt inadmissible

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<sup>90</sup>Laclau, “Dislocation,” p. 42.

<sup>91</sup>Laclau, “Dislocation,” p. 42.

<sup>92</sup>Laclau, *On Populist Reason*, pp. 188, 288, 293.

<sup>93</sup>To take one set of recent data: global wealth grew 66% between 1995 and 2014, as did positive variations in per capita global wealth (with a net increase in per capita wealth of 31%). See Glenn-Marie Lange, Quentin Wodon and Kevin Carey, *The Changing Wealth of Nations 2018: Building a Sustainable Future* (Washington, DC: World Bank, 2018), pages, accessed on line at <https://openknowledge.worldbank.org/handle/10986.29001>.

given the preeminent place occupied by the economy in their texts, it should not be required from Post-Marxists to acknowledge said data, since their omission is consistent with the emphasis placed on a view that privileges political discourse over facts.

At the end of the day, despite his efforts to go beyond classical Marxism, Laclau is trapped in a similar straightjacket in regard to the functioning of an alternative to capitalism. Marx overestimated the proletarian capacity for organized rebellion and self-management, and he also assumed that under communism workers would find enough incentives to be productive and that the leaders would operate for the benefit of society. Consequently, he could not anticipate many of the “deviations” that emerged when his proposals were actually implemented by the Communist Parties. Likewise, Laclau assumes that the populist leader will find enough incentives in order to pursue actions that bring about only benefits to the people. Just like Marxists, the populist leader is expected to show enough capacities and goodwill to comply with the satisfaction of popular demands. If at a historical level the ruling Communist Parties always proved to operate in favor of their own privileges and in detriment of the general wellbeing of the population, why not assume that the populist leader might behave in a similar fashion? Thus, Laclau’s abandonment of the protagonist role of the Communist Party and of its corresponding bureaucratic functioning is not accompanied by a cautionary view about how those evils can or cannot be avoided in a populist regime. In this, he fails to engage in a successful “radical critique”, one in which the alternatives “must at least not face the same problems that face existing institutions” and in which the proposed structures should “prevent or preclude the recurrence of the social ills characteristic of the existing order.”<sup>94</sup> Of course, the absence of a thorough analysis describing the specifics of their alternatives is a frequent component of the radical mentality. Nozick summarizes well the effects of this trend in cognitive terms: “Communism’s ideal situation’ has very great appeal to many around the world, while how capitalism actually works out, flaws included, is greatly better. That is an unstable situation, one of great

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<sup>94</sup>N. Scott Arnold, “Radical Social Criticism,” *Reason Papers* No. 14 (1989), pp. 30–31, accessed on line at [https://reasonpapers.com/pdf/14/rp\\_14\\_2.pdf](https://reasonpapers.com/pdf/14/rp_14_2.pdf).

‘cognitive dissonance,’ and the temptation to certain denials will be very great.”<sup>95</sup> We would only add that this dissonance is fueled by ignorance, or by hiding evidence about the positive results of the global economy.

## CLASSICAL LIBERALISM VS. POST-MARXIST POPULISM

Classical Liberalism is a set of intellectual traditions that take individual freedom as the basis of the social order, and look at creating the political conditions to protect that freedom. Classical liberals defend ontological and methodological individualism;<sup>96</sup> a cautionary vision of rationality; individual rights, including private property and free economic exchanges; the respect for legality; stringent limits to collective decisions, and a strong distrust of the functioning of government.<sup>97</sup>

The Marxist theoretical family reviewed in these pages challenges most or all of these premises. Neo-Marxists place few stringent limits to collective decisions, and show a strong distrust in the functioning of markets. Classical Marxists and Post-Marxists hold methodological holism; an unlimited range of political decisions; and unbounded confidence in the functioning of hegemonic governments. Despite these traits, Laclau aspires to make Post-Marxism compatible “with

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<sup>95</sup>Robert Nozick, *The Examined Life: Philosophical Meditations* (New York: Simon & Schuster, 2006), p. 283.

<sup>96</sup>In the ontological individualist model, persons have an individual identity and a plan of life that are self-chosen and self-directed. That is, individuals are not determined by social structures and forces; they exist as separate and different beings with the capacity to choose their own lifestyle. In turn, methodological individualism studies social processes and events as the result of individual actions and decisions. Ontological and methodological individualism do not necessarily imply each other: Analytical Marxists are methodological individualists, but they are not ontological individualists because they think that some types of social structures (for example, capitalism) determine the unfolding of individual identities and life plans.

<sup>97</sup>Mises, *Human Action*; F.A. Hayek, *The Constitution of Liberty*.

the whole field of democratic public spaces.”<sup>98</sup> However, the main aspects of his political model impair it from being compatible at all with the spirit of equality before the law, with limits to governmental administration, and with horizontal and vertical accountability that characterize democracy. Although he goes at great lengths to dissociate his logic from any implicit authoritarianism, sentences like the following make it explicit: “If the plurality of demands requires a constant process of legal transformation and revision, the state of emergency ceases to be exceptional and becomes an integral part of the political construction of the social bond.”<sup>99</sup> This apologetic tone is inconsistent with his claim that populism is just one more “competitor,” since by endorsing a permanent state of emergency it threatens to end the pluralism proper of democratic political competition.

Perhaps it may not be inconsistent to say that populism might be compatible with some degree of pluralism insofar as it declares to respect social heterogeneity. But this is contradicted by the acknowledgment that “some populist movements can be totalitarian [but] the spectrum of possible articulations is far more diversified.”<sup>100</sup> The facile acceptance of the association between populism and totalitarianism could be explained by pointing out a “normative deficit”<sup>101</sup> which, as mentioned before, is made manifest in the idea that ethics and individual rights are deprived of any positive content and are subject to contingent political discourses. If totalitarianism is accepted as one possibility among many, albeit remote, hegemonic populism shows the tremendous danger that it represents for the liberal democratic order.

In this regard, it seems pertinent to reiterate the outreach of the word hegemony as antonym of liberalism. According to Hayek, the terms *Herrschaftstaat* (ruling state) and *Hoheitsverwaltung* (Sovereign administration) were strange to the English language and

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<sup>98</sup>Laclau, “Community and its paradoxes,” pp. 254–255.

<sup>99</sup>Laclau, “Bare life or social indeterminacy?,” p. 236.

<sup>100</sup>Laclau, *On Populist Reason*, p. 166.

<sup>101</sup>S. Critchley, “Is there a normative deficit in the theory of hegemony?” in *Laclau: A Critical Reader*, eds. S. Critchley and O. Marchart (London and New York, Routledge, 2004), pp. 113–121.

culture, hence the word “hegemonic” had to be coined.<sup>102</sup> Hayek quotes from Mises, who distinguishes two forms of social cooperation: by “contract and coordination”, based on individual choices under the law, or by “subordination or hegemony”, based on “coercion and compulsion” and on “directives and regulations”. Mises asserts: “The state, the social apparatus of coercion and compulsion, is by necessity a hegemonic bond.”<sup>103</sup> As the quotes illustrate, both thinkers equate hegemony with the State. But the assertion that all political authority is hegemonic fails to distinguish between a State under the rule of law and one where the latter is absent. In the first case, there are political institutions, decisions and procedures established by law, and political life is carried out under legal principles and constitutional limitations. In the second case, the rule of law is weakened or abandoned for the sake of a particular political project. It is only in this latter situation that hegemony emerges, and that it can be defined as antonym of liberalism. In Laclau’s words, “Legitimacy can only proceed from the hegemonic practices of a group that organizes a certain social order in its opposition to a real enemy. Legality is part of that order and is, in that sense, an effect and not a cause.”<sup>104</sup>

At the end of the day, the contention that the leader creates “the people” by means of a permanent antagonistic discourse against other groups does not only reflect a conflictive vision of society, but it also carries legal implications in terms of possible discriminations and restrictions of individual rights. It undermines the normative claim of general and equal laws, in the absence of which the door is opened for the hegemonic leader’s discretionary policies to affect individual lives, properties and liberty. In this regard, Post-Marxist populism follows the spirit of classical Marxism that celebrates “the victory of socialism over any law.”<sup>105</sup>

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<sup>102</sup>Hayek, *The Constitution of Liberty*, p. 262.

<sup>103</sup>Mises, *Human Action*, pp. 672n8, 196–197, 199, 281.

<sup>104</sup>Laclau, “On real and absolute enemies,” p. 230.

<sup>105</sup>Hayek, *The Constitution of Liberty*, pp. 240, 243.

## CONCLUSION

The preceding sections presented an outline of the Marxist theoretical family, pointing out some similarities and divergences between Laclau and the other Marxist formulations published since the 1980s. Our analysis offered a reading of Post-Marxist populism from a classical liberal angle. In what follows we sum up the main concerns underlying this work.

Political and economic claims will be of the Post-Marxist populist kind if accompanied by speeches and actions that replace the principles and institutions of liberal democracy, free markets and the rule of law with a socially divisive, hegemonic, discretionary and contingent political logic. According to the model of liberal political representation, governments must be limited by vertical and horizontal controls, so as to prevent any person or political force from exercising unlimited power over the rest. Post-Marxist populism subverts or distorts these objectives: instead of promoting deliberation and negotiation, it fuels confrontation; it replaces the predictability of norms with discretionary leadership, and its call for hegemony works against liberal pluralism and democratic competition.

We are, therefore, presented with two opposed political logics, the populist and the classical liberal. The first presupposes that there will always be an insurmountable division between the people and their antagonists. It does not expect or admit any possible dialogue or exchange between these two actors, and it implies that what a group gains in terms of claims or positions of power represents a loss for the contending force. On the contrary, for a classical liberal logic, any legitimate demand can be satisfied through the legitimately established procedures and channels. In this respect, political activity in a representative limited government is based on exchange and negotiation. By appealing to agreement and respect for institutional procedures, general benefits are expected to result from these exchanges. In contrast, the defense of hegemonic populism generates greater incentives for rent seeking, which is a direct function of

the special benefits granted by discretionary governments,<sup>106</sup> populists included.

The populist approach overlooks crucial questions in political theory: how to organize and maintain an order that produces general stability and predictability? How to prevent abuses of power by the rulers? Laclau's theoretical model leads to an unlimited regime prone to preserve its power regardless of overall costs (and he also seems to assume that these costs can be borne indefinitely). This logic allows the leader in power to make arbitrary modifications of laws and basic rights (mainly, property rights) to build the populist project. Taken to the extreme, such a system can never lead to the satisfaction of equivalent demands insofar it undermines the basic economic and legal conditions for an increase in social inclusion.

Moreover, just as Marxism inspired the implementation of communist regimes via revolutionary violence, Post-Marxist populism also aspires to operate by any means available: "The classical idea of revolution implies violence and a new basis for the social order. (...) I am very much in favor of reintroducing the dimension of violence into the reform."<sup>107</sup> Laclau's quote is useful to understand the ideological sources and the political construction of global protests that nowadays move in violent directions, and enables us to call into question certain views about populism that reduce it to an "elastic and promiscuous impulse," or that associate it with a "rhetoric of optimism and hope" proclaimed on behalf of the people.<sup>108</sup> Such characterizations blur the profile of Post-Marxist populism in at least two ways. First, in describing it as a mere impulse, the potentiality of populism for establishing a long-term strategy to weaken the republican institutional network is underplayed. Despite Laclau's invocation of a "civic republicanism,"<sup>109</sup> his division of society into two irreconcilable camps is not marked by republican civicism but

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<sup>106</sup>James M. Buchanan and Gordon Tullock, *The Calculus of Consent: Logical Foundations of Constitutional Democracy* in *The Collected Works of James M. Buchanan*, vol. 3 (Indianapolis: Liberty Fund, 1999), pp. 23, 286.

<sup>107</sup>Laclau, "Community and its paradoxes," p. 249.

<sup>108</sup>Michael Kazin, *The Populist Persuasion: An American History* (Ithaca and London: Cornell University Press, 2017), pp. 2–3, 6–7.

<sup>109</sup>Laclau, "Community and its paradoxes," in Howarth, *Ernesto Laclau*, p. 254.



by an iconoclast Marxist attitude. Secondly, populism consists less in an optimistic and hopeful promise of a new social order, than in an invitation to a permanent revolt against liberal ideas and its related institutions.

The ideology of liberalism at the end of the last century had justifiable cause for celebration, given the growing global acceptance of pluralistic democracies and free markets, and the convergence of socialism towards egalitarian liberalism at the time.<sup>110</sup> Twenty years into the 21st century, the outlook appears to be much gloomier. Can the spirit and confidence of the classical liberal be raised amid this scenario? It is not implausible to think that if applied Marxism failed earlier, post-Marxism populism might also fail in its implementation. Be that as it may, it would be prudent to always keep Sun Tzu's wise dictum in mind.<sup>111</sup>

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<sup>110</sup>Gerald F. Gaus, "Liberalism at the end of the century," *Journal of Political Ideologies*, vol. 5 (2000), p.180.

<sup>111</sup>"One who knows the enemy and knows himself will not be endangered in a hundred engagements" (Sun Tzu), quoted in Derek M.C. Yuen, *Deciphering Sun Tzu: How to Read The Art of War* (New York: Oxford University Press, 2014), p. 110.



## Anarchy, Nozick, and Gordon

*Aeon J. Skoble*

Only a system that renounces force altogether . . . qualifies  
as fully libertarian.

—David Gordon

I have never met David Gordon, but he nevertheless has played a role in my intellectual development, so I am happy to contribute to this volume of essays in his honor. That role is indeed the subject of this essay. Although I did not know it at the time, Gordon was one of the anonymous reviewers of the manuscript of my first monograph, *Deleting the State: An Argument About Government*, and Gordon's review was largely positive, yet he disagreed with my interpretation of Nozick's defense of the minimal state.<sup>1</sup> For my contribution to this *festschrift*, I will discuss how Gordon's interpretation of Nozick differs from mine, but why in either case Nozick's argument doesn't quite succeed in defending the minimal state against individualist anarchism. I also discuss how Nozick's

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<sup>1</sup>The points he made in his referee report were later published as a book review; quotations from Gordon will be to that. The published review is David Gordon, "Review of *Deleting the State: An Argument about Government*, by Aeon J. Skoble," *The Mises Review* 15, No. 1 (Spring 2009).

argument can be repurposed to Gordon's advantage in the debate between minimal state libertarians and anarchist libertarians.

## WHAT I THINK NOZICK WAS DOING

Robert Nozick's 1974 book *Anarchy, State, and Utopia* advances a robust theory of individual rights as a moral principle which must limit state power. If people have rights that cannot be overridden, then the coercive power of the state will be difficult, if not impossible, to justify. This might be taken to imply the logical necessity of anarchism, the idea that no rulers can be justified. The anarchist position is that since governments necessarily violate rights, the legitimacy of state authority is inconsistent with the idea of rights as a moral principle. The State produces commands which must be followed on pain of imprisonment or death, and this will frequently violate rights. The State finances itself through nonconsensual taxation, also violating rights. For many people, this inference is just obviously false, as anarchism is inconceivable to them and appears as a *reductio ad absurdum* for rights theory. But Nozick thought the argument was worth taking seriously. He recognized that a robust theory of individual rights is difficult to reconcile with most forms of government that we're used to—whether via majority rule or kings and parliaments. So before arguing *against* certain models of political authority, chiefly socialism and redistributive welfare-state liberalism, Nozick argues *for* the legitimacy of the “minimal state”; that *that* can be justified even if more expansive conceptions of government cannot. “Since I begin with a strong formulation of individual rights,” Nozick says, “I treat seriously the anarchist claim that ... the state must violate individuals' rights and hence is intrinsically immoral.”<sup>2</sup> Nozick sets himself the task of showing how the minimal state could arise *without* violating anyone's rights.

In *Deleting the State*, I interpreted Nozick in the following way: “the services of protection and conflict resolution would be provided more efficiently with the minimal state than without it, and thus the state is inevitable. [Nozick] defends the extension of the right to individual self-defense to one of collective self-defense in

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<sup>2</sup>Robert Nozick, *Anarchy, State, and Utopia* (Basic Books, 1974), p. xi.

the sense that many might collectively engage the same means of exercising their right to self-protection, which means it would be morally legitimate to pay other people or companies to protect us. Then Nozick explains how, as a matter of economic efficiency, one of these protective agencies would come to dominate the others, at least in a particular geographic area, through a non-coercive process of mergers and acquisitions. This ‘dominant protective agency’ would then fit the standard definitions of a state, as it provides protection for all and monopolizes this service.”<sup>3</sup>

Nozick appreciates the Lockean argument that if we have rights at all, we also have the right to contract for assistance in protecting or enforcing our rights. That I have a moral claim that others not steal from me does not entail that no one will steal from me. I have a right to try to prevent others from stealing, and if they do steal, I have the right to seek redress. Since I may have difficulty doing this on my own, it may be advantageous, and certainly morally legitimate, to contract with one or more agents to assist me in this endeavor. In the classical liberal tradition, this is one way to justify the entry into political association. Anarchists have responded to this by noting that such a service could be provided by any number of private firms, which might in turn compete for customers. So if the state is classically conceived of as being the agent of rights-protection, there’s no reason why we shouldn’t have a market among several protective agencies. Nozick’s move is to suggest that one such protective agency would inevitably become predominant, not via conquest and violence, but via non-rights-violating market practices.

Of course, it is possible that all these competing firms might coalesce into one dominant protective agency, but the difficulty is, once this has happened, why shouldn’t another competitor emerge, either to compete on rates or to offer some innovation (as Netflix challenged Blockbuster)? And what if someone in that region wanted to opt out of subscribing to that agency (you’re not required to watch television in the first place)? It is here where Nozick needs to engage the anarchist argument.

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<sup>3</sup>Aeon J. Skoble, *Deleting the State: An Argument About Government* (Open Court, 2008), pp. 43–44.

I interpreted him as saying something like the following: “the protection of ‘independents’ who do not want to subscribe to the dominant protective agency might be subsidized by members of the dominant protective agency who pay a higher fee for a different kind of service....Nozick argues that it would not be rights-violating for this ‘de facto monopoly’ to coerce payment for the services. Presumably, he arrives at this conclusion because each of the smaller protection agencies was voluntarily funded, so the new ‘parent company’ is not violating rights to exact payment after the ‘merger.’ The question, then, is whether or not coercion is involved after the formation of the dominant protective agency. If someone who, despite having voluntarily subscribed to one of the smaller companies, disliked the operation of the new dominant protective agency wanted to ‘opt out,’ would this be permitted by the agency? Would he be entitled to secure this service from someone else? If the dominant protective agency must use coercion to bar market entry of competing services, and may force dissenters to continue paying them, then Nozick will be in error in claiming that no rights have been violated.”<sup>4</sup>

Besides the fact that it protects “independents,” the dominant protective agency’s prohibition of competing protective agencies is what makes it a state. To Nozick, this means he has shown how the state could arise legitimately, without violating rights, and this is the aspect of *Anarchy, State, and Utopia* I had expressed disagreement with. I was attempting to argue that Nozick can only make this move if he’s tacitly appealing to a kind of Hobbesian worry that if the dominant protective agency has competition, it would produce a decline in social order as they found themselves in conflict. If everyone’s rights are made less secure by the entry of a new firm, then maybe it’s not wrong to prohibit, and if they are to prohibit, they must compensate. As Nozick himself explains: “A protective agency dominant in a territory does satisfy the two crucial necessary conditions for being a state. It is the only generally effective enforcer of a prohibition on others’ using unreliable enforcement procedures [i.e., independent enforcement]....And the agency protects those nonclients in its territory whom it prohibits from using

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<sup>4</sup>*Deleting the State*, pp. 44–45.

self-help enforcement...even if such protection must be financed (in apparent redistributive fashion) by its clients. It is morally required to do this by the principle of compensation, which requires those who act in self-protection in order to increase their own security to compensate those they prohibit from doing risky acts which might have turned out to be harmless [i.e., seeking independent enforcement] for the disadvantages imposed on them.”<sup>5</sup> This seems like a fear that a polycentric system of dispute resolution would be incapable of stable cooperation. I go on to explain why I think Nozick is mistaken to find this an insurmountable objection, but that’s not particularly what led Gordon to disagree with my analysis.

## WHAT GORDON DISAGREES WITH ME ABOUT

Gordon argues that if my interpretation of chapters 4 and 5 of *Anarchy, State, and Utopia* were correct, the rest of my argument against Nozick would follow, but that in fact I have misconstrued what Nozick is arguing there. “But,” Gordon says, “Nozick does not say that the dominant agency can compel those who prefer other agencies to join it. Neither can it compel people to pay for its protective services. Further, although Nozick does discuss preemptive attacks, he does not at all assume that agencies will fear such attacks by other agencies.”<sup>6</sup> A lot rides on the following passage from Nozick: “It is enough to have rebutted the charge we imagined earlier that our argument fails because it ‘proves’ too much in that it provides a rationale not only for the permissible rise of a dominant protective association, but also for the association’s forcing someone not to take his patronage elsewhere or for some person’s forcing someone not to join any association. Our argument provides no rationale for the latter actions and cannot be used to defend them.”<sup>7</sup> Gordon cites this passage as evidence that I’ve gotten Nozick wrong, whereas I had deployed it as evidence that Nozick’s argument doesn’t work. It’s clear that this is a difference in reading with great import. I had gone

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<sup>5</sup>*Anarchy, State, and Utopia*, pp. 113–114.

<sup>6</sup>David Gordon, “Review of *Deleting the State: An Argument about Government*,” *The Mises Review* 15, No. 1 (Spring 2009). [Review is unpaginated.]

<sup>7</sup>*Anarchy, State, and Utopia*, p. 129.

on to note that if Nozick has no argument for the state beyond that one *could conceivably* arise without violating anyone's rights, merely a logical possibility as opposed to an inevitability, then that means he thinks that no competitive set of such agencies could be fair and feasible; that is, he rejects polycentrism because of a Hobbesian fear of social chaos. This is where Gordon argues I have misread.

Gordon continues by clarifying his disagreement. "Skoble has allowed his conception of what a minimal statist *must* believe to govern his interpretation of Nozick. In Nozick's system, the dominant agency can successfully forbid other agencies from imposing risky decision procedures on its clients. Because in doing so it disadvantages these independents, it must provide them with low cost or free protective services. These features, in Nozick's view, suffice to make the dominant agency a minimal state. If Skoble does not agree that this is enough for a state, he may well be right; but that is Nozick's contention. He does not say, as Skoble thinks, that preservation of society necessitates rights-violating coercion."<sup>8</sup> To clarify, I wasn't disputing that this makes the dominant protective agency a state; I was disputing that such a state would not be rights-violative. But Gordon's other point is more solid: I did indeed infer that Nozick thinks the rights violations are justified because otherwise the minimal levels of social cooperation would not obtain—while I didn't use the expression "preservation of society," that is not an unreasonable summary of what I had argued. That is why I had characterized the concern as a Hobbesian fear.

This leads Gordon to elaborate. "In Skoble's framework, Hobbesian Fear leads libertarians to accept coercion they would otherwise deem unjustified. Nozick does not think this: he thinks that the dominant agency acts perfectly within its rights in forbidding risky decision procedures to its clients. Skoble, if I have understood him, thinks that the dominant agency can de facto shut down all competing agencies by declaring their decision procedures unacceptably risky. But this is not correct: the dominant agency cannot forbid other agencies from applying such procedures to nonclients. Nozick does not contend that agencies would be unable, without a minimal

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<sup>8</sup>"Review of *Deleting the State: An Argument about Government*," *The Mises Review* 15, No. 1 (Spring 2009). [Review is unpaginated.]



state, peacefully to resolve their differences about decision procedures: he thinks that they are under no obligation to do so.”<sup>9</sup> This would mean, he says, that I have missed an important distinction, and that Nozick is not motivated by Hobbesian-fear-based opposition to polycentrism.

### A DECADE LATER, HOW DO I UNDERSTAND THIS DISAGREEMENT

I do see that much hangs on the modality of whether the dominant protective agency *would* act a certain way as opposed to *might* act a certain way. But Nozick certainly seems to be saying that it would have to prohibit. Nozick might be arguing that they have to prohibit, but then might have an obligation to compensate, and that this means, when all is said and done, no rights have been violated. But that doesn't quite work; when Smith gives Jones fair compensation for having trespassed, it doesn't imply that Smith didn't in fact trespass. If the dominant protective agency says to a potential competitor “we will forcibly prevent you from starting a new rival firm, but will also compensate you to make up for it,” the would-be rival's rights have in fact been violated, the correctness of the compensation notwithstanding. Why would the dominant protective agency feel it necessary to say something like this? Assuming it's not simply wishing to avoid competition, it would have to be the idea that allowing the rival firm to operate reduces the security of everyone. That would make it a necessity to prohibit, and that is indeed the fear of social chaos.

Consider this passage from *Anarchy, State, and Utopia*: “when an action is forbidden to someone because it might cause harm to others and is especially dangerous when he does it, then those who forbid in order to gain increased security for themselves must compensate the person forbidden for the disadvantage they place him under.”<sup>10</sup> While Nozick appeals here to a principle of fairness to generate the obligation for the dominant protective agency to com-

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<sup>9</sup>Ibid.

<sup>10</sup>*Anarchy, State, and Utopia*, p. 81.

pensate, it is the specter of open conflict that underlies this special category of prohibition. The concern expressed in this passage continues to seem to me to indicate opposition to polycentrism based on Hobbesian fear; viz., fear that minimal levels of social cooperation would not obtain under polycentrism.

One thing I have come to see differently about Nozick's argument in the last several years is the extent to which he is confident that very few people would actually be "independents" of the sort that would prompt the advent of rival firms. Given his "framework" conception of the minimal state, in which many sorts of voluntary societies are possible provided that one's right to exit is preserved, perhaps it might never come up that another "firm" could deliver rights protection better than the one that first arose. But this just means that Nozick's conception of the minimal state is closer to the concerns of the anarchist than it first appears. It remains the case that Nozick wants the dominant protective agency to be seen as morally in the right when it prohibits competition. Gordon's remarks did prompt me to reread Nozick carefully on this point.

## **WHY, EITHER WAY, NOZICK'S ARGUMENT DOESN'T DEFEAT THE ANARCHIST OBJECTION**

At the end of the day, I think Gordon remained sympathetic to my main point: "Many people do dismiss libertarian anarchism just because they think that it would lead to chaos. Skoble argues that the Hobbesian Fear lacks adequate grounds: people can resolve disputes without a monopoly state."<sup>11</sup> Whether Gordon is right or wrong about the way I've characterized Nozick's justification for the dominant protective agency prohibiting competition, it remains the case that the dominant protective agency, now the minimal state, is a monopoly that uses coercion to remain that way.<sup>12</sup> While in Nozick's

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<sup>11</sup>"Review of *Deleting the State: An Argument about Government*," *The Mises Review* 15, No. 1 (Spring 2009). [Review is unpaginated.]

<sup>12</sup>That is, the minimal state that is the "framework" is a monopoly. Within the framework, the various voluntary communities/associations may or may not be "minimal," but in any case they're all "under" the minimal state which guarantees rights protection, and which can prohibit competition against itself (not between communities).

telling, this is entirely benign, it's of course possible that this minimal state could degenerate into something less attractive, or more specifically, something that didn't protect people's rights as robustly. It could be subject to any number of well-documented problems to which states are prone: it could be captured by one faction and adjust its operations to disadvantage another; it could cease recognizing as robust a conception of rights as it once did; it could ramp up what the "user fees" are to the point where they're not recognizably voluntary at all. Paper constitutions are helpful in averting this sort of "mission creep," but they are not infallible, as experience has shown. The advantage of polycentrism is its built-in resistance to this. As long as there is more than one firm providing the service of conflict resolution and rights protection, no one firm can overstep its bounds. The idea that these true "checks and balances" would devolve into constant violent conflict is belied by both the history of competition and game-theoretic analysis.<sup>13</sup>

Gordon addressed this larger argument thus: "A group of people may recognize that if all of them refrained from initiating violence, they would all be better off. No longer would life be nasty, brutish, and short: people could now live peacefully. Unfortunately, this recognition will fail to generate the required agreement. Each person will also recognize that he would be still better off if he himself resorted to violence whenever he deemed it advantageous. If others keep their agreement, so much the better, and if they do not, one clearly is worse off by being the sole person to observe the agreement. Of course, everyone will reason in the same fashion and no one will keep the agreement. In brief, we have here a classic Prisoner's Dilemma."<sup>14</sup> This is, in large part, why proponents even of minimal-state libertarianism often "settle for" the state despite their recognition of its essentially coercive nature. The minimal level of cooperation necessary for society to function at all would be lacking without centralized authority. But is this correct?

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<sup>13</sup>Both of which are discussed in *Deleting the State*, but much more thoroughly explored in the works I drew on, as Gordon rightly notes.

<sup>14</sup>"Review of *Deleting the State: An Argument about Government*," *The Mises Review* 15, No. 1 (Spring 2009). [Review is unpaginated.]

Gordon continues: “Skoble brings to bear important work by Robert Axelrod and later writers that undercuts the analysis just presented. The argument that keeping the agreement, despite its recognized advantages to the group, is irrational applies only in a special case. If people do not expect to have further dealings with one another, then defection is the rational course. But people in a society do not find themselves in such a ‘one-shot Prisoner’s Dilemma.’ Quite the contrary, they must deal with one another repeatedly. In such an ‘iterated Prisoner’s Dilemma,’ cooperation, not defection is rational.”<sup>15</sup> In other words, competition can co-exist with cooperation. In a way, Nozick’s “framework” presupposes this: the many different voluntary societies that would flourish there are, at their own level, an example of polycentricity. Nozick tacitly recognizes this, but thinks there still needs to be a final authority which is centralized, because it would be too risky, too chaotic to allow polycentricity at that level. But that still seems to me to be a mistake.

There’s no particular reason to assume a polycentric (or non-monopolistic) system of dispute resolution and rights enforcement would degenerate into chaotic strife. If one protective agency’s client had a dispute with a client of another agency, why assume the two agencies would resolve the matter through violence? That’s surely not an efficient or sustainable business model. I suspect that people are thinking of the passions of the individual disputants, who may be so aggrieved as to want blood. But it’s already true in the actual world that some people in disputes have inflamed passions and seek immediate private retribution. Consider this scenario: Smith drives over Jones’ rose bushes, Jones gets enraged, Jones punches Smith. People assume this is what would happen without a state, but of course it happens all the time with the state. Most people prefer to settle their disputes in a more procedurally stable format. In the world with a state, this can involve reporting a crime or filing a lawsuit—or, as it turns out, seeking private arbitration. If there were no state, it wouldn’t follow that none of the things the state does would get done. The tired old chestnut about roads and lighthouses requiring state action is belied by both theory and history. Since private arbitration already exists, and in general the idea of

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<sup>15</sup>Ibid.

third party adjudication of disputes already exists, there's no reason to assume they wouldn't be the preferred approach in a stateless world, just as they are in the real world. No social order, stateless or otherwise, can guarantee that there will be no ill-tempered individuals who prefer violence. The question is, which sort of social order offers the most stable institutions with the least propensity for corruption and the greater incentives for peaceful cooperation. For all the reasons Nozick thinks this points towards the minimal state, it points towards the polycentric legal order envisioned by individualist anarchists.

Gordon's sympathies appear to fall on the side of polycentricity, though we've never actually had a chance to discuss this aspect of it. In any event, Nozick's argument, for all its many virtues, still seems to fail to refute the anarchist objection. Gordon doesn't claim otherwise, of course; his main concern being with how I characterized Nozick. Gordon's comment pressing me to think more carefully about Nozick's argument ended up helping me be even more confident that the polycentric model withstands Nozick's objections. Gordon's analysis and arguments are incisive; his benevolence invaluable.



## The Anti-Liberty Requirements of Affirmative Consent

*Jasmine Rae Straight*

I'm on the floor, my arms around her legs, my head in her lap, and we're both quiet. Silence. My pulse. I'm a crystal, dissolving in her, in I-330. I feel with absolute clarity the way the polished facets that define me in space are melting, melting. I'm vanishing, dissolving in her lap, in her. I'm getting smaller and smaller, and at the same time wider, larger, off every scale.... Because she...she's no longer herself, she's the whole universe.

—Yevgeny Zamyatin, *We*

**T**he conventional wisdom that influences university policy on what is considered valid sexual consent has undergone radical change over the past twenty years. Valid consent being the criteria that makes subsequent sexual behavior morally justified because the consent is *morally transformative* in the way that matters. Previously, sex was considered to be consensual provided that each party had the ability, and opportunity to object, and did not do so. This view was captured in the 'No Means No' campaign where the lack of dissent was held to be sufficient to ground the validity of sexual consent. This is no longer the case, as the policy is thought to unfairly burden the victims of sexual assault

and rape. Affirmative consent policies are now being used increasingly at universities across the country, as well as forming the basis for legislation in some U.S. states.<sup>1</sup> University policies that define affirmative consent are varied, but policies generally require the consent to be voluntary, conscious, unambiguous, and ongoing. The consent can be communicated verbally or behaviorally as long as it is clear and continues throughout the sexual encounter.

I will outline two problematic requirements in the affirmative consent model and argue that we should reject this model of consent because of these requirements. I suggest we adopt an alternative model of consent that avoids the serious problems that these requirements present. The first requirement I will argue against is the need for the behavioral or verbal communication of sexual consent to be unambiguous in order for the consent to be valid. The second objectionable requirement is that the communication of consent must be ongoing throughout the sexual encounter. The requirement that the communication of consent be ongoing is primarily objectionable because the communication must also be unambiguous. That is, if communication of consent did not have to be unambiguous in order to be valid, it would not be as problematic for the communication of the consent to have to be continuous.<sup>2</sup> For these reasons, most of my argument will focus on the problems presented by the requirement for an unambiguous communication of consent to sex. I will then offer some reasons in favor of returning to a lack of dissent model of sexual consent.

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<sup>1</sup>California was the first state to adopt legislation that required universities use the affirmative consent standard in 2014. See SB-967 Student safety: sexual assault., Pub. L. No. 967. 2014. [http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=201320140SB967](http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140SB967).

Other states have followed suit or are in process of adopting a similar standard. For an updated list of legal progress in each state see "Affirmative Consent Laws (Yes Means Yes) State by State," [AffirmativeConsent.com](http://AffirmativeConsent.com), accessed Oct 15, 2020, <http://affirmativeconsent.com/affirmative-consent-laws-state-by-state/>.

<sup>2</sup>The ongoing requirement might still present problems for the affirmative consent model independently of the unambiguity, but those problems are not as severe if the unambiguity requirement is dropped, and they will not be the focus of this paper.



## CONSENT AND COMMUNICATION

There are three main ontological views regarding what constitutes consent and therefore when consent is considered valid. Understanding what constitutes valid consent is critical for understanding when sex is considered consensual, as valid consent is the criterion that enables certain sexual behavior to be morally justified. The first model of consent is the mental or subjective view where a person's mental state is necessary and sufficient for valid consent.<sup>3</sup> Consent is the mental state, and the accompanying behavior is simply providing evidence of the consent that has already taken place. Consent is ontologically distinct from its communication—consent can occur whether it has been communicated or not.<sup>4</sup> The second model of consent is the behavioral or performative view where communication is necessary and sufficient for consent to be valid. In this model, the communication can either be verbal or nonverbal.<sup>5</sup> Finally, the third model is a hybrid view where a person's mental state plus her communication of her mental state are both required for valid consent to occur.<sup>6</sup>

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<sup>3</sup>This might sometimes be called the *attitudinal view*. There are nuances within the mental view. Heid Hurd thinks the person's mental state is based in *intentionality*. Peter Weston thinks the mental state is based in *acquiescing*. Larry Alexander thinks the mental state is based in one *waiving her right* (Alexander believes his view is appropriately weaker than Hurd's but stronger than Weston's). Larry Alexander, "The Ontology of Consent," *Analytic Philosophy* 55, no. 1 (2014): 102–113.

<sup>4</sup>Alexander, "Ontology," 106.

<sup>5</sup>Proponents of this view include A. John Simmons and Alan Wertheimer. A. John Simmons, *Moral Principles and Political Obligations* (Princeton: Princeton University Press, 1979); Alan Wertheimer, *Consent to Sexual Relations* (New York: Cambridge University Press, 2003).

<sup>6</sup>See Emily Sherwin, "Infelicitous Sex," *Legal Theory* 2 (1996): 209–231; Richard Healey, 2015, "The Ontology of Consent: A Reply to Alexander," *Analytic Philosophy* 56, no. 4 (2015): 354–363; Douglas Husak, "The Complete Guide to Consent to Sex: Alan Wertheimer's *Consent to Sexual Relations*," *Law and Philosophy* 25 (2006): 267–287; Tom Dougherty thinks that his "duty of due diligence" can improve the epistemic access one requires without having to embrace the behavioral view. Tom Dougherty, "Affirmative Consent and Due Diligence," *Philosophy & Public Affairs* 46, no. 1 (2018): 102.

Affirmative consent policies look to be a variant of the behavioral model, as the focus is on clear and unambiguous *communication* of consent to sex. The importance of a corresponding mental state is implied by verbiage such as “voluntary” or “conscious”, so perhaps the affirmative consent model is a variant of the hybrid model. I am skeptical that this is the case given the overwhelming emphasis on the communication component in both the affirmative consent policies and the affirmative consent campaign.<sup>7</sup> The presence of a corresponding mental state seems to be assumed to be present *if* communication of consent is given, but it is not explicitly required.<sup>8</sup>

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<sup>7</sup>See instructional videos available online at <http://affirmativeconsent.com/how-do-you-ask-for-consent/?hvid=3vSWGGR>. The University of Colorado, Boulder’s sexual consent policy states that, “Consent **must include words or actions** that create mutually understandable, clear permission conveying acceptance of the conditions of the sexual activity and willingness to engage in the sexual activity” (emphasis added). (See “Understanding Affirmative Consent,” Office of Institutional Equity and Compliance, University of Colorado Boulder, accessed Sep 3, 2020, <https://www.colorado.edu/oiec/policies/sexual-misconduct-intimate-partner-abuse-stalking-policy/understanding-affirmative-consent>.) The California Senate Bill 967 states,

‘Affirmative consent’ means affirmative, conscious, and voluntary agreement to engage in sexual activity. It is the responsibility of each person involved in the sexual activity to ensure that he or she has the affirmative consent of the other or others to engage in the sexual activity. Lack of protest or resistance does not mean consent, nor does silence mean consent. Affirmative consent must be ongoing throughout a sexual activity and can be revoked at any time. The existence of a dating relationship between the persons involved, or the fact of past sexual relations between them, should never by itself be assumed to be an indicator of consent.

Also, the law states that consent cannot be valid if, according to 4(C), “The complainant was unable to communicate due to a mental or physical condition.” While the lack of communication is tied to a mental or physical condition that *prevents* the communication, it is reasonable to assume that the law would not find a mental state *alone* sufficient, nor would the law likely find that the corresponding mental state *needed* to match the communication in order for the consent to be valid. The emphasis is on *communication* with the assumption that the communication matches the mental state.

<sup>8</sup>Excluding cases where an individual is intoxicated or not of sound mind. In

The details of any given affirmative consent policy vary, but there are four consistent features of the model, which are: (1) consent must be communicated *clearly* or *unambiguously*, either verbally or behaviorally, (2) communication of consent must be *ongoing* throughout the sexual encounter, (3) consent must be given voluntarily, and (4) the person must be conscious. There is also a fifth feature that requires a person can also not be intoxicated as it would make it difficult to meet the first four criteria. In particular, it calls into question the person's ability to consent *voluntarily* and whether she is conscious *enough* to give valid consent. Some of the more extreme views contend that a person cannot give valid consent if *any* alcohol has been consumed. I am only concerned about (1) and (2) in this paper.

## THE PROBLEM OF UNAMBIGUITY

The motivation behind having communication of consent be unambiguous is to reduce confusion that can lead to harm, specifically sexual assault and rape. If communication of consent is unambiguous, then instances of sexual assault or rape resulting from misunderstandings or confusion about permissibility should be reduced or eliminated. While the focus in the affirmative consent model is on protecting potential victims of sexual assault or rape, the model could also be argued to protect both parties. If there is explicit, unambiguous communication of consent to sex, then there is no room for misunderstandings or misinterpretations, which can protect men<sup>9</sup> from being accused of sexual assault or rape for sexual

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these cases, no matter *what* communication of consent is provided, it is considered invalid. This poses an interesting and troubling problem for drunken sexual encounters, as the affirmative consent model states that sex while intoxicated cannot be validly-consented-to sex. This doesn't seem right, but it is outside of the scope of this paper for me to investigate it further.

<sup>9</sup>I understand that men can be the victim of sexual assault or rape and not just the (possible) perpetrators of such crimes, but for the purposes of this paper I will be assuming that women are more often victims of rape and men are more often the perpetrators. While the arguments will be framed using this assumption, all arguments can be applied to either sex in either role.

encounters they thought were mutually consented to.<sup>10</sup> The motivation behind the unambiguity requirement is well-intentioned, but the actual enactment of it reveals why it is morally problematic to require unambiguous verbal or behavioral consent to sex. I will explore both acceptable forms of communication of consent—the verbal and the behavioral—and show why the unambiguity requirement should be rejected.

### *The Problem with a Requirement of Unambiguous Verbal Communication of Consent*

Some college affirmative consent policies have a *verbal-only requirement* such that *any* nonverbal action or behavior, no matter how unambiguous, is insufficient to communicate valid consent.<sup>11</sup>

Valid verbal communication of consent means that a person must explicitly agree to the sexual act before the encounter takes place and must verbally agree to each new sexual activity. This means that the person initiating sexual behavior must verbally ask for consent from the other person involved in the sexual activity and she

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<sup>10</sup>The National Sexual Violence Resource Center states that studies support that an estimated 2% to 10% of reports are false. (“False Reporting Overview,” National Sexual Violence Resource Center, 2012, [https://www.nsvrc.org/sites/default/files/2012-03/Publications\\_NSVRC\\_Overview\\_False-Reporting.pdf](https://www.nsvrc.org/sites/default/files/2012-03/Publications_NSVRC_Overview_False-Reporting.pdf).)

However, these numbers only capture those instances where a claim was investigated and refuted by the police. The reality is that no one knows exactly how many rape allegations are false. Cathy Young states that, “Many other complaints are left unresolved, ending in dismissal or *acquittal* even if an arrest is made; surely at least some of these cases involve wrongful accusations. And none of these statistics include informal accusations made in the media or in the political arena, or accusations made years after the alleged crime when memories may be altered and reconstructed.” (Cathy Young, “A step forward for victims of assault,” *Newsday*, Oct 2, 2018, <https://www.newsday.com/opinion/columnists/cathy-young/a-step-forward-for-victims-of-assault-1.21348036>.)

<sup>11</sup>The exception would be if both parties explicitly and verbally agreed beforehand that those behaviors counted as communication of consent. In Anitoch College’s Sexual Offense Prevention Policy, it states, “Use of agreed upon forms of communication such as gestures or safe words is acceptable but must be discussed and verbally agreed to by all parties before sexual activity occurs.” (“Sexual Offense Prevention Policy (SOPP) Revised,” Anitoch College, Apr 20, 2016, <https://antiochcollege.edu/campus-life/sexual-offense-prevention-policy-title-ix/>.)

must respond verbally with her consent.<sup>12</sup> Exceptions can be made such that gestures or safe words are deemed permissible to count as consent, but these too, must be verbally agreed to prior to the commencement of sexual activity. Verbal-only affirmative consent policies are less common than policies that allow for both verbal and behavioral consent but given that verbal-only affirmative consent policies still exist, and people are therefore subject to punishment if they are in violation of it, the requirement is worth discussing. I argue that *if* the affirmative consent policy requires verbal-only communication of consent, then it is a case of objectionable compelled speech.

Compelled speech is law requiring that citizens use or express certain language. One could argue that affirmative consent policies requiring verbal-only communication of consent are not law—they are just university policy, which is importantly different from law, so my compelled speech objection could not hold in instances of university policy. This is a valid concern, but it is important to note that some states have actually made the affirmative consent standard a legal requirement for universities, so in these instances, they are not just university policy—they are *legally required* university policy. Additionally, if we look at states where a legal standard for affirmative consent has not been adopted, the verbal-only affirmative consent policies can still be considered cases of compelled speech once one understands that university affirmative consent policies act as “university law” with its university justice system. While the university system of “law” is distinct from the system of criminal law of the wider society, it operates as a justice system of its own where individuals can accuse others, make charges against others, and be “convicted” of violations.<sup>13</sup>

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<sup>12</sup>See Anitoch’s policy for example of these conditions (The person who initiates sexual conduct is responsible for verbally asking for the “consent” of individual(s) involved. The person with whom sexual conduct is initiated must verbally express “consent” or lack of “consent.” Each new level of sexual activity requires consent.) (Anitoch 2016) Additionally, for simplicity’s sake, I will be speaking of sex between two parties, but my arguments and discussion apply equally to sex between more than two people.

<sup>13</sup>The following distinctions between the university justice system and the criminal justice system were made by Michael Huemer in a private communication

A prime example of compelled speech operating in university law is the university policy requiring correct gender pronoun use. The idea that a person's gender pronoun preference should be respected is acceptable, but the university requirement that punishes those who fail to use the correct gender pronoun, is not acceptable. The University of Minnesota has been revising a gender pronoun policy that requires the correct gender pronoun be used and failure to adhere to the policy could result in academic expulsion (for students) or termination of employment (for faculty or staff).<sup>14</sup> These are drastic consequences for all involved. The gender pronoun requirement that the University of Minnesota is proposing requires that all members of the university community adhere to the correct gender pronoun use for each individual and failure to adhere to this requirement could lead to severe punishment. It could be argued that this is not really an instance of compelled speech, because while university members are required to use the *correct* pronoun, they are still able to refer to any individual by his or her name, or by referring to the individual generally, so this policy does not compel university members to use specific language in a problematic way. However, if we modify the policy to one that requires university members use the correct pronoun and *only* the correct pronoun, much like the verbal-only communication of consent that requires specific language be used or punishment may ensue for not obtaining valid sexual consent, then it would be a clear

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on 2 July 2017. The university justice system is inferior to the criminal justice system, as convictions of guilt only require a preponderance of the evidence, the trial is performed in secret, and evidence is not provided to the accused ahead of time. Additionally, there is a perverse incentive structure where (1) individuals that make accusations are protected from retaliation even if the accusations are false, which incentivizes individuals to make "risk-free" accusations, and (2) if those who are accused are not convicted, the university is at risk of losing federal funding.

<sup>14</sup>See draft of policy available online ("Equity and Access: Gender Identity, Gender Expression, Names and Pronouns (Draft)," University of Minnesota, accessed Aug 17, 2020, <https://www.documentcloud.org/documents/4598811-Updated-Draft-Gender-Identity-Policy.html>.) Policy states, "Discrimination or harassment based on gender identity or gender expression may result in appropriate responsive action, including but not limited to disciplinary action up to and including termination from employment and academic sanctions up to and including academic expulsion."

case of compelled speech and it would be one that I imagine almost everyone would find objectionable. Let us also imagine the modified policy comes with the same drastic consequences that the actual gender pronoun policy suggested by the University of Minnesota does. While fictitious, this modified gender pronoun policy serves to show what makes compelled speech at university so unethical. No matter how well-intentioned, a university is not meant to create policies that police and control the speech of its faculty, students, and employees. In fact, universities were designed to be an environment that fostered free speech and exchange, and up until recently, were one of the last places one would expect compelled speech to be accepted. Verbal-only communication of consent polices *are* instances of compelled speech similar to the modified gender pronoun policy example, because they require individuals to use or express certain language in sexual encounters, and if an individual fails to do so, they can be found in violation of the policy and face punishment, just as in the cases of the gender pronoun use policy.

So far, I have only made the case that verbal-only affirmative consent policies are actually instances of compelled speech, but it does not automatically follow from this that these policies are instances of *objectionable* compelled speech. The belief that compelled speech is objectionable is controversial. Some view compelled speech as somehow a *greater* protection of free speech by protecting underserved minorities.<sup>15</sup> While I disagree and believe that most compelled speech is objectionable, I will not be able to provide a full defense of the broader claim in this paper. Specifically, I will argue that the verbal-only communication of consent in the affirmative consent policies is a case of objectionable compelled speech because it is an unjustified Constitutional rights restriction on an individual's free speech protections afforded by the First Amendment. Furthermore, because compelled speech is ideologically at odds with the principles of free speech that underlie the First Amendment, it is also immoral. Therefore, solutions that propose ratifying the First

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<sup>15</sup>See the response to the 2016 Jordan Peterson case on transgender pronouns. Peterson argued against a law requiring the use of transgender pronouns, stating that it was objectionable compelled speech, but opponents stated that the laws were there to protect those who were getting misgendered.

Amendment to allow for compelled speech exceptions would be morally wrong, even if technically legal.

Compelled speech has been criticized for being objectionable on the grounds that compelling people's speech is akin to compelling people's thoughts, which undermines individual autonomy and liberty. Often, compelled speech has been struck down by the Supreme Court on grounds that it violates free speech rights afforded under the First Amendment. In *West Virginia State Board of Education v. Barnette*, the Supreme Court ruled that children have protection under First Amendment such that they are not required to salute the flag or recite the Pledge of Allegiance in school.<sup>16</sup> In *Rumsfeld v. Forum for Academic and Institutional Rights*, Chief Justice John G. Roberts Jr. stated, "Some of this Court's leading First Amendment precedents have established the principle that freedom of speech prohibits the government from telling people what they must say."

<sup>17</sup>Typically, the only restrictions permitted by the First Amendment have been those that do not defeat a central purpose of the right.<sup>18</sup> Constitutional rights are not absolute, but restrictions cannot render the right ineffective by excluding its core exercises. It is doubtful that many would consider the ability to speak freely or to stay silent during sex *specifically* to be a central purpose of the right to free speech. But, surely, the core of a right to free speech must extend to one's own bedroom. If the First Amendment cannot protect a person in the most intimate of encounters, and if we permit the government to legislate communication in the bedroom such that the right to free speech becomes inert and offers individuals no serious protection here, then surely this is a Constitutional rights restriction that cannot be justified.

Consider the following case. Imagine if, instead of the government requiring the use of specific language in sexual encounters, it *forbade* the use of specific language in sexual encounters. Let's suppose that the new government policy forbids the use of the four-letter

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<sup>16</sup>*West Virginia State Board of Education v. Barnette* (319 U.S. 624 [1943]).

<sup>17</sup>*Rumsfeld v. Forum for Academic and Institutional Rights* (547 U.S. 47 [2006]).

<sup>18</sup>I have presented this argument in another paper, see Jasmine Rae Straight, "The Right to Self-Defense Against the State," *Philosophia* (2020), <https://doi.org/10.1007/s11406-020-00212-7>.



expletive beginning with the letter ‘f’. The justification for forbidding this word during sex is that it is a violent word, and its use can cause psychological harm to those who hear it. Anyone caught in violation of the policy could be subject to legal punishment. It is unlikely that many people would find this kind of restriction on free speech justified. Why think it should be any different if instead of forbidding certain language during sex, we require certain language? Both are instances of controlling a person’s free speech in the most intimate of encounters and both are equally objectionable because of this feature.

A final point to consider regarding the verbal-only communication of consent requirement, is that it permits other people the right to govern how individuals communicate in their own sex lives, which sets a dangerous precedent. In the name of safety and preventing serious harms, one could imagine that it would be reasonable to allow the university to govern other areas of individuals’ personal lives, such as rules governing interpersonal relationships. Surely, this is not only an undesirable result, but it is a morally unjustifiable result too.

### *An Objection and a Reply*

A person could argue that there is a difference between an unconditional requirement, such as the requirement that all school children have to recite the Pledge of Allegiance during assembly, and a conditional requirement that is only required if a person wishes to do or obtain something, such as a police officer who can only accept her position after verbally assenting to an oath.<sup>19</sup> It looks as though the verbal-only communication of consent requirement is a conditional requirement and conditional requirements are not typically viewed as problematic. Part of what makes compelled speech objectionable (at least in the most egregious cases) is that it is an unconditional requirement—it applies to all persons and to all instances. If this is true, then perhaps the verbal-only communication of consent requirement isn’t really a case of objectionable compelled speech.

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<sup>19</sup>I am grateful to David Boonin for bringing up this objection and important distinction.

I think the distinction between an unconditional and a conditional requirement is useful, and it is most certainly true that the most egregious cases of compelled speech are found in the cases of unconditional requirements; however, this distinction collapses in the case of verbal-only communication of consent. On the surface, it appears that this kind of consent is of the conditional variety, but I contend that there is a sense in which this kind of consent is *unconditional*. It is unconditional because it applies to *all* people who have sex; the only way to avoid compelled speech would be to abstain from sex altogether, which is completely unreasonable. The police officer who swears an oath can *choose* whether to become a police officer, based on the demands and expectations of the position, including the conditional requirements to obtain such a role. Whereas, in the sexual consent case, an individual's choices, provided that she does not wish to engage in sex that is considered invalidly-consented-to, are: (1) have sex that requires compelled speech, or (2) not have sex. There is no way for a person to have sex free of compelled speech. The only way for the individual to avoid compelled speech would be to abstain from sex and that seems not only ridiculous and unfair, but also, it appears to be an *unconditional* requirement.<sup>20</sup> Essentially, the verbal-only communication of consent requirement is conditional in form, but unconditional in spirit.

Perhaps the police officer case and the sex case are too importantly different in the ways in which they are conditional for this objection to be as strong as possible. Because it looks as though the police officer case is purely conditional whereas the sex case is not.

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<sup>20</sup>A person could try and extend my basic argument and say that the requirement for the police officer could be considered to be *unconditional* in this sense to, because the only way for the individual to become a police officer is under conditions of compelled speech. There is no way for the individual to become a police officer without compelled speech. But this is surely not the same as the sexual consent case. It isn't unreasonable for positions, especially those with such a high degree of danger, risk, and responsibility, to require that individuals take an oath understanding their rights and responsibilities. A person does not have to become a police officer. It *is* unreasonable to require specific verbal behavior in order to engage in sex. Sex is an important life good (some would even argue it is a *basic* need) for many people for many reasons (reproduction being one of them). Being a police officer is not.

By ‘purely conditional,’ I mean that it is conditional in both form and spirit. It is conditional in form, because it takes the form “if *x* wants to be a police officer, then *x* must perform verbal oath.” It is conditional in spirit because it truly only does apply the conditional to those individuals who wish to become a police officer. Any individual can opt-out and the compelled speech is only required conditionally in a specific scenario. Whereas, in the sex case, it is only conditional in form—if *x* wants to have sex, *x* must verbally express her consent—but it is not conditional in spirit, because it applies to all individuals and no one can opt out of the compelled speech and still perform the action of having sex. The only way to avoid the compelled speech is to opt-out of sex.

A stronger objection would be a case that is more analogous to the sex case. Consider the following scenario. Dakota needs to have surgery on her eyes and if she does not get the surgery, she will become blind in both eyes. In order to get the surgery, Dakota must give clear verbal consent to the surgery. As with the sex case, the costs of not giving verbal consent are high. The costs to Dakota are going blind. But unlike the police officer case, the compelled speech applies to all people who would wish to have this surgery. This example takes the conditional form, if *x* doesn’t give her verbal consent to the eyesight surgery, then *x* will not be able to get the surgery, but, similar to the sex case, it is unconditional in spirit because no one can opt-out of the verbal requirement and still have eyesight surgery.<sup>21</sup> The verbal requirement of consent in the eyesight case isn’t objectionable though. Most people would agree that it would morally be impermissible for the surgeon to perform the surgery without Dakota’s verbal consent. If this is true, then why wouldn’t it also be morally impermissible to engage in sex without verbal consent. Perhaps it is just the case that there are certain hybrid-conditional requirements where the compelled speech isn’t objectionable. While the eyesight case and the sex case are analogous in that they are both conditional in form and unconditional in spirit, they share an important difference that elucidates why it isn’t objectionable compelled speech in the eyesight case, but it is in the sex case.

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<sup>21</sup>I’m assuming that the eyesight surgery case could be broadened to include all surgeries.

The difference is related to the degree of risk. The standard of consent is warranted in the eyesight case because surgery comes with risks that we don't think a surgeon can assume a patient is willing to take. Most surgeries come with the risk of death or significant complications specific to that surgery, so even though the cost of staying silent and therefore not getting the surgery in the eyesight case is high, we accept that verbal consent needs to be acquired because it would be unacceptable to put the patient at risk of death or significant injury as a result of a surgery performed without her consent. Additionally, there is an epistemic asymmetry between the doctor and the patient pertaining to the knowledge of the degree of risk. The patient is usually dependent on the doctor to provide the relevant information about the risks of surgery. She is not privy to this information on her own. This is important because the attainment of verbal consent indicates that the patient has been given this critical information by the doctor—it communicates that this transfer of information has taken place. There is also the additional consideration that the person having the surgery is assuming significant financial obligations that could impact her life for years to come and again, we don't think the surgeon is able to assume an individual is willing to take on these financial obligations unless she has verbally consented.<sup>22</sup>

We accept the requirement of verbal consent given the high risks involved with the subsequent action (in this case, surgery). These risks are so high that we accept the high costs of not performing the subsequent action without the verbal consent. The compelled speech is not objectionable, because the consequences of not requiring it are unacceptable. This is not true with the sex case.

In the sex case, the degree of risk is arguably lower, and the risk level is certainly too low to justify the high cost of requiring people to abstain from sex absent verbal-only consent. While the risk of imminent death is a possibility when engaging in sex, it certainly is not a risk in most cases. The risk of imminent death would most

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<sup>22</sup>Someone could object that healthcare costs are particularly opaque, and people rarely understand the detail of financial obligations. While this is possibly true, it doesn't change the fact that cost of surgery is a factor and plenty of people do consider financial obligation before they get surgery.

commonly be attributed to murder, usually following a rape, where an individual has intentionally committed murder. The death is not a complication of surgery or negligence, both of which are unintentional. The reason this is important is because if an individual is willing to commit murder, then he is already willing to commit an act against someone else's will. Lack of verbal consent to sex is not going to be a difference-maker. There is also the risk of death that is not imminent, such as death resulting from a sexually transmitted disease. This risk is undoubtedly higher than the risk of imminent death from murder, but it is also relatively easy to reduce by using contraception. Also, I think it is generally true that most people do not think of themselves as risking the possibility of death when they engage in sex.

But maybe it is not fair to focus on the risk of death when comparing the degree of risk because there are greater risks involved with sex that are more important. Maybe some of these risks are high enough to tip the scale? Undoubtedly, one of the greatest risks in engaging in sex is being forced to perform a sexual act against one's will. In fact, this is the very harm that verbal-only consent policies aim to prevent. But the risk of this occurring absent verbal-only consent is not high enough to justify the compelled speech.

I think the only real option that avoids requiring individuals perform objectionable compelled speech in order to have sex is to implement a policy that requires all sexual behavior stops at the first expression or sign of dissent. An expression of dissent is often less ambiguous by its very nature, but more importantly, it completely avoids the charge of compelled speech.<sup>23</sup> A requirement that sexual activity ceases once one person has expressed her dissent is simply an acknowledgement that she has withdrawn her consent and she is no longer a willing participant. I offer more reasons in support of this criterion later in this paper.

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<sup>23</sup>I would like to thank a reviewer whose comments helped improve and clarify this point.

### *The Problem with a Requirement of Unambiguous Behavioral Communication of Consent*

Requiring unambiguous behavior to communicate consent in a sexual encounter is unrealistic and disrupts the process of sexual discovery. What behaviors would count as valid tokens of consent to sex? While there are undoubtedly some behaviors that could be agreed upon, it would be extremely difficult to catalog an exhaustive list of behaviors that would constitute unambiguous behavioral consent. It is not clear what would happen to the outlier behaviors. This requirement calls for conformity in sexual behavior that impedes an individual's ability to express themselves freely during sexual encounters. In order for an individual to be certain that they are displaying unambiguous behavior sufficient to count as valid consent, she would need to not only be aware of what behaviors count, but she would also have to be sure that she performed this behavior before sex could commence (or continue).<sup>24</sup> This would require her to disengage from the sexual experience, even if only for a moment, in order to note to herself that she needs to perform the requisite behavior. The requirement for unambiguous behavioral communication of consent also disrupts sexual discovery by requiring one bring herself out of the sensory experience.<sup>25</sup> The sexual experience has been modified for her by having to conform to external rules of sexual conduct. I think that this is objectionable. Studies show that cognitive interference during sex can lead to negative emotional state, which can inhibit sexual arousal and orgasm.<sup>26</sup> A phenomenon called 'spectatoring' has been used to describe individuals who are so focused on their own sexual performance during sex that they

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<sup>24</sup>In this context, 'commence' refers to each new sex act and 'continue' refers to the entire sexual experience.

<sup>25</sup>Part of the joy of engaging in sex is discovering new pleasures, which require an individual to engage in sexual behavior that is completely new. At best, an individual could offer consent to exploration, but she cannot give unambiguous consent to an act that she doesn't know is going to occur and/or is not sure she will like, but that doesn't mean she is not willing to engage in the behavior to find out.

<sup>26</sup>Natalie L. Dove and Michael W. Wiederman, "Cognitive Distraction and Women's Sexual Functioning," *Journal of Sex & Marital Therapy* 26 (2000): 68.

fail to become immersed in the experience.<sup>27</sup> I think it is reasonable to believe that requiring individuals to disengage from the sensory experience of sex in order to give “clear” behavioral consent would result in spectating.

Furthermore, cognitive distraction is a problem for pleasurable sex and women are especially prone to being distracted.<sup>28</sup> If women are frequently mentally distracted during sex, then it might be difficult for them to provide unambiguous behavior of the kind that affirmative consent policies require (not to mention the fact that this unambiguous behavior would need to be *ongoing*, but I address this requirement later in the paper). Remedies such as mindfulness training have been suggested to help with cognitive distraction during sex and the remedies have emphasized *increased* focus on sexual stimuli and *decreased* attention on non-sexual thoughts.<sup>29</sup>

### *More Objections and Replies*

It could be argued that I’m focusing on areas of lesser importance—people’s sexual pleasure and the value of sexual discovery—over something of much greater importance, which is whether sex has been validly consented to. I could even be accused of being insensitive in this regard, because victims of rape or sexual assault have been subjected to someone else’s prioritization of their own sexual pleasure. I grant that being able to deduce when valid consent has been given to sex is more important than whether a person is able to attain an orgasm or discover a new part of her sexuality, but I also think this objection misunderstands my argument. I am not arguing that a person should be free to seek sexual pleasure and discovery without any regard to whether the sex he is having is validly consented to. I

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<sup>27</sup>W. H. Masters and V. E. Johnson, *Human Sexual Inadequacy* (Boston: Little, Brown & Co, 1970).

<sup>28</sup>Hannah Gale lists 31 things that women have thought about during sex. Hannah Gale, “31 things all women have thought about during sex at one time or another...,” *Associated Newspapers Limited*, May 29, 2014, <https://metro.co.uk/2014/05/29/31-things-all-women-have-thought-about-during-sex-at-one-time-or-another-4741169/>.

<sup>29</sup>M. Géonet, P. De Sutter and E. Zech, “Cognitive factors in women hypoactive sexual desire disorder,” *Sexologies* 22 (2013): e9-e15.

am arguing that by requiring the behavior be *unambiguous*, that is, not open to more than one interpretation, affirmative consent policies are disrupting an important life good for many people.

A requirement of unambiguous behavior sufficient to count as valid consent to sex is also extremely difficult to prove.<sup>30</sup> In fact, the difficulty in proving that a sexual partner has validly consented has given rise to sexual consent apps that allow individuals engaging in sex to gain consent via the app.<sup>31</sup> One app aims to provide users with a legal contract to sexual activity that would allow for breaches of contract to be permissible.<sup>32</sup> Not only do these apps strike me as difficult to legally enforce as a valid sexual contract, but they are certainly an invasion of privacy. A user has to explicitly specify sexual behavior that they consent to, which presumably stays logged in the app. Having one's sexual preferences, permissions, and partners logged in an app is extremely invasive and risky. It is not difficult to see the kind of problems that could arise in people's lives if this information were accessible by other people. Additionally, it sets a dangerous precedent that interpersonal relationships cannot simply occur naturally, but instead require contractual agreements. Not only does this seem damaging for each individual sexual encounter, but over time, it seems that it would erode trust and people's ability to read interpersonal behavior.

Fortunately, there is a way out of this problem that still acknowledges the importance of valid consent but does not require sexual conformity and does not interrupt sexual discovery. The solution is, as mentioned earlier in this paper is to implement a policy that requires all sexual behavior cease the moment dissent is expressed

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<sup>30</sup>See article by Ashe Schow (2014) for one reporter's experience trying to get legal clarity on how a person would prove they received sexual consent under affirmative consent policies. Ashe Schow, "How can those accused of sexual assault prove consent under 'yes means yes'?" *The Washington Examiner*, Dec 19, 2014, <https://www.washingtonexaminer.com/how-can-those-accused-of-sexual-assault-prove-consent-under-yes-means-yes>.

<sup>31</sup>Steven Petrow, "People are talking about sexual consent. Would an app help?" *USA Today*, Feb 20, 2018, <https://www.usatoday.com/story/tech/columnist/2018/02/20/sexual-consent-apps-set-rules-intimacy-come-their-own-risks/328635002/>.

<sup>32</sup>See app LegalFling at <https://legalfling.io>.



(verbally or behaviorally). A sexual consent policy with a firm requirement that sexual activity stop at the first sign or expression of dissent, is more respectful of the nuances of sexual behavior as it allows for individuals to enjoy sexual discovery with one another. It also avoids the pitfalls that come with the contractual approach the affirmative consent model promotes with sexual consent apps. I will elaborate on this approach later in this paper.

## THE ROOTS OF THE ONGOING COMMUNICATION OF CONSENT REQUIREMENT

Affirmative consent policies all require that the communication of consent be *ongoing* throughout the sexual encounter. One instance of valid consent to a particular sexual act does not entail consent to any future sexual acts. The ongoing requirement is in conjunction with the requirement that the communication of the consent be unambiguous. My issue with the ongoing requirement is largely conditional. I am chiefly concerned with this requirement because the ongoing communication of consent that is required must *also* be unambiguous and given the reasons that I outlined earlier in this paper; I think this is a major problem.

The ongoing communication of consent requirement has roots in Lois Pineau's Communicative Sexuality (CS) model.<sup>33</sup> Pineau states that her CS model is based on the idea that sex should be mutually beneficial, and that communication of consent should be required throughout the encounter. Pineau takes issue with the contract model of consent, specifically that there is point in the sexual interaction where the two parties agree to the terms, and follow through on those terms, is required. Consent is considered established from the point of agreement, unless there is a "vigorous act of refusal"<sup>34</sup>, and one person can enforce the other as per the "terms of that contract."<sup>35</sup> Pineau wants to provide an alternative to the contract model and her

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<sup>33</sup>Lois Pineau, "Date Rape: A Feminist Analysis," *Law and Philosophy* 8, no. 2 (1989): 217–243.

<sup>34</sup>*Ibid.*, 233.

<sup>35</sup>*Ibid.*, 227.

goal is to ground the criterion of consent in what is considered ‘reasonable’ from the women’s point of view. She states that men have an obligation to, (1) ensure the sexual encounter is mutually enjoyable<sup>36</sup>, or (2) to know why the woman would want to continue despite her lack of enjoyment.<sup>37</sup> In her CS model, communication of consent is akin to a proper conversation—a give and take, as opposed to lectures, interrogations, or diatribes, which have unidirectional flow.

A flaw in Pineau’s analogy is that contracts are intended to be mutually beneficial agreements, or at least mutually *agreeable* terms, not a one-way forceful agreement. In a contract, the terms are fully considered by both parties and both parties only enter into the agreement of their own volition. If they are not entered into voluntarily, the contract is considered invalid. Contracts also have the feature of clauses that would permit a person to cancel the contract, with or without penalties (again that both parties agree to). For these reasons, I am not convinced that Pineau’s condemnation of the contract model of consent is justified or as strong as Pineau thinks it is. Her motivation in criticizing the contract model of consent is to prevent anyone, including the state, from forcing a woman to continue with sex if she does not wish to. I am confident that she would not approve of the sexual consent apps that have been generated in response to the affirmative consent movement. But I am not convinced that anyone is making the argument that once the “terms” of sex are agreed to, the woman can be forced to follow through, although I accept that part of Pineau’s concern is that these expectations lie implicit in some cultural norms. I think the more likely interpretation of the contractual model of consent is that the sexual “contract” permits free sexual exploration up until the point that a person expresses her dissent. The expression of dissent is the withdrawal of the previously granted valid consent and once the dissent is expressed, the sexual exploration must cease. Sex may continue once both parties are on the same page, but I don’t believe anyone is advocating that once a person has validly consented to such terms, no amount of dissent is sufficient to count as withdrawal of consent.

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<sup>36</sup>This seems to imply that a women’s enjoyment is dependent on the man.

<sup>37</sup>Pineau, “Date Rape,” 234.

Additionally, Pineau's CS model seems to support that only certain kinds of sex could be validly consented to, because only certain kinds of sex are *reasonable* for a woman to consent to. The argument looks like this:

1. Sexologists show that women derive little pleasure from aggressive, noncommunicative sex.
2. It is unreasonable to think that women will consent to things that don't stand much chance of bringing them pleasure.
3. Therefore, it isn't reasonable for women to consent to aggressive, noncommunicative sex.

The second premise seems false. Women consent to things that do not bring them much pleasure frequently, but yield greater rewards, such as childbirth, sex for procreation's sake, or even simply wanting to please their partner. Also, I am not convinced the first premise is true either, but I think part of the difficulty in establishing the first premise would be to have a clear understanding of what constitutes 'aggressive' or 'noncommunicative' sex. Given the large amount of *concept creep*<sup>38</sup> occurring, we should be weary of assuming that there is one, unambiguous way of understanding the kind of sex Pineau is talking about. This understanding of what is and is not reasonable for a woman to consent to paves the way for Pineau to claim that if her CS model is not occurring, then there are grounds for believing sex was not consensual.<sup>39</sup> Essentially, if there was not ongoing communication of consent, then consent did not occur.

### *The Problem with a Requirement of Ongoing Communication of Consent*

The ongoing communication of consent requirement acts as a back-up to the unambiguity requirement in the affirmative consent

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<sup>38</sup>See Lukianoff and Haidt for a discussion of the impact that 'concept creep' is having on the college campuses in the U.S., Greg Lukianoff and Jonathan Haidt, *The Coddling of the American Mind* (New York: Penguin Press, 2018).

<sup>39</sup>For Pineau, it is the man's job to ensure he is meeting this condition and if he doesn't, we should assume he is acting out of either reckless disregard, or willful ignorance.

model and this is why it is objectionable when tied to the unambiguity requirement. First, an individual must unambiguously consent to sex, then she must continually communicate this consent unambiguously throughout the sexual experience, thus *solidifying* the unambiguity of the consent. When the ongoing communication of consent requirement is conjoined with the unambiguity requirement, it is an unjustifiable intrusion into people's privacy in their sexual experiences, as it disrupts the flow of sexual experience by dictating specific conditions of the sexual encounter. It also disrupts the process of sexual discovery by requiring cognitive interference and distraction, which as I discussed earlier in this paper, leads to unpleasurable sex, especially for women. In some sense, the ongoing requirement also *rules out* certain kinds of sex which some people might find enjoyable. Certain fantasies and role-plays would not be permissible on the grounds that they were not properly consented to. Lastly, studies show that students do not really recall explicitly consenting to or continuing to consent to sex, often stating, "it just happened."<sup>40</sup> In fact, researchers state the following on sexual consent at universities:

One of the main early finding of the students' contributions is that consent is a (sometimes intentionally) vague process. It rarely manifests as overt or enthusiastic consent, despite efforts by college administration to encourage or require it. While most of the respondents in our first study were generally clear in their negative response to sexual solicitations, rarely did they report providing an affirmative, "Yes, I'd like to have sex" to a sexual solicitation, or giving what would be considered "enthusiastic consent."<sup>41</sup>

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<sup>40</sup>Jake New, "It Just Happened," *Inside Higher Ed*, Aug 2, 2016, <https://www.insidehighered.com/news/2016/08/02/researchers-say-many-students-still-struggle-affirmative-consent>.

<sup>41</sup>J. Laker and E. Boas, "Compliance is simple, Consent Stories are complex: Building capacity for sexual agency as a prevention strategy," *Journal of Campus Title IX Compliance and Best Practices* 1 (2015): 25.

Not only do students not procure unambiguous, affirmative consent before sex takes place, but they also are not “updating” this consent throughout the sexual experience. They certainly are not providing ongoing *unambiguous* consent.

If individuals were not required to provide unambiguous behavioral or verbal communication of consent to sex, it would not be as problematic to require that the consent be *ongoing* throughout the sexual experience. The ongoing requirement amplifies the problems of the unambiguity requirement I detailed earlier in this paper. If the ongoing requirement was tied to more ambiguous behavioral or verbal communication of consent, then it would not be problematic to require that it continue to occur throughout the sexual experience.<sup>42</sup> Especially if it was in conjunction with a continual readiness to stop at the first sign of dissent. The requirement that both individuals who engage in sex be *continually* ready to stop sexual activity at the first expression of dissent is not objectionable, and it also seems to be closer to the actual social norms of young adults, and society in general. In a study on the sexual communication of young adults, results showed that their communication does not include affirmative consent, but instead, young adults (and presumably, the rest of society) use a lack of resistance to gauge sexual consent.<sup>43</sup> This provides some evidence that a requirement for ongoing readiness to stop at the first sign of dissent would be supported by the very people that affirmative consent policies are trying to help.

Additionally, it doesn't appear as though the implementation of the affirmative consent standard has resulted in less sexual assault or rape. California experienced an *increase* in rape after the introduction of SB-967—the 2014 state law requiring that Californian universities be required to use affirmative consent for sexual con-

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<sup>42</sup>Surely, this is how a majority of people behave when engaged in sexual activity—they interpret the other person's body language in conjunction with verbal cues as the sexual experience continues.

<sup>43</sup>Annika M. Johnson and Stephanie M. Hoover, “The Potential of Sexual Consent Interventions on College Campuses: A Literature Review on the Barriers to Establishing Affirmative Sexual Consent,” *PURE Insights* 4, article 5 (2015), <https://digitalcommons.wou.edu/pure/vol4/iss1/5>.

sent.<sup>44</sup> In 2014, the number of rapes, including attempted rapes, was 9397.<sup>45</sup> The number of rapes increased to 12,793 in 2015.<sup>46</sup> That is a 36% increase within one year. The number of rapes has increased in California each year, up until 2019, where it decreased slightly, although the 2019 figure still remains significantly higher than the pre-2014 figures.<sup>47</sup>

## A RETURN TO DISSENT

I would like to suggest that we return to a lack of dissent as the criterion for valid sexual consent. I will not be able to provide a robust defense of this claim, as it would go beyond the scope of this paper. But what I hope to provide are strong reasons to believe that using a lack of dissent model will not only avoid the problems that I have argued affirmative consent policies produce, but it also does a superior job of respecting individual liberty.

By ‘dissent’ I mean the verbal or behavioral expression of non-agreement. In the context of sexual relations, this would mean the verbal or behavioral expression that the individual no longer agrees to the sexual encounter that is taking place.<sup>48</sup> The working assump-

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<sup>44</sup>“Note: In 2014, the crime of “forcible rape” was changed to “rape.” The definition was expanded to include both male and female victims and reflects the various forms of sexual penetration understood to be rape” (Crime in California 2015,” California Department of Justice, accessed Oct 14, 2020: 9, <https://oag.ca.gov/sites/all/files/agweb/pdfs/cjsc/publications/candd/cd15/cd15.pdf>). This definitional change surely accounts for some of the increase, but I am skeptical that it is all that could explain the increase.

<sup>45</sup>“Crimes & Clearances Counties: All. Years: 2010 – 2019,” State of California Department of Justice, accessed Nov 1, 2020, <https://openjustice.doj.ca.gov/exploration/crime-statistics/crimes-clearances>.

<sup>46</sup>Ibid.

<sup>47</sup>Ibid. The number of rapes in California in 2019 was 14,720. It was 15,500 in 2018, 14,724 in 2017, and 13,695 in 2016.

<sup>48</sup>Where sexual “encounter” includes either the entire sexual experience, or just a subset of sexual experience within the whole. For example, an individual may be willing to continue to engage in sexual intercourse but does not wish to engage in oral sex.

tion of this model is that people typically express that they don't want to have sex before they are actually having sex.<sup>49</sup>

Perhaps the problem is that this assumption is false. People don't express dissent before being in a sexual act that they don't want to be in. In fact, part of the motivation for an affirmative consent model is to protect these people, who end up becoming victims of unwanted sexual activity. My response to this claim is that it appears to be a claim about mental states. Mental states are difficult to accurately gain access to, especially since they are often asked about in retrospect, and in cases of sexual activity, there are often many subsequent mental states that play a role in the individual's feeling about the encounter.<sup>50</sup> But beyond the matter of whether we can reliably obtain accurate data on people's mental states, is the question that *if* this assumption isn't true, what assumption about human behavior in sexual situations *is* true? The affirmative consent model of consent appears to assume that people wish to dissent, but they are not capable or willing to communicate it, and therefore, they are waiting for someone to ask them, so that they have then been given the opportunity to say no. This would equate to believing that adults lack the agency to say no of their own volition. This seems to be infantilizing adults. A sexual consent policy that doesn't respect rational<sup>51</sup> adults' agency consequentially violates their freedom. Just as individuals have the capability to express their desire to engage in sex, they have the capability to express their dissent to engage in sex also. To treat adults as if they incapable of expressing their own will during a sexual encounter, to the point that there is a policy legally requiring both parties to be forced into specific communication about their own sexual behavior, is an absolute violation of their individual freedom.

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<sup>49</sup>The same assumption applies to any sexual act, not just sexual intercourse.

<sup>50</sup>There are many stories where a person was willing to engage in sex, but that person later regrets it. A common situation is where an individual has just ended a relationship with one person and becomes single, engaging in sex with other people whom they regret having sex with.

<sup>51</sup>I set aside the difficult questions and issues surrounding sexual consent for adults with impaired cognitive capabilities. When I refer to 'adults', I am referring to a person over the age of 18 with normal mental functioning.

Another benefit of the lack of dissent criterion is that the chances of unjustly punishing innocent people<sup>52</sup> is far lower. The recent move to a policy of affirmative consent has left many individuals unjustly accused of sexual assault or rape with their lives devastated by the accusation.<sup>53</sup> It is difficult to obtain accurate statistics on false accusations of sexual assault or rape, as many of these occur on college campuses.<sup>54</sup> According to the FBI, the “unfounded” rate, which is defined as the “percentage of complaints determined through investigation to be false, is higher for forcible rape than for any other Index crime. Eight percent of forcible rape complaints in 1996 were “unfounded,” while the average for all Index crimes was 2 percent.”<sup>55</sup> A popular view on false accusations of rape and sexual assault appears to be that (1) the men who are falsely accused are rarely convicted or serve jail time, and (2) the underreported rapes and sexual assaults far outweigh the false accusations.<sup>56</sup> But even if it is true that falsely accused men rarely get convicted or serve jail time, this fails to capture the utter devastation that a false accusation can have on the individual’s life. Men who are falsely accused of rape or sexual assault are often expelled from the university or fired from their job, their family and friends are harmed in the process by either being subjected to ridicule or hate, or by experiencing doubt about the veracity of the allegation, and they have their reputations destroyed, because even when the allegation is proven to be false, a thick cloak of mistrust surrounds the

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<sup>52</sup>I state people, but in a majority of cases, it is men who are accused of sexual misconduct, or rape.

<sup>53</sup>See one instance of a false accusation in the following story: Emily Yoffe, “The Uncomfortable Truth About Campus Rape Policy,” *The Atlantic*, Sep 6, 2017, <https://www.theatlantic.com/education/archive/2017/09/the-uncomfortable-truth-about-campus-rape-policy/538974/>. There are many other similar stories, but it is difficult to find accurate statistics on false accusations of rape and sexual assault. Although as mentioned previously, estimates appear to be in the 2-10% range.

<sup>54</sup>See footnote 10 on this issue.

<sup>55</sup>“Crime Index Offenses Reported,” Federal Bureau of Investigation, accessed Sep 17, 2020: 24, <https://ucr.fbi.gov/crime-in-the-u.s/1996/96sec2.pdf>.

<sup>56</sup>Katty Kay, “The truth about false assault accusations by women,” *BBC News*, Sep 18, 2018, <https://www.bbc.com/news/world-us-canada-45565684>.



verdict, with many people believing that the man accused is guilty.<sup>57</sup> False accusations seem to be a natural by-product of the affirmative consent model of sexual consent, because the policies typically promote the idea that *any* accusation should be met with belief that the accuser is telling the truth. For example, the University of Colorado, Boulder website states that in an effort to change society's attitude towards victims of sexual assault, we should start by, "telling survivors we *Believe Them*."<sup>58</sup> While it is certainly noble to treat any person who claims to have been the victim of a crime with the benefit of the doubt, what about the person who has been accused? The standard of innocent until proven guilty appears to have vanished in the wake of affirmative consent. The default now appears to be to believe the victim *no matter what*. But surely we can find a way to validate the alleged victim's feelings while pursuing evidence in search of the truth. A basic tenet of justice is to treat all equally before the law.<sup>59</sup> Unfortunately, the affirmative consent standard incentivizes valuing some individuals over others before the law, and as a consequence, many individuals suffer injustice.

## CONCLUDING REMARKS

The affirmative consent model is designed with the hopes of preventing any kind of miscommunication regarding sexual consent with the goal of reducing sexual assault and rape that result from such miscommunication. But the reality is that the current affirmative consent model is an artificial requirement that is out of touch with the social norms and expectations of sexual behavior for young adults. The requirement for unambiguity shows us how impractical and immoral it is to require unambiguous communication of consent in sexual encounters.

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<sup>57</sup>This is often a result of the "if there is smoke, then there must be fire" mentality.

<sup>58</sup>Emphasis in original. "5 Things to Know about Campus Sexual Assault," University of Colorado, Boulder, accessed Nov 3, 2020, <https://www.colorado.edu/wgst/2019/02/21/5-things-know-about-campus-sexual-assault>.

<sup>59</sup>The words, "Equal Justice Under Law", appear on the West side of the U.S. Supreme Court building. "Building Features," Supreme Court of the United States, accessed Oct 4, 2020, <https://www.supremecourt.gov/about/buildingfeatures.aspx>.

I believe the alternative model of sexual consent I have suggested prioritizes valid consent without mandating a requirement of unambiguous behavioral communication of consent that is impossible to catalog, intrudes on people's sexual freedom, and is difficult to prove without serious privacy invasions. It also avoids compelling people's speech in an objectionable way. The current affirmative consent model should be rejected and replaced with a model of consent that holds the lack of dissent as sufficient to ground valid sexual consent. Obviously, more work would need to be done to detail the particulars of such a model, but I hope that what I have sketched in this paper can provide a valuable first step towards that end.

## Economics and Ethics: Neither Independent nor Intertwined

*Jakub Bożydar Wiśniewski*

The main achievement of economics is that it has provided a theory of peaceful human cooperation.

—Ludwig von Mises,  
“Economic Freedom and Interventionism”

Treasures gained by wickedness do not profit, but righteousness delivers from death.

—Proverbs 10:2

**B**usiness ethics is a paradigmatic example of a discipline that straddles the domains of economics and ethics. Hence, appreciating its potential and making the most of it requires a clear understanding of the relationship between the aforesaid two fields, which, in turn, requires a clear delimitation of their respective areas of competence.

Despite many decades—if not centuries—of research having been devoted to this issue, it remains contentious and polarized between several entrenched orientations. The present paper is an attempt to move the discussion forward by offering a comprehensive overview of what is perhaps the most nuanced and least prevalent of the approaches to the subject at hand—namely, the contention that

economics and ethics are neither strictly independent, nor inextricably intertwined, but mutually relevant.

The first popular approach to be discussed in this connection is that of strict value freedom.<sup>1</sup> On this view, economics is a paradigmatically positive science, which describes the nature of economic phenomena and insists that this nature is entirely independent of the values endorsed by individuals who are subject to them. By implication, the argument goes, whenever an economist relies on his professional knowledge to bolster his normative arguments or pursue specific policies, he thereby ceases to act as an economist and assumes the role of an ethicist.

I regard the above perspective as essentially correct, but also regrettably incomplete. Its great achievement is the identification of the structure of cooperative action as a separate domain of scholarly investigation, parallel to the achievement whereby logic identifies the structure of valid thought as a distinct area of systematic inquiry. This intellectual feat allows for looking at the realm of human affairs from the point of view informed by “the economic way of thinking,”<sup>2</sup> whereby concepts such as opportunity costs, incentive structures, and unintended consequences delimit both the boundaries and the potentialities of collaborative endeavors.

At the same time, however, strict adherents of this perspective have been perhaps somewhat too quick in dismissing ethical considerations as not only independent of, but also entirely irrelevant to economic theorizing. This, one might argue, has been causing them to arrive at economic conclusions that are deductively valid, but sometimes limited in terms of soundness, meaning that they are sometimes insufficiently cognizant of the broader normative framework that crucially conditions the emergence of the relevant economic phenomena.<sup>3</sup> Furthermore, such conclusions can be said to fall short of their full explanatory potential insofar as they do not engage with

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<sup>1</sup>Murray Rothbard, “Value Implications of Economic Theory,” *American Economist* 17, no. 1 (1973), pp. 35–9.

<sup>2</sup>Paul Heyne, Peter Boettke and David Prychitko, *The Economic Way of Thinking*, 13th ed. (Upper Saddle River: Prentice Hall, 2013).

<sup>3</sup>Deirdre McCloskey, *Bourgeois Equality: How Ideas, Not Capital Or Institutions, Enriched the World* (Chicago: University of Chicago Press, 2016).

the question of the extent to which robust economic development is a crucial prerequisite of equally robust moral development.

Another pertinent approach to the issue at hand suggests that economics and ethics are essentially connected, which amounts to an attempt to strip economics of its status of a value-free science. In this context, one sometimes encounters the name “social economics,” which seems to suggest that trying to decouple economic analysis from normative ambitions and presuppositions disqualifies economics as a social science in the full sense of the term.<sup>4</sup>

The fundamental problem associated with this perspective appears to be its denial of the distinction between the positive and the normative, which implies that the laws of economics are conditioned or modifiable by moral commitments. This, in turn, hints at the claim that economics is not an independent scholarly discipline capable of furnishing an objective description of the logic of cooperative action, together with all of its non-negotiable parameters. Consequently, on this view ethics runs the risk of turning into an exercise in wishful thinking, losing both its theoretical coherence and its practical import.

Finally, there is the approach, which I consider as the only truly fruitful one in this connection, that regards economics as value-free, but also value-relevant, hence seeing it as a strictly positive field of study that is nonetheless capable of illuminating various normative disciplines, including business ethics.<sup>5</sup> By extension, one might argue that the perspective in question allows for viewing ethics as clearly value-laden, but also fact-relevant, hence recognizing the essential role of ethical capital in solving various operational problems described by pure economic theory.<sup>6</sup> This take on the matter, one should notice, neither economizes ethics, nor ethicizes economics, nor yet keeps the two completely isolated from each other, but

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<sup>4</sup>John B. Davis and Wilfred Dolfsma, eds., *The Elgar Companion to Social Economics*, 2nd ed. (Cheltenham, UK: Edward Elgar, 2015).

<sup>5</sup>Joseph Heath, “The contribution of economics to business ethics,” in *The Routledge companion to business ethics*, ed. E. Heath, B. Kaldis and A. Marcoux (New York: Routledge, 2018).

<sup>6</sup>Luigino Bruni and Robert Sugden, “Reclaiming Virtue Ethics for Economics,” *Journal of Economic Perspectives* 27, no. 4 (2013), pp. 141–64.

underscores their reciprocal pertinence and the corresponding gains from trade.

In what follows, I shall endeavor to demonstrate a broad range of analytical applications that this approach offers. First, I shall argue that there are two major ways—negative and positive—in which economics can benefit ethics, the former consisting in subordinating the “oughts” of human action to its logically viable “cans,” and the latter consisting in showing the extent to which cooperative efficiency can aid moral flourishing. Second, I shall argue that there are likewise two major ways—negative and positive—in which ethics can benefit economics, the former consisting in elucidating the normative preconditions of cooperative efficiency, and the latter consisting in illustrating the role of ethical resources in addressing various cooperative challenges. Finally, I shall conclude by suggesting that the key to the proper understanding of the relationship between economics and ethics may lie in regarding the former as the meta-ethics of cooperation—i.e., the positive science of normative coordination.

Before proceeding to the substantive sections of the present paper, let me finish with a methodological caveat. While I believe that the cogency of my arguments does not depend on the acceptance of any specific methodological tradition within economics, I intend to strengthen my contentions by adopting the perspective of the Austrian School,<sup>7</sup> otherwise known as the causal-realist approach.<sup>8</sup> Since Austrians view economics as the investigation of the immutable causal laws that govern the structure of human action, they are particularly devoted to emphasizing the strictly positive status of the discipline in question. In other words, on their view no purely empirical contingencies, including those relating to ethical commitments or moral customs, can impact the contents of economic principles.

Thus, my intention in following the above perspective is twofold. On the one hand, I wish to underscore the fact that there are good reasons—both methodological and substantive—to regard economics as a purely positive and analytically distinct field of inquiry with its

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<sup>7</sup>Ludwig von Mises, *The Ultimate Foundation of Economic Science: An Essay on Method* (Indianapolis: Liberty Fund, 2006 [1962]).

<sup>8</sup>Joseph T. Salerno, “Menger’s causal-realist analysis in modern economics,” *Review of Austrian Economics* 23, no. 1 (2010), pp. 1–16.

own conceptual toolset and area of competence. On the other hand, however, I wish to indicate that even given such a strong assumption of positivity and analytical autonomy economics can be justifiably considered as both applicable to ethical theorizing and capable of being enriched by it.

Having made the preceding introductory remarks, let me move to discussing the aforementioned four specific ways in which economics and ethics can demonstrate their mutual relevance while keeping their respective conceptual distinctions intact.

## THE NEGATIVE RELEVANCE OF ECONOMICS TO ETHICS

The fact that economics is concerned with investigating the logical essence of cooperation, while treating the specific values that animate concrete cooperative endeavors as given, endows it with a normatively unique character. More precisely, while the discipline in question is by itself positive rather than normative, its unique methodological place among other social sciences allows it to approach many crucial normative issues from a peculiarly nuanced angle.<sup>9</sup>

All economic values are firmly rooted in individual preference scales, thus being ineradicably subjective. On the other hand, the cooperative phenomena studied by economics, such as prices, contracts, and property titles, are intersubjective—that is, while not being entirely mind-independent, they are nonetheless independent of any single mind. In other words, their nature is perfectly encapsulated in the felicitous phrase “meeting of the minds,” which aptly accounts for their being the result of at least two subjective value rankings interacting in a mutually satisfactory manner.

This situates economics in a curious place, firmly at the intersection between individual values and the attendant social facts. One can plausibly argue that its foundational principle is the realization that the subjective value of personal satisfaction, filtered through the

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<sup>9</sup>Gerard Casey, “Ethics and Economics: Friends or Foes?” in *Human Destinies: Philosophical Essays in Memory of Gerald Hanratty*, ed. F. O’Rourke (Notre Dame: University of Notre Dame Press, 2012).

intersubjective value of transactional reciprocity, gives rise to the semi-objective value of social cooperation.<sup>10</sup> I deliberately describe the value of social cooperation as semi-objective, since, on the one hand, it does not exist apart from the underlying subjective values of the cooperating agents, but, on the other hand, it embodies the indispensable core of virtually every major ethical tradition—that is, the notion that fulfilling the interests of others constitutes the ultimate source of moral self-actualization.

Hence, it appears reasonable to suggest that economics, though independent of any ethical presuppositions, is all the same uniquely capable of sharpening our ethical acuity. As indicated earlier, this is because it is singularly suited to describing the logical prerequisites, potentialities, and limitations of social cooperation.

Negatively speaking, it constitutes the most precise tool available for identifying existential errors, internal inconsistencies, and operational impossibilities in various schemes for moral utopias.<sup>11</sup> But while guarding against the ruinous consequences of attempts at implementing such utopias may be the most important role of economics in this area, it is by no means the only one. More generally speaking, adopting the economic way of thinking allows for disabusing oneself of the notion that doing good is solely or even primarily a matter of exhibiting appropriate intentions and sufficient commitment. In fact, when unmoored from considerations of opportunity costs, marginal decision-making, and praxeological

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<sup>10</sup>Insofar as the extent of social cooperation can be seen as a proxy for social welfare, and given the assumption of the impossibility of making scientifically meaningful interpersonal comparisons of utility, it is unsurprising that the only changes that the causal-realist tradition treats as genuinely Pareto-superior are the ones that are grounded in voluntarily demonstrated preferences. Consequently, a purely contractual system of market transactions is treated by the tradition in question as the only system that can be objectively identified as welfare-enhancing. See Jeffrey M. Herbener, “The Pareto Rule and Welfare Economics,” *Review of Austrian Economics* 10, no. 1 (1997), pp. 79–106.

<sup>11</sup>Peter Boettke, “Controversy: Is Economics a Moral Science? A Response to Ricardo F. Crespo,” *Journal of Markets & Morality* 1, no. 2 (1998), p. 215; Murray Rothbard, *Man, Economy, and State: A Treatise on Economic Principles with Power and Market*, Scholar’s Edition (Auburn, AL: Ludwig von Mises Institute, 2004 [1962]), p. 1297.



coherence, ethical passion can be positively dangerous and counterproductive, and this is the point that the science of cooperation regularly drives home.

For instance, one's economically untutored moral intuitions may militate against the existence of sweatshops. Obviously enough, from an absolute standpoint sweatshop labor is an ethically deplorable phenomenon. However, as soon as the issue of opportunity costs is brought into the picture, it may turn out that, relatively speaking, sweatshop labor is the most satisfactory option available to large numbers of inhabitants of underdeveloped countries, an option vastly preferable to stealing, begging, prostitution, or starvation.<sup>12</sup> Thus, in many cases, opportunity cost analysis can lead to the realization that accepting the best among ethically disagreeable alternatives may be the only way to advance towards future situations involving more ethically favorable choice sets.

Such a realization sheds important light on the ethical implications of the law of comparative advantage. More specifically, it demonstrates that a necessary ethical corollary of possessing a low-labor-cost comparative advantage is willingness to work under hard and exacting conditions. In other words, here both economics and ethics seem to underscore, each in its own way, the commonsense principle of "no pain, no gain," whereby, in this particular instance, relatively low productivity has to be compensated by relatively high endurance and resilience.

What appears especially striking in this connection is the recognition that, in virtue of exhibiting the aforementioned characteristics, low-wage workers from underdeveloped regions possess the kind of human capital that gives them certain absolute (rather than just comparative) advantages over their high-wage counterparts from developed countries. On second thought, however, this recognition seems almost mundanely obvious—after all, it is only natural to assume that when one is poorly endowed in physical and organizational capital, one can make up for these lacks primarily by accumulating as much ethical capital as possible. In sum, in the absence of specialized knowledge and resources, general strength of

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<sup>12</sup>Benjamin Powell, *Out of Poverty: Sweatshops in the Global Economy* (New York, NY: Cambridge University Press, 2014).

character becomes all the more essential, and it is only a misguided understanding of the relationship between economics and ethics that can, and so often does, cloud this intuitive truth.

By the same token, engaging in various forms of well-intentioned consumer boycott can, for all practical purposes, be tantamount to rejecting the value of the ethical capital accumulated by sweatshop laborers. This not only deprives the boycotters of affordable goods and services, but also, more importantly from a purely ethical point of view, deprives their would-be beneficiaries of their most promising means of livelihood and economic advancement. In other words, failing to grasp the cooperative potential embedded in the law of comparative advantage is bound to make actions grounded in ethically laudable motives both economically and ethically counterproductive. Contrariwise, fully realizing the potential in question allows for making choices that tellingly demonstrate the natural harmony between economic and ethical benefits. In this particular case, buying and, better still, actively seeking out goods produced by sweatshop laborers can not only enrich all the involved parties in a broadly utilitarian sense, but also give the buyers the moral satisfaction of constructively supporting the most needy, and give the sellers the moral satisfaction of exercising their comparative economic advantage grounded in their aforementioned absolute ethical advantage.

To sum up, participating in market democracy and regularly “voting with one’s money” enables one to engage in the kind of consumer activism that is as ethically impassioned as it is economically informed.<sup>13</sup> What is crucial in this context, however, is the realization that one’s ethical passion can be transformed into ethical efficiency only through the intermediation of sound economic knowledge, that is, knowledge concerning the cooperative capabilities of human action in a world of scarce resources and uncertain outcomes.

Another conspicuous illustration of the fact that solid economics is a necessary prerequisite of solid ethics is the counterproductive nature of so-called positive discrimination. One might initially believe that treating members of historically disadvantaged groups

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<sup>13</sup>John Tomasi, *Free Market Fairness* (Princeton, NJ: Princeton University Press, 2012).

on preferential terms is a morally praiseworthy effort insofar as it compensates them for the injustices suffered by their ancestors. However, if one's goal is to allow such individuals to fulfill their genuine economic and social potential, then employing unambiguously anti-meritocratic means for that purpose is more than likely to backfire, thus casting serious doubt on the moral worth of the whole enterprise.

Moreover, it appears that, once again, it is precisely economics that is singularly capable of highlighting the ethically self-defeating character of such endeavors.<sup>14</sup> First of all, by underscoring the crucial role performed by price signals—that is, intersubjective, quantitatively precise expressions of exchange value—it demonstrates that genuine cooperation cannot flourish where such signals are falsified by non-meritocratic admixtures. More concretely, positive discrimination is likely to distort both its beneficiaries' view of their qualifications' real market worth and their prospective employers' attempts at gauging such worth. Consequently, the former will end up deprived of reliable feedback to guide the development of their careers, while the latter will be unable to develop their businesses based on a reliably high-quality workforce.

Worse still, if the beneficiaries of positive discrimination manage to get away with being paid far above their productivity for a longer period of time, they might become demoralized and willing to adopt a generally non-meritocratic attitude, whereby resorting to outright fraud is viewed as justifiable in virtue of the historical disadvantages of one's ancestors. On the other hand, if their employers decide to keep treating them on preferential terms on account of their well-intentioned but misguided moral views, this might erode their entrepreneurial ability, thereby undermining one of the cornerstones of the cooperative potential of a free economy.

An indirect analogy could be made here with the theory of business cycles originated by the Austrian school of economics. According to this theory, business cycles occur primarily as a result of artificial credit expansion, which falsifies interest rate signals and

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<sup>14</sup>Walter Block, *The Case for Discrimination* (Auburn, AL: Ludwig von Mises Institute, 2010).

generates clusters of malinvestments.<sup>15</sup> It is crucial to notice here that the credit in question is fiat credit, i.e., credit created out of thin air by central banks, which, as such, is not backed by any genuine savings and any corresponding capital goods liberated from less roundabout processes of production. Consequently, the majority of investment projects financed by such credit are bound to result in failure, thereby cutting the initial boom phase short and ushering in the unavoidable bust—i.e., a period of necessary liquidations, bankruptcies, and painful readjustments in the capital structure of production.

Likewise, it might be said that positive discrimination generates “fiat skills,” “fiat merits,” and “fiat human capital,” reliance on which can lead employers to undertake overly ambitious projects. Now, again, as soon as it turns out that the qualifications and competencies supposedly exhibited by the workforce employed on such projects are purely nominal, the endeavors in question turn out to be unsustainable. However, if even in the face of such failures employers continue to follow the policy of positive discrimination on account of fearing the loss of their purported moral sensitivity, then enacting the requisite restructuring procedures could become particularly onerous and time-consuming. To put it briefly, modifying relationships involving primarily physical capital is much easier than modifying those that involve primarily human capital, since repurposing inanimate matter is much easier than reforming human character.

More generally speaking, it might be suggested that, in an important sense, ethics divorced from economics—that is, the science of what is logically possible and impossible in the realm of human action—becomes “fiat ethics,” i.e., counterproductive wishful thinking based on free-floating normative abstractions.<sup>16</sup> In this

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<sup>15</sup>Joseph T. Salerno, “A Reformulation of Austrian Business Cycle Theory in Light of the Financial Crisis,” *Quarterly Journal of Austrian Economics* 15, no. 1 (2012), pp. 3–44.

<sup>16</sup>The definition of „fiat ethics” used here should be distinguished from that employed by Hülsmann (see Jörg Guido Hülsmann, “The Production of Business Ethics,” *Journal of Markets & Morality* 11, no. 2 [2008], pp. 275–99). The latter uses the term in question to designate ethical rules imposed by legislative fiat, while

connection, one might argue that it is no wonder that every putative moral utopia that aims to overthrow the laws of economics has a much greater potential for destruction than sincere tyranny that pays at least lip service to them.<sup>17</sup>

Yet another telling example of the dangers of engaging in economically uninformed ethical theorizing centers on the destructive consequences of promoting certain versions of the so-called stakeholder theory of business ethics.<sup>18</sup> According to the normative variety of this theory, businesses should be seen as responsible not only to their shareholders, but also to their stakeholders, defined as all those groups of individuals who are affected by corporate operations. It appears clear that putting matters this way is so ambiguous as to invite a host of different interpretations with vastly divergent ramifications. On the one hand, the stakeholder theory may be construed as an uncontroversial observation that caring about the goodwill of customers, increasing job satisfaction of employees, and maintaining good relations with the local community is a highly reliable way of establishing a stable competitive advantage and boosting the profitability of one's enterprise. Such an observation, far from being an invitation to a reformulation of the normative role of business, is a natural complement to the centuries-old conclusion of classical economists like Adam Smith and Frederic Bastiat that in a peaceful commercial environment relations between various social groups are inherently harmonious.

If, on the other hand, one construes the stakeholder theory as suggesting that anyone even remotely influenced by the operations of a given company should be given the right to co-decide on its policies, then one may unwittingly support the politicization of business and the consequent loss of its distinct cooperative efficiency. After

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I use it to designate ethical rules adopted by means of "mental fiat," i.e., without due consideration given to their logical viability. Nevertheless, it is fair to say that these two meanings are interrelated, since legislative fiat is often tantamount to mental fiat as far as the counterproductivity of its consequences is concerned.

<sup>17</sup>Rudolph J. Rummel, *Death by Government* (New Brunswick, NJ: Transaction, 1994).

<sup>18</sup>John Hasnas, "Whither Stakeholder Theory? A Guide for the Perplexed Revisited." *Journal of Business Ethics* 112, no. 1 (2013), pp. 47–57.

all, one of the major prerequisites of actualizing the cooperative potential of society is respect for and promotion of the division of labor, whereby not only particular individuals perform specific tasks within a given business structure, but business itself fulfills a distinct social role, different than the one fulfilled by, say, families, charities or religious organizations.

More specifically, the function of commercial firms is to supply scarce goods and services in the context of relationships involving relatively high transaction costs, relatively high information asymmetries, relatively high heterogeneity of preferences, and a fairly low degree of psychological intimacy. This is why, unlike some of the other classes of entities mentioned in the preceding paragraph, commercial firms need to rely on the common denominator of the market price system in order to evaluate their performance.<sup>19</sup> This, in turn, implies that obliging them to adopt modes of operation and criteria of evaluation characteristic of fundamentally different social structures is bound to destroy their unique competitive advantage in facilitating large-scale, complex cooperation. To put the matter somewhat facetiously, a chess player cannot become a chess champion, let alone prove to others that he in fact is one, if at the same time he is expected to be a full-time athlete, charitable worker, and religious leader.

Worse still, if every potential stakeholder is to be thought of as capable of insinuating himself into the position of an uninvited de facto co-owner of the assets of a given company,<sup>20</sup> then businesses may become paralyzed by a particularly troublesome form of regime uncertainty.<sup>21</sup> In other words, they may become incapable of executing their unique business visions and utilizing their distinguishing competitive advantages on account of their activities being routinely intercepted by individuals who lack both the motivation and the skills

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<sup>19</sup>Ludwig von Mises, *Profit and Loss* (Auburn, AL: Ludwig von Mises Institute, 2008 [1951]); Art Carden, "A Note on Profit, Loss, and Social Responsibility," *New Perspectives on Political Economy* 5, no. 1 (2009), pp. 1–8.

<sup>20</sup>Jörg Guido Hülsmann, "The Political Economy of Moral Hazard," *Politická ekonomie* 54, no. 1 (2006), pp. 35–47.

<sup>21</sup>Robert Higgs, "Regime Uncertainty," *Independent Review* 1, no. 4 (1997), pp. 561–90.

to wield entrepreneurial judgment.<sup>22</sup> Needless to say, such a situation is bound to erode the foundations of consistent economic growth and development, by the same token destroying social well-being. Thus, once again, it turns out that one cannot credibly promote the moral interests of stakeholders unless one understands their intimate connection with the positive economic consequences of unconditionally respecting the fiduciary duty to shareholders.

Finally, ethics cannot aspire to fulfill its role of mature, systematic reflection on moral matters unless its practitioners prove themselves able to grasp the nature of more abstract and complex forms of cooperative endeavors. Among endeavors of this kind one might include such oft-maligned financial activities as stock market speculation, “junk bond” dealing, leveraged buyouts, and “hostile takeovers.” Though certainly not immune from misuse, the phenomena in question hold vast potential for boosting the scale, scope, and intensity of large-scale social collaboration.<sup>23</sup> However, in order to realize this fact and not to succumb to counterproductive moralizing, one needs to grasp the wealth-enhancing function of professional uncertainty bearing, value arbitrage, and intertemporal resource coordination. Furthermore, this kind of knowledge—which can be furnished exclusively by economics and related disciplines—is necessary to distinguish between the uses and abuses of the aforementioned financial tools. In other words, it is necessary to distinguish between those situations in which the tools under consideration are used to fortify the capital structure of production and those in which they are used as monopolistic, politically-backed leverage in an environment of institutionalized moral hazard.<sup>24</sup>

Absent such knowledge, an aspiring ethicist is not only destined to lose sight of the moral prerequisites of extended social cooperation, but, perhaps even more regrettably, he is likely to contribute to suppressing its creative unfolding and its developmental aptitude.

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<sup>22</sup>Nicolai J. Foss and Peter G. Klein, *Organizing Entrepreneurial Judgment: A New Approach to the Firm* (Cambridge, UK: Cambridge University Press, 2012).

<sup>23</sup>Stephen Hicks, *Defending Shylock: Productive Work in Financial Markets* (CEE / Ockham’s Razor, 2010).

<sup>24</sup>David Stockman, *The Great Deformation: The Corruption of Capitalism in America* (New York: Public Affairs Press, 2013).

In sum, while economics without ethics may be a caricature, ethics without economics is a fairy tale.

## THE POSITIVE RELEVANCE OF ECONOMICS TO ETHICS

The preceding is an overview of the ways in which the economic point of view crucially supplements the ethical point of view from a negative angle: that is, by clearing it of infeasible ambitions and deceptive illusions. However, its equally important role consists in pointing out the extent to which economic development opens up great scope for ethically ambitious endeavors.

Let me begin exploring this subject by making a few general remarks about the moral status of enjoying the kind of disposable income that allows one to be choosy with regard to one's desires. Here it might be said that familiarity with even the most fundamental precepts of sound economics is usually enough to quell one's willingness to grumble about the supposed perils of "consumerism." Since, technically speaking, consumption—that is, obtaining the psychic satisfaction that signifies moving from a less desirable state of affairs to a more desirable state of affairs—is the purpose of all human action, there can be no system of social cooperation that is not "consumerist." To wit, no economic system could be meaningfully designated as "producerist," since the goal of production is consumption—even in a society of die-hard workaholics production could not function as an end in itself, but would rather be a source of a specific consumer good: namely, the satisfaction of doing one's work.

Admittedly, it might be perfectly justifiable to criticize excessive consumption understood as unsustainable utilization of the underlying capital structure. Since continued prosperity depends on the willingness of society to save and invest enough resources to replace depreciating capital goods on a continuing basis, consistent capital consumption can be rightly condemned as economically ruinous and thus immoral from a broadly utilitarian standpoint. By the same token, moral criticism of short-sightedness, wastefulness, reckless indebtedness, and other unsustainable financial practices—as well as institutional frameworks that promote them—can be seen as a cogent denunciation of insupportable patterns of consumer



behavior.<sup>25</sup> Such criticism, however, cannot be construed as aimed against “consumerism,” since its ultimate purpose is to restore the kind of mindset that allows for preserving, or, better still, enhancing the disposable income of all individuals.

Is voicing doubts about “consumerism” entirely misguided, then? Not necessarily. One might see at least a grain of utility in it insofar as it stimulates consumers not to rest content with low-quality offers, or, better yet, with low-quality desires that such offers are addressed to. In other words, the criticism under consideration may be entirely rejected as an attack on the wealth-enhancing nature of market cooperation, but, at the same time, it may be appreciated as a reminder of its qualitative potential.

Economics studies the logical structure of all human action, not the qualitative merits of its specific instances, but it clearly recognizes the evaluative nature of all intentional undertakings. Likewise, it distinctly appreciates the fact that, in a world of scarce resources and opportunity costs, such undertakings necessarily assume a hierarchical structure, whereby needs subjectively evaluated as more urgent are necessarily attended to before those subjectively evaluated as less urgent. Thus follows the well-known lesson of the law of diminishing marginal utility: each consecutive unit of a homogenous supply of goods brings less satisfaction.

Pure economic theory can only say that much, but it can imply rather more. For example, if any given good can be said to become increasingly less useful as its supply expands, the same can be said with respect to whole categories of goods, since the way in which any given agent categorizes his wants and the objects capable of satisfying them is ultimately an entirely subjective matter. Hence, to illustrate, one might say not only that each consecutive apple is less pleasing to his palate, but also that each consecutive piece of food is less conducive to his culinary well-being.

However, by the same token, we could easily imagine the above example to go in an entirely different direction. More specifically,

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<sup>25</sup>Jörg Guido Hülsmann, “Cultural Consequences of Monetary Interventions,” *Journal des Economistes et des Etudes Humaines* 22, no. 1 (2016), pp. 77-98; Daniel J. Smith and Sean P. Alvarez, “The Demoralizing Trap of Keynesianism,” *Journal of Markets & Morality* 20, no. 1 (2017), pp. 55-68.

instead of homogenizing all food items into a single category, the agent in question could just as well heterogenize them—not only in numerical terms, but also, and far more importantly, in qualitative terms. It must be borne in mind here that, in contrast to certain overly formalistic branches of neoclassical economics, more explicitly realistic traditions of economic reasoning do not in any sense regard instability of preferences as an indication of irrationality.<sup>26</sup> On the contrary, they see such instability as a crucial sign of personal development and experiential dynamism. Thus, it is only to be expected that as soon as one's wants are fully satisfied on a relatively basic level, one might become interested in exploring their deeper layers and their more refined dimensions.

To return to the aforementioned example, having been feeding on apples for a substantial period of time, and having fully grasped the essential difference between hunger and satiety, one might decide that the only way to maintain one's culinary well-being is to experience the taste of more exotic fruits. In other words, while advancing from the state of hunger to the state of satiety can be rightly seen as a matter of first urgency, it can be argued that beyond a certain point preserving (let alone increasing) the enjoyment of satiety requires endowing it with successively novel properties.

Here we are dealing with a natural qualitative extension of the law of diminishing marginal utility: just as each consecutive unit of a given good brings less utility, the same goes for each consecutive instance of satisfaction belonging to a given qualitative category. And since economic laws, understood as deductions grounded in universal categories of action, apply both to the micro and macro levels, we can see the same principle operating in the area of economic growth and development. That is to say, beyond a certain level of division of labor only specialization can further increase the productivity of the economy, beyond a certain level of capital accumulation only innovation can do the same, etc. More generally speaking, beyond a certain level of quantitative growth only qualitative development can sustain (let alone increase) the productive potential of the economy. Besides, and quite interestingly, the principle in question applies not only

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<sup>26</sup>Israel M. Kirzner, "The Entrepreneurial Market Process—An Exposition," *Southern Economic Journal* 83, no. 4 (2017), pp. 855–68.

to consumer and producer goods, but even to money, where ever greater levels of cooperative complexity can be reached exclusively with the use of ever more qualitatively solid means of exchange.<sup>27</sup> All in all, as befits a regularity worthy of the name of an economic law, the phenomenon under consideration appears to be consistent across the individual and social perspective.

Furthermore, the qualitative ramifications of the laws of diminishing marginal utility and diminishing returns need not be restricted to the purely subjective dimension. As I pointed out at the beginning of the present section, social cooperation can be treated as a semi-objective value insofar as it allows humankind to actualize its specific inherent potential. To borrow a somewhat grandiose phrase, it is “a purposeful utilization of a universal law determining cosmic becoming.”<sup>28</sup> This implies that there is no necessary tradeoff between the subjective values of personal comfort and individual gratification and the objective values of character development or communal flourishing. On the contrary, inasmuch as economic growth allows for attaining the former, it can also provide a huge boost in attaining the latter.

What seems particularly interesting to note in this connection is that even purely value-free social sciences, including economics, cannot meaningfully formulate any positive theoretical statements unless they implicitly acknowledge the existence of an objectively definable human nature.<sup>29</sup> For instance, unless one views humans as inherently rational and cooperative creatures, one cannot regard voluntary transactions as Pareto-superior, and one cannot conceive of the division of labor or the market price system as efficiency-enhancing processes. If, however, one does recognize the essentially cooperative character of human nature, then one can justifiably view economics as a science that, while remaining value-free, describes the

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<sup>27</sup>Philipp Bagus, “The Quality of Money,” *Quarterly Journal of Austrian Economics* 12, no. 4 (2009), pp. 22–45.

<sup>28</sup>Ludwig von Mises, *Human Action*, 4th edition, revised. (San Francisco: Fox and Wilkes, 1996 [1949]), p. 145.

<sup>29</sup>Gerard Casey, “Ethics and Human Nature,” *American Catholic Philosophical Quarterly* 77, no. 4 (2003), pp. 521–33.

indispensable tools and processes whereby human beings can reach the normative heights of their social existence.

Economics, understood as a formal and deductive science, can at most prove that there is no necessary tradeoff between subjective and objective values, and that the same praxeological devices used to promote the former can also be used to promote the latter. On the other hand, more empirically-oriented social sciences, such as psychology, can credibly suggest that the non-existence of the tradeoff in question is not only a logical possibility, but also an actual fact.

Maslow's hierarchy of needs—especially in its later formulations—is an illustrative example here.<sup>30</sup> According to this hierarchy, satisfying one's lower-order needs is a prerequisite of advancing towards their higher-order counterparts. Needless to say, such a conclusion is perfectly in line with the claim that narrowly understood economic development need not in any way impede the pursuit of cultural, spiritual, and other broadly understood "higher ends."

In addition, it should be noted how Maslow's model alternates between different categories of values in its consecutive tiers. The lowest tier comprises values that are physiologically objective, such as food, sleep, and warmth—i.e., phenomena without which no life can be sustained, and which are therefore automatically sought out by all non-rational life forms. The middle tier comprises values that are paradigmatically subjective, such as individual self-esteem and the feeling of accomplishment—i.e., psychological phenomena inseparable from the context of social cooperation. It is likely this category that, according to the critics of "consumerism," can become too bloated and overwhelming, thereby arresting human development at the merely hedonic stage. And yet, while becoming overly fixated on personal comfort treated as the ultimate end in itself is a real possibility, Maslow's model, as well as the aforementioned qualitative extension of the law of diminishing marginal utility, clearly indicate that becoming dissatisfied with remaining on the level of purely subjective satisfaction is a real possibility too. This is so especially given the fact that, according to the hierarchy under consideration, it is

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<sup>30</sup>Mark E. Koltko-Rivera, "Rediscovering the later version of Maslow's hierarchy of needs: Self-transcendence and opportunities for theory, research, and unification," *Review of General Psychology* 10, no. 4 (2006), pp. 302–17.

its topmost levels—those comprising the objectively defined values of self-actualization and self-transcendence—that correspond to the most genuine experience of personal fulfilment.

Another illustration of the abovementioned process is provided by Kohlberg's theory of moral development.<sup>31</sup> In many respects similarly to Maslow, Kohlberg suggests that moral development proceeds in a hierarchical manner. More specifically, he distinguishes between the pre-conventional, conventional, and post-conventional stages that need to be traversed if one is to attain full moral maturity.

One might argue that, with no loss of the relevant psychological insights, the stages in question could be reconceptualized as subjective, intersubjective, and objective. While operating on the purely subjective level, a human being follows rules out of unreflective conformity, fear of punishment, and the desire for narrowly understood self-preservation. Then, as its moral maturity progresses, it moves to the intersubjective level, which involves respecting the conventions of social cooperation and, consequently, allows for pursuing one's "enlightened self-interest"—that is, promoting the interests of others so that others might promote one's own interests.<sup>32</sup> Finally, as one begins to realize that social cooperation is not just an institutional tool for bringing about mutual desire satisfaction, but also one of the principal schools of virtues, one begins to approach the objective level of moral advancement. Thus, once again, oversaturation with the more mundane effects of a healthy economic order turns out to pave the way to unlocking its full qualitative potential.

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<sup>31</sup>Lawrence Kohlberg, *Essays on Moral Development: Vol II. The Psychology of Moral Development: The Nature and Validity of Moral Stages* (San Francisco: Harper & Row, 1984).

<sup>32</sup>However, as stated earlier, since engaging in social cooperation requires meeting certain objective conditions, such as displaying respect towards the bodily integrity and private property of others, the moral level under consideration might as well be called semi-objective rather than merely intersubjective.

## THE POSITIVE RELEVANCE OF ETHICS TO ECONOMICS

The foregoing remarks emphasize the fact that the greater the scale, scope, and depth of economic sophistication and collaborative complexity, the greater the prospects for undertaking concerted efforts aimed at the attainment of normatively desirable goals. However, it is also worth noting in this connection that as such sophistication and complexity grow, their maintenance requires increased ethical awareness even on the purely operational level.

For instance, as the organizational intricacy of business enterprises grows and as specialization and division of labor reach ever higher levels of arcane detail, it becomes increasingly difficult to evaluate the performance of managers and other high-level employees on the basis of their objectively defined technical expertise. Hence, firm owners are increasingly expected to raise such employees to the rank of proxy-entrepreneurs—i.e., agents capable of exercising “derived entrepreneurial judgment,” whose actions thereby become directly evaluable in terms of the profit-and-loss criterion.<sup>33</sup> In other words, instead of following strict rules laid down by their bosses, such agents can freely manage parts of the company’s assets as long as they remain capable of boosting their long-term value. Since, however, they typically possess little to no ownership stake in the companies that employ them, giving them such broad discretionary powers generates substantial moral hazard. And while there exist numerous purely structural methods of addressing the issue of moral hazard within business firms,<sup>34</sup> it would seem that none of them is nearly as effective as that which consists in relying exclusively on individuals who possess adequate ethical capital.

More specifically, it might be argued that only those individuals who can be verified as sufficiently trustworthy, responsible, and otherwise upstanding should be promoted to the position of proxy-

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<sup>33</sup>Kirsten Foss, Nicolai J. Foss, and Peter G. Klein, “Original and derived judgment: An entrepreneurial theory of economic organization,” *Organization Studies* 28, no. 12 (2007), pp. 1893–912.

<sup>34</sup>Eugene Fama and Michael Jensen, “Separation of Ownership and Control,” *Journal of Law and Economics* 26, no. 2 (1983), pp. 301–25.

entrepreneurs. Furthermore, it might be suggested that the best way to generate ethical capital among one's employees is to immerse them in a value-oriented corporate culture solidified by the exemplary conduct of the firm's boss. If the overall culture of a given company is oriented primarily towards professional mastery,<sup>35</sup> with monetary profits serving chiefly as its proof rather than as its goal, then even the company's non-owning staff might be immune to the temptation of sacrificing its long-term reputation for the sake of short-term ill-gotten gains. Thus, it turns out that focusing on ethical excellence may be necessary even in a merely instrumental sense if a sufficiently complex business entity is to retain its operational effectiveness.

Similarly, accumulating ethical capital may be rightly seen as the best method of generating genuine goodwill, which, in turn, helps in addressing transactional challenges associated with issues such as information asymmetry. Information asymmetry, far from being an exceptional circumstance of cooperative failure, can be plausibly regarded as a ubiquitous feature of market relations, where the seller typically knows far more about the nature of the sold product than the buyer does.<sup>36</sup> Hence, there is nearly always an unbridgeable "quantitative" difference between buyers and sellers in terms of their possession of the relevant data, and its potentially detrimental effects can be neutralized only by the application of a predominantly qualitative solution—namely, by establishing durable bonds of trust with one's prospective clients.<sup>37</sup>

It should be noted that the existence of such bonds can successfully address transactional difficulties related to various forms of information asymmetry, including not only those pertaining to product quality, but also those pertaining to the quality of customer relations. For instance, if a reputable entrepreneur suddenly finds

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<sup>35</sup>G. P. Manish and Daniel Sutter, "Mastery versus profit as motivation for the entrepreneur: How crony policies shape business," *Journal of Entrepreneurship and Public Policy* 5, no. 1 (2016), pp. 95–112.

<sup>36</sup>Thomas DiLorenzo, "A Note on the Canard of 'Asymmetric Information' as a Source of Market Failure," *Quarterly Journal of Austrian Economics* 14, no. 2 (2011), pp. 249–55.

<sup>37</sup>Daniel B. Klein, ed., *Reputation: Studies in the Voluntary Elicitation of Good Conduct* (Ann Arbor: University of Michigan Press, 1997).

himself confronted with a foreign dumper, who attempts to intercept his customers by offering ultra-low prices, then the reputation of the former may dissuade them from making the switch. After all, it is only to be expected that the dumper will raise his prices significantly as soon as he manages to drive his competitor out of the market, thereby getting rid of his now unneeded “quantitative” advantage and offering his newfound patrons no qualitative compensation. Thus, it is in the interest of the patrons in question to continue dealing with the original entrepreneur, who has already made himself known as a reliable and upstanding member of the market, unlikely to engage in bait and switch schemes.

In other words, projecting a credible ethos of “corporate social responsibility”—treated not as ideological window dressing, but as an honest commitment to creating a justifiably well-respected brand—can be seen as a crucial source of enduring competitive advantage,<sup>38</sup> particularly in a global, highly specialized and organizationally complex market environment.

## THE NEGATIVE RELEVANCE OF ETHICS TO ECONOMICS

Finally, it needs to be pointed out that ethical reflection allows for identifying various essential normative preconditions for the emergence of more advanced forms of social cooperation described by the principles of economics.

It needs to be noticed in this connection that while the most fundamental among those principles—such as the law of supply and demand or the law of opportunity costs—can be formulated even in reference to Robinson Crusoe isolated on his desert island, the more complex ones—such as the laws of absolute and comparative advantage—can manifest their operation only in an environment of extensive interpersonal interactions. For such interactions to take place, however, specific normative attitudes and the underlying ethi-

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<sup>38</sup>Michael E. Porter and Mark R. Kramer, “Strategy and Society: The Link Between Competitive Advantage and Corporate Social Responsibility,” *Harvard Business Review* 84, no. 12 (2006), pp. 78–92.



cal values need to be present, sufficient mutual trust being the chief among them.<sup>39</sup> In other words, understanding economic theory is not a sufficient condition of reaping gains from trade—the presence of appropriate informal institutions that constitute the moral culture of a given society is equally important in this context. Absent such institutions, their formal counterparts aimed at facilitating beneficial economic processes are unlikely to exhibit “institutional stickiness”—that is, they are unlikely to be accepted as a permanent part of a spontaneously developing social organism.<sup>40</sup>

This, nonetheless, does not change the fact that understanding economic theory is a necessary condition of reaping gains from trade—even in view of their normative preconditions economic phenomena remain subject to the underlying causal laws, so regardless of its level of trust an autarkic society cannot reach the degree of cooperative efficiency and prosperity characteristic of societies that participate in the international division of labor.

Similarly, even if the members of a given community grasp the paramount role of deferred gratification and capital accumulation in the process of consistent economic growth and development, they cannot make practical use of it unless they acquire and deeply internalize the classical moral virtues of temperance and frugality. Furthermore, insofar as they allow these virtues to deteriorate in an already well-developed economy, for instance by increasingly relying on debt and leverage rather than equity, they expose the economy in question to systemic fragility, which can culminate in cascading bankruptcies and other manifestations of the debt domino effect.<sup>41</sup>

Yet another illustration of the negative relevance of ethics to economics consists in the significance of comprehending the normative core of the job of the entrepreneur. The logical effects of various kinds of entrepreneurial activity can be elucidated in purely

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<sup>39</sup>Francis Fukuyama, *Trust: the social virtues and the creation of prosperity* (London, UK: Hamish Hamilton, 1995).

<sup>40</sup>Peter Boettke, Christopher Coyne, and Peter Leeson, “Institutional Stickiness and the New Development Economics,” *The American Journal of Economics and Sociology* 67, no. 2 (2008), pp. 331–58.

<sup>41</sup>Nassim N. Taleb, *Antifragile: Things That Gain from Disorder* (New York: Random House, 2012).

economic terms—some entrepreneurs are conceptualized as revolutionary agents who upset the existing market equilibrium by introducing innovations, while others are regarded as coordinating agents who restore market equilibrium by engaging in price arbitrage, these two modes of operation sometimes being seen as complementary and mutually reinforcing.<sup>42</sup> The same goes for the functional preconditions of entrepreneurial action—pure economic analysis can demonstrate that entrepreneurs, qua uncertainty bearers, cannot be cogently thought of as propertyless deliberators, but only as owners of capital structures of production, capable of earning profits and incurring losses.<sup>43</sup>

However, the above observations, while necessary, are nonetheless insufficient for creating and maintaining the kind of institutional and organizational environment in which entrepreneurship can flourish and serve as an essential engine of economic growth and development. An additional indispensable element in this setting is a widespread recognition of the dignity of the entrepreneurial class and other representatives of bourgeoisie professions.<sup>44</sup> Only given the prevalence of such a mindset can a sufficient number of individuals be enticed into entrepreneurship and persistently strive for the development of relevant competencies. Moreover, it should be noted that the competencies in question contain a crucial ethical core in its own right, since they correspond directly to the classical moral virtues of courage and prudence, the former being necessary in the context of introducing innovations and the latter being necessary in the context of spotting unexploited profit opportunities and deploying scarce resources under conditions of uncertainty.

In sum, economics by itself can describe the immutable laws of social cooperation and their logical strictures, but it cannot fully anchor their concrete manifestations in the actual world of human affairs. To do this, it needs to partner with those disciplines that

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<sup>42</sup>Randall Holcombe, "Entrepreneurship and Economic Growth," *Quarterly Journal of Austrian Economics* 1, no. 2 (1998), pp. 45–62.

<sup>43</sup>Joseph T. Salerno, "The Entrepreneur: Real and Imagined," *Quarterly Journal of Austrian Economics* 11, no. 3 (2008), pp. 188–207.

<sup>44</sup>Deirdre McCloskey, *Bourgeois Dignity: Why Economics Can't Explain the Modern World* (Chicago: University of Chicago Press, 2010).

focus on the normative values and attitudes whose presence ensures that the aforesaid laws are productively utilized rather than vainly rebelled against—and in this category ethics stands as the most important field to consider.

## CONCLUSION

To conclude, economics can be defined as value-free, but value-relevant. As such, it delimits the scope of what is logically possible in the realm of human action, thereby putting disciplining constraints on ethical thinking and allowing it to follow strictly the principle of „ought implies can.” By the same token, however, it reveals the ethical potential of social cooperation, which demonstrates a natural complementarity between utility and goodness, between prosperity and virtue, and between subjective satisfaction and objective flourishing. This is not to say that the complementarity in question obtains automatically—far from it, its establishment requires not becoming overly enamored with the low-hanging, exclusively hedonic fruits of the extended social order and not losing sight of its qualitatively deeper perspectives. Still, this realization too requires familiarity with the logical workings of such an order, which can be furnished solely by the study of economics.

Ethics, on the other hand, can be defined as value-laden, but fact-relevant. As such, it points out that various economic phenomena have their necessary ethical preconditions, thereby enriching economic analysis and making it institutionally and culturally realistic. To take a specific example, purely positive economic developments such as patterns of comparative advantage or capital accumulation are grounded in essential normative foundations such as sufficient mutual trust, diligence, and thrift. Furthermore, and equally importantly, ethics provides indispensable tools to solve organizational problems that inevitably appear in the context of managing complex structures of social cooperation.

In sum, economics and ethics complement and reinforce each other’s analytical potential, but only provided that they maintain their strictly defined methodological and substantive differences. Nevertheless, it appears that ethical analysis devoid of economic considerations is more likely to go astray than economic analysis devoid

of ethical considerations.<sup>45</sup> This is probably because ethics deals with a specific subset of cooperative endeavors, while economics deals with cooperative action as such. In other words, sound economic investigation, conscious of its professional logic, is less likely to fall prey to separating “oughts” from “cans,” since it inherently abhors praxeological impossibilities.

And yet, as I have tried to argue throughout the present paper, economics cannot be entirely decoupled from ethically relevant notions. Its elucidation of the intricacies of the market process, whereby self-interested mutuality engenders intersubjectively ascertainable efficiency, can hardly be regarded as having no moral import. Thus, one is almost tempted to designate economics as the meta-ethics of cooperation—i.e., the science that, while being strictly non-normative, nonetheless expounds the logical essence of normative coordination.

The difficulty of finding the right kind of terminology in this context testifies to the complexity and multidimensionality of the relationship between economics and ethics. However, it seems necessary to see this relationship in a clear light if the two disciplines under consideration are not to sabotage each other’s successes, serving instead as the twin pillars of materially and spiritually robust social development.

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<sup>45</sup>Helmut Schoeck, *Envy: A Theory of Social Behaviour* (Indianapolis: Liberty Press, 1987 [1966]).

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# Index

Compiled by Roger E. Bissell

- agent neutrality, 79n49, 79n50. *See also* equinormativity; universality
- agent relativity, 72, 76, 79n49
- alcohol
- abuse, 4, 26
  - deaths, 36
  - prohibition, 133
  - use as impediment to consent, 203
  - use as increasing likelihood of violent behavior, 133
- American Founding Fathers, 83
- Analytical Marxism, 159–61. *See also* Cohen, G. A.; Elster, Jon; Rawls, John; Roemer, John
- as methodological individualist, not ontological individualist, 180n96
  - as primarily focused on normative considerations, 155
  - basic premises of, 159
  - critiques of, 160–1
- anarchism. *See also under* libertarianism
- as *reductio ad absurdum* for rights theory, 188
  - individualist anarchism, 49, 187
  - libertarian anarchism, 194
  - logical necessity of, 188
  - market anarchism, 58–61
  - methodological anarchism, 57
  - philosophical anarchism, 40, 45n15, political anarchism, 57
- Anderson, Benjamin, 19
- Aristotle, 7, 12, 27, 68, 86–87, 90, 173
- conflation of polis qua community with polis qua state, 67
  - Neo-Aristotelian, 75n38, 79n50, 85
- Austrian School, 8n22, 35, 230, 235
- Ayer, A. J., 100n9
- Bastiat, Frédéric, 7, 7n18, 237
- Berlin, Isaiah, 75–76n40
- Bhattacharya, Jayanta, 24
- Bhopal, Ray, 22–24
- Blackburn, Simon, 95
- Bornedal, Ole, 113
- Butler, Judith, 162–3
- Calvin, John, 99
- Centers for Disease Control, 4n9, 150
- classical liberalism, 156, 166, 168, 170, 177, 180, 183, 185. *See also* libertarianism
- as methodological and ontological individualist, 180, 180n96
  - vs. post-Marxist populism, 180–2
- classical (orthodox, traditional) Marxism, 155–9, 161, 165–8, 176, 178–80, 182. *See also* Marx, Karl

- as methodological collectivist, 159
- as methodological holist, 180
- as primarily focused on strict defense of Marxist economics
- basic premises of, 156
- Codevilla, Angelo, 5n11, 32
- coercion. *See also under* epidemic
  - by the state, government, 40, 47–48, 68n18, 124, 128–34, 134n12, 136–38, 140, 145, 147, 177, 182, 188–90, 192, 194–5
  - coercive monopoly for enforcing rights, natural duties, 40, 59–60
  - compulsory isolation as sometimes justified, 131–6
  - contact-tracing and compulsory testing as sometimes justified, 136–7
  - criterion for deciding whether coercive intervention is morally justified, 147–8
  - in a state of nature, stateless society, 41, 47, 57, 61 (*see also* anarchism)
  - limits on crowd size, bans on large gatherings, school closings as justified, 139–42
  - lockdowns, closing “non-essential” services, jobs, travel, 148–51
  - mandated mask-wearing as justified, 139
  - mandated social distancing as justified, 139
- Cohen, G. A., 160, 168n53
- common good, 71, 75
- consent policies. *See* sexual consent policies. *See also under* violation
- consent theory. *See also under* Locke, John
  - ontological views of consent, 201, 201n3
- consequentialism, consequentialist, 12, 89–90
- constitution, 9 fig., 25 fig., 58. *See also under* freedom; rights
  - constitutional rights restriction, 207–8
  - constraints, 58
  - limitations, 182
  - principles, 96
  - rights not absolute, 208
  - US Constitution, 65, 83
- Covid-19 (aka SARS-CoV-2), 1–2, 4n9, 5, 7, 15–16, 17 fig., 18, 21–24, 27, 31–34, 126, 130–1, 134, 138n16, 148–53, 154n34
- Craig, Andy, 34
- crime, 134n12, 136, 196, 203n9, 204n10, 222n44, 224–5. *See also* violence
- crisis, 2, 6–7, 13, 20–21, 30. *See also* disaster; emergency
- Cultural Studies, 163. *See also* Post-Marxism
- defense, 31, 34–35, 126–7, 133
  - against dangerous diseases, 135–6, 141–6
  - against harm, 24, 27, 33, 35–36, 44, 52, 55, 128, 130–1, 133–7, 142–4, 146, 149–50, 191, 193, 203, 209, 213, 224
  - against risk, 132–4, 137–8, 143–51, 191–2, 196, 210n20, 212–3, 216
  - against threat, 30–31, 43, 47, 53, 55–57, 60–62, 66, 70, 72–73, 128, 132, 134, 134n13, 137, 140, 148
  - against violence, violation, 31, 34–35, 126–7, 133
  - of justice, 57, 62, 78, 87–88
  - of laissez-faire, capitalism, free exchange, 6, 12, 156
  - of liberty, 2, 6, 27, 37, 132
  - of rights, 2, 30–31, 34–35, 70, 126–7, 141–6
- Den Uyl, Douglas J., 6, 12, 25, 29–30, 30n90, 30n92, 35, 69n19, 79n49, 170n60

- deontology, deontological, deontic, 55, 90
- de Tocqueville, Alexis, 100n6
- dialectic(s), 6–7, 162, 176
  - dialectical libertarianism. *See under* libertarianism
  - dialectical materialism. *See under* Marxism
- Dialectics and Liberty Trilogy, 10
- disaster, 2, 125–6. *See also* crisis, emergency
- Disney Company, 4
- drug
  - abuse, 4, 26
  - overdose deaths, 36
- economic determinism. *See under* Marxism
- economics. *See also under* ethics
  - as dealing with cooperative action as such, 252
  - as meta-ethics of cooperation, 252
  - as value-free, but value-relevant, 228–9, 251
  - negative relevance to ethics, 231–40
  - positive relevance to ethics, 240–5
- Elster, Jon, 160
- emergency, 31, 35, 37, 125–6, 181. *See also* crisis; disaster
- emergency powers, 24
- epidemic, 2, 14–15, 17, 21–22, 33, 123, 123n1, 124–6, 128–9, 134–5, 135n15, 138, 142, 147–8, 151–4, 154n34. *See also* pandemic
  - coercive non-pharmaceutical interventions (CNPIs), 124, 127–9, 131, 136–40, 144, 146–7, 153 (*see also under* coercion)
  - non-pharmaceutical interventions (NPIs), 123–4
  - pharmaceutical interventions (PIs), 123
- Epstein, Richard, 141
- equinormativity, 73, 79, 79n50, 80, 92. *See also* agent-neutrality; universality
- ethics
  - as dealing with a specific subset of cooperative endeavors, 252
  - as value-laden, but fact-relevant, 229, 251
  - business ethics as straddling economics and ethics, 227
  - economics and ethics, 11, 227–52
  - ethical ideals as unavoidable by political philosophy, 66
  - ethical norms, 35, 73–74, 76–78, 79n50, 80, 92–93, 170
  - ethical pluralism, 64n3
  - ethics of emergencies, 35, 125 (*see also* politics: politics of emergencies)
  - eudaimonist ethics, 36, 80
  - harm vs. wrong, 142, 146
  - individualist ethics, 79n50, 80
  - individualistic perfectionism, 72, 79n50
  - negative relevance to economics, 248–51
  - normative ethics, 71, 79n50, 80, 90–92
  - positive relevance to economics, 246–8
  - utilitarian ethical theory, 79n50
- false alternatives, false dichotomies, 10–11, 25, 34, 97. *See also* natural complementarities
  - as variants of mind-body dichotomy, 10
  - big government vs. small government, 34
  - decency, caring vs. prosperity, freedom, property, 11, 25
  - ethical vs. economic point of view, 11
  - idealism vs. realism, 90–93

- intrinsicism vs. subjectivism, 105–9  
 moral vs. practical, morality vs.  
 prudence, 10–11
- Farr, William, 17
- Fauci, Dr. Anthony, 16, 21, 32–33
- Feyerabend, Paul, 116–7n31
- First Amendment, 207–8
- Flauhault, Antoine, 18
- flourishing. *See* human flourishing
- Foucault, Michel, 102n13
- Frankfurt School. *See under* Marxism
- freedom, 25, 28, 35, 38, 42–43, 45–48,  
 52, 55, 60, 71, 124, 128, 140–1,  
 159–60, 169, 174, 180, 208, 223, 228.  
*See also under* defense; violation  
 economic, free exchange, 37, 156,  
 159, 177, 180  
 external, 46–48  
 of speech, 207–9  
 sexual, 226  
 Freeman, Samuel, 48n22  
 Freud, Sigmund, 100n6, 175  
 Friedman, David, 49  
 Fromm, Erich, 159
- Galson, William A., 64
- Gaus, Gerald, 50n29, 66, 83–90
- Geuss, Raymond, 63
- Gibson, Eric, 114n29
- Gordon, David, 37, 54, 160–1, 187–8,  
 191–2, 194–7
- government, 2–4, 10n28, 14, 16, 20,  
 22, 30–31, 35, 37, 40, 71, 148–9,  
 151–3, 154n34, 168–9, 180–1, 183–4,  
 188, 208. *See also* the state
- properly limited government, 2, 14,  
 19, 21, 29–30, 34, 36, 156, 183. *See  
 also* classical liberalism; libertarian-  
 ism; minimal state
- Gramsci, Antonio, 164–5, 177
- Grant, James, 19–20
- Hall, Edward, 64n3, 80
- Hamlyn, D. W., 114
- Hampshire, Stuart, 81
- Hanson, N. R., 101n11
- Harding, Warren (pres.), 19–20
- Hardt, Tony, 163
- Hart, H. L. A., 142
- Hayek, F. A., 158, 168, 181–2
- Hayekian, 175n78
- Hazlitt, Henry, 7n18, 11, 25, 35
- healthcare, 3, 23, 26, 31, 212n22
- hegemony. *See under* Post-Marxism
- Henry, Patrick, 37
- Heraclitus, 101n10
- Hippocratic Oath, 19, 24, 36, 123
- Hohfeld, Wesley Newcomb, 43
- Honigsbaum, Mark, 14–15
- Hoover, Herbert, 16, 19–20
- Horwitz, Steve, 111
- human flourishing, 67–70, 70n22,  
 71–78, 78n47, 90. *See also* self-per-  
 fection
- human good, 72, 74–75, 75–76n40, 90.  
*See also* common good
- Hume, David, 100n7, 101n12
- impersonalism, 79n49. *See also* agent  
 neutrality, agent relativity
- individualism, individualistic, 139–41.  
*See also* human flourishing, method-  
 ological individualism, ontological  
 individualism. *See also under* anar-  
 chism  
 individualistic justification, 139  
 individualistic perfectionism, 72,  
 79n50
- individual liberty. *See* liberty
- individual rights. *See* rights
- Institute for Global Health, 18
- integrated political diversity, prob-  
 lem of, 90, 92. *See also* liberalism’s  
 problem
- intersubjectivity, 44–45, 111, 120,  
 231–2, 235, 245, 252

- intrinsicism, 97, 105–9, 113, 134, 188  
 intrinsic reality, intrinsically in reality, 107, 116n31
- invisible hand theory of the state. *See under* Nozick, Robert
- Joseph, H. W. B., 13
- Jubb, Robert, 66, 90–92
- Kant, Immanuel, 39, 41, 45–46, 48–49, 53, 53n33, 53n34, 55, 55n38, 56–57, 59n42, 61–62, 70n22, 77n44, 99n4, 110n21, 127  
 Kantian ethical theory, 79n50  
 Kantian natural duty theory, 40–41, 45–48  
 Neo-Kantian, 110
- Kazin, Michael, 175
- Kierkegaard, Søren, 39
- Kingdom of God, 61
- Kohlberg, Lawrence, 245
- Kolakowski, Leszek, 156
- Kuhn, Thomas, 102n14
- Laclau, Ernesto, 164–80, 182–4  
 and discourse theory, 169–71  
 and social antagonism, 172–4, 176–80  
 and populist leadership, 174–6
- laissez faire, 5–6, 11, 15, 19, 21, 24, 27.  
*See also under* freedom; defense
- law of diminishing marginal utility, 241–4
- law of unintended consequences, 3
- legitimacy of use of force, 62, 132–3, 134n12, 144, 189
- legitimacy of state, government, 40–41, 45–46, 48, 59, 61–62, 66, 68, 72–74, 79n50, 80, 92–93, 182, 188, 190. *See also* political legitimacy
- liberal democracy, 156, 166, 183  
 incompatible with Post-Marxism, 163, 166, 180, 183–5  
 limited version. *See* classical liberalism  
 unlimited version. *See* welfarist liberalism
- liberalism, 60, 67n12, 76n40, 93, 96, 164, 181–2, 185. *See also* classical liberalism; welfarist liberalism.  
 and inter-subjectivity, 120–1  
 and nihilism, 99  
 and objective vs. subjective vs. intrinsic, 104–9  
 and objectivity, 97, 110–20  
 as merely subjective, 98–103
- liberalism's problem, 67, 67n12, 68–76, 78–80, 82, 89. *See also* integrated political diversity (problem of)
- libertarianism, libertarian, 6, 34, 36, 38–39, 40, 48, 66, 161n23, 187. *See also* classical liberalism; minimal state  
 libertarian anarchism/anarchist libertarian, 39, 188, 194  
 and Hobbesian fear, 192, 194  
 dialectical libertarianism, 6
- liberty, 30. *See also under* defense
- Locke, John, 39–46, 48–49, 61, 67n12, 73, 189  
 Lockean consent theory, 41–45
- Mack, Eric, 142–3, 143n22, 144, 146
- Marchart, Oliver, 163
- Marx, Karl, 8n22, 156–7, 179
- Marxism, 66, 155–6, 158, 161, 165, 167–8, 170–1, 176, 178–80, 183–5.  
*See* Analytical Marxism; classical Marxism; Neo-Marxism; Post-Marxism  
 economic determinism, 156  
 four main theoretical perspectives of, 155  
 Frankfurt School, 158 (*see also* Neo-Marxism)  
 strict political control or elimination of capitalism as main ideal, 155

- dialectical, Marxist materialism, 167  
 philosophical materialism, 156–8, 162  
 Maslow, Abraham, 244–5  
 Medlin, Brian, 102n15  
 metanorm, 67n13, 78–80  
 meta-normative vs. normative as political vs. ethical, 170  
 metaphysical-epistemological positions in history of philosophy, 106. *See also* objectivity; intrinsicism; subjectivism  
 metaphysical realism, 66, 66n10, 78, 85, 94, 94n69, 109n20  
   as basis for realistic idealism in normative ethics and political philosophy, 80  
   as context for rejecting political realist-idealist dichotomy, 66  
   importance for ethics and political philosophy, 94n69  
 methodological collectivism, 158–9, 171. *See also* Neo-Marxism  
 methodological holism, 180. *See also* classical Marxism; Post-Marxism  
 methodological individualism, 180, 180n6. *See also* classical liberalism; Analytical Marxism  
 Mill, John Stuart, 28, 70n22  
 Milton, Ohmer, 112  
 minimal state, 39, 50–51, 187–8, 192, 194, 194n12, 195, 197. *See also* classical liberalism; libertarianism  
 Montague, W. P., 109n20  
 Mouffe, Chantal, 164–5  
  
 naïve realism, 120  
 natural complementarities. *See also* false alternatives  
   between utility and goodness, 251  
   between political realism and political idealism, 65  
   between prosperity and virtue, 251  
   between subjective satisfaction and objective flourishing, 251  
 natural duty theory. *See under* Kant, Immanuel  
 Negri, Antonio, 163  
 Neo-Marxism, 158, 165, 176–7, 180  
   as methodological collectivist, 158  
   as primarily focused on cultural analysis, 155  
   basic premises of, 158  
 Newsom, Gavin, 4  
 New York Board of Health, 148  
 Nietzsche, Friedrich, 102n12, 107  
 nonconsequential, 28–29  
 Nozick, Robert, 132–3, 133n12, 138, 142–3, 143–4n22, 144–5, 147n25, 161, 161n23, 179, 187–94, 196–7  
   Gordon's objection to Skoble's interpretation of Nozick's minimal state argument, 191–3  
   Market anarchist objections to Nozick's minimal state argument, 58–61  
   Nozick's invisible hand argument for minimal state synthesizing Locke and Kant, 40–41, 48–57, 61–62  
   Nozick's argument for minimal state not defeating anarchist objections, 194–7  
   Skoble's interpretation of Nozick's argument for minimal state, 188–91, 193–4  
  
 Oakeshott, Michael, 69n19  
 objective ends, 75n40  
 objective "wholes," 158  
 objectivity, 74, 96–98, 100–16, 116n31, 117–21, 229, 232n10, 243–5, 245n32. *See also under* social cooperation  
   abandonment leads to brutality and is incompatible with civil society, 97

- interfered with by fallacy of False Alternative (overlooked option), 97, 105–9
- interfered with by fallacy of Implicit Denial (hidden false assumption), 97, 105–6, 109–17
- needed because cognition not automatic, 97
- Ollman, Bertell, 8n22
- ontological individualism, 180, 180n96. *See also* classical liberalism
- orthodox Marxism. *See* classical Marxism
- pandemic, 1–6, 14–16, 18n56, 19, 21–22, 26–27, 34, 38, 123n1, 130, 152. *See also* epidemic
- Pascal, Blaise, 101n12
- Payne, Daniel, 33
- People's Republic of China, 2, 152, 154
- philosophical materialism. *See under* Marxism
- Pineau, Lois, 217–8
- Plato, 72, 99n6, 106
- pluralism, plurality, 67, 69, 75–76n40, 88, 172, 175, 181, 183, 185
- political idealism, 64–67, 80, 84, 92. *See also* Rawls, John
- not limited to ideals of justice, 93
  - often views ethical norms as of one type or having same function, 73 (*see also* equinormativity)
- political legitimacy, 40–41, 46, 61, 72, 92, 182, 188. *See also* legitimacy of state, government
- political philosophy, 39–40, 64, 64n3, 65, 65n6, 68, 76n40, 80, 83–84, 93, 156
- fundamentality of rights, 28
  - improved political reasoning requires more universal principles, 74
  - integrated political diversity, reconciling competing views of human flourishing, as central, basic problem, 66, 68, 90, 91n64 (*see also* liberalism's problem)
- irreducible to applied normative ethics, 68, 71, 90–91
- not just about justice, 93
- not requiring rejection of ethical ideals, 66
- radically deficient without metaphysical realism, 94
- political realism, 64, 64n3, 65, 67, 71, 81, 84, 90–92. *See also* Williams, Bernard
- defined by six guidelines, 91
  - does not preclude political idealism, 92
  - does not rule out ethical solution to liberalism's problem 92
- politics, 35, 68, 81–82, 91, 162–5, 167–9, 171n61, 172–3
- as a unity in diversity according to a guiding principle of social interaction, 82
  - essence is reconciliation not conflict, 66, 69, 75, 81–83, 90
  - ideals and principles together are necessary for both acquiescence and affirmation, 83
  - politics of emergencies, 35 (*see also* ethics: ethics of emergencies)
  - “virtue politics,” 93 (*see also under* political idealism)
  - with only ideals, conflict replaces acquiescence, 83
  - with only principles, pragmatism replaces affirmation, 83
- Popper, Karl, 101n11, 161–2n26
- populism. *See under* Post-Marxism
- Post-Marxism, 155, 161–6, 168–9, 171, 175, 179–80, 182–5. *See also* Butler, Judith; Gramsci, Antonio; Hardt, Tony; Laclau, Ernesto; Marchart, Oliver; Mouffe, Chantal; Negri, Antonio;

- Rancière, Jacques  
 as hegemonic, 164–7, 174, 177, 180–3  
 as methodological collectivist, 171  
 as methodological holist, 180  
 as populist, 166–76, 180–2  
 as primarily focused on political construction of social antagonism, 155  
 incompatible with liberal democracy, 163, 166, 180, 183–5  
 macro-political Post-Marxism vs. micro-political resistance, 163–4  
 rejecting economic essentialism and historical determinism, 165  
 replacing argumentative logic with terminology, 161  
 viewing liberal contractualism as a fiction reducing politics to the State, 163  
 practical wisdom, 72, 74, 74n36, 76n40, 81, 90
- Rancière, Jacques, 163–4
- Rand, Ayn, 8n22, 9–10, 10n27, 11–13, 27–28, 35, 38, 71, 125–6
- Rasmussen, Douglas B., 6–7, 25, 29 30, 30n90, 30n92, 35, 120, 170n60
- Rawls, John, 64, 64n3, 65n6, 78–79, 83, 85–86, 159–60
- realism. *See* metaphysical realism; naïve realism; political realism
- redistributive welfare-state liberalism. *See* welfarist liberalism
- rights. *See also under* defense, violation  
 as condition-setting not condition-seeking norms, 78  
 as regulating not guiding human conduct, 69  
 natural right to life and liberty vs. natural right to private property, 26  
 prohibit-but-compensate as middle ground between permitting and simply prohibiting, 143–5  
 protection by property rule (permission) vs. liability rule (compensation), 141–3, 143–4n22, 144–7, 147n25, 148–9, 151, 191  
 right of self-defense, 132, 188  
 right to liberty, 26, 30  
 right to life, 26, 126–7  
 right to property, 26, 46–47, 126, 128, 131, 153, 184  
 universal applicability of, 170–1
- risk. *See under* defense
- Robinson Crusoe, 248
- Roemer, John, 160–1
- Roosevelt, Franklin D., 16, 37
- Rothbard, Murray, 14, 16, 21, 49, 133–4, 134n13
- Russell, Thaddeus, 113
- Sachs, Jeffrey, 115
- Scheare, Gabriel, 111
- Schmitt, Carl, 82
- Schumpeter, Joseph, 103n16
- Sciabarra, Chris Matthew, 6–8, 8n22, 8n23, 9n24, 9n25, 10–12, 35
- self-direction, 30, 30n90, 67–70, 70n22, 70n25, 75–77, 79, 180n96  
 required by human flourishing 67  
 protected by liberty, rights, limited government, 30
- self-perfection, 72–74, 78. *See also* human flourishing
- sexual consent policies. *See also* consent theory: ontological views. *See also under* violation  
 advantages of affirmative consent policy, 203–16, 217–22  
 advantages of lack of dissent policy, 216–7, 221–2, 224, 226  
 affirmative consent as voluntary, conscious, unambiguous, and ongoing, 200



- lack of dissent claimed unfair and burdensome for victims and insufficient for valid consent, 199  
 problems with affirmative consent, 200, 203–23, 225  
 valid consent as moral justification of sexual behavior, 199  
 Simmons, John, 40, 45n15  
 skepticism, skeptical, 96, 98, 104, 117–8, 120–1  
 Skoble, Aeon, 192, 194, 196  
 Smith, Adam, 103n16, 237  
 social cooperation, 192, 232, 232n10, 240, 244–5, 245n32, 248, 250–1  
   as semi-objective, 232, 243, 245n32  
 solipsism, 120  
 Solomon, John, 33  
 South Korea, 152–3, 153–4n34  
 Spooner, Lysander, 49  
 state, the, 37, 39, 45, 45n15, 47–49, 55n38, 57n39, 59, 61–62, 99n6, 129, 131, 133–4, 163, 182, 188–90, 192, 195–6, 218. *See also* minimal state emergence through just processes without consent, 40  
   legitimization by synthesis of Lockean consent and Kantian natural duty, 40  
   statecraft as not soulcraft but securing liberty for humans to develop their own souls, 71  
 state of nature, the, 41, 44, 48  
 St. Augustine, 98  
 Stevenson, C. L., 100n8  
 subjective criterion of valid consent, 201. *See also* sexual consent policies  
 subjectivism, 97–103, 103n16, 104–9, 110n21, 112–14, 116, 116n31, 120–21, 231–2, 241, 243–5, 251. *See also* intersubjectivity  
 suicide, 4, 26, 36  
 Sunstein, Cass, 102n13  
 Sun Tzu, 155, 185, 185n111  
 super-spreader, 32–33. *See also* epidemic; pandemic  
 Supreme Court, 208  
 Sweden, 5n9, 16, 18, 18n14, 21  
 Taiwan, 152–3  
 Tannehill, Morris and Linda, 49  
 Thompson, Derek, 1, 34  
 threat. *See under* defense  
 transpersonalism, 79n49. *See also* agent relativity  
 Tri-Level Model of Social Relations, 8, 8n22  
 Tucker, Benjamin R., 49  
 Tucker, Jeffrey A., 15–16, 18n56  
 Typhoid Mary (Mary Mallon), 32–33, 131–2, 136  
 unemployment, 2–4, 4 fig., 21, 146, 149n28, 157, 177  
 United Nations Conference on Trade and Development, 3n3  
 universal, 74–78, 98, 100n9, 102–3, 120. *See also* human flourishing vs. universalist, 170–1, 170n60  
   vs. being universalizable, 75n37  
 universal income, 160  
 universality, universalism, 67, 79n50, 98, 103, 121. *See also* agent neutrality; equinormativity  
 utilitarianism, utilitarian, 27–29, 36, 53, 55, 131, 140, 234, 240  
 Van Parijs, Philip, 160  
 violation  
   of consent policies, 205, 207, 209  
   of freedom, 42, 47, 223  
   of rights, 35, 39, 44, 49, 51–53, 53n34, 54, 56–57, 60, 126–8, 132, 134n12, 135, 139–40, 142, 144n22, 147, 188–90, 192–3, 208

violence, 4, 5, 51, 81–82, 172n66, 184,  
189, 195–7. *See also* crime. *See also*  
*under* defense

von Mises, Ludwig, 168, 182, 227

welfarist liberalism, 166, 188

White, Hayden, 113

Whitmer, Christine, 4

Williams, Bernard, 64, 64n3

Williamson, Oliver, 8n22

Wilson, Woodrow, 20

Wittgenstein, Ludwig, 100n9

Wood, Connor, 112

Woods, Thomas E., Jr., 19, 22

Young, Cathy, 204n10