

REASON PAPERS

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Nonrelativity and Subjectivity of Aesthetics Claims

Imtiaz Moosa

My paper delineates how some aesthetic claims can be unequivocally true.¹ Unfortunately aesthetic claims are often defined in ways that rule out offhand the possibility of them ever being true. They are said to be nonempirical, because claims that make use of merely our senses or of scientific, empirical procedures, like claims about the types of pigments used in a painting, are clearly not aesthetic. But we do not have to regard aesthetic claims as nonempirical, if the concept of empirical were broadened to include observation that is informed by aesthetic sensibility. Or they are said to be nonfactual, to contrast them from factual claims that are clearly not aesthetic, like claims about when and by whom an artwork was created. But are claims about the style of a painting being neoclassic or romantic — which are clearly aesthetic — any less factual? Or they are said to be value claims, surreptitiously implying that they are colored by our biases and personal ideals. I concede that value-loaded claims, as about an artwork being majestic and monumental, are certainly aesthetic, but value-neutral ones about, say, a work being stark and blunt, or ornamental and gilded, are equally aesthetic. And must we assume that all value claims are biased? Or they are said to be relative and just matter of opinion, because aesthetic qualities, like “ugly,” are not something palpable. But it is crass positivism to suggest that since aesthetic qualities are not physical properties, they cannot be correctly attributed to artworks. The widely-held view notwithstanding, that aesthetic claims are just matters of taste and opinion, the fact is it is normal to acknowledge that some aesthetic claims are incontrovertibly true, about for example a melody being lively and upbeat.

My paper defends two theses. Thesis One is, *some* aesthetic claims are true and nonrelative. I do not deny that there are also relative aesthetic claims. However, I do not investigate here what sorts of aesthetic claims are relative. Rather, my primary question is, how can an aesthetic claim be true for all? Thesis Two is, *all* aesthetic claims, even those nonrelative, are subjective; that is to say, they are in the final analysis contingent on how humans are constituted. This raises the question of how the nonrelative aesthetic claims are also subjective. My strategy is to first examine gustatory claims. These lend themselves better to scrutiny. By my establishing nonrelativity of some gustatory claims (by

refuting the positivists' stance), I will the better demonstrate nonrelativity of some aesthetic claims.

I. The Issue of the Relativity of Gustatory Claims; and Brief Remarks on Their Subjectivity

This formal requirement holds: for it to be a gustatory or an aesthetic claim it should *not* merely state the subject's response toward foods or artworks; rather it must be formulated as making a claim about foods or artworks themselves. This is so even if it were reducible to a "personal opinion." And a claim C would be reducible to a personal opinion if these two conditions apply: (1) C can be fully translated to a descriptive statement about the response and attitude of the person towards some artifact or food, without any loss of meaning. (2) C is not binding on others.

If all gustatory and aesthetic claims were essentially personal opinions, then they would be relative. Definition: A claim X is relative if it is possible for some humans to correctly uphold X, while for others to correctly uphold the negation of X. It is a personal opinion to declare, "Apples taste better than oranges." However, this claim is incorrectly upheld if the subject actually preferred oranges instead.

An obvious rule: it is never possible to correctly uphold a claim that is categorically false. But a relative claim and its negation can be correctly upheld.

Hence relative claims are not categorically false. This rule is also obvious: If a claim R were categorically true, then the claim not-R must be categorically false. Consequently not-R could not be correctly upheld. But by definition the negation of a relative claim can be correctly upheld. Hence R cannot be categorically true. Thus relative claims can *also* be defined as those that are neither categorically true nor categorically false.

Let us consider the positivists' reason for relegating all gustatory claims to relativism. A. J. Ayer declares that "any dispute about a matter of taste will show that there can be disagreement without formal contradiction."² But why does he believe that a gustatory claim and its contrary can be both always correctly upheld? The answer is implicit in this statement: "At the same time, it must be admitted that if the other person persists in maintaining his contrary attitude, without however disputing any of the relevant facts... then there is no sense in asking which of the conflicting view is true..."³ Hence only "facts," or more precisely, only aposteriori claims about the physical world, are not relative.⁴ This raises two questions. Are gustatory claims reducible to factual ones? If not, *must* they then be deemed relative?

Consider these three assertions (A1 to A3):

- A1. This substance is bitter.
- A2. This cup is red.
- A3. This person is old.

A2 and A3 could be nonrelative *to some degree* for positivists, because “red” and “old” could be translated to claims about the physical world. *Red* could mean “a surface reflecting light having wavelength of a particular range R” (or, “range R light” for short), and *old* would denote “having been in existence for more than ninety percent of the average total life span of the members of one’s species, kind or group.” This does not entirely do away with relativity because some odd person may perceive range R light as blue, or may regard old anyone above sixty percent of the average total life span. Thus we would have to *stipulate* to what facts “red” and “old” refer.

These are the requirements of the positivists: A claim that predicates a property P of a thing T is nonrelative, only if P can be correctly substituted for a descriptive claim about some *physical* states-of-affairs S. The *minimum* condition for this substitution to be possible is that whenever we correctly apply the predicate P there also exists the physical fact S, because S is a necessary condition for P. It may be objected that A2 does not meet the positivists’ requirements, because the necessary condition for redness is not the physical fact of the reflected range R light, but that there exist the peculiar sense data that we have, to which we give the appellation “red.” I concede that (1) how we perceive light is a necessary condition for what is called red, and that (2) how we perceive something, or what sense data we have, is not empirically verifiable, physical states-of-affairs but is a private experience, and hence that (3) this necessary condition does not meet the positivists’ requirements for nonrelativity. But there *also* is a physical state-of-affairs which is a necessary condition. Since what a healthy, normal eye perceives to be red can legitimately be regarded as red, and since a healthy eye does perceive the range R light to be red, the range R light is also a necessary condition for redness.

The question is: Does A1 meet the positivists’ requirements for nonrelativity? Perhaps for certain substances, like quinine, we could isolate the chemical compound X that makes quinine bitter; and any substance containing a certain percentage of X would most likely also taste bitter. But while X is a sufficient condition for why some foods are bitter, X is not a necessary condition for why all bitter things are bitter. Even substances unlike quinine and devoid of X can be bitter. It is a common experience that many disparate substances taste bitter, making the hypothesis unlikely that *all* bitter substances share some common chemical ingredients. In other words, it is possible that there is not even a fixed set of chemical compounds, which is a necessary condition for bitter taste. Since “bitter” may not stand for some factual condition, A1 could be considered relative by positivists.

I reject the positivists’ stance that the only true claims there are, are scientifically verifiable physical facts and apriori claims. By our everyday understanding, truth can be predicated of many other kinds of claims besides these. Hence it makes perfect sense to say of a scenery that it is majestic or quaint, without implying that these predicates refer to some properties existing “out there,” in my ken. Positivists would

regard such claims neither true nor false and would consider the common usage wrong. They decide upon how best to define truth, and then conclude the relativity of gustatory claims. I propose another route. Instead of imposing a preconceived idea of truth, I will examine the rationale for the common usage first. "Lemons are sour, quinine bitter" is proclaimed true. I ask: In what sense is this claim regarded true? Is this sense justified?

Many gustatory claims are just not reducible to personal opinions. It is required of all people to declare lemons sour. A person who finds lemons tasteless would have to concede that he finds even sour substances bland. Implicit in the claim that lemons are sour is the requirement that we apply, not our personal responses as a standard, but that of a sound tongue. And since most people have an adequate ability to taste, their consensus can be made the standard. But why cannot each decide for himself what is the standard? My answer: certain standards are often implicitly woven in the very web and woof of the meaning of certain claims. For example, it *must* be said of a hundred-year-old man that he is very old, despite the fact that a century is but a moment in geological time. Sometimes it is not left to our discretion to decide upon a standard.

In our everyday conversation, we declare some gustatory claims true. This customary practice is justified because it is consistent with what is logically expected of true claims. One requirement of a true claim is, its negation cannot be correctly upheld. No one can correctly declare that quinine is sweet, irrespective of his or her personal responses. A supra-individual standard decides bitter and sweet. Another plausible requirement of a true claim is that it be informative. The nonrelative gustatory claims *are* informative. Were a person to declare something sour or bitter or sweet, the above-mentioned supra-individual standard informs us of what to expect. (Of course a false claim disappoints rather than fulfills our expectations.) But we cannot be sure of what to expect when he declares that something is hot and spicy. What is spicy for an Irish palate is bland for an Indian, yet both regard sugar sweet and lemons sour. In conclusion, their irreducibility to physical facts notwithstanding, some gustatory claims can legitimately be said to be true and nonrelative.

Let the following claim be dubbed Type One or T1 claim, to be later distinguished from another type.

T1. Lemons are sour, quinine bitter.

Some may argue that T1 is by no means nonrelative because the healthy tongues of the members of other species may respond to quinine differently. This argument points out merely the *subjectivity* and not the relativity of T1. The reason why T1 is said to be nonrelative is that, by

implicitly requiring *all* humans to apply some supra-individual standards, T1 is thereby distinguished from those gustatory claims, which are in fact personal opinions (like, “apples taste better than oranges”). Nevertheless T1 is contingent on human constitution in a way that facts of the physical world or a mathematical proposition may not be. This makes for its *subjectivity*. My terminology points out what distinguishes T1, both, from personal opinions, as well as from factual and apriori claims. I examine the issue of subjectivity later.

There are nonrelative gustatory claims of a very different type. The very sense of these claims make it clear that the standard required for us to assent to or reject them is not that of the normal tongue, but that of a very fine one. Consider this “Type Two” (T2) claim:

T2. This is a sound, well-balanced wine.

It is the verdicts of those who are connoisseur wine tasters that establish the caliber of wines; and it is this supra-individual standard that accounts for T2’s nonrelativity. Some may object thus: Why should I consider the views of the so-called experts any better than my own predilections and judgment? Response: A person either has or has not developed the ability to discern and identify precisely the aroma, bouquet, balance, body, soundness, astringency and color of wines. Having a discerning and educated tongue is a testable quality. And there are pleasures reserved for those who have it. T2 informs us of the savors to be relished by those with developed acute sensibilities.

Finally, another separate group of gustatory claims exist. These are unique in that, while they are not merely personal opinions, they are not categorically true either. I will designate this group as relatively true claims. From a particular standpoint a relatively true claim is definitely true. That is to say we cannot adopt this standpoint, and yet deny the relatively true claim in question. However, the standpoint is but a result of fortuitous factors of birth and upbringing; and hence there exists no requirement on others to adopt it.

Consider this claim, “This Irish dish is spicy.” If an Irish dish were compared with other typical Irish dishes, or judged from the standpoint of the Irish palate or those reared on Irish foods, it could be stated incontrovertibly that a dish is spicy. But were the self-same dish Indian, it would be regarded as bland, because from the standpoint of the Indian palate, all Irish dishes are more or less bland. While there is a supra-individual standard to judge the spiciness of Irish dishes, it is not shared by all. Now consider this other example: “This Moroccan dish is done very well.” It is not merely a matter of personal opinion which dishes are done well. If there were no acknowledged differences between those dishes cooked very well and those not, we would not be able to rate restaurants and cooks. But they are rated all the time. However, only those who are familiar with and relish Moroccan cuisine can properly rate Moroccan dishes. This claim is deemed true within a certain perspective, a perspective that not all humans share or are supposed to share.

There are four kinds of gustatory claims: the two types (T1 and T2) of nonrelative claims, claims that are relative truths, and claims that are personal opinions.

All gustatory claims are subjective. A subjective truth can best be characterized as one that is not objectively true. And I propose two definitions of objective, to correspond to the two kinds of objectively true claims.

Physical facts as well as necessary apriori truths are objective. The two differ in that the former articulate contingent facts, facts that happen to have validity in this universe but need not be valid in another kind of universe, while the latter, by revealing the necessary conceptual relationships, have validity in and for any possible universe. I first discuss the objectivity of physical facts, like, "A water molecule comprises one oxygen and two hydrogen atoms." This is my *first* definition: An objective truth is a proposition whose truth is not affected by, but is independent how humans are constituted. Now, had we been constituted differently we might have been incapable either of knowing or of formulating in a meaningful way the composition of water. Nevertheless the actual composition of water remains a fact independent of what and how we conceive or formulate anything.

Also objective are the necessary apriori truths, like this mathematical claim, "The series of prime numbers is infinite." Some may argue that such a claim cannot possibly be objective because infinite series and prime numbers cannot have existence independently of minds. (What would that mean?) I will offer a second definition, according to which objectivity has to do with being independent of the *accidental* features of our natures, and not with being independent of human minds as such. That is to say, a claim would not be objectively true if it lacks independence in *this* sense: chance events in the pathway of our evolution and contingent facts of genetics and environment have formed human minds to think in particular ways, and that apriori claims express the outlook of the minds so evolved by chance, and that in different circumstances we *could* have evolved to regard very different apriori claims true. Now let us suppose this: that rationality is not merely an accidental by-product of evolution, environment and human biology, and that it consists of comprehending universal conceptual truths, and that there is no peculiarly human way of being rational, and that all beings, human or not, insofar as they reason, reason similarly. Suppose further that apriori claims express the rational point of view, thereby presupposing minds that reason. If such were the case, apriori claims would then not express some peculiar viewpoint that humans happen to have as a result of some quirks in their nature. My second definition sums all this up: Objective truths are those which all rational beings, even non-human rational beings, if they exist, must acquiesce in, and affirm to be true.

The two different kinds of claims are objective for somewhat different reasons. This makes for objectivity for each: Matters of fact are independent of human minds as such, while apriori claims are

independent of the peculiarly and specifically human viewpoint. But there is one thing we can say about *any* objectively true claim; it is not grounded in the peculiarly human way of conceiving anything.⁵

A subjective truth, by contrast, expresses specifically the human perspective, in that, it is such a claim that had humans been constituted differently, they could rightfully have regarded it as not true. Also, not all non-human rational beings have to acquiesce in what is subjectively true (to humans). Now surely had we evolved very different kinds of sense organs, we would have declared very different gustatory claims true. Sugar is declared sweet only because the normal tongue finds it so. One reason why this is the normal response is that those with the genetic propensity to find it sweet had an advantage over and ousted those with a propensity to find it acrid or even merely bland, because, since they enjoyed consuming foods with sugar, they had more energy for survival purpose. But had sugar impaired our immune system, natural selection could have favored those with a different genetic propensity, and this claim *could* have been nonrelative: "Sugar is acrid." Since gustatory claims are contingent on the sense of taste developed in humans, these claims are subjective truths.

II. Nonrelativity of Aesthetic Claims

G. Hermeren classifies all aesthetic predicates under six categories.⁶ I contend that four would suffice.

The first category he calls reaction qualities, which include predicates like funny, exciting and boring. M. Beardsley argues that, since such predicates chronicle primarily the audience's reaction to artworks rather than describe the artworks themselves, they are not fitting aesthetic predicates.⁷ No doubt, to say of a play that it is exciting is to say merely that it excites the audience. But, as I will later show, the audience's response is the standard that determines what predicates can correctly be ascribed to *some* artworks (though not to all).

He calls the second emotion qualities, like serene, somber and solemn, which refer to emotions expressed in artworks. The third are dubbed behavior qualities, like dynamic, vehement and bold. These refer to behavior or personality traits. Artworks are expressive of both emotion and behavior qualities. I amalgamate Hermeren's second and third categories under this one rubric: *expressive* qualities.

The fourth category, which he names gestalt qualities, includes unified and simple. These describe the composition of an artwork and the relation of its parts. I will label them *formal* qualities instead, because they disregard the content of artworks,

The fifth he calls taste qualities, which are "value loaded terms," like beautiful, depraved and sublime. He states that these are based on "canons of taste internalized by critics."⁸ I contest that aesthetic sensibility or taste is required to recognize any aesthetic qualities. Further, aesthetic qualities of other categories can be equally value loaded. Serene and harmonious are *positive*, expressive and formal

qualities respectively, while sterile and disorganized are *negative*. But these point to only positive or negative *aspects*. "Serene," a positive quality, does not vindicate the entire artwork; the latter could be insignificant for all its serenity. Thus there can be a separate category for predicates that judge the entire artwork. Insignificant, insipid, puerile, flat and inane are terms of condemnation, while beautiful, significant, elevated and sublime are terms of approval of the work as a whole. I will call such predicates *judgmental* terms.

Redundant is Hermeren's sixth category, nature qualities, for terms like cool, deep and luminous. He believes that these qualities are first observed in nature but are by "metaphorical extension" applied to artworks. But emotional states and personality traits are also quite naturally found to be cool or warm or deep. In fact natural phenomena themselves, like spring or sunsets, are so interwoven and overlaid with emotional characters, that it is not by a detached observation of nature that we ferret out nature qualities (because then "cool" or "warm" would refer to merely the temperature). Rather these qualities, as applied to artworks, are clearly derived from an association with emotional states and personality traits. Nature qualities will be subsumed under expressive qualities.

Aesthetic claims that make use of judgmental terms are *value* claims, while claims that ascribe predicates of my first three categories of reaction, expressive and formal qualities can be called *interpretive* claims, despite the latter predicates not always being value-neutral.

This makes for a relative claim: An interpretive aesthetic claim (i) expresses a person's response to an artwork, and (ii) the response is unique to and inextricably linked with his temperament, and (iii) we are not justified either to condemn or condone this response, or to dictate to him how he ought to respond. Strong responses can be triggered by, and incredible significance attached to, certain artifacts like the Statue of Liberty or the watch of a dear, long-gone mother. It is unproblematic to state that, just as these responses admit of neither praise nor censure, so also are certain responses to artwork relative. There is nothing right or wrong in a person having an affinity for, and finding, Gauguin's paintings of the South Pacific especially soothing, because they evoke lovely childhood memories of the sea. What is problematic, and what I investigate here, is how aesthetic claims are nonrelative. The following would establish nonrelativity: There is a correctly upheld interpretive or value claim C, such that it is not possible to correctly uphold the negation of C. I ask, are there any aesthetic claims, which all humans are required to affirm? If so, why?

I will first sketch an outline of how some aesthetic claims are nonrelative, before arguing for my thesis in some detail.

There is a remarkable heterogeneity in the significations of aesthetic claims. The self-same aesthetic claim can take on two entirely different meanings. Consider this claim C:

C. This film is deeply moving.

In some cases, this first sense (S1) is the exact equivalent of C.

S1. This film *does* deeply affect humans. Just as it is ludicrous to designate a narcotic a depressant when it stimulates rather than sedates most who ingest it, so also there are films which can only be regarded as deeply moving, if the general audience is stirred by them.

But there are films, which can be designated as deeply moving even if only few are stirred by it. If public's response were *always* made the standard, absurdities would result. We would then have to conclude that Van Gogh's paintings were not deeply moving during his lifetime because they were then generally despised, but became stirring artworks when they gained recognition. However, the paintings can be said to be deeply moving even in face of public censure, for this reason: they have the potential to deeply move us. This second sense of C can be stated thus:

S2 This film *can* deeply affect us, if we could respond to it. When C is equivalent to S1 then it belongs to class of aesthetic claims designated as Type One or T1 claims, and when C means S2, it is a T2 claim.

I will be defending these six propositions which account for, both, the above dichotomy and the nonrelativity of some aesthetic claims: (1) Apprehending, evaluating and appreciating art requires the involvement of our concerns, interests and aspirations, or in short, our emotions. (2) The emotions requisite for apprehending *popular* art, like, "pop music" or slapstick comedies, are of a mundane nature, and hence generally accessible. (3) The emotions requisite for apprehending *serious* art are nobler, higher, more delicate or more refined, and hence not generally accessible. (4) T1 claims are about popular art; and since the public can access it, their verdict can be the standard. (5) T2 claims are about serious art, and only the verdict of the "true judges" can be the standard. Note that the T1 and T2 aesthetic *and* gustatory claims are both nonrelative for similar reasons. (6) The T2 *value* claims are nonrelative also because claims about high and noble or low and base mental states are nonrelative.

The standard of nonrelativity of T1 claims is different from that of T2 claims. Interestingly, this is reflected in the very meaning of the English word "standard." What is standard can mean what is usual, normal and customary. But a standard can also mean a model and a paragon. My primary interest here is T2 claims about serious art. Popular art is discussed merely to distinguish T2 from T1 claims.

A clarification and defense of my central claim that art apprehension presupposes *participatory* attention, requires that I examine a view contrary to mine, namely, of E. Bullough and J. Stolnitz.

Bullough explores the nature of the specifically aesthetic perception by examining, surprisingly, how the natural phenomenon of fog is experienced. Practical concerns, which are what normally

preoccupy us, indispose and impair us from enjoying the astonishing beauty of a foggy landscape. We view fog as a nuisance, if not as downright dangerous. Only through “psychical distance,” through “the cutting-out of the practical sides of things and of our practical attitude to them,”⁹ can we appreciate fog aesthetically. Stolnitz also argues that practical concerns make our perceptions “limited and fragmentary.”¹⁰ He contrasts the aesthetic attitude and perception from “the attitude people usually adopt.”¹¹ The latter is swayed by practical interests, while the former is disinterested and objective.

Their argument comprises premises P1, P2, and deductions D1, D2.

P1 Mundane, practical concerns and interests stymie aesthetic appreciation.

P2 Aesthetic attitude is a highly unusual way of perceiving something.

D1 Psychical distance and disinterestedness is needed for an aesthetic appreciation of something.

D2 Aesthetic attitude is characterized by psychical distance and disinterestedness.

While P1 is a fundamental insight of Bullough and Stolnitz, D1 cannot be inferred from it. Even if aesthetic appreciation (of serious art) must be cleansed of everyday practical concerns and interests, must it be divested of *all* concerns and interests, to the point of being disinterested, neutral and impartial? Why cannot aesthetic attention (of serious art) engage *higher* concerns, aspirations and valuations?

G. Dickie rejects Bullough and Stolnitz for a different reason. He argues that disinterestedness is the hallmark of not only aesthetic contemplation, but of *all* genuine attention, because a person who can neither maintain distance nor expunge self-centered concerns cannot attend to what is there. Dickie rejects P2, that *aesthetic* attention is some out-of-the-ordinary activity, in that it is especially disinterested. The problem he sees with Stolnitz’s and Bullough’s theory is that it “entails that there are at least two kinds of attention, and that the concept of the aesthetic can be defined in terms of one of them.”¹² He argues to the contrary that “there is no reason to think that there is more than one kind of attention involved.”¹³ We attend to artworks no differently from attending to anything else, by being disinterested. There is no distinctive class of aesthetic attention.

I reject the basic tenets D1 and D2 of Bullough and Stolnitz, tenets which Dickie never questions, that the *only* correct way to contemplate art is disinterestedly. I contest that there also exists a *participatory attention* requiring a participation of our likes and dislikes, interests and concerns, just as there exists an impartial, neutral and disinterested attention. Not only need our interests, concerns and

valuations not distract or blind us, but often they can open our eyes to aspects of a work otherwise hidden. For example, our sexual drives and proclivities could help us recognize and relish the sexual charm and suggestiveness of a subtle, erotic picture.

No doubt emotions also blind. Not all emotional responses constitute participatory attention; and these four conditions disqualify the former: (1) We respond merely to some inconsequential or extraneous features of a work, to the detriment of essential ones. (2) We are so affected by one or two features of a work, that we do not respond to many other aspects. (3) Before even examining an artwork, we are strongly committed to responding to it either favorably or unfavorably. (4) It is so essential for us to hold on to a certain viewpoint, and opening ourselves to foreign viewpoints is so uncomfortable, that we respond to an artwork only insofar as it bolsters our views. I contend that the solution to incorrect emotional responses is not disinterestedness but correct emotional responses.

This is Kant's explanation of the experience of the sublime:

In this way nature is not judged to be sublime in our aesthetic judgments in so far as it excites fear, but because it calls up that power in us... of regarding as small the things about which we are solicitous... and of regarding its [nature's] might... as nevertheless without any dominion over us... Therefore nature is here called sublime merely because it elevates the imagination...¹⁴

Hence only if it triggers heroic feelings in us can a nature's spectacle be judged sublime. "Sublimity, therefore, does not reside in anything of nature, but only in our mind, in so far as we can become conscious that we are superior to nature. . . Everything that excites this feeling in us, e.g., the *might* of nature which calls forth our forces, is called then (although improperly) sublime."¹⁵ His view that something is improperly called sublime, if the latter is not some property "out there," is a type of reasoning reminiscent of positivism which I have already rejected. I concur with Kant, however, that the apprehension of the sublime requires a *participatory* attention. I mean this: Our heroic aspirations are that we not be subdued by fear, external forces or internal vicious impulses. At the sight of nature's cataclysm we may feel in ourselves a power to resist all subjugation. This heroic mental state is inextricably linked with apprehending the sublime in nature.¹⁶ The sublime is not apprehended disinterestedly, because the apprehension involves or is built on our strivings, aspirations and valuations.

We cannot disinterestedly enjoy popular art. The aspirations of our mundane existence are the ones that the protagonist of a melodramatic film, for example, sees fulfilled, namely, to be sexy and to charm, to be lucky and to win impossible odds, to be rich and to triumph over others. To the extent that our not-so-sublime interests are involved

and we can sympathetically participate, if not identify ourselves, with the protagonist, we respond to the film. In serious art the interplay of all mundane emotions cannot be categorically ruled out; however, a sole preoccupation with these would block art appreciation.

The quality of the states of the soul requisite for art apprehension can testify in many cases to the quality of the artworks themselves. Something can be regarded as high art in many cases because it inspires high emotions. Hence aesthetic *value* claims are in many cases founded on claims about the quality of the states of the soul in question. Now if claims about lofty, noble, sublime and positive states or mean, growling and negative ones were relative, by being founded on the specific moralities of particular societies, then many aesthetic value claims would also be relative. But the verdicts of various moralities are not the correct measures of the nobility and baseness of the states of the soul. In fact moralities can themselves be high, mediocre and low. A high morality is associated with high states, by expressing the aspirations of high-souled humans or by approving high mindedness or by propelling us to heights. Hence, not only is morality not the judge of high states, it itself is judged by the latter. This is the central point: an external measure is not needed to judge the quality of emotions. Rather, the states of the soul give themselves out to be noble or base. The contemptible states are *self*-condemning; negativity enshrouds them, disapprobation plagues them. We exult in our heights, they are *self*-affirming and *self*-justifying. Hence, claims about the height of the states of the soul, and consequently about the worthiness of artworks are in many cases nonrelative.

Hume in his essay, "Of the Standard of Taste," provides this reason for the nonrelativity of T2 claims:

Some particular forms or qualities, from the original structure of the internal fabric, are calculated to please, and others to displease; and if they fail of any effect in any particular instance, it is from some apparent defect or imperfection of the organ... In each creature, there is a sound and a defective state, and the former alone can be supposed to afford us a true standard of taste and sentiment.¹⁷

The true judges are arbiters, and their verdict the standard, because, possessing sound sensibilities, they are receptive to, and can evaluate, the features of artworks meant to truly please. The sound state of a true judge consists of "a strong sense, united by delicate sentiment, improved by practice, perfected by comparison and cleared of prejudice."¹⁸ Despite finding his views deficient, I concur with his basic thesis.

It is problematic to regard the beauty of artworks as "certain qualities in objects, which are fitted by nature to produce those particular feelings [of pleasure]."¹⁹ The logical consequence of this view is that, it would be possible in principle to catalogue features requisite for a thing

of beauty. There are, however, no determinate rules to which all works must conform, to be beautiful. There is beauty in Bach and Mozart, in da Vinci and Degas, yet how different they are. Each artist imparts beauty to artworks in his unique and personal way. (This point is discussed in the next section.) Also problematic is Hume's list of the qualifications of true judges. Refinement seems to be the primary quality. No doubt this is needed to appreciate the formal qualities of order, composition, rhyme, rhythm, form and design. But to respond to the expressive qualities, there must also be nobility and depth of feeling. In any case, making a list of qualifications is itself problematic. A sensitive and learned critic, well versed in a specific era, could harbor the most inane notions about certain art forms or artists of that era. Hume's claim that there are true judges is correct, only if it is not implied that their talent and learning is a surety for the correctness of their claims.

Scholars debate whether Hume's definitions of "good critic" and "good art" are circular. It is very well for him to say that a good critic has a "strong sense, united by delicate sentiment," but how is one to establish who has this? It appears that the only way a fine and delicate sensibility is detected is when the ability to appreciate good art is manifested. This is a vicious circle: good art is that which is approved of by good critics, and a good critic is the one who appreciates good art. Each can only be explained in terms of the other.

P. Kivy counters this objection by showing that most of the characteristics of a good critic can be defined independently.²⁰ He argues that, "delicacy of taste," for example, is inextricably tied to "delicacy of passion"; and the latter can be defined in a nonaesthetic context. But N. Carroll rejects this. Delicacy of taste is not the concomitant of delicacy of passion. An emotional person may be insensitive to art, while a person of exquisite aesthetic sensibility may not evince much emotion.²¹ If delicacy of taste cannot be determined independently, and if it is discerned only by our ability to appreciate good art, then Hume's definitions are circular.

There exists, however, an empirical way of recognizing true judges. The clue is in this statement: "Many people, when left to themselves, have but a faint and dubious perception of beauty, who yet are capable of relishing a fine stroke which is pointed out to them."²² When the suggestions of a critic open our eyes to the merits of an artwork, we have a first-hand experience of his worthiness. L. Venturi writes, "Cezanne deliberately distorted objects in order to represent them from different angles, to turn around them and bring out the fullness of their volume, and to convey by the liberties he took the vital energy of objects."²³ If these comments enable us to see for ourselves that the distorted objects, far from being botched, are in fact powerfully expressive, then one can vouch for the penetration of Venturi.

G. Sircello argues that the opinions of the experts do not matter, but rather "one's perceptual reports must be used as the only reason for one's judgment of a work of art." "Let us then admit that our aesthetic judgments cannot be grounded by appeals to authority."²⁴ His position, however, is ambiguous because it could mean two quite different things.

One, that the verdicts of the critics carry no weight because no such thing as an "expert" exists in matters of art interpretation. Two, that it is problematic to distinguish a correct from a mistaken interpretation of an artwork, because even critics can be inept. Hence only those judgments can be vouched for whose validity has been established by our own experience. I certainly concur with the second, but not with the first proposition. Of course, we cannot abdicate our judgment and blindly follow the so-called experts. This may raise doubts about the need for critics, since ultimately we must rely on our own judgment. I uphold these three points: (1) The acuity of some critics has been proven to us, by them shedding light on artworks. (2) Our views on artworks must be informed by their verdict. (3) While their views *prima facie* carry more weight, it does not guarantee truth.

My absolutist position regarding T2 claims may be seen by some as not being appreciative of the diversity of interpretations that artworks can lend themselves to. B. Heyl, for one, supports relativism for precisely this reason. While discussing Bramantino's *Adoration of the Magi*, he writes:

Adolfo Venturi admires the picture greatly, finding in it an effect of "regal splendour" and a supreme example of balancing cubistic masses... Berensen, on the contrary,... finds in it no evidence of serious art. The verdict is readily comprehensible too, since we know that, for Berensen, art must present notable tactile values, movement and space composition. A third... considers the, standard of "associative form" a basic one. According to this standard the painting is inferior since certain gestures, postures and expression seem affectedly conceived...²⁵

Heyl is entirely mistaken to say that only a relativist would be open to all three interpretations; so would an absolutist. Maybe Venturi is right that the painting has regal splendor, and Berensen that it has no tactile values, and the third opinion that the gestures are affected. Each provides one perspective of looking at the artwork, and since neither contradicts the others, all *could* be valid. "Perspectivism" is a better theory than "relativism." It admits of many interpretations without relegating them all to the level of personal opinions. An absolutist's position need not be constrictive, because he can approve of multiple and valid perspectives, which enrich our understanding.

While they both may admit of the possibility of multiple interpretations, relativism differs from perspectivism by denying that any interpretation is true or false unequivocally. Relativists could defend their view thus: Arguments about the truth and falsity of interpretations are futile. The most that can be demanded of viewers is that they come up with *good* interpretations, namely, interpretations that are consistent, account for all the salient features and are original. This view, I argue, is untenable.

There are reasons to reject Goethe's and J. J. W. Winckelmann's interpretations of Greek art, even while conceding that they are consistent, thorough and original. F. Nietzsche writes about Goethe's interpretation:

[It is] incompatible with that element out of which Dionysian art grows—the orgiastic. Indeed I do not doubt that as a matter of principle Goethe excluded anything of the sort from the possibilities of the Greek soul. *Consequently Goethe did not understand the Greeks.*²⁶

Goethe would surely misinterpret Greek art, if the innermost aspirations of the Greeks, by being judged morally reprehensible, were ignored by him. Winckelmann suggests that, in the most famous of Greek sculptures, Laocoon is depicted as superior to his suffering, just as “the depths of the sea remain always at rest, however the surface may be agitated.”²⁷ G. E. Lessing interprets differently why Laocoon's countenance is not contorted with pain.

Imagine Laocoon's mouth open and judge. Let him scream and see. It was, before, a figure to inspire compassion in its beauty and suffering. Now it is ugly, abhorrent, and we gladly avert our eyes from a painful spectacle, destitute of the beauty which alone would turn pain into sweet feeling of pity for the suffering object.²⁸

While it is “northern heroism” to “stifle all signs of pain, to meet the stroke of death with unaverted eye, to die laughing under the adder's sting,”²⁹ this is not the idealism to which the Greeks aspired: “a cry, as an expression of bodily pain, is not inconsistent with nobility of soul, according to the views of the ancient Greeks.”³⁰ In short, *if* Winckelmann's thesis that Laocoon is depicted as someone too noble to scream, results from his attempt to see his own ideals mirrored in the work, then he misinterprets. A correct apprehension of artworks requires that we partake of the aspirations of the artists, evoke in ourselves their longings, and transfigure our world with their glow. I concede that we applaud rather than censure even those plays of Racine, Goethe and Sartre, where the Greek legends of Andromache, Iphigenia and Orestes are interpreted loosely and freely. But what is applauded here is the creation of *new* artistic visions, and not the correctness of the interpretation of the Greeks' worldview.

Serious art either embodies a grand, profound, enigmatic or complex worldview, or it evokes and expresses delicate, noble or deep emotions. The standard of correctness of T2 claims is the verdict of those few who can access the out-of-ordinary emotions requisite for the apprehension of serious art; and this accounts for the nonrelativity of T2 claims. The general public, however, can judge how well popular art conveys, evokes and expresses ideas and emotions. The majority

response can function as the nonrelative standard of T1 claims.

III. Subjectivity of T2 Aesthetic Claims

I provide two sets of reasons to make a case for the subjectivity of aesthetic claims. With the first set I make my case only indirectly and by default, by showing that the claims cannot possibly be objective. If aesthetic terms were code words for some factual, physical states-of-affairs, then they could be objectively true. A necessary condition for redness is the physical fact of a surface reflecting range R light; thus "red" can be a code word for the latter. By demonstrating that no physical states-of-affairs are necessary conditions for the applicability of aesthetic terms, I establish that aesthetic terms are not code words for physical states-of-affairs, and hence that aesthetic claims are not objective. My second set of reasoning will directly demonstrate subjectivity, by showing that aesthetic claims are valid primarily from the human point of view. It will also be made clear that this does not imply that such aesthetic claims are relative. First discussed are the aesthetic predicates that I call expressive qualities, followed by a discussion of formal qualities and judgmental terms.

I concur with an important point A. Tormey makes concerning expressive qualities of artworks. He states that even though "the nonexpressive qualities are *wholly* constitutive of its [i.e., an artwork's] expressive qualities,"³¹ no set of nonexpressive qualities functions either as sufficient or necessary condition for expressive ones. For example, we can account for and explain the liveliness and cheerfulness of a particular piece of music, by pointing to certain relevant nonexpressive features. A particular musical piece is lively because of its fast-paced rhythm and its high volume. Play it slowly and softly, and it loses all its upbeat energy. However fast-pace and loudness can also make for very angry music. These are not, therefore, sufficient conditions for music to be lively. The reason is that "a given set of nonexpressive properties can be compatible with, and constitutive of any one of a *range* of expressive qualities."³² Furthermore, the fast pace and high volume are not necessary conditions either. Soft music with a slow tempo can also be lively.

Tormey is not denying that in a particular artwork the nonexpressive features X, Y, and Z can account for the presence of an expressive quality Q. However the former are not the conditions for Q, and an expressive quality Q cannot be reduced to or defined in terms of nonexpressive properties X, Y, and Z. Hence claims making use of expressive qualities are not reducible to objective, factual claims.

Expressive qualities have the paradoxical feature of seeming to belong to artworks, and artworks appearing to be infused with or embodying them. Hence an expressive quality E can be *directly* conveyed to or partaken of by responsive spectators. By "directly" is not meant "obviously," because E could be subtle. But it means that no convention is needed to recognize E. There are gestures of a despairing man that are directly expressive of grief, like wringing the hands, pulling the hair and

grimacing. These are not culturally accustomed mannerisms, but universal gestures. Contrast this with the sign language of the deaf, where gestures are arbitrarily and by convention assigned a meaning.

E. Gombrich, on the other hand, denies that artworks possess directly exhibited expressive qualities. Artworks, he argues, make use of a "language of symbols rather than 'natural signs'" and are a result of a "developed system of schemata."³³ And since art comprises, or at least makes use of, convention (which he identifies with "style"), knowledge of artists' convention is a *sine qua non* for art appreciation. J. Robinson states that "the essential point that Gombrich makes is that we cannot understand what emotion (or other state of mind) a painting expresses unless we know what style the work is in,"³⁴ and that for him "unless one knows an artist's expressive 'vocabulary'... one cannot understand the expressive significance of his work."³⁵

My brief critical remarks may do little justice to Gombrich's views, but they will clarify my position. We could be thoroughly familiar with art history and the style of the artist in question, and yet be unmoved by his work. Hence knowledge by itself does not suffice, though it often facilitates art appreciation. But sometimes it is quite dispensable. We could sometimes be deeply affected by an artwork of another culture, about whose history and style we know little, as when at the very first exposure a person is deeply moved by Indian classical music. If it were convention that reveals what the emotions are, that are supposed to be conveyed by an artwork, then how come we can sometimes grasp the emotions independently? This fact indicates that emotions can be grasped directly: Critics, sometimes, may concur on the expressive qualities present in an artwork, but disagree about how this work achieves this effect. S. Talmor makes this intriguing remark, "It might indeed make one wonder whether we do not think of reasons to fit our judgments (as Kant claims), rather than *have* reasons to make our judgments."³⁶ In other words, we first see or respond to the expressive quality, and only then explore how the work achieves it. In short, we can *directly* apprehend these qualities. If artworks were not directly expressive, and if style was all, then how come those artists who once imitated successfully the then popular styles of Claude Lorraine and Raphael, yet did not produce convincing and significant works? Venturi, whom I quoted earlier, claims that Cezanne deliberately distorts objects to bring out their vitality and fullness. Surely, someone could paint in Cezanne's style and yet fail to convey this vitality. A style cannot salvage an insipid, inane work.

There is perhaps no theoretical explanation for how a nonvocal musical piece can brim with exultation. The latter, after all, is not some empirical, palpable property of music. Yet it is undeniable that we can experience the exultation of the last movement of Beethoven's *Fifth Symphony*. My previous discussion on the participatory nature of aesthetic attention permits me to draw this conclusion: apprehending the expressive quality of exultation requires at least that we be able to partake of joy.

It is the fortuitous fact of how we humans are constituted that can at least partly explain the kinds of emotions we are capable of experiencing. Entertain momentarily this gruesome fantasy. An intelligent, asexual species has evolved which is not composed of two genders and whose members can only reproduce themselves by ripping apart other members and eating their guts. This species would have no inkling of romantic love. Our stirring romantic songs would be nonexpressive to them. We also would find their art nonexpressive. The expressive artworks are expressive from the human point of view, or from those who share our predicament and nature. We could have been so constituted that Beethoven's music would have had no analogue to our longings and aspirations; and such music would then have been rightly judged nonexpressive. Of course it just could not then have been produced. This explains the subjectivity of T2 claims about expressive qualities.

I now examine formal qualities. E. Redslob writes of Poussin's *Jupiter As An Infant*:

The diagonal sweep of the trunk and the horizontal movement of the left branch are rhythmically integrated with the movements of the figures: the branch, the incomparably beautiful arm of the nymph holding the honeycomb and the kneeling satyr's arm stretched along the goat's back form the three strong horizontals of this clear conscious composition.³⁷

The horizontal lines of the branch and the arms of the satyr and the nymph, bring poise and stability, and underpin the harmony of *this* composition. But in another work, the horizontal lines could jar or destabilize or divert attention or disrupt the overall harmony. Does this not show that horizontal lines are not a necessary condition for order and stability, despite them accounting for the poise of this work? It may be objected that, while horizontal lines cannot by themselves bring about harmony and stability, they can do so in conjunction with other qualities. In other words, horizontal lines are one of many necessary conditions. This argument fails, however, because even a painting devoid of prominent horizontal lines can have order and stability.

Consider an example of a formal quality, "complexity." There are no physical traits of a thing, which are a necessary condition for it to be deemed complex. No doubt for specific works, specific physical traits can account for their complexity. In a particular painting, large contrasts, small gradations, and interwoven accords of color account for its complexity. However, even austere paintings could be subtly complex. And there can be a cluttered painting which is merely chaotic without being complex. I will express this point formally and generally. Let us say that several specific physical traits PT account for why an artwork A has a formal quality F. This can be rendered as, "PT > F is true (for A)." However, a different artwork B could possess PT and yet not possess F. For B, PT

> F is not true. And an artwork could achieve F with a vastly different combination of physical traits than PT. PT are not necessary conditions for there to be F. There is no rule for whether or when PT>F is true for an artwork. We cannot say, "Whenever a formal quality F is present; there must also exist physical traits X, Y, and Z."

I repudiate objectivity by showing that formal qualities cannot be equated with physical traits of artworks. I now attempt to establish subjectivity by indicating how our ascribing formal qualities to artworks is built upon the uniquely human response to forms. I propose a plausible though not substantiated hypothesis. It seems to me that there is a psychological basis for why we are so responsive to composition, contrasts, gradation, design and form. Within our psychic lives, we suffer from disharmony by the clashing of opposing drives which tear us apart, from chaos and confusion resulting from not subordinating superfluous impulses to our main aspirations. This very human desire for clarity, harmony and structure within us could be what is requisite for relishing formal qualities in artworks. It would still be a mystery why specific forms move us in specific ways. C. Bell writes, "For a discussion of aesthetics it need be agreed only that forms arranged and combined according to certain unknown and mysterious laws do move us in a particular way, and it is the business of the artists so to arrange them that they shall move us."³⁸

By my hypothesis, our manner of responding to form has something to do with a peculiarity of human nature, namely, with our universal desire to bring clarity and structure within ourselves. Had we thrived on inner chaos and confusion, on inner clash and discord, vastly different would be our response to form. This explains the subjectivity of T2 claims about formal qualities.

M. Friedlander writes about Cranach's nude paintings:

Not the least reason why Cranach's nudes are so inoffensive and respectable is their lack of physical presence and plastic reality. By suspending the laws of nature so to speak, these pictures amused and entertained his patrons... Cranach's idiom is neither classical nor truly romantic,... but an original creation, though with a streak of idiosyncratic quaintness.³⁹

A hodgepodge of positive, negative and neutral terms, like, pleasing, not classical, not romantic, original, and idiosyncratic, are used to explore what is unique about Cranach's nudes, and not to praise or condemn them. However, applying a *judgmental term* is to judge approvingly or disapprovingly the work as a whole. I will discuss the subjectivity of judgmental claims in the reverse order. I first discuss why they could be subjective, and then argue for why they cannot be objective.

These two propositions have already been defended: (1) In many cases the worthiness of an artwork consists in it calling forth and

bringing into play our nobler and higher states of the soul. (2) Claims about high and low states of the soul are not relative. If it can be shown that the nonrelative claims about high states of the soul are subjective, that is, are contingent on how humans are constituted, then many aesthetic value claims would be also ultimately contingent on the latter, and hence subjective.

Two principles regarding high states reveal their subjectivity. I call the first principle the "Limitation Principle," and it is: Nothing that is either unattainable by or contrary to human nature can be a high state. Our nature prescribes a limit to what can be a high state. An analogy: Raging ferocity is anathema to a gazelle's nature, and so its triumphant states could not consist in such a feeling. The second principle I dub the "Flourishing Principle," and it is: High states are inextricably linked with the fulfilling and the flourishing of human nature. At the physical level, what makes our bodies flourish, brings into play their powers and realizes their *telos*, is activity. Hence there is "a high" that comes with exercising. However, what makes for this high state is determined by the nature of our bodies. Had we been organisms that could flourish only by stretching in the sun and being absolutely still, and are hurt by activity, very different would be our high states. Nietzsche gives this reason for rejecting Schopenhauer's "pity principle": "how insipidly false and sentimental this principle is in a world whose essence is will to power."⁴⁰ It is because life is will to power, that higher affirmative states of human soul consist in activity, conquest, self-overcoming and not in pity, abnegation and passivity. The specific point in Nietzsche's argument I find plausible is that while certain states of the soul are certainly high and others low for all humans, what makes for height is determined by what life, or at least what human life is all about. Claims about high and low states are subjective, and hence so are many aesthetic value claims.

Were value claims objective, they would meet one of these two conditions: (a) there exists a "measuring stick" to size and stack artworks, or; (b) there exists some criteria or distinguishing marks to separate good from bad works of art. It will be shown that neither of these two conditions can be met.

These two tenets that I uphold are not at odds: (1) There is no *predetermined* standard to judge and compare the worth of artworks. (2) Great artworks do meet or achieve certain objectives, or if you will, certain standards. In fact to repudiate all standards, would amount to proclaiming all value claims to be relative. Combining the two points, we can say that there are standards, but no predetermined standards for excellence. An illustration of a predetermined standard, is the requirement that the steel wire of size S withstand a tension T to be deemed durable. And how can there be no predetermined standard in art? This is the case when each artwork sets its own standard by which it is to be judged. And how would we know what standards to make use of? The artwork itself reveals or projects the standard by which it is supposed to be judged. We have to respond to each works on its own terms.

Let me illustrate this point. E. Redslob claims that in the

sumptuous *Portrait of George Gisze* Holbein “reached the summit of his powers.”⁴¹ About his rather austere *Portrait of the Man With a Lute*, he writes, “Holbein’s progress as a painter from the portrait of Gisze with its mass of detail to the simple grandeur of the Renaissance portrait is astounding...”⁴² The sumptuousness enhances the Gisze portrait. But its absence is not a defect in his later work, whose grandeur is its simplicity. Each work demands to be evaluated differently by setting its own standard. A work that sets out to be rich and sumptuous, but happens to be merely gaudy, fails. However, if the objective is noble, classic simplicity, then it fails if it is cold and formal. Each work makes it clear to those who are responsive to it, what its peculiar standards are. The projects that Cezanne set for himself in his work are not those set by da Vinci. There is no one measurement for both. The standard by which the worth of an artwork is to be judged is disclosed by attending to it exclusively, and is unique to it. I do not deny that artists are influenced by other artists. Despite this, they could create original and unique works.

Kant titles the forty-sixth chapter of his *Critique of Judgment*, “Beautiful Art is the Art of Genius.” A genius does not follow rules but “gives rule to art.” “Hence originality must be its [i.e., a genius]’ first property... But since it also can produce original nonsense, the product must be models, i.e., exemplary and must serve as a standard or rule of judgment of others.”⁴³ Note: since the genius follows no rule, the model of excellence is not some pre-existent standard which a genius attempts to fulfill. Rather, with the creation of a beautiful work is the paradigm set. This is what J. Burckhardt has to say about the ancient Greek sculptures of gods: “The gods of the Greeks have been a canon of beauty in representing divinity and sublimity in all religions, and the Greek ideal of the gods has become a fact of world historical significance.”⁴⁴ This canon of beauty, however, would not have existed had not the Greeks existed. Such a canon originated with Greek art. Artworks themselves establish the paradigms; they need not be judged by some pre-existent measure.

It may seem likely that at least criteria would exist to distinguish good from bad artworks. It could be required of all good art to have certain positive expressive and formal qualities. There is no doubt that a quality like gracefulness is a positive quality in that, its presence alone in an artwork enhances it. But in some artwork, gracefulness could be out of place.⁴⁵ By interacting with other qualities, it could jar and impair the overall effect. And since no quality is appropriate for all artworks, one cannot predetermine what qualities will enhance a good work. Hence, the T2 value claims meet neither of the two conditions of objectivity.

I have explained how some aesthetic claims are unequivocally true and hence nonrelative, and how all are contingent on human constitution and hence subjective.

Notes:

1. The specific problems with interpreting texts are not dealt with here, but rather with interpreting sensuous artforms like music and painting.
2. Alfred Jules Ayer, *Language, Truth and Logic*, "Introduction" (New York: Penguin Books), p. 28. The Introduction was written in 1946, a decade after the publication of the book.
3. *Ibid.*, p. 29.
4. The contrary of even the apriori claims (which for Ayer, are reducible to a tautologies) cannot be correctly upheld.
5. Depending upon how "universal" is defined, the nonrelative claims as well as the objective ones can be regarded both as universally true and as not. Consider the claim, "This shoe fits me." Unlike claims about what shoes I like wearing, this claim is not relative, because it is unequivocally true or false if a shoe fits me. (I may enjoy wearing an excessively loose non-fitting shoe.) And it can also be said to be universally true by this *first* sense of universal: A universal truth must be accepted to be true by *all* humans. However, it is *not* universally true by this second sense: A universal truth must not merely be accepted to be true by all, but must also express some truth about all humans (to whom this claim is relevant). By this sense, the claim is not universal because what shoes fit me may not fit you. Note also that claims about fitting shoes while nonrelative, are subjective. What makes for a fitting shoe for humans is linked to some specifically evolved traits in humans. We can imagine some alien species whose limbs may require of shoes to accommodate vast wriggling room; and hence what is fitting shoes to them would not be fitting to us. (The attribute "fitting" is analogous to "sweet" or "sour.") This point could be expressed thus. By the *first* sense of universal truth, a nonrelative, but subjective, claim is universally true for all humans (specifically), while the nonrelative, *objective* claim is true for all rational beings. The latter claim is not founded upon or inextricably linked to some characteristics specific to humans.
6. Goran Hermeren, "The Variety of Aesthetic Qualities" in *Contemporary Philosophy of Art*, ed. By J. Bender and H. G. Blocker (New Jersey: Prentice Hall, 1993). Originally from *Aesthetic Quality and Aesthetic Experience*, M. Mitias, ed. (Amsterdam: Rodopi, B. V., 1988).
7. Monroe Beardsley, *Aesthetics: Problems in the Philosophy of Criticism*, 2nd ed. (Hackett Publication, 1981), pp. 41-43.
8. Hermeren, op. cit., p. 265.
9. Edward Bullough, "'Psychical distance' as a Factor in Art and as an Aesthetic Principle" in *Aesthetics: A Critical Anthology*, G. Dickie, R. Sclafoni, R. Roblin, eds. (New York: St. Martin's Press, 1989), p. 321. Originally in *British Journal of Psychology*, 5 (1912).
10. Jerome Stolnitz, "The Aesthetic Attitude" in *Aesthetics: A Critical Anthology*, op. cit., p.335. This selection is from his *Aesthetics and Philosophy of Art Criticism* (New York: Houghton Mifflin, 1960).
11. *Ibid.*
12. George Dickie, *Introduction to Aesthetics: An Analytic Approach* (New York: Oxford University Press, 1997), p. 33.
13. *Ibid.*
14. Immanuel Kant, *Critique of Judgment*, translated by J. H., Bernard (New York: Hafner Publications, 1968), p. 101.
15. *Ibid.*, p. 104.
16. Kant claims that we apprehend the sublime "provided we are in security." "He who fears can form no judgment of the sublime..." (*ibid.*, p. 100). But Edmund Burke writes, "Indeed terror is in all cases whatsoever either more openly or latently the ruling principle of the sublime" [*Philosophical Inquiry Into the Origins of the Sublime and the Beautiful*, (New York: Columbia University Press, 1958), p. 58.] I disagree with both. The raging sea, when viewed in complete security from a lighthouse, is only mildly titillating. It must seriously threaten us, but we must continually overcome the fear. It is this heroic state, where we fear and yet remain defiant, that is requisite for the apprehension of the sublime.
17. David Hume, "Of the Standard of Taste" in *Aesthetics, A Critical Anthology*, p. 246.
18. *Ibid.*, p. 250.
19. *Ibid.*, p. 246.
20. Peter Kivy, "Hume's Standard of Taste: Breaking the Circle," *British Journal of Aesthetics* 7 (1967).
21. Noel Carroll, "Hume's Standard of Taste," *Journal of Aesthetics and Art Criticism* 43 (1983).
22. Hume, op. cit., p. 251.
23. Lionello Venturi, *Cezanne* (New York: Rizzoli International Publications), p. 116.
24. Guy Sircello, "Subjectivity and Justification in Aesthetic Judgments," *Journal of Aesthetics and Art Criticism* 45 (1986), pp. 5-6.
25. Bernard Heyl, "Relativism Again," *Journal of Aesthetics and Art Criticism* 5 (1946), p. 56.
26. Friedrich Nietzsche, *Twilight of the Idols in The Portable Nietzsche*, edited and translated by W. Kaufmann (New York: Penguin Books), p. 561.
27. Winckelmann is quoted by Gotthold Ephraim Lessing in his *Laocoon: An Essay Upon the Limits of Painting and Poetry*, translated by E. Forthingham (New York: The Noonday Press, 1963), p.1.
28. *Ibid.*, pp. 13-14.
29. *Ibid.*, p. 4.
30. *Ibid.*, p. 7.

31. Alan Tormey, "The Concept of Expression: A Proposal" in *Contemporary Philosophy of Art*(1969), p. 112. The selection is from Tormey's book, *The Concept of Expression* Princeton: Princeton University Press, 1971), p.165
32. *Ibid.*, p. 166.
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39. "Introduction" by Max Friedlander in *The Paintings of Lucas Cranach*, by M. Friedlander and F. Rosenberg (New York: Tabard Press, 1978), p. 23.
40. Nietzsche, *Beyond Good and Evil*, translated by Kaufmann (New York: Vintage Books, 1966), aphorism #186.
41. E. Redlslob, op. cit., p. 206.
42. *Ibid.*, p. 207.
43. Kant, op. cit., pp. 150-151.
44. Jacob Burckhardt, *The History of Greek Culture*, translated by P. Hilty (New York: Frederick Ungar Publications, 1963), p. 138.
45. M. Beardsley argues that there are only three qualities which always count as positive: unity, complexity, and intensity (in "On the Generality of Critical Reasons," *The Journal of Philosophy*, 59, 1962). Frank Sibley responds to this by arguing that (1) there is nothing special about these three qualities because there are many which are also deemed positive, and (2) that no positive quality is always positive because, by interacting with other qualities, it could act detrimentally for this work (see "General Criteria and Reasons in Aesthetics" in *Essays in Aesthetics*, J. Fisher, ed., Temple University Press, 1983). G. Dickie supports Sibley, and clarifies the problem in, "Beardsley, Sibley, and Critical Reasons," *Journal of Aesthetics and Art Criticism*, 46, 1987



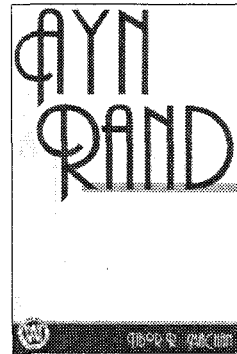
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On Economic Rent: Michael Jordan, The Reichmann Brothers, and Jim Smith, Day-laborer: Whom do we get to Tax, and Why?

Jan Narveson

Michael Jordan is a highly talented basketball player; crowds delight to watch him exercise his skills, thus enabling him to sell those exhibitions at a good price. He has done this for some time, and is in consequence a wealthy man. The Reichmann Brothers, for awhile, were immensely wealthy from clever real-estate investments. (They also went broke, for awhile, when real estate values collapsed. We hear that things are going better for them these days.) And Jim Smith is a working-class person, who gets the going rate for sweeping the floors in a warehouse. We should no doubt add Bill Gates, for completeness: his stock has gone through many roofs, making him - for the present, at any rate - an extremely wealthy man. Our assemblage of money-getters thus covers the classical gamut of Wages of Labor, Rent of Land, and Profits of Stock. According to Barbara Fried, we get to tax all of them except Jim Smith. The others, we are told, exemplify the category of "surplus value," and the incomes derived therefrom are accordingly taxable by virtue of amounting to "economic rent." Even David Gauthier concurs that insofar as income is "economic rent," it is in principle eligible for being taxed. Views of that kind are widely held. Not, however, by the Taxman himself. That personage avoids subtle distinctions, feeling free to tax absolutely anything he can get his hands on. Convenience of collection and relative lucrateness are all that matter to him.

The purpose of the present essay is to dispel illusions to the effect that there are differences among sources of market-derived income such that some are properly subject to tax and some not. I am of the contrary view: no income of any kind should be taxed, taxation being a mistake. Most readers will draw the opposite conclusion: that virtually *everybody* should be taxed. Whichever of us is right about that, the point remains that the taxman is right in making no basic distinctions among these resources for income. Either it's all grist for his mill, in principle, or none is. If he distinguishes some potential revenue-suppliers from others, it will quite properly be on pragmatic grounds, not grounds of fundamental principle. Less-than-fundamental considerations of fairness, yes: but that cuts across the distinction we are concerned with here, namely the

distinction between income from economic rent versus other kinds. While most readers, for reasons I am unable to go into here, favor the taxman, I prefer the people. But that is not the main point at issue here.

I shall discuss the subject via reflection on two recent papers¹, one stimulated by the other. Both writers discuss Nozick, who will therefore also come in for mention below.

1. Fried's Thesis

I begin with Barbara Fried. Her argument is essentially this:

1. [assume:] Laborers deserve what they get from their labor.
2. Income from rent or holding stock isn't real "labor"; income of the latter sort is not "earned"; it is essentially "rent."
3. Rent is therefore essentially appropriable by the public, even if the products of labor, as such, are not.

Fried's central focus is on a narrower issue: whether we should say that high-income talents are like land and stocks in being essentially the source of "rental" rather than "earned" income. Michael Jordan may work very hard, both while he plays and in the many years of intensive practice honing his skills in the years preceding professional play; but basically those skills were inborn, and so "at least in theory, we could tax him on the value of that income-earning potential from the moment of birth, with appropriate adjustments each year to reflect changes in its value."²

On this narrower issue, there is an obvious rejoinder to the argument about the very talented: *all* talents, great *and* small, are likewise inborn (or, as in Rawls' famous argument, made possible only by possession of features of the subject that, in turn, are inborn). If being inborn is what makes a valuable asset eligible for taxation as being unearned, then *all* income earned from the sale of work is eligible, since it is all unearned. Fried's effort to drive this particular wedge thus comes to grief: it is a distinction without a difference, except in degree. But then, if we will tax a factor, *F*, that is variable in degree, we will *prima facie* tax it proportionately.

Why, then, does Fried, or anyone, think that it does make a difference? Her answer is this: What is "implied in property", says John Stuart Mill in a passage quoted by Fried, is "the right of each to his (or her) own faculties, to what he can produce by them, and to *whatever he can get for them in a fair market*; together with his right to give this to any other person if he chooses, and the right of that other to receive and enjoy it."³ I would note that Mill's statement of the matter is redundant, since the right of the seller to give or sell to whom he chooses, and of potential recipients to receive as they will, is all there is to a "fair market." Fried might possibly dispute this latter point, and it is important; much of the remainder of this article will, in effect, be concerned with such possible disputes.

Meanwhile, she goes on to say that “the moral appeal of a Lockean labor theory of ownership lies in its promise of (quoting Mill again) ‘proportion between remuneration and exertion’”⁴ But on that point, Mill’s phrase is misleading. For there is no independent measure of “exertion” here - nothing you can point to in what is done by the worker or the entrepreneur, such that whatever the former produces or whatever profit the latter reaps from his investment will necessarily be proportional to it. That reflects the problem with every version of the “labor theory of value.” As Nozick demonstrated,⁵ attempts to recalibrate the input so that it will match the output inevitably have the tail wagging the dog: how much you have worked is measured by output rather than by the number of hours, or calories, or whatever, that went in; but then the evaluation of that output is made by consumers consulting their desires and their budgets, not by theorists. Michael Jordan probably puts out a lot more calories than, say, Thomas Edison, and probably works more hours than a lot of us; but his high salary is not a payment for calories or hours, but rather for performances at basketball, and how much he may need to practice to perform so well is an empirical question to which answers will be hard to come by, and probably vary widely.

At the outset of her article, Fried characterized the view that people are entitled to what they create as “the most widely held intuition about distributive justice.”⁶ The intuitive status proclaimed for this truth is of some interest, perhaps. But what matters is the strength of the reasoning underlying it. And that reasoning is straightforward. What *do* creators create when they create something? The immediate answer might be some material good, or an essay or painting or whatever. But there is a more fundamental answer, for present purposes: In doing this, they create the occasion for desirable experiences for others - experiences desirable enough to make those others willing to pay something in order to have them. If you create *x*, *x* wouldn’t have existed but for what you did; other people, if any, who come to use *x* in some way have therefore been done a service by you. This service is worth something to them. How much? As much as it’s “worth” to the buyer - which is, of course, very variable from one potential customer to another. So the price to propose is a matter for each potential future user to decide for herself, and whether it is accepted is up to the seller. In light of her answer to that, she either pays a proposed price or she doesn’t buy, perhaps proposing an alternative price - all of which she is permitted to do on the general assumption that she may do as she pleases provided only that she not thereby impose involuntary costs on others. Thus the price is, quite strictly, a matter for negotiation.

All of this is part of the package we are considering. There is not an independent component, consisting of a publicly available, common measure of labor on the one hand, and a measure of output on the other, and some common measure of the two, such that we can say on the basis of the one that a creator is entitled, *qua* creator, to such-and-such a ‘reward’ for his efforts. That is not what the “intuition” Fried is exploring amounts to. The intuition, rather, is that if you scratch my back, I’ll

scratch yours; and more specifically, that if you offer to scratch mine if and only if I scratch yours, and I take you up on it, then we owe each other a scratch - and we owe it to *each other* rather than anyone else, because it is each other who is the provider of the service of which we thereby avail ourselves, and therefore the one to whom it is relevant to make an offer.

In none of this is there any interest whatever, fundamentally, in the question whether what the potential seller can do for the potential buyer is something that costs the seller a certain amount of physical labor, or of mental labor, or anything except attention to the question of whether she should part with her control over it in response to the offer being made.

Why do people think that such distinctions do matter nevertheless? There is an easy and plausible answer. Taxation is enforceable; governments use force, when necessary, to transfer wealth from its possessors to themselves, or to others as designated by the government rather than by the initial possessors. People with more will thus be viewed by people with less as eligible targets for such transfers. People with nothing are unlikely to be capable of effecting such transfers, but people with below-average amounts are quite likely to be so. Thus we below-average types need a "social theory" according to which ordinary workers receiving ordinary wages have "deserved" and "earned" them and thus get to keep them, whereas the so-and-sos who have a lot more than we do clearly have not "earned" them and are therefore justifiable targets for predatory activity by the "people," that is, by people well below the median income. But, I shall argue, no such theory is plausible.

The fundamental reason for claiming that a laborer is entitled to his wages is that he has *produced* what he gets. An isolated frontier farmer in 18th or 19th C. America, for example, makes virtually everything he has. Taking it from him obviously invades him; forcibly transferring it from him to others effectively enslaves him to those others. And we all, of course, think that slavery is wrong.

If we are inclined, as is Fried and almost everyone, to accept this story, then we shall quickly enough run into a snag. For our frontier worker works on land that was not created by himself. If he is entitled only to the fruits of his labor, no matter how you construe that, then how do we separate out what he himself has made from what nature has contributed? Clearly he does not deserve nature's share in the enterprise, does he? So we are back to being able to tax even marginal farmers, after all. So the story goes.

The latter argument would be susceptible of no reasonable reply, if its premise were correct. For there is no rational way to assess the relative values supposedly distinguished in the preceding argument - no way to apportion what *we* contribute in comparison to what *nature* did. Nature's contribution will always be necessary: no amount of effort expended on nothing will ever yield our dinners, or even our symphonies. The closest we can come is purely intellectual effort; but even if man could live by bread alone, he certainly cannot live on thought alone.

However, man does not live by nature alone either. Put our individual in whatever paradisiacal state you like, and at least *some* effort on his part will be necessary in order to translate nature's bounty into a square meal. At the lower limit, perhaps, we could envisage returning to the womb, where everything is truly done for us. But then, the person who does it for us is quite decidedly not in a womb herself, and certainly must put forth effort, guided by some at least rudimentary know-how, to enable her to continue to function as a supplier to her infant.

Should we say, then, that all effort being human, nature's "share" should be zero? Or should we instead say that all effort is made potentially fruitful only by nature, and so nature's share should be 100%? To this, fortunately, the correct answer is easy: *we* get it all. Nature's share is zero, because nature *isn't one of the players in this game*. Nature, as such, has no moral status. It is, simply, *there*, a bunch of stuff of various kinds. When people devote effort to altering nature in one way or another, it is with a view to satisfying assorted desires, realizing various values, of their own. Nature has no desires to satisfy, no values to realize, and in any case, no intelligence to enable it to address itself to the question of what to do this morning, or how to accomplish it. So the right answer to the question posed in the previous paragraph can only be as I said: *all* for us, *nothing* "for nature".

This obvious point will no doubt raise hackles. It will be thought that I'm devaluing nature. Not at all. I am instead merely correctly identifying its relation to morality. People's valuations of nature, both as a means to useful products and as an object of aesthetic admiration or spiritual contemplation, are among their primary inputs to moral and political matters, which largely concern whose values are to give way to whose in situations of conflict. Those who admire nature as it is attempt, on the basis of their admiration and love - *theirs*, not *nature's* - to exclude others who would turn it into parking lots. One set of values and agents contests with other sets. But nature isn't one of the players; it is, instead, what the game is about.

Now, the arguments we are considering here do not in fact put it that way. Their proponents make an assumption: if good X is "due to nature" rather than to Jim Smith, then it is appropriable *by the rest of us* despite the productive human effort involved being Jim's. Why? The answer could only be that nature, as such, is assumed somehow to belong to mankind *collectively* - the hoary Lockean assumption that got philosophers in the ensuing three hundred years into writing articles such as Fried's. But the assumption is manifestly wrong, even absurd. Nature is inert. It does not, as such, *belong* to anybody - it simply *is*. People are equipped with interests, intelligence, limbs, backs, torsos, muscles and bones, and the motivation to use those resources in order to accomplish their goals. They apply those to whatever they can apply them to: land, trees, veins of gold, whatever. That's just the way we are.

Where does morality enter this picture? Again, the general answer is clear. It enters as a set of what we nowadays may reasonably describe as "social software." People encounter other people, likewise equipped

with desires, intelligence, and the other means to fulfill those desires. So long as we are Robinson Crusoe, there is no need for such software - though there is plenty of need for prudence, directing us to allocate our efforts more efficiently rather than less. But it is when people come in contact with each other - as, we may well suppose, all of them do - that we encounter the kind of problems that we can hope to do something about by means of an institution of morality, moral-type software. So conspicuous among these problems as to be almost definitive of them is that some people will see a prospect of gain from availing themselves of services capable of being provided by others, especially in the form of appropriating the products of other people's efforts. The thought occurs to such people that by investing some effort in the means for such appropriation, rather than directly from nature, we can increase the efficacy of our efforts.

There are basically two species of such efforts that matter from the point of view of the potential re-appropriator, and that set the stage for a moral institution.

(1) In one case, the effort is devoted to inducing voluntary transfers of control over various products or other services to the other person.

(2) In the other case, effort is devoted either (a) to forcibly appropriating those products, nullifying any effort the attacked parties might make to resist, or (b) to *coercion*, which induces people to transfer those products by the prospect of still greater loss if they do not.

The difference between (2a) and (2b), for present purposes, is immaterial. It is enough to observe that people are sometimes motivated to "invade and despoil", as Hobbes puts it. Any of these methods might be rational from the point of view of the appropriator. But from the point of view of potential victims, there is a clear distinction between them: he greatly prefers (1) to (2). Or at least, he does provided that the methods employed under the aegis of (1) do genuinely make the transfer fully voluntary. They will be so only if the communication by which otherwise voluntary transfers are induced is reliable, in the sense that the information transmitted by the first party to the second (and vice versa) is clear and accurate, so that the second party knows exactly what he's getting into. Only thus will the transfer be fully voluntary. Since it is easy and can be highly profitable to lie, mislead, distort, or obfuscate, the temptation to do so is great. But these deviations from clear communication are part of methods of type (2), not (1). Blending voluntariness with coercion is easy and familiar.

Various facts about the general situation of people may now be brought in to support a fairly simple and straightforward principle for designing the needed social software, that is, moral rules. First, we are all quite capable of employing either method (1) or (2). Were it not so, a plausible social rule might be designed that would solidify and provide social recognition, "legitimacy", to the continued existence of a subset of people who would standardly exploit the rest. We might think of the Medieval period in Europe, in which there developed a warrior class

whose members were so formidably superior in fighting ability to ordinary working people that their continued dominance was recognized in the social mores of the day. And second, investment of effort on methods of type (2) is, from the social point of view, inefficient. *Prima facie*, investment in predation is unproductive. In order for predation to "produce" anything, someone else, the potential victim, must have engaged in nonexploitative production. Predation produces for one person at the expense of another. Again *prima facie*, had the exploiter invested his own labor in production rather than predation, there would be more for both parties. (We will also do well to appreciate how long it took Europe to move from a situation of desperate poverty to one of modest poverty. The correlation between that and the thralldom of the productive to the militarily superior is, I suggest, hardly accidental.)

It might be argued that the proper social rule is got by calculating the expected gains to predators from predation as compared with their expected gains from their own non-predatory production, and then imposing a tax on the nonpredatory producers to compensate the potential victors in predation for desisting from such predation. This provides mutual benefit - or does it?

The answer to this is that it would, if the potential exploiters were incapable of predation themselves, or otherwise spoiling the picture for the exploiters. But since that is normally false, a proposed system of the above kind will induce normally productive persons to turn to defense or counter-predation themselves. This reduces social efficiency yet more. Instead of a predatory class exploiting a productive class, we will have everyone spending most of his time and energy either on predation or defense, or a mix of both.

Taking all this into account, we may propose a simple hypothesis: let's prohibit activities of type (2). Or in the words of Hobbes, let us adopt as a general rule of conduct, a "Law of Nature", as he calls it, to "seek peace and follow it," confining the use of interpersonal force or threats of same to the countering of previously initiated aggression by others. As noted, we will count fraud, which is the misuse of communication, as a species of coercion, so that (2) comprises not only invasion with fists and knives, but also with false words and deliberate obfuscation.

The effect of this is indeed to confirm one of Fried's intuitions: the products of the productive efforts of person A are to be left in the control of person A, so long as A in turn confines his uses of those products to those compatible with the prohibition on aggression. That, of course, leaves the door wide open to mutually beneficial exchanges between person A and person B. The importance of such exchanges is almost impossible to underestimate.

We should also note that sometimes there is what we would ordinarily describe as a one-way transfer of wealth from one person to another, namely gift. But they are not an exception, for such transfers are nevertheless mutually beneficial. If A voluntarily supplies B with a product of A's efforts, x, then that must be because A sees some value in B's having x, so that in making this transfer, A course realizes that value; thus B is

not the only beneficiary, unless we look, myopically, only at the material objects involved, such as the slice of pizza A puts into B's waiting hands.

This last leads to a further reflection. Many transfers of desirable things from one person to another will not actually transfer "things," that is, "material" things. If A plays the violin so that B can hear it, and B enjoys the result, no material transfer of bits of matter from one to the other has taken place, but B has certainly benefited. For that matter, we might go further and point out that when we say that possession of some material object is a good thing, what makes us say it, and what makes it true, is what possession of that object *does* for us. The car enables me to get around, enjoy its comfort and handling, say; the fine big house is a pleasure to look at and walk around in, and so on. And in turn we can say - because it is, on reflection, true - that when someone transfers the right to some material object that we want to us, he is thereby doing us a service. So that when we are willing to pay money for this, what we are really buying is a *service* - the service consisting of transferring the right to use the thing unmolested from him to us, he in turn enjoying the service of our providing him with the cash, which is actually a kind of general draw on the voluntary services of yet others.

When we view the matter carefully, we see that *all* exchanges are of services. Playing the violin beautifully before willing audiences, washing floors, enabling someone to drive a nice car by selling it to him, are all services, and those services are the real objects of transfers. Paying someone money is a service to him - normally a very useful one, precisely because it enables the recipient to take advantage of quite a wide range of opportunities, rather than some very specific one only.

When I make my way into a previously unoccupied wilderness and put it to some sort of use, and you, seeing that I have done so, refrain from trying to use the bits of it that I am now putting to use, you also do me a sort of service: you refrain from molesting me, and that is to my benefit. What do you get for it? The answer is that you get, at a minimum, similar service from me, should you set up shop down the path a bit. If each of us could molest the other if we felt like it - and we usually could - then mutual refraining from doing so is a mutual benefit, and normally an extremely easy one to provide, since one can provide it by doing nothing. In general, I would argue (following Hobbes, Locke, Kant, and many others) that the uniquely right payment for the benefit of noninterference is reciprocal noninterference. It is *never* true that A owes B not only noninterference, but also a free lunch, in return for B's noninterference with A.

Fried on Original Acquisition and Capital Appreciation

We are now in a position to respond to some of Barbara Fried's arguments. We may start with an offhand observation she makes about Nozick in regard to the theory of Justice in Acquisition: "Among the things left ambiguous is whether the process by which unowned things are

justly acquired is that of a Lockean labor theory of ownership, first possession, or some other thing entirely..." (227). Whether that is a fair comment about Nozick's discussions in particular is not my concern here; rather, I want to consider the widely held idea that these *are* "different accounts." They are not. What matters about someone's laboring to produce something is that that something originated as a result of the labor in question. The person expending that effort either intended to produce that very thing by means of it (the normal case), or if not, he noted potential use for what he inadvertently produced, and proceeded to take it in hand in some way. In either case, he is, literally, the first *possessor* of that thing. He is not, just by virtue of being the producer, the *owner* of that thing, for ownership brings up normative claims. Rather, he is literally its possessor, that is, the person within whose grasp, under whose immediate control, it now is. Exactly the same is true of someone who finds, rather than makes, some useful thing - such as a bit of real estate. It is often harder to establish and identify boundaries for the latter than the former, to be sure, and that is understandably the source of much difficulty, as when people with some agricultural technology intermingle in an area with people utilizing only hunter-gathering technology. Nevertheless, the basis for a claim that a bit of land or a gold mine or whatever "belongs" to person A rather than person B is, in the absence of exchange, the fact that A was the first possessor of it - that A got there first.

Many writers seem to think that being first is *arbitrary*, in a sense that implies some kind of unfairness or inadequacy in a system paying important attention to this factor. And in a sense, it is arbitrary, but not in such a way as to entail unfairness - indeed, exactly the opposite. The arbitrariness of first-coming mirrors a fundamental "arbitrariness," the one that Rawls refers to as the operation of the "natural lottery." The fact that each of us is born with the particular set of characteristics we have, in the circumstances and locations we are in, is fundamentally not due to our efforts; as such, it is morally neutral, reflecting no credit of any sort for the sheer possession of those features. Despite this, however, the best principle for society is one declaring that each one of us is, absolutely, entitled to be the person he or she is, and to remain, barring certain extreme eventualities, inviolate against the invasions of any and all others. The fundamental "reason" for respecting Jones as such, with all his peculiarities, is that each one of us is a particular person, a particular bundle of peculiarities which we nevertheless value in themselves, and which form the very fountainhead of whatever other values we come to adhere to. To be someone is to be a particular, cosmically arbitrary, individual; if that doesn't matter, nobody matters.

This cosmic arbitrariness is existential. Even so, the reason for insisting on our right to the selves we happen to be is closely related to the reason for recognizing first possession as a ground of ownership. When person A "gets there first", some time elapses between the time of his discovery and the time, if any, that the next person comes on the scene. What happens to the valuable bit of nature that A finds and goes

to work on - using, contemplating, or altering it to his purposes - if we say that the arbitrariness of individuals qua individuals must be overridden by the interests of society at large? The answer is that it lies fallow while "society" squabbles about how it is actually going to use it. And in doing so, it disenables A from putting that thing to good use - good, in A's own view of what is good, not in society's. But then, society's is just somebody else's - it is not some superior kind of being with a different order of claim on things. In addition, of course, we must mention the fact that A will try to defend himself from the efforts of others to take over the results of his work. This brings the situation within the scope of the preceding argument about the inefficiency of aggression. It is this consideration especially that underwrites "first come, first served" as an *efficient* social principle: it will enable more people to realize more of what is of value to them than any alternative. Being able to count on continued possession of a useful thing enables the possessor to improve it; being unable to count on that motivates under-use, or irresponsible use. (As a contemporary example, clear-cutting in Canadian forests occurs because those who cut do not own the land but have simply acquired cutting rights from the government which does own them.)

Those who dissent from this typically buy into an idea that comes very naturally to us all, especially professional academics. That view or idea is that the good of individuals is something that we can know in a sense that outruns or even is quite irrelevant to the view on that subject of the very individual whose good it is supposed to be. We are all natural paternalists: we have a set of values, and we naturally think, especially if we are high-brow thinkers of great thoughts, as in Philosophy, that they are *right, true*. And if "true" for me, then of course true for everyone, no?

Well - no! What's wrong with it? Nothing, if we don't mind being more or less continually at war with our fellow men, who for some reason obstinately insist on thinking differently from us. But if the prospect of being subordinate to the values of others is of any interest to us, then the idea that what's good for Jones is what Smith thinks is good for Jones is going to run into heavy weather. Jones, of course, will in turn hold that what's good for Smith is what Jones thinks is good for Smith, and on the face of it, it is hard to see why either opinion on this point should be intrinsically more plausible than the other. But there is very good reason for thinking that Jones, at any rate, is going to be motivated by Jones's ideas about what is good, and Smith's by Smith's, and *not* the other way around. Jones acts rationally when he tries to realize the values he actually has, and not - if that even makes any sense - the ones he does not have. So rational beings will also understand that for one person to declare that the other one should do x, despite the fact that the other person has no interest in x, nor in anything that supports the doing of x, is for that person to talk great nonsense. If he persists in talking that way, or worse, acting on it, he is, manifestly, asking for trouble.

While it is not a simple, direct, immediate inference from the preceding, I nevertheless think that there is only one plausible inference: rules purporting to be good rules for the direction of human society will

have to be rules that are for the “common good”, that is, they will have to benefit *everyone*, all things considered; *and* they must support it compatibly with each person’s being allowed to be the ultimate authority on what is good for him or her. Given the known variability of human values, it is a quick inference from this, in turn, that we should refrain from using force to attain our ends against those of our fellows. Instead, we should allow each person to do what he can in the way of promoting what he sees to be valuable, with costs and benefits of his activity falling to himself rather than their being socially forced upon others. That in turn entails allowing individuals to use otherwise unused bits of the world when they have the opportunity to do so. When, as might conceivably happen eventually, there is nothing left not owned by someone, then the individual thus “bereft” is obliged to make offers to the existing owners. This method of making his way in the world is, of course, certain to be immensely easier and more profitable than trying to slug it out with Mother Nature, so the absence of opportunity to acquire what was never used before is not a net loss, but just the reverse.

Now it will often be true that the utility to me of item *x* is a function of my relation to others. If item *x* can be used for purpose *P*, which I do not share, *x* may nevertheless be valuable to me on that account; for if I see that others do have *P* and therefore an interest in *x*, and if I can enable them to use *x* provided they do something for me that enables me to realize my own purpose, *P'*, then we are in a position to benefit from exchange. Other persons, no doubt, are in a position to benefit from *x*, but if they have nothing to offer that interests me, it is not rational for me to relinquish my possession of it in order to enable them to do that. The vendor of images of saints waiting outside the gates of the cathedral for the emergence of people to whom those saints do have value, is motivated to serve the interests of those religious people even if he is an atheist himself. If he were only constrained to deal with like-minded people, both he and the religious people in question would do worse.

Let’s now apply these considerations to our erstwhile day-laborer *JS*, who buys a lot in suburban New York City for \$5,000 in 1960 and sells it in 1980 for \$500,000. According to Fried, a theorist under the rubric of “Left Locke” would reason, with Ricardo and Henry George, that “by virtue of his labor *JS* is entitled to a portion of the value of that land, but (being a strict desert theorist) would argue the portion is limited to *JS*’s actual cost, or sacrifice, in acquiring it (\$5,000), plus perhaps a fair return on that cost.”⁷ And why? “Any appreciation in value above that amount is purely fortuitous so far as *JS* is concerned, resulting from the intersection of a naturally constrained supply of land in commuting distance from New York City, and increasing societal demand for such land.”⁸

But is it “fortuitous”? Perhaps *JS*, day-laborer though he be, was canny enough to see that demand for this land was likely to increase. Possibly he could even, as we say, “make a killing” by hanging onto it for two decades before he sells. Let us not try to analyze *JS*’s reasoning as a real-world case: he could have been mistaken in any number of ways. Perhaps, for example, had he sold it two years later for \$8,000, and

invested \$5,000 in stocks, those stocks would now be worth \$2,000,000 instead of the paltry half-million he can now get for his lot as a piece of unimproved real estate.

But it doesn't matter. For Fried and Henry George have made a subtle but crucial mistake here. The value of me to you is what I can do for you. The "market" value of me to you is what "I" am worth on the open market. But then, an open market is just you and I and more people being free to buy whatever they like from whoever is willing to sell at the prices envisaged. So the value of me to you on an open market is the value of me to you, given that a lot of other people might also be interested in me and that I am disposed to sell myself (= my services) to the highest bidder - as, of course, I am. Now, what has JS done for society? He has in fact made available to someone an extremely valuable piece of land. So far as JS knows - and he does not know for certain, of course, but he calculates against a tolerably good background of information, we will suppose - any earlier sale by JS would not have netted JS as much. As the years go by, JS is in a position to offer a more and more valuable service to somebody. He calculates that his optimal selling point is Feb. 17, 1980: that is when he can most use the half-million in liquid form, and when his buyer makes his best purchase by expending it on that land instead of keeping it in the bank. And this is all due to JS, as far as that purchaser is concerned. That the increment of value is due to the presence of a whole lot of people in the near neighborhood is true too, but constitutes no reason whatever why something should be done with that land other than letting the person who did indeed get there first, in the relevant sense of buying it, sell whenever he judges is the best time for him to sell, to whoever judges that that is the best time to buy, at the price available at that time. JS has now done a very substantial service to the public: he has enabled it to reap the benefits of an investment worth a half-million dollars in capital cost. (JS, to be sure, is not a "first-comer." But then, we can tell similar stories, mostly boring, that would eventually take us all the way back to the Indians selling Manhattan for what they take to be the excellent price of \$24 in beads.)

So in making his initial purchase, JS turns out to have done a very great service instead of the modest one he might have performed, years earlier, by building a modest home that might now be worth only \$150,000. And so on. In general, when in a free market the price of G is \$X, X reflects the values of the persons concerned: it will be the highest price someone is willing to pay for the opportunity to use G that G's owner is willing to accept for transferring the right to G over to the purchaser. If that owner has played his cards right - as of course he may not, but then, they are his cards, not ours - then it will be true at every earlier time when he does not sell that he is doing society the service of keeping the item out of a less productive use and waiting for the moment when it has its maximally productive use, as judged by the interests of all consumers and potential producers over the period in question.

One trouble with Fried's exposition, and those of almost every recent writer, is that there is an assumption that what is "owned" is

essentially some or other *material object*, as such, and the “labor” of a “worker” is essentially devoted to creating or otherwise modifying that object, and that’s that. But that is certainly not that. What the worker - any worker - does is to provide a *service* to someone. The someone is usually an employer, in the first instance, but of course the employer is in turn attempting to provide a service to some potential customer, and what the worker does helps to achieve that end. In the “service industries” narrowly so called, the point is obvious anyway; but the paradigms in this subject got set in the 19th Century, and it has taken rather too long for philosophers to take the larger view that was really needed right from the start. The distinction of goods and services simply has no fundamental significance. What is economically valuable about a good is measured by the interest in the service that its provider performs for those interested. Whether the service involves pushing some material object around is of no fundamental significance.

Of course it is not just “workers,” in any sense in which we can distinguish between a set of workers and a set of people who earn money in other ways, who provide services. Obviously the investor provides a service too, just as does the landlord, the violinist, the basketball player, or the minister of some religion. Services provide benefits at various distances in time and space from provider to beneficiary. People can attempt to provide services to people forty years down the road, such as a manager of a pension fund, or on the other side of the globe, and so on. In all these cases, the provider negotiates a price for his or her services and will, ordinarily, go for the highest price available, just as those benefiting from the service will hope to pay the least possible. Sometimes the “price” is not fixed but an open-ended arrangement, as with speculative investments. If we ask, then, who has “done more” for people as between the baker or the investment banker, the likely answer is that the latter has: his services have been judged by those who benefit from them to be worth a good deal more than those of the creators and suppliers of material objects, even when those objects are loafs of bread or other items deemed essential to life.

This assessment, that the person who gets the higher price is the one who is thought to perform the greater service, must not be confused with another kind of evaluation. Some are not interested in money, or profess not to be. In claiming that the services they claim to provide are beyond price, or worth something in kind that is not available on a market - happiness, for example - they certainly make a relevant and intelligible claim. And it is easy to see how such persons might want to advocate a social system oriented toward the production of that special value rather than the innumerable different satisfactions provided by the liberal economy. Liberalism attends to the values people have, as revealed in their choice behavior. The Platonist or the proponent of some other sort of “ideal” values readily accepts the view that many of those choosers know not what they do. The way of life he proposes for us is, he claims, much superior to the tawdry and defective ones we presently have, and of course a social system should be geared to promoting that more valuable one. (Shouldn’t

it? Obviously it should!) This will be readily agreed to by all those who are persuaded. But then, those *not* persuaded will find it equally obvious that it should not. Meanwhile, liberalism, as has so often been emphasized in the literature, is austere neutral on the subject. It says only that we shall deal with each other on a basis of respect, not love. It commands us to advance our values only insofar as we can do so without thereby frustrating other people's pursuits of their values. And the economic "values" of the marketplace, rather than being some new set of special values, are simply measures or indicators of success in the terms recognized by whatever people there are, as they are at the time of purchases.

People can reckon themselves to be better off as the result of some other person's activities even though no material objects have been shoved their way by those activities. When they enjoy musical or athletic performances, or gain, as they suppose, in intellectual or spiritual respects, their gains are not measured in material terms. Even so, there is no problem comparing such benefits to "material" ones. We can miss lunch in order to hear a good speech, and sacrifice our bodily well-being for what we take to be spiritual improvements. There would indeed be such a problem if the theorist wished to find some measure of benefit that is both valid and independent of the preferences, attitudes, and powers of those concerned. But that is the theorist's problem, not ours. What each individual does is to look about for opportunities to do what will find favor with others, to the point where they will in turn do what finds favor with him. We are then ready to "do business" - that is, to participate in a scheme of interpersonal behavior that is mutually beneficial in the eyes of those who participate in it, even though the terms of benefit are peculiar to each.

Once we view an economy this way, our cast of characters is put in a perspective that shows the arbitrariness of distinguishing among them for purposes of political exploitation. The politician's or the social theorist's claim that some economic agent, A, "hasn't done anything" is conclusively refuted by the fact that what he does is valued by someone else so greatly as to induce that other person to provide a reciprocal service, in the form of offering a monetary payment, for its performance. Whether A has labored for hours in a dark sweaty place, or instead sat at a large mahogany desk for a few minutes, or stood on a stage drawing horsehairs across catgut, does not matter. What matters to B, the purchaser of A's services, is, simply, that what B offers her is what she wants, sufficiently so to induce her to respond by reaching for her wallet, or whatever else she might be able to offer to A in order to induce him to provide those desired services. So long only as what is offered to B matches what is actually received by B, B has no interpersonally acceptable complaint.

The thesis that some income comes from "economic rent" *instead of* the productive efforts of someone and is therefore eligible for political ministrations, independent of the preferences of the parties to the transactions in question, is consequently short on economic sense. We always pay for someone's efforts, of some kind or other. In making those

efforts, that person has, as it turns out, succeeded in providing what someone else wants. If we tax the “rich” instead of the “poor”, we increase the cost of the services by which those people have made their money. This is as true when the tax is on income derived from rent, profits from investment, or fees for exotic performances as when it comes from manual labor. And since the laborer, like anyone else, makes his purchases from various of these other people, in making life more difficult for them we also make it more so for him. Increases in the costs of what one buys are increases in one’s cost of living, hence decreases in one’s real income.

If taxation were a sort of “investment”, as it is widely claimed to be, it should be possible to estimate its expected returns and compare those with the returns that might instead have been expected from voluntary activity in its own right. But the sheer fact that taxation is not voluntary leads one to suspect that the verdict would always favor the latter, and never favor taxation - so long as we are measuring social success in the person-neutral terms of the market, these being the terms of the people whom social institutions are, on our liberal view of the matter, supposed to be trying to benefit, rather than by some imposed set of values belonging to the politically powerful.

I conclude that Fried’s attempt to distinguish the workman from the capitalist from the renter are ineffective. Market rent is not what she and so many others evidently suppose: the holder of valued permanent assets is not a useless leech on society, but rather performs one more useful service among others, its utility being measured by the effective demand for it when others are free to make offers for it.

2. Gross’s Counter-critique

A different response to Fried, by Damon J. Gross⁹, also expresses concerns about the problems of private ownership, but argues that Fried is mistaken in assimilating the income Jordan gets by exerting his scarce talents to the capital gains income accruing to JS from his ownership of land purchased long ago and now worth a hundred times what he paid for it. His claim is that “as land becomes scarce, and therefore comes to have value, private property rights with respect to land come into conflict with what I shall call the principle of equal liberty” (44) What fundamentally makes for this problem is a “serious general problem” - namely, that “any system of property rights... restricts someone’s liberty in some way.” (44)

How serious and how general is this problem? On the one hand, it is indeed very general, if as he says it is a matter of “trading off one set of restrictions for another.” (44) That is because we are *always*, and necessarily, trading off one set of restrictions for another as long as we are in the business of trying to establish rights: A’s having the right to do whatever he has the right to do inherently restricts B from interfering. It does that because that is the whole and entire point of rights: rights *prohibit*. They are never *free*. No free lunch, no free rights. To be a right is

to be a restriction on the activity of someone else who might for some reason want to do what that right grounds the prohibition of: taking the rightholder's life, for instance.

And so when he states the libertarian principle as "The notion that we should all have the greatest possible liberty consistent with the equal liberty of all others..", tradeoffs loom before us. Can we escape them by adopting what he claims is "a somewhat weaker principle... that whatever liberty one person has, it is to be limited by the equal liberty of all others"? (44) Plainly, as we have seen, the answer to this has to be in the negative, no matter what meaning is attached to the idea. All rights limit the activities of others. But further, both formulations employ the adjective 'equal.' We should not suppose that we know what we mean when we combine the two. Is liberty L1 "equal to" liberty L2 when the same description of the permitted action is used in each? Or when the value to the person who has L1 is equal to the value L2 would have for him? Or is there an obscure idea of measuring the number of kinds of activities L1 permits as compared with L2, and then counting so as to see whether each has a roughly equal number?¹⁰

Of these three answers, the first and third are plainly hopeless. The *value* of the liberty in question is the most basic consideration, since it is, by definition, all that anyone cares about - to "value" liberty over and above the value we put on what it allows us to do is, I take it, nonsensical. But if that's so, then we surely will be hard put ever to apply any principle of "equal liberty:: we can let Smith do x and Jones do x, but how are we to know that x is just as valuable to Smith as it is to Jones? And when we move from Smith and Jones to all members of a large class of people, it's still more obviously game over. We cannot know that sort of thing about them, and anyone who claims to is importing his own values into the situation, rather than going by those of the persons concerned.

But we can no doubt get a better insight into Gross's idea by looking at his own scenarios, which are designed to explicate it. He produces 3:

1. A and B go for a walk in an orchard; there are lots of apples within easy reach of both. A eats one.
2. Only one apple is within reach of either. A takes and eats it.
3. A is much taller than B and can reach lots of apples, while B is too short and can reach none. A takes one and eats it.

In case 1, by eating that apple, A deprives B of the liberty of eating that particular apple; but, Gross says, it does not deprive B of equal liberty, "because there are plenty of apples left for her to pick, and she and I are indifferent with regard to any differences that may exist among the many apples within our reach." (45) But why does 'equal liberty' reach to the case of eating *some* apple or other, but not to the case of eating *that* apple? After all, that is a possible action, and A's performing it precludes B's doing so. Of course, most of us do not care which apple we eat, and Gross specifies that this is so in the case of his person B. But some jealous person might envy the apple A eats, no matter which it is, and just

because it is A who is eating it. We'll return to that below, but first let's consider the two other cases. In case 3, says Gross, A's taking an apple does not deprive B of the liberty to do "anything she could have done had I not been on the scene". Perhaps - although B might ingeniously erect a ladder, or find other ways to avail herself nevertheless of the apples. It remains that A's eating one apple blocks B from getting *that* one, and also (therefore) from getting them *all*, by whatever independent method B might be able to use to get them.

Case 3 presents an important new feature: the technological difference between the two, which is such that A's presence increases B's potential, at the time, for apple-getting; she can now obtain an apple by asking A for it, for instance; or by offering something of value to A. Division of labor can go to work, increasing the satisfactions of both parties.

But it is case 2 in which, Gross thinks, B's equal liberty has indeed "been compromised". Presumably this is because it is not only B's desire to eat that particular apple that has been thwarted, but also her desire to eat any apple at all (from that orchard). And in the circumstances, that is true. But it is unclear what the word 'equal' is doing here. In eating the sole apple, A deprives B of a liberty: to eat an apple. Had B instead got it, B would have deprived A of that same liberty. If B in fact doesn't like or need an apple anyway, the deprivation wouldn't matter to her. But supposing that B either likes or needs an apple, then there is a conflict here: both cannot have the one apple there is. (They could split it, but this is uninteresting. We will stipulate that half an apple isn't enough to satisfy the particular interest we have in mind.)

Now, why call this "equal" liberty? If it's a matter of identity of description for acts available to the persons in question, then we must point out that both A and B *can* have a right to a "same liberty" regarding (2): the liberty to take *whatever apples aren't already taken*. In the scenario, A doesn't violate that right of B's, nor of course does B violate that right of A's. And in fact, in all three scenarios, specifying that as the relevant right will resolve all problems of conflicting rights. The question would only be, why seize upon that particular act-description rather than some other?

To this there is an excellent answer. The case concerns apples, and the assumption is that everyone would like to have one or more of them. There is no problem about both satisfying that particular consumption interest in case (1), and there are different difficulties about doing so in the other two. Only in case 2, that of scarcity, is there an insuperable difficulty about it at the particular time. So the question is, what is the right rule for managing the modest conflict that exists in that case? The answer is the rule I have specified in the previous paragraph, which in effect is, first come, first serve. For that rule maximizes liberty for all in the only way it can be: by generally prohibiting violations of liberty. It prohibits that because to violate liberty is to prevent people from using their capacities in whatever way they want, from the available range of options insofar as those options are available without coercion.

Suppose the sole apple is x . When A arrives, there hangs x , available for the picking, and A picks it. When B arrives, there is no apple that can be got without taking it from someone. A did not take it *from B*, who wasn't there as yet - instead, he merely took it from the tree, which by hypothesis does not belong to B or anybody. Both do have the "same liberty": to use whatever they can use that has not already been put to use by someone else. This is the only sense of 'same liberty' that matters. Each of us has things we want to do, and attempts by others to prevent our doing them will therefore be resisted. There isn't any other aspect of liberty that matters to each of us. This is the one liberty that can function as the common good.

Gross proposes to generalize as follows: "When land has no market value whatsoever it is like the apples in (1). My exclusive use of it cannot come into conflict with the equal, but non-identical, liberty of anyone else. (46-7) But when the first parcel of land in the world comes to have value, we are into (2). There, B is deprived of equal liberty." (47) Yet, despite this, Gross says, "there are very strong, perhaps compelling, reasons that people should be allowed exclusive use of parcels of land..." (47) This is unsatisfactory: we should not have a structure of rights such that we have to infringe them sometimes, in the interests of something or other, and then say that it's nevertheless OK to do so in those cases. The point of a theory of rights should be to enable people to know what they may and may not do. A maneuver such as Gross's should be rejected if we are to get a decent solution to the social problem to which a schedule of rights is proposed as the solution.

The scarcity of land, Gross suggests, leads us to Locke's Dilemma: "either one must give up equal rights to land and thereby give up equal liberty; or one must give up the benefits of exclusive ownership of land, and particularly the benefit of the assurance of one's rights to exclusive use of the fruits of one's labor" (48) If this were indeed the dilemma, then we would be in bad shape; for lack of exclusive ownership, whether of land or of anything else, is indeed equivalent to lack of freedom. One is free to do x when nothing prevents one's doing x at will. Lack of exclusive ownership of anything, say M , means, by definition, that someone else may prevent one from doing what one wants with M . Scarcity entails lack of ability to exercise exclusive ownership, for all who might like to do so, over the scarce items. That means that unilateral action becomes impossible. And if unilateral action is impossible, action in general is impossible.

But *does* equal liberty imply equal rights to land, as Gross apparently supposes? Not if the measure of liberty is the value attached by each to the actions permitted by the liberty in question. Those with no interest in farming, say, or of the other uses that the land in question might be put to, lose less than those with such interests. And among them, those with the most passionate interests but who are deprived of the use of the land they want lose the most. Since people vary a great deal in such respects, the idea that they should be thought to be entitled to equal liberty *as so measured* is plainly absurd.

Should they be thought to be entitled to it in the first sense? Again, plainly not. Not only is it impossible to apply the principle as interpreted in that way, but insofar as one can apply it at all, we would have to expect it to be impossible to realize it. Given the range of desires possible to humans, the probability of at least some of them conflicting in zero-sum manner is essentially unity. But a “right” that it is impossible to fulfill for all who have it is a non-starter. Any statement of a right having that implication is incomplete and needs modification. To take a famous example of H. L. A. Hart’s, if there is a five dollar bill lying in the street, we cannot both have the right to *it*. What we *can* both have, though, is the right to it *if we get there first*, plus a right to try to do so.

Gross lists 4 attempts to solve this supposed dilemma: (1) the Lockean Proviso in its original form; (2) Nozick’s modification of same; (3) Spencer’s proposal to give all land to the state; and (4) Henry George’s idea of taxing land-rent at 100%. His (and my) quick comments on each follow.

1. The Lockean proviso in its original form is a cop-out, as Gross points out. As Fried says, “We leave ‘enough, and as good’ for others only when what we take is not scarce. But when it is not scarce, it has no value...” (Fried, 230)

2. Nozick modifies Locke by proposing only that we require that appropriation not worsen the situation of others. But, says Gross, “It has been argued convincingly that Nozick’s proviso does not preserve equal liberty but merely substitutes his favorite system of property with its inherent restriction on liberty for less favored (by him) systems of property with their inherent restrictions on liberty.”¹¹ We now see, however, that this assessment is wrong. The right of all to use whatever is not already taken so long as it is not used to violate the existing rights in what others already have, which is almost Nozick’s proposal, does preserve equal liberty in the only relevant sense.

3. Herbert Spencer’s conclusion: Make the state the owner of all land, which would be leased to the highest bidders. (My comment on this: And then what? Why would the money be spent on whatever it would be spent on? Whatever the answer to that, why should we think that the state’s use of it would be better than the uses to which income got by private owners would be put? In any case, the outcome of any such scheme, one has to think, would be squalidly political in the worst sense. Cf. the Soviet Union: Mankind has been there, done that, and thank you, has had quite a bit more than enough.)

4. Henry George’s solution: All rent of land to be collected as tax. “In this way all members of the community are placed on equal terms with regard to natural opportunities that offer greater advantages than those any member of the community is free to use...”¹² (Of course this requires us to know what part of the income is “rent” - as well as inheriting the demerits of the Spencerian scheme. I have previously argued that this is unknowable in any interesting sense.)

Gross concludes that, alas, there seems to be no solution to the problem of land. But what about Michael Jordan and his special talents?

He considers 4 ways to construe the Jordan examples "in such a way that it might appear that someone is deprived of something:" (50) They are that he deprives others of (1) their money; (2) the chance to be Most Valuable Player etc.; (3) whatever Jordan, with his higher income, might have outbid someone for; (4) the equality necessary to prevent oppressive regimes from taking over... (50-51) None of these, he thinks, carries much weight - despite the fact that the first three are, in differently irrelevant ways, true. But they are irrelevant. (1) Of course you don't "deprive" someone of his money when you sell him something; (2) the chance to be MVP is a competitive game which all play because they want to, and outbidding is simply willingness to pay more, rather than a tendency to "deprive"; and as to (4), it's largely far-fetched, but is in any case a quite independent point, depending on incidental circumstances.

So Gross concludes, "If what I have argued is correct, then *either* there is one class of holdings, to which land belongs, for which the holder's entitlement is nothing like as absolute as Nozick believes, *or* an adequate principle of justice must prohibit the acquisition of exclusive rights to land. On the other hand, for all that has been said in this paper, there may be another class of holdings, to which natural talent may belong, for which the holder's entitlement is more nearly absolute..." (52)

And he concludes, first, that there is indeed "a general problem with full private property rights to land that goes as deep as the principle of equal liberty" (49); and second, that any problems with extreme disparities of wealth and power "have no special connection with surplus value. But we have not found a general problem with market-based distribution." Meanwhile, "it would seem that land value is an especially apt candidate for a redistributive tax... [but] Since neither the possession nor the use of natural talent conflicts with the principle of equal liberty the same case cannot be made for an endowments tax. Michael Jordan's talent is not like the appreciation of JS's land. An endowment tax is not analogous to government collection of land rent." (52)

Of course, it is analogous in being a tax, and thus raising the same question that any other tax does: why think that imposition of the tax and expenditure by a political body of the resulting income would do better for people than nonimposition and expenditure by individual people? But in any case, I wish to challenge the thesis that there is a relevant difference. We should take issue with the claim that there is the problem he says there is: "a conflict between full private property rights to land and equal liberty". Gross says that if we don't like that phrase, then we may talk instead of "the equal right of all for the opportunity for self-preservation, for some place to live, some place to work, for some place to play." (50) It is unclear how he means these uplifting phrases to be understood, but it does seem clear that he supposes that we all have *positive* rights to all those things - rights to them that are supported at other people's expense. We should, of course, raise the question where people are supposed to have gotten such rights. And we must certainly ask why anyone should think that people should have, say, identically sized houses on identical plots of land, irrespective of any sort of work or

service they have provided for those who would make those houses. Whatever we say of that, it is surely completely disputable that there is an equal right of a kind that will bear those particular consequences. And Gross does not discuss the equal right to climb Mount Everest, to pilot a 747, to be the exclusive viewer of the Mona Lisa for awhile, or in general to any of the myriad activities that are plainly impossible for more than a few, or in many cases more than one, person to do. A theory billing itself as offering an equal right to liberty which is logically incapable of delivering on what it promises is a theory we should reject.

Above all, we have to point out that any egalitarianism of that type will have the usual problem that it is wildly unequal in its visiting of costs relative to benefits for each individual person. When those who do much are given the "same" benefits as those who do nothing or very little, such equality has been kissed goodbye. And of course it leaves us with the question which sort of equality is the right sort, and why. But the question has an answer. When we talk of "equal liberty" what, in general, are we talking about? Liberty is the absence of interference. You and I are equal in this respect when neither of us interferes with the other; we are morally equal when we are morally prohibited from doing so. We interfere when we block courses of action that people are engaged in. Some of those actions consist in transforming bits of nature in sundry ways; others do not. In the former case, we interfere if we take those bits of nature that others have already begun to work with or on and use them for our own purposes without their consent. Supposing that they, in working with them antecedently, do not in turn interfere with the ongoing activities of others, then the principle of liberty, which is the same as a principle of general and mutual noninterference, calls upon all to respect free activities that are innocent in that sense. We shall all be equally and maximally at liberty if and only if we all respect each other's liberty, as so specified, completely. When we do, we cannot enjoy more freedom without some else enjoying less. This is the by-now familiar Pareto principle.

Pareto principles require baselines for their interpretation, and this brings up Ryan's point against Nozick: that his version of the Lockean proviso does not preserve equal liberty but merely substitutes his favorite system of property with its inherent restriction on liberty for systems of property less favored by him, with their inherent restrictions on liberty. All rights principles restrict liberties, as I have pointed out: that is what they are for, and why they can be of any use; and so the complaint as stated is pointless. The question has to be whether the Nozickian modification is the relevant one if our interest is in liberty as such. And on the face of it, that does sound right. Nozick's modification prohibits whatever uses of newly acquired things worsen the situations of others. Since (social) liberty is nothing but the absence of costs imposed by other people, and costs are just worsenings of one's situation, it is hard to see how Nozick's principle could be wrong. The question is only how we conceive the baseline for worsenings.

To see how, let us go back once again to Gross and his apple cases. The trouble, he thinks, arises when we contemplate case (2):

there's just one apple, and if A takes it, then B doesn't get it. But as a representation of mankind's general situation vis-a-vis scarcity, case (2) is crucially misleading - and has misled almost everyone in this area for a very long time. For it omits the fundamental solution to problems of scarcity: production. B can't get *it*, true, and at that moment he can't get any apples at all. But knowing that there is a demand for apples can motivate A to take steps to grow more, thus enabling B's demand to be satisfied after all. Supply isn't fixed - not even of apples. And on the other hand, there is great variation in our world among people who are in B's position at particular times. Typically, they are in case (3), not case (2). Most people, for example, would like a bigger, faster, more convenient computer, but are quite incapable of producing one with their own hands and brains. However, other people are, and some of them do, in return for money that most people are capable of earning by doing whatever *they* can do. So supply increases, scarcity diminishes, and we are not in case (2) any more.

The idea that the fundamental scarcity in the world is of *land* in particular is, when one thinks of it, quite wrong. Land may - or may not - be good for growing food, for walking around on, for aesthetic contemplation, for building houses and malls on, and any number of other things, depending what sort of land it is and where it is in relation to which sort of neighbors. On the other hand, land is not much good for operatic productions, lectures on quantum mechanics, and so on indefinitely. In fact, it is, in its unimproved state, not really much good for food either. What most of us eat is not a product of raw nature, but of technological ingenuity on the part of agricultural and many other kinds of producers. The land on which they grow what we eat is very different from "state of nature," and were it not so, we would almost all starve.

Production of anything, in turn, requires noninterference with the productive process. There is a special kind of noninterference that is especially relevant here, beautifully explained by David Schmidtz in his discussion of the Lockean Proviso¹³: food-growing characteristically involves a period during which premature harvest is advantageous - in the short term - to some others. The cultivator of an apple orchard, for instance, must worry about people who would pick and eat the apples before they can reproduce, and especially before they would be sold by the cultivator. In both cases, this short-sighted predatory activity will cause reduction of output. In extreme cases, it will lead to general starvation, as Schmidtz observes.

It may seem as though the point just made is a pretty narrow one, applying only to the production of "consumer goods," in some limited idea of what consumers consume. But wrongly. In fact, people consume a vast range of things. Indeed, 'consume' is a poor word for most of the activities we have in mind, for many uses of many things do not consume them, and plenty of activities valuable to the actor don't consume anything at all, except time: two people having a pleasant chat are engaging in activities useful or agreeable to them. For others to intervene in this agreeable transaction is for them to decrease the "production" of desirable

states of affairs. There is not, intrinsically, any reason to insist that the production of material objects is more important than the production of agreeable experiences. In fact, it's the other way around: the point of producing any material object is to enable it to function in such a way as to improve the lives of those interested.

On occasion, intervention will result in net improvement despite its intrusiveness. I interrupt your pleasant chat to point out that the house is afire and you would be well advised to move; or to invite the both of you to a party which you will both enjoy; or... But what determines whether the intervention is a desirable one? The right answer here is that the preferences of the subjects of the chat do.

We could perhaps say that an intervention is not an intervention when it is welcome. Or better, that what might have been an intervention is not such, if it is welcome. Better still, let's distinguish between a proposal to enter into a relation and an entering not previously negotiated, and in turn, between the latter when it is also welcome in the event and when it is not. The term 'intervention' should perhaps be confined to the latter case. At any rate, it is intervention in this last sense that is to be generally disallowed or at least disapproved in human affairs. But what about scarcities when the intervenor sees no other way to rectify his need? The arguments considered previously were intended to establish that persons deprived of the use of natural resources by others' prior uses of it are thereby deprived in a way that creates a case for compensation. I deny that. There is, simply, no case as a matter of right. Others are not required to preserve shares of the world for my use if I have done nothing to merit them, nor am I required to do so for them. Nevertheless, we will, almost all of us, be motivated, almost always, to utilize the resources we do command in such a way that others do in fact share in their benefits, namely by exchanges, which improve the lots of both. Not to do so is enormously imprudent.

We should note that all benefits from anything in social situations are *broadly cooperative*. Being free from the molestations of others is a benefit much outweighing the benefit to be expected from having the right to molest others, should they not be inclined to assist me when in need. And indeed, the right that others molest me really doesn't make much sense. It is in my interest to engage your energies, one way or another, in cooperative enterprises to mutual advantage. The success of such enterprises is always very much contingent on the past efforts of others, either freely or, perhaps more frequently, elicited via mutually satisfactory arrangements. Unilateral intervention is the enemy of such undertakings at all points. The claims of newcomers to need what others have made, and in particular to be *entitled* to it on the ground that they were disinherited of their supposed share in the natural resources of the world, are without substance.

Parents produce all the people there are, and prudent parents will produce only such children as they can expect to support through their childhood years and into productive adulthood. Imprudent ones will be encouraged by the arguments of the Lockean-commons theorists to

produce children without that support, thus making them a burden on their neighbors. In fact, those neighbors are likely to be supportive anyway, out of sheer fellow-feeling as well as from the prospect of useful contributions by those children in future if they are reasonably well taken care of now.

There is, in any case, no sense to the idea of an "equal share of natural resources." This has been well dealt with by others (and by myself earlier¹⁴), and there is no need to restate the case at length. The earth's resources are resources only to persons with the knowledge, willingness, strength of body, and skills to make use of them, and are resources for countless different uses. There is no such thing as a "resource" independently of those personal inputs from potential users, and thus no "value" of such resources can be attributed to them apart from the interpersonal situations of users and would-be users. Trying to make out that everyone is entitled to an equal share really means that everyone may hold everyone else in bondage - hardly what the writers we have been considering here had in mind.

Conclusion

Neither Fried nor Gross has made a case for singling out some kinds of actors in the economic scene as eligible for taxation on grounds not applicable to others. All economic agents are in the same boat: they utilize whatever resources they have for what they take to be the best ends, and in the process characteristically create opportunities for others. So long as no one disrupts this process by using violence against others, physically or by fraud, all of these actors operate under the same set of basic rights - the right to pursue one's ends as one pleases, consistently with the like right of all. Taxation disrupts this desirable scene, no matter on whom it is visited or how. If some independent case can be made for justifying taxation as such - and I doubt that this is really possible - then one may conjecture that the tax to impose is what is easiest to collect and will ruffle the least feathers, or be perceived by most as being equitable. But there's no saying, a priori, which that would be, and in particular we do not have good philosophical reason to try to distinguish rent from other sources of income, so long as the property being put to rent is got by free means. There is, at any rate, no problem of the general type that Fried and Gross propose. The same maximal liberty for all is definable, coherent, and just.

Notes:

1. Barbara Fried, "Wilt Chamberlain Revisited: Nozick's 'Justice in Transfer' and the Problem of Market Based Distribution", *Philosophy and Public Affairs* 24, no. 3 (Summer 1995), pp. 226-245; Damon J. Gross, "Land and Human Endowments" *Reason Papers* No. 22, Fall 1997, pp. 39-57.
2. Fried, *op. cit.*, p. 227.
3. Fried, *op. cit.*, p. 228. The quote from Mill is in his *Principles of Political Economy* (London: Longans, Green, 1929) Bk. II, Ch. 2, #3, at p. 221.
4. Mill, *op. cit.*, p. 209.
5. Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), pp. 253-262.
6. Fried, p. 227.
7. Fried, 236-7.
8. Fried, *Loc. Cit.*
9. Damon J. Gross, "Land and Human Endowments" *Reason Papers* No. 22, Fall 1997, 39-57
10. See "How Free? Computing Personal Liberty," by Hillel Steiner, in Phillips Griffiths, ed., *Of Liberty* (Cambridge, England: Cambridge University Press, 1983, pp. 73-90.
11. Gross refers us here to Cheney Ryan, "Property Rights and Individual Liberty", in Jeffrey Paul, *Reading Nozick* (Totowa, New Jersey: Rowman & Allanheld, 1981), p. 340.)
12. Henry George, *Progress and Poverty* (New York: Robert Schalkenbach Foundation, 1966), p. 32
13. See David Schmidtz, "The Lockean Proviso", in his *The Limits of Government* (Boulder, Col: Westview, 1991)
14. See my "Libertarianism vs. Marxism: Reflections on G. A. Cohen's *Self-Ownership, Freedom and Equality*", for *The Journal of Ethics*, Winter 1998]

Some Ethical Aspects of Antidumping Laws

Robert W. McGee

Reasons for the Antidumping Laws

Before the ethical aspects of antidumping laws can be discussed it is necessary to spend some time discussing the antidumping laws themselves, what they are, what they are intended to accomplish, what they actually accomplish and what can and should be done if they do not accomplish what they are supposed to accomplish. All these points have been covered elsewhere in the literature, so this article will merely review and summarize the literature rather than attempt to break new ground. Where new ground will be broken is in the section that discusses some ethical aspects of the antidumping laws that have been all but ignored in both the trade and ethics literature.

Those who support the antidumping laws generally do so for one of two reasons.¹ The dominant reason why antidumping laws were supported in the early days was to prevent predatory pricing. The Antidumping Duty Act of 1916² was passed in response to alleged German predatory dumping during World War I.³

The main problem with the predatory pricing argument is that predatory pricing does not exist. Furthermore, if it did exist, it would benefit consumers, whom the antitrust laws were supposedly designed to protect.⁴ Studies that have been done on this point have been more or less in agreement that predatory pricing behavior is difficult, if not impossible to find, and in the few cases where it might have been found, it has always benefited consumers at the expense of the predator.⁵ James Bovard states that there are no known cases in the last 100 years where predatory pricing has achieved its goal of driving competitors out of existence, followed by the reaping of monopoly profits by the predator.⁶

One might reach a similar conclusion in the absence of studies by a priori reasoning.⁷ Predatory pricing is irrational. The predatory pricing argument begins with the premise that it is possible for a predator to drive down prices to the point where all competitors go out of business, never to return, at which point the predator can increase prices to more than recover former losses and reap monopoly profits. There are several problems with this premise.

For one thing, it is seldom if ever possible for the dominant company in any industry to reduce prices to the point where all competitors go bankrupt, especially if one takes the possibility of foreign

competition into account. In order to drive out all competitors, the predator company would have to be unusually strong financially because it would lose money on every sale it makes. As competitors drop out, it would increase its market share, thus losing money on even more sales.

Even if all competitors were eliminated, there is nothing to prevent them, or others, from reentering the market as soon as the predator starts raising prices. Also, the new market entrants, who bought up the assets of the bankrupt companies for perhaps ten cents on the dollar, would be low-cost producers, and would probably be able to undersell the predator company, which probably has much higher costs of production, and is in a weakened financial position after taking such large losses from making so many sales below cost. Perhaps that is the reason why researchers have been unable to find a single case where predatory pricing has succeeded. Of course, if they were able to find such cases, the fact remains that consumers would benefit, since prices would be abnormally low, and the successful predator would have to keep them abnormally low to prevent others from entering the market. It makes one wonder whether predatory pricing should be punished in the first place, since consumers benefit and since the predator is already suffering from making sales at a loss and is unable to recoup them by raising prices, since doing so would be an invitation for competitors to reenter the market.

Even those who support the antidumping laws are now beginning to admit that they cannot be supported on predatory pricing grounds, although politicians, business and labor leaders still argue that predatory pricing is the reason why we need antidumping laws.⁸ The other reason supporters now use is to level the playing field, especially in cases where foreign governments subsidize their domestic industries or where foreign laws tend to distort the market. The problem with this argument is that the antidumping laws do little or nothing to counterbalance the effects of foreign laws. An even more basic question that might be addressed here is whether governments should even attempt to level the playing field, since reducing comparative advantage works against the interests of consumers and makes all economies work less efficiently. One of the main reasons why trade is good for all participants is because of comparative advantage.⁹ Thus, actions that governments take to reduce comparative advantage are counterproductive from the standpoint of economic efficiency, which will be discussed later in this paper.

Criticisms of the Present Antidumping Laws

The World Trade Organization's antidumping rules are about the same structurally as those of the United States. In fact, the WTO antidumping provisions are modeled after the U.S. rules. The U.S. antidumping laws have been on the books for decades and a vast body of literature has evolved that discusses, analyzes and criticizes the hundreds of antidumping cases that have been resolved over the years. Very little literature exists on the WTO's antidumping rules, since those rules are so

new, and since it takes awhile for an antidumping action to work its way through the WTO process. Thus, the criticisms of the antidumping laws that are made in this section will draw from the vast literature that already exists, which criticizes the U.S. rules, not the WTO rules. However, since the two sets of rules are structurally about the same, the criticisms that have been made of the U.S. rules over the last few decades could just as validly be made of the WTO rules.

Foreign producers run afoul of the antidumping laws if they sell their products in a domestic market for less than fair value. The initial philosophical issue to raise here is "What is fair value?" Another set of philosophical questions would be "Why would anyone sell for less than fair value?" and "If they did, so what?" However, trade attorneys and judges do not ask such philosophical questions. Neither did the members of Congress who started passing antidumping laws nearly a century ago or the GATT (General Agreement on Tariffs and Trade) representatives who incorporated antidumping laws into the Uruguay Round, which resulted in the creation of the World Trade Organization (WTO). Under present rules, a foreign company or industry can be found guilty of dumping if it sells its products on a domestic market for a price that is lower than that charged in its home market, or if it sells its product for less than the cost of production. A company that is found guilty of either practice is deemed to sell for less than fair value, even though the buyer and the seller agree on price, a position that is on extremely weak ground philosophically.

Thus, the initial criticism that could be made is why would anyone want to punish a foreign producer for giving domestic consumers a better deal than the consumers in the foreign country get? Alternatively, one might criticize punishing foreign producers for selling below cost when domestic consumers obviously benefit by such sales. Unfortunately, these criticisms are never made. Yet these criticisms are perhaps the best that could be made of the antidumping laws.

If these criticisms were made, domestic producers would likely counter that their own sales are reduced when foreign producers are allowed to get away with making sales at such low prices. The underlying premise here is that domestic producers are somehow entitled to make sales even when domestic consumers would rather buy from a foreigner. A strong criticism that has been made of the antidumping laws is that they serve to protect domestic producers at the expense of the general public.¹⁰ More on this point later.

A number of criticisms have been made about the process and the way the antidumping laws are applied. For example, the vast majority of antidumping investigations are launched by domestic producers who feel the heat of competition and don't like it. Very few antidumping investigations are initiated at the Commerce Department.

One of the most abusive antidumping investigations ever launched was started by the American steel industry, which convinced the Commerce Department to initiate an antidumping investigation against the steel industries of more than 20 countries.¹¹ The official

reason for the request was because domestic steel producers were harmed by the importation of too much foreign steel. Domestic steel producers accused practically every foreign steel company that made sales in the United States of selling their steel in the United States at less than fair value.¹² When the self-serving nature of this investigation hit the press, the bureaucrats in Washington were so embarrassed that they terminated the investigation. But other countries and industries have not been so lucky.

One series of antidumping investigations that harmed the U.S. computer hardware industry involved the importation of computer chips from Asia. Domestic chip makers were upset that the Koreans and Japanese were selling higher quality chips in the U.S. domestic market for lower prices, so a group of domestic producers petitioned the Commerce Department to launch an investigation of the foreign producers for dumping. The result of the investigation was that the price of computer chips increased dramatically and at least one U.S. computer maker had to close up shop in California and move to the Philippines so it could afford to continue buying the Asian chips that it needed for its computers. Some jobs in the American chip industry were saved but only at the expense of American jobs in the computer hardware industry. The price of computers was also adversely affected, since the cost of producing computers in America increased as a result of the antidumping action. That resulted in increased costs for any company in America that buys computers. Thus, a few domestic chip producers gained, but only at the expense of the computer hardware industry and everyone who buys computers in America. The worst part of this investigation is that the methodology the Commerce Department used to find guilt was inappropriate. It found dumping where no dumping had actually occurred.¹³

Not only the antidumping rules themselves have been labeled unfair but also their application. For example, the accused party is considered guilty until proven innocent. The federal government launches an investigation at the request of the domestic industry, which stands to gain if the accused is found guilty. The accused party may have to spend millions of dollars to gather the necessary documents and defend itself, whereas the domestic producer that asked for the investigation has the federal government do all the work and incur all the cost of going forward with the investigation. The federal government determines what information is required, when it is required and how it shall be delivered. There is no appeal if the federal government deems the submission to be less than adequate. The federal government stands in the position of judge and jury.¹⁴ The targeted company or industry has no recourse.

Matsushita withdrew from an antidumping case involving small business telephone systems, thereby abandoning more than \$50 million in export sales, because of the onerous requirements imposed by the Commerce Department.¹⁵ On a Friday afternoon, it received a demand by the Commerce Department to translate 3,000 pages of Japanese financial documents into English by the following Monday morning.¹⁶ There was no

appeal. It had the choice of full compliance or being hit with an antidumping penalty that would be computed by the Commerce Department with the assistance of the domestic producer that asked that the investigation be initiated.

In another investigation, the Justice Department placed a particularly onerous and burdensome reporting requirement on SKF, a Swedish bearings manufacturer. The Commerce Department demanded, and SKF supplied, information on more than 100 million separate sales. The first submission weighed three tons, was more than 150,000 pages in length, and included more than 4 billion pieces of information.¹⁷ As might be expected, there were a few mistakes in the data, which the company put together in about a week, the amount of time the Commerce Department gave it to respond. About 1% of the data from its German sales were in a form that was not suitable to the Commerce Department, so it ignored all the data the company supplied and worked up its own numbers, using information obtained elsewhere. The result was a 180 percent dumping margin.

Some small companies in Taiwan have also felt the wrath of the Commerce Department because they were not able to supply the information required. In one case, the Commerce Department demanded that the companies respond to a 100-page questionnaire, written in English, which required more than 200,000 pieces of information. The management of one of these companies consisted of a husband and wife team, but the Commerce Department found that lack of sufficient management was no excuse for not responding to the questionnaire. The Commerce Department imposed a duty on another Taiwanese company because it did not supply information; the fact that its factory had burned down and its records destroyed was not a sufficient excuse for failure to provide information. As a result of these and other cases, many Taiwanese sweaters now have a 21.94% dumping duty that, combined with a 34% tariff, makes it very difficult, if not impossible, to compete in the U.S. market. Within a year after the Commerce Department started its investigation of the Taiwanese acrylic sweater industry, more than two-thirds of the Taiwanese companies that produce acrylic sweaters went out of business.¹⁸

This kind of widespread abuse is one reason why representatives from developing countries were so angry at President Clinton's refusal to include reform of the antidumping laws on the WTO agenda at the Seattle meeting in December, 1999. Developing countries are being targeted because their relatively low labor costs place them at somewhat of a competitive advantage over the more developed countries, which have to pay higher wages.¹⁹ The People's Republic of China has been the most frequent target of antidumping actions in recent years.²⁰ Latin American countries have also come under increasing attack.²¹

The antidumping laws have been criticized for the methods they use to compute dumping margins and costs of production and the way comparisons are made between domestic and foreign sales. For example, a company can be found guilty of dumping even if it sells its product for

the same price all over the world if the Commerce Department is allowed to construct target company costs²² or if exchange rates shift.²³ It is possible to be convicted of selling below the cost of production even if the target company actually sold at a 7% profit.²⁴ That is because the Department of Commerce's definition of cost of production includes an 8 percent profit.

The Commerce Department has also found dumping when it compared dissimilar products. For example, it found dumping to have occurred in a case involving an Italian manufacturer of pads for woodwind instruments. It computed the dumping margin by comparing the cost of the smaller pads sold in the United States with those of larger pads sold in Italy. Naturally, the larger pads would sell for more than the smaller pads. Yet the Commerce Department treated the large and small pads as identical, allowing no adjustment in cost due to the size of the pad. It explained away its position by stating that the Commerce Department has unlimited discretion to make or not make adjustments for differences in merchandise.²⁵

Numerous other cases could be cited where the Commerce Department completely disregarded differences in quality in arriving at a dumping margin. It has compared Canadian grade B raspberries sold in the United States to make juice with grade A raspberries sold in Canada to make jam without making any allowances for differences in either quality or market destination, even though the harvesting cost of the inferior quality berries was much lower. It considers a wilted flower in New York to have the same value as a fresh flower in Amsterdam. New forklift trucks sold in Japan are the same as used forklift trucks sold in the United States as far as the Commerce Department is concerned.²⁶

The Commerce Department sometimes compares the prices the exporting company receives in the U.S. market with those it receives in some third country market. Such comparisons are often made when the exporting country does not have much of a home market for its product. It penalized some Korean sweater companies because they sold their sweaters in the U.S. market for a little less than what they sold for in foreign markets. In arriving at its guilty verdict, the Commerce Department ignored several facts — that each shipment of sweaters was a custom order and that there were significant differences in the sweaters the companies shipped to different countries. It merely assumed the sweaters were identical. It also ignored cases where the U.S. price was higher than the price in another country, which had the effect of understating the average U.S. price.²⁷

The Commerce Department regularly disregards sound accounting and economic theory when making comparisons. It has compared U.S. wholesale prices with foreign retail prices. It has disregarded volume discounts. It is inconsistent in classifying costs as direct or indirect. When computing average prices it often disregards domestic sales prices when they are above average and included only those sales that were below average.²⁸ A U.S. General Accounting Office study pointed out these abuses in 1979.²⁹ Yet these practices continue.

Applying Utilitarian Ethics to the Antidumping Laws

Utilitarianism is the ethical philosophy espoused by the vast majority of economists and many philosophers so we will start by applying utilitarian theory to the question of whether antidumping laws are ethical. Basically, utilitarianism aims at the greatest good for the greatest number. Jeremy Bentham, an early proponent of the utilitarian philosophy, said that "...it is the greatest happiness of the greatest number that is the measure of right and wrong."³⁰ Henry Sidgwick, a later utilitarian, extends the philosophy, as follows:

"...an action is right if and only if it brings about at least as much net happiness as any other action the agent could have performed; otherwise it is wrong."³¹

According to Sidgwick's view, an act that increases happiness by 10 percent is unethical if another act could have increased happiness by more than 10 percent.³² Richard A. Posner, one of the leaders of the law and economics movement, seems to indicate that an act is moral if it is efficient.³³ From his view, one may perhaps draw an inference that an act is immoral if it increases inefficiency. A variation on this theme is the wealth maximization view, which holds that "...the criterion for judging whether acts and institutions are just or good is whether they maximize the wealth of society."³⁴

Do the antidumping laws pass the utilitarian test? Do they result in the greatest good for the greatest number? The evidence is stacked against them. The losers seem to outnumber the winners. While one U.S. producer of microchips stands to gain from the imposition of dumping duties on its competitors, its various competitors stand to lose, as does anyone who uses computers, since they would have to pay higher prices if dumping duties were imposed on foreign chip manufacturers. A few steel companies and their workers stand to benefit if dumping duties are imposed on foreign steel producers, but the steel producers in more than 20 countries, as well as their employees, stand to lose, not to mention all the industries in the United States that must now pay higher prices for steel and all the U.S. consumers who purchase products made of steel. The U.S. auto industry would have to pay more for steel, which would make it less competitive in international markets. Thus, autoworkers would also suffer if dumping duties were imposed on foreign steel producers.

If one applies the results of studies that have been made of gains and losses from tariffs and quotas to the antidumping laws, it is possible to estimate the possible gains and losses. Various studies have estimated that where a quota or tariff saves jobs in the domestic economy, job losses tend to exceed gains by a factor of 2 to 3. In other words, for every 10,000 jobs saved in the steel industry, 20,000 to 30,000 jobs are destroyed in the industries that use steel.³⁵ Thus, protectionism results in a

deadweight loss. The losses exceed the gains.

Interestingly enough, a study by the U.S. International Trade Commission, one of the agencies charged with administering the antidumping laws, conducted a study that found that antidumping laws resulted in more losses than gains. It estimated that removing all existing dumping duties would result in a net gain of somewhere between \$1.59 billion and \$2.94 billion.³⁶ That being the case, one wonders why antidumping laws continue to be enforced.

The answer, of course, is because of rent-seeking behavior on the part of domestic producers. Those who stand to benefit from the enforcement of the antidumping law have the ears of the Department of Commerce while those who stand to lose are either foreigners or domestic consumers, who are unorganized, and who probably don't even know that the antidumping laws are reducing their standard of living. Concentrated special interests that have much to gain have more influence than the unorganized majority, who lose much less, per capita, and who cannot be bothered marching on Washington just to save \$5 on the price of a shirt.³⁷

The evidence is clear that the antidumping laws fail the utilitarian test because losers exceed winners. Even if those who stand to benefit from the antidumping laws stand to gain much, while those who lose stand to lose little, the losses exceed the gains in the aggregate. Thus, antidumping laws cannot be condoned on utilitarian grounds.

Applying Rights Theory to the Antidumping Laws

Utilitarian ethics suffers from several deficiencies. One flaw is that it is impossible to compare interpersonal utilities. It is also impossible to precisely measure gains and losses. All calculations must be approximations. But perhaps the main flaw in utilitarian ethics is that utilitarianism totally ignores rights.³⁸ If the gains are deemed to exceed the losses, it does not matter to a utilitarian whether someone's rights get trampled on in the process.

Applying rights theory to the antidumping laws remedies these structural flaws of utilitarianism. According to rights theory, any policy that violates someone's rights (without full compensation, according to some theorists) is automatically an unacceptable policy, even if the overall gains exceed the losses. To use an extreme example to illustrate the difference between utilitarian and rights theory, let's take the case of a sex starved maniac who is just released from prison and who rapes a drunken prostitute who lightly protests and who actually falls asleep during the rape. A utilitarian would say that the act was moral, since the rapist benefited a great deal while the prostitute suffered little, if any, discomfort. A rights theorist would insist that the act was immoral, since the prostitute's rights were violated. The example is extreme, but it illustrates the point and highlights the difference between utilitarian ethics and a rights-based ethics.

That does not mean that any act that does not violate rights is ethical because some such activities may be unethical. For example, no

one's rights are violated if a woman chooses to rent her body for sex. Yet few people would say that prostitution is a moral act. Rights theory merely helps to identify acts or policies that should or should not be prohibited.

Getting back to the case of antidumping laws, it is clear that they violate contract and property rights. Antidumping laws prevent consenting adults from entering into trade and exchanging what they have for what they want. Antidumping laws prevent foreign producers from selling their products in domestic markets, thus depriving consumers from entering into contracts with the parties of their choice and trading their property.

It might be argued that antidumping laws are needed to protect domestic producers from being harmed. Surely, domestic producers would be harmed if foreigners were permitted to sell to domestic customers, especially if the foreign product were either better or cheaper, or both. But being harmed is not the same as having rights violated. There is no right to sell products to people who would rather buy from someone else, even if that someone else were a foreigner. This fact does not change if the foreigner is selling for less than the cost of production or for a lower price than that charged in the home market. Thus, antidumping laws fail the rights test because they must necessarily violate someone's rights.

A Question of Fundamental Fairness

There is also the question of fundamental fairness. The way the antidumping laws are applied often violates concepts of fundamental fairness. There is something fundamentally unfair about being found guilty of dumping if a company charges the same price for its product worldwide. There is something fundamentally unfair about forcing a company to spend perhaps millions of dollars to defend itself, using a process that is stacked against foreigners. There is something fundamentally unfair about being forced to supply vast quantities of documents on short notice as a condition of being allowed to continue selling products to willing buyers.

Concluding Comments

It is clear that the antidumping laws fail the ethical test, whether one applies utilitarian or rights-based rules. They are also fundamentally unfair. If one concludes that the present rules are unethical, then the logical question to ask is "What should be/can be done about it?" If any other alternatives to the status quo would make things even worse, the answer is to do nothing. However, that is not the case here. That leaves us with two other possibilities. The antidumping laws can either be reformed or repealed.

Some commentators who are concerned about the present antidumping laws call for reform. They think that some kind of

antidumping laws are needed to maintain a level playing field or to prevent predatory dumping or to punish foreign producers that receive government assistance or subsidies.

The first two of these arguments have already been discussed in this paper. The level playing field argument does not hold up to analysis because a level playing field is not desirable. Having a level playing field would reduce the natural comparative advantage that would otherwise be present, thus reducing the standard of living and economic efficiency. The result would not be the greatest good for the greatest number, thus violating utilitarian ethics. Furthermore, in order to have a level (or more level) playing field it would be necessary to use the force of government against individuals who have not violated anyone's rights, which is unethical based on rights theory. Thus, the level playing field argument is not tenable, either on utilitarian or rights grounds.³⁹

The predatory pricing argument has been demolished both by theory and experience. Predatory pricing is irrational and empirical studies have found that it does not exist in the real world. Thus, there is no need to pass laws to protect us against this mythical threat that, if it actually existed, would only serve to benefit consumers anyway.

That brings us to the third argument in favor of reform, to counterbalance government support and subsidies of foreign producers. Should foreign producers be punished for receiving assistance from their governments, either in the form of helpful legislation or outright subsidies? Interestingly enough, it is often the same people who make this argument who also want the federal government to grant low-interest loans or tax credits to U.S. businesses or who want to subsidize exports. American farmers⁴⁰ have been subsidized for decades by low-interest loans and price supports, yet when foreign governments do basically the same thing, there is somehow something sinister about it. That is not to condone it, of course, but the irony of the inconsistent positions should be pointed out.

Whether antidumping laws should be used to counter this kind of government activity can be answered by looking to ethical theory. From a utilitarian ethical point of view, antidumping laws would be a good policy choice if such laws resulted in the greatest good for the greatest number. So the obvious question to ask is who benefits and who loses by the status quo and who stands to gain or lose if changes are made to the status quo.

Under the present situation, the foreign producers who are subsidized by their governments are winners, as are consumers in the country that receives the "dumped" goods. The losers are the taxpayers in the foreign country, who have to pay the subsidy one way or another. The domestic producers who lose sales are also adversely affected. On which side does the balance fall? It is not easy to say, given the fact that many people lose a little while a few gain a lot. However, it would not be inaccurate to say that the status quo is inefficient. If the status quo were efficient there would be no need for subsidies. Subsidies reduce efficiency because they take assets from higher value uses and place them in lower

value uses. But it does not logically follow that the U.S. government should use the force it has to change this situation. The inefficiency is present in the foreign country, not in the USA.

American consumers benefit by the foreign government's subsidy. In effect, the foreign government's subsidy of its industry benefits American consumers because it allows them to buy at lower prices than would otherwise be the case. If the U.S. government stepped in to prevent such foreign subsidies to U.S. consumers, it would be doing consumers a disservice from a utilitarian standpoint, and would be violating their rights to property and contract from a rights perspective.

If the antidumping policy were successful in ending the foreign government's subsidy, the foreign producers would lose something and the taxpayers in the foreign country who had been subsidizing the foreign producer would gain because they would no longer have to pay taxes to subsidize a domestic industry. Thus, the U.S. government would be in the interesting position of benefiting foreign taxpayers at the expense of both American consumers and American taxpayers, who have to pay the salaries of the American bureaucrats who are enforcing the antidumping laws and who must pay higher prices for foreign goods as a result of removing the subsidy. It thus seems clear that antidumping laws should not be used to prevent foreign governments from subsidizing their producers even if such laws could actually prevent such activities and even though the subsidy is unfair to the foreign taxpayers who must pay to subsidize American consumers.

Since the status quo has been shown to be an incorrect policy choice, and since none of the reform arguments hold up to analysis, the case for repeal wins by default. But let's not stop there. Let's analyze the repeal option from a utilitarian and rights standpoint.

Repealing the antidumping laws would result in lower prices for consumers. Repeal would also result in higher profits for foreign producers, since they would no longer be excluded from the domestic market. The American businesses that handle the foreign product, such as foreign auto dealerships in Dubuque and Cincinnati, would also benefit rather than being forced out of business. The only losers would be the domestic producers who cannot make sales to domestic consumers in the absence of protection. From a purely utilitarian viewpoint, the winners exceed the losers, so repeal is called for.

The result is the same if one applies rights theory, only for a different reason. Rights theory holds that a policy is inherently bad if it results in someone's rights being violated, and is (perhaps) good if no one's rights are violated. Repealing the antidumping laws violates no one's rights, but keeping them on the books and enforcing them does violate the property and contract rights of consumers and foreign producers. Thus, the case is clear. The only ethical solution is repeal.

Notes:

1. The third reason would be protectionism, but that position is indefensible and self-serving, so we will not explore it here.
2. *Revenue Act of 1916*, chap. 463, §§ 800-1, 39 Stat. 798, codified at 15 U.S.C. § 72.
3. Richard Dale, *Anti-dumping Law in a Liberal Trade Order* (New York: St. Martin's Press, 1980), 12; Jacob Viner, *Dumping: A Problem in International Trade* (Chicago: University of Chicago Press, 1923), 242-246.
4. I say "supposedly" because there is evidence to suggest that antitrust laws were passed to protect producers rather than consumers. There is strong evidence to suggest that antitrust laws are being used as weapons to protect less successful competitors from more successful competitors. For more on this point, see William F. Shughart, II, *Antitrust Policy and Interest-Group Politics* (Westport, CT: Quorum Books, 1990); Jeffrey A. Eisenach and Thomas M. Lenard, editors, *Competition, Innovation and the Microsoft Monopoly: Antitrust in the Digital Marketplace* (Boston: Kluwer Academic Publishers, 1999); Stan J. Liebowitz and Stephen E. Margolis, *Winners, Losers & Microsoft: Competition and Antitrust in High Technology* (Oakland, CA: The Independent Institute, 1999).
5. Ronald H. Koller, "The Myth of Predatory Pricing: An Empirical Study," *Antitrust Law & Economics Review* 4 (Summer 1971), 105-123; John S. McGee, "Predatory Price Cutting: The Standard Oil (NJ) Case," *Journal of Law and Economics* 1 (October 1958), 137-169; D.T. Armentano, *Antitrust Policy: The Case for Repeal* (Washington, DC: The Cato Institute, 1986), 41-44; Dominick T. Armentano, *Antitrust and Monopoly: Anatomy of a Policy Failure*, second edition (New York: Holmes & Meier, 1990), 63, 91, 114, 240.
6. James Bovard, *The Fair Trade Fraud* (St. Martin's Press, 1991), 157.
7. For a discussion of the empirical studies and a priori reasoning approach, see Robert W. McGee, "When Is Pricing Predatory?" *Journal of Pricing Management* 2 (Spring, 1991), 40-43.
8. Greg Mastel, *Antidumping Laws and the U.S. Economy* (Armonk, NY: M.E. Sharpe, 1998), 40, as cited in Brink Lindsey, "The U.S. Antidumping Law: Rhetoric versus Reality," *Trade Policy Analysis* No. 7 (Washington, DC: Cato Institute, August 16, 1999), 3.
9. Some people still do not believe that trade is good for both parties, which raises the obvious question: Why then did they make the trade? For a discussion of the arguments for and against free trade, see Robert W. McGee, "The Trade Policy of a Free Society," *Capital University Law Review* 19 (Spring 1990), 301-341; Robert W. McGee, *A Trade Policy for Free Societies: The Case Against Protectionism* (Westport, CT: Quorum Books, 1994), 3-86.
10. Robert W. McGee, "The Case to Repeal the Antidumping Laws," *Northwestern Journal of International Law & Business*, 13 (1993), 491-562; Michael S. Knoll, "United States Antidumping Law: The Case for Reconsideration," *Texas International Law Journal*, 22 (1987), 265-290.
11. United States International Trade Commission, "Certain Flat-rolled Carbon Steel Products from Argentina, Australia, Austria, Belgium, Brazil, Canada, Finland, France, Germany, Italy, Japan, Korea, Mexico, the Netherlands, New Zealand, Poland, Romania, Spain, Sweden, Taiwan and the United Kingdom," (Investigations Nos. 701-TA-319-354 Preliminary), USITC Publication 2549 (August, 1992).
12. Brink Lindsey, Daniel T. Griswold and Aaron Lukas, "The Steel 'Crisis' and the Costs of Protectionism," *Center for Trade Policy Studies*, April 16, 1999; Daniel T. Griswold, "The U.S. Government's No-Win War on Imported Steel," *Center for Trade Policy Studies*, February 1, 1999; Doug Bandow, "Stealing from Steel Consumers," *Center for Trade Policy Studies*, July 7, 1999.
13. For a discussion of these cases, see Robert W. McGee and Yeomin Yoon, "Technical Flaws in the Application of the U.S. Antidumping Law: The Experience of U.S. - Korean Trade," *University of Pennsylvania Journal of International Business Law*, 15 (Summer, 1994), 259-297; Yeomin Yoon, "The Korean Chip Dumping Controversy: Are They Accused of Violating an Unjust Law?" *North Carolina Journal of International Law & Commercial Regulation*, 19 (Winter, 1994), 247-266.
14. N. David Palmeter, "Torquemada and the Tariff Act: The Inquisitor Rides Again," *International Lawyer*, 20 (1986), 641.
15. Investigation 731-TA-426, listed in I.M. Destler, *American Trade Politics* (Washington, DC: Institute for International Economics, 1992), 393.
16. James Bovard, *The Fair Trade Fraud* (New York: St. Martin's Press, 1991), 136.
17. *Ibid.*, at 137.
18. *Ibid.*, at 139, 155.
19. It should be pointed out that the low cost labor advantage is largely offset by the lack of capital. This point is seldom made, and even less frequently realized, by those who feel threatened by cheap foreign labor.
20. Robert W. McGee, "Antidumping Laws, the World Trade Organization, and the People's Republic of China," *Advances in Chinese Industrial Studies*, 6 (1999), 141-155; Robert W. McGee, "The USA's Assault on Trade with the People's Republic of China: Antidumping Laws as Weapons of Protectionism," in Edward B. Flowers, Thomas P. Chen and Ibrahim Badawi, editors, *Trade and Investment in Asia* (St. John's University: Center for Global Education, 1997), 187-198.
21. Robert W. McGee, "Application of the Antidumping Laws in Latin America: A Review of Recent Cases and Prospects for the Future," in Edward B. Flowers, Thomas P. Chen and Jonchi Shyu, editors, *Interlocking Global Business Systems: The Restructuring of Industries, Economies and Capital Markets* (Westport, CT: Quorum Books, 1999), 275-286.

22. Michael S. Knoll, "United States Antidumping Law: The Case for Reconsideration," *Texas International Law Journal*, 22 (1987), 280.
23. N. David Palmeter, "Exchange Rates and Antidumping Determinations," *Journal of World Trade*, 22 (1988), 73-80.
24. Robert W. McGee, *A Trade Policy for Free Societies: The Case Against Protectionism* (Westport, CT: Quorum Books, 1994), 98-100.
25. Luciano Pisoni *Fabrica Accessori Instrumenti Musicali v. United States*, 640 F.Supp. 255 (CIT 1986). This case was discussed in James Bovard, *The Fair Trade Fraud* (New York: St. Martin's Press, 1991), 119.
26. Robert W. McGee, *A Trade Policy for Free Societies: The Case Against Protectionism* (Westport, CT: Quorum Books, 1994), 105.
27. Bovard, *The Fair Trade Fraud*, supra, at 121-122.
28. Robert W. McGee, *A Trade Policy for Free Societies*, supra, at 108-111.
29. U.S. General Accounting Office, U.S. Administration of the Antidumping Act of 1921 (March 15, 1979), 21.
30. Jeremy Bentham, "A Fragment on Government," in J. Bowring, editor, *The Works of Jeremy Bentham*, vol. 1 (New York: Russell & Russell, 1962), 227 as quoted in William H. Shaw, *Contemporary Ethics: Taking Account of Utilitarianism* (Oxford: Blackwell Publishers, 1999), 8.
31. Quoted in Shaw, supra, at 10.
32. There are several problems with the utilitarian philosophy, such as the inability to measure changes in happiness and the fact that utilitarianism totally ignores rights violations. For more on this point, see Robert W. McGee, "The Fatal Flaw in the Methodology of Law and Economics," *Commentaries on Law & Economics*, 1 (1997), 209-223.
33. Richard A. Posner, *Economic Analysis of Law*, fifth edition (New York: Aspen Law & Business, 1998), 284-285.
34. Richard A. Posner, *The Economics of Justice* (Cambridge, MA: Harvard University Press, 1983), 115.
35. For summaries of these studies, see Robert W. McGee, *A Trade Policy for Free Societies: The Case Against Protectionism* (Westport, CT: Quorum Books, 1994), 65-75; Gary Clyde Hufbauer, Diane T. Berliner and Kimberly Ann Elliott, *Trade Protection in the United States: 31 Case Studies* (Washington, DC: Institute for International Economics, 1986).
36. United States International Trade Commission, "The Economic Effects of Antidumping and Countervailing Duty Orders and Suspension Agreements," Investigation No. 332-344, USITC Publication 2900, June, 1995.
37. Time and space do not permit a full discussion of rent-seeking, a phenomenon that has been studied and analyzed by the Public Choice School of Economics for several decades. For an overview and some examples of rent-seeking behavior, see Gordon Tullock, *Rent Seeking* (Aldershot, England: Edward Elgar Publishing, Limited, 1993); Charles K. Rowley, Robert D. Tollison and Gordon Tullock, editors, *The Political Economy of Rent-Seeking* (Boston: Kluwer Academic Publishers, 1988); James M. Buchanan, Robert Tollison and Gordon Tullock, editors, *Towards a Theory of a Rent-Seeking Society* (College Station, TX: Texas A&M University Press, 1980).
38. Discussions on the flaws inherent in utilitarian ethics may be found at Robert W. McGee, "The Fatal Flaw in NAFTA, GATT and All Other Trade Agreements," *Northwestern Journal of International Law & Business*, 14 (Spring, 1994), 549-565; William H. Shaw, *Contemporary Ethics: Taking Account of Utilitarianism* (Oxford: Blackwell Publishers, 1999), 102-132.
39. For a detailed critique of the level playing field argument that was made before the term "level playing field" came into popular use, see Antony Flew, *The Politics of Procrustes: Contradictions of Enforced Equality* (Buffalo: Prometheus Books, 1981).
40. For more on farm subsidies, see James Bovard, *The Farm Fiasco* (San Francisco: ICS Press, 1989).

Absurd Assumptions & Counterintuitive Conclusions: The Case of David Friedman

Robert P. Murphy

In a recent article, this author demonstrated that two of Steven Landsburg's 'surprising' results were due to his false assumptions, and that the 'naïve' layman was thus exonerated from Landsburg's criticism. In this article, we will attempt to do the same with an argument presented by the eminent David Friedman in his fascinating book, *Hidden Order* (HarperCollins, 1996).

As with Landsburg it will be first necessary to quote extensively from Friedman. The following analysis is presented in his section, "Heads I Win, Tails I Win":

You have just bought a house. A month later, the price of houses goes up. Are you better off (your house is worth more) or worse off (prices are higher) as a result of the price change? Most people will reply that you are better off; you own a house and houses are now more valuable.

You have just bought a house. A month later, the price of houses goes down. Are you worse off (your house is worth less) or better off (prices are lower)? Most people reply that you are worse off. The answers seem consistent. It seems obvious that if a rise in the price of housing makes you better off, then a fall must make you worse off.

It is obvious, but wrong. The correct answer is that either a rise or a fall in the price of housing makes you better off! We can see why using [simple geometrical indifference curve analysis].

[Friedman then refers to his diagram which has "Amount of housing" on the vertical axis and "Dollars spent on everything else" on the horizontal axis. He draws an initial budget line and finds the optimal point A (where the line is tangent to an indifference curve). He then shows that, whether we make the budget line steeper or more shallow, since it still must pass through A (since the owner can always choose to *retain* his original

consumption bundle after the price change) the resulting new point of tangency—in both cases—by simple geometry *must* be on a higher indifference curve.]

By looking at the figure, you should be able to convince yourself that the result is a general one; whether housing prices go up or down after you buy your house, you are better off than if they had stayed the same. The argument can be put in words as follows:

What matters to you is what you consume—how much housing and how much of everything else. Before the price change, the bundle you had chosen—your house plus whatever you were buying with the rest of your income—was the best of those available to you; if prices had not changed, you would have continued to consume that bundle. After prices change, you can still choose to consume the same bundle, since the house already belongs to you, so you cannot be worse off as a result of the price change.

But since the optimal combination of housing and other goods depends on the price of housing, it is unlikely that the old bundle is still optimal. If it is not, that means there is now some more attractive alternative, so you are now better off; a new alternative exists that you prefer to the best alternative (the old bundle) that you had before.

The advantage of the geometrical approach to the problem is that the drawing tells us the answer. All we have to do is look at [the figure]. The initial budget line was tangent to its indifference curve at point A, so any budget line that goes through A with a different slope must cut the indifference curve. On one side or the other of the intersection, the new budget line is above the old indifference curve—which means that you now have opportunities you prefer to bundle A.

What the drawing does not tell us is *why*. When we solve the problem verbally, we may get the wrong answer (as at the beginning of this section, where I concluded that a fall in the price should make you worse off). But once we find the right answer, possibly with some help from the figure, we not only know what is true, we also know why. (34-36)

Friedman's analysis is obvious, but wrong. Its most fundamental error is an illegitimate application of a static optimization problem to the real world of markets which change over time. In other words, Friedman assumes he can handle the phenomenon of a price change by finding the

optimal bundle *A* at one price, then drawing a different line through that point, and finding the new optimum bundle *B*. If *B* is on a higher indifference curve, Friedman interprets this to mean that the agent has benefited from the price change.

This procedure is completely unjustified. The determination of the optimum bundle *A* only makes sense if the price is (and always will be) the original price. One cannot compare the utilities of two static equilibrium points in order to say anything about a model that (more realistically) allows the possibility of changing prices.

Friedman feels his geometric analysis can adequately 'capture' the real world phenomenon of holding assets amidst price changes. But this step in his argument is not so self-evident. What Friedman's diagram *really* shows is that the agent would prefer to be endowed with bundle *A* and face the second (or third) price ratios. Friedman assumes that this is *the same thing* as the proposition that the agent, initially buying bundle *A*, would prefer a price change. In many settings, this equivalence is perhaps justified. But it is certainly not in Friedman's example, and his 'refutation' of the verbal reasoning in the beginning of his section is consequently wrong.

Housing is peculiar in that it is a durable asset that also provides a flow of services. We can test the rigor of Friedman's analysis by shifting to the two extremes of this spectrum. First, let us suppose the good in question is not durable, like housing, but rather extremely perishable. Thus, let the vertical axis represent "Amount of food," while the horizontal represents "Dollars spent on everything else." We have an original price of food relative to everything else, and our agent buys his optimum quantity. Now, a worldwide catastrophe causes all vegetation to die. (No one knows why, not even those with a Ph.D. in physics.) Consequently, the price of a "unit" of food rises, say, to \$1 billion. Silly writers for the *Wall Street Journal* and even lesser newspapers conclude that humanity is doomed, and that everyone is much worse off as a result of the price increase. But these critics fail to realize that no one will go hungry, at least not as a result of the price increase. If anyone had thought buying more food would be desirable, he or she would already have done so. In fact, everyone is much better off. A person can sell just a fraction of a unit of food, and with the proceeds buy all manner of luxury goods that were previously outside of his budget set.

Now suppose that the vertical axis represents "Number of gold coins." An eighty-year-old man, close to death, sells virtually all of his possessions and purchases their equivalent in gold coins at a certain price, intending to bequeath them to his heirs. The day after his purchase, an advance in alchemy allows the easy transformation of copper into gold, such that the price of the latter falls until it equals the price of the former. At first the man is terribly upset, for his heirs will no longer be able to afford the same bundles of goods that they would have under the previous price structure. But his friend points out the error of this view: Before, the old man held on to a few hundred dollars in cash, feeling that the marginal gold coin was not worth its purchase price. But

now the man can afford to give his heirs one hundred *additional* gold coins, with only sacrificing one single dollar. Truly the price fall is a boon, not a curse.

The staunch defender of indifference curve analysis will no doubt be unconvinced by the above examples. If we want to model the more complicated process of buying (and selling) houses *over time*, then our vertical axis should be interpreted to denote, not simply the number of houses purchased *today*, but rather the (contingency) plan specifying how many houses will be purchased, and at what dates, for the rest of eternity, as a function of their spot market prices. Once we adjust the model to capture the real world phenomena we are trying to describe, the absurdities described above disappear.

This is certainly true, but then, as it was argued much earlier, we can no longer allow for a 'price change,' since this possibility has already been built into the original price (vector). One cannot have it both ways; either the model incorporates time or it does not. If it does not, then we cannot use it to draw any conclusions regarding the effects of changing conditions. Friedman's result is so completely unexpected that he should have tested its ability to generate even more sweeping conclusions. For example, his figure would also 'prove' the really counterintuitive proposition that a governmental decree prohibiting future housing sales would have no effect on anyone, even young couples who were planning on buying a house tomorrow.

Whose Liberalism? Which Individualism?

Colin Bird, *The Myth of Liberal Individualism*.
Cambridge and New York: Cambridge University Press, 1999.

Irfan Khawaja

Introduction

At first glance, the term “liberal individualism” seems to have both a clear denotation and a clear connotation. As a matter of *denotation*, “individualism” is the view that individuals enjoy a kind of ontological or axiological priority to the collectives they constitute. “Liberalism” is the view that liberty is an inalienable right that ought to receive special protection in the constitution and laws of a just government, even to the point of permitting the right to do what is morally wrong. “Liberal individualism,” then, denotes a distinctive combination of liberalism and individualism according to which liberalism as a *political* ideal is justified and given content by individualism as a *philosophical* doctrine. *Because* individuals are prior to society, the liberal individualist says, they are entitled by right to live and act by their own judgment. Were it not for this priority, the thesis implies, there would be no justification for political liberty at all.

So conceived, “liberal individualism” involves a rich set of *connotations* as well. Among the positive ones are those that associate it with the struggles against absolute monarchy, slavery, patriarchy, imperialism, totalitarianism, racism, and homophobia, among other things. The essence of these evils is collectivism, the denial of the just claims of the individual; were it not for liberal individualism, its champions assert, these evils would not only still exist in the world (as they do), but in fact prevail in it. It is liberal individualism’s unique contribution to have made such evils in large part obsolete, in theory and in practice.

Among liberal individualism’s negative connotations are those that associate it with some form of anarchy or exploitation: e.g., the Reign of Terror in revolutionary France, the robber barons of nineteenth century England, and the rugged individualists of American capitalism. Liberal individualism, its critics assert, is the ideological opiate of the rich, powerful, and self-deluded. Its version of liberty benefits the strong at the expense of the weak, while giving the spurious impression of universal

liberation.

Debates about liberal individualism have raged in Anglo-American political philosophy for two or three decades now, where claims like the preceding are tossed back and forth like polemical grenades by partisans in each camp. But should the idea so cavalierly be taken for granted? Or is our very reliance on it a symptom of confusion?

Colin Bird's *The Myth of Liberal Individualism* (hereafter, *TMLI*) makes the case for the latter claim. "Liberal individualism," Bird argues, is a term with a familiar sound but no defensible purpose. It is what we might call an "anti-concept" (not Bird's term)—an "artificial, unnecessary, and (rationally) unusable term, designed to replace and obliterate" more nuanced and defensible ones.¹ According to Bird, the liberal individualist ideal is not just wrong but incoherent: there is no clear sense in which the individual enjoys any "priority" to the collective, and thus no sense in which this alleged priority can give content to or justify liberalism. Precisely because the term is meaningless, Bird writes, debates about liberal individualism tend to produce a great deal of sound and fury, but ultimately signify nothing.

The complexity of Bird's book makes it impossible to write a comprehensive review of it in the space at my disposal. My aim here is to offer a more limited appraisal concerning the *scope* of its thesis. According to Bird, the notion of "liberal individualism" finds a home in two prominent political theories—libertarianism and Rawlsian-type liberalism. Libertarianism, being the more avowedly individualistic of the two theories, is more obviously committed to the idea of "liberal individualism," and thus more centrally the target of Bird's critique.

Among libertarian theories, Bird includes what I'll call *neo-Aristotelian libertarianism*, or *neo-AL* for short. Neo-AL is the view, inspired by (but not identical to) Ayn Rand's Objectivism, which holds that individual rights of a Lockean sort can be justified by an Aristotelian conception of human flourishing. The question I pose here is whether Bird's critique of liberal individualism applies to neo-AL. I answer that it does not. Whatever the merits of Bird's critique of non-Aristotelian theories, the critique has little application or relevance to neo-AL. Or so I'll argue.

Clarifying "Individualism"

After some initial remarks, Bird begins *TMLI* by specifying what he takes to be the exact target of his critique.

The term 'individualism' has acquired a dizzying range of meanings and applications. Steven Lukes discerns no fewer than eleven different forms of individualism, and he adds, dishearteningly, that the items on his list are not intended to be mutually exclusive or jointly exhaustive. Because of the confusion that shrouds the term, it is important to set out precisely the kind of individualism

that is relevant to the arguments of this study. (*TMLI*, 4).

This is helpful advice. The term “individualism” *does* mean a great many things in a great many contexts, and the sheer proliferation of meanings ascribed to it makes it difficult to grasp the unity at its core. A critique of individualism, then, has to narrow down its subject matter to something manageably precise—to find, so to speak, the one individualism in the many.

Bird begins his clarification of individualism by “excluding from the analysis two aspects of the idea of individualism” (*TMLI*, 4). They are, in his words:

“individualism understood as an empirical property, either of individuals or societies”; and
 “Individualism as a form of egoism or selfishness, whether as an empirical or as a normative commitment” (*TMLI*, 4-5).

“Excluding these two aspects of individualism,” Bird continues, “still leaves us with an enormous range of potentially relevant ‘individualisms’...” (*TMLI*, 5). The form of individualism that is relevant to *TMLI*, then, is what might tediously be called *normative non-egoistic individualism* or *normative a priori non-egoistic individualism*—individualism B for short. As we’ll see, Bird’s stipulations on this point lead to significant difficulties in his handling of neo-AL. For—to put the point tediously—neo-AL is a form of *normative a posteriori egoistic individualism*, and a very specific one at that. The way in which Bird defines individualism B, then, seems to exclude neo-AL right out of the book. To see this, let’s look at each exclusion in turn.

Bird justifies his exclusion of the “empirical” conception of individualism as follows:

The notion of individualism that is relevant [in this study] expresses a normative ideal, not an empirical generalization about liberal civilization, and it is the directly normative connotations² of individualism that this book seeks to address. I therefore set these empirical issues aside and make no effort to evaluate them. (*TMLI*, 5).

This explanation is puzzling. Granted, *TMLI* is not a historical or sociological study of “liberal civilization”; it’s a political theorist’s critique of a conception of political justification. But conceptions of political justification derive their content from, and operate in, the empirical world. If so, we need a more precise account of the relationship between “normative” and “empirical” individualism than Bird offers. Consider two possibilities.

If Bird intends the normative/empirical distinction to mark a rough division of labor, the distinction is harmless: it merely reminds us that *TMLI* will focus more on conceptual analysis than on history or

sociology. But in this case, the distinction can't be very sharp, and can't do very much work. In particular, it can't serve to exclude very much.

On the other hand, if (as I suspect) Bird intends the normative/empirical distinction to be mutually exclusive, the claim implies that normative ideals *cannot* in principle consist of empirical generalizations, and empirical generalizations *cannot* in principle embody normative ideals. In this case, Bird's exclusion runs into two glaring problems. The first is that he needs a philosophical justification for making this move in the first place; there is, as he must know, a large literature in meta-ethics and moral epistemology that argues rigorously against making it.³

The second is that neo-AL is *part* of this literature. Like all Aristotelians, neo-ALs vehemently reject the legitimacy of a distinction between the normative and the empirical, claiming instead to espouse an empiricist conception of normativity. On the Aristotelian view, human action is goal-directed, and the ultimate goal of human action is happiness, or flourishing. A flourishing life consists of the cultivation of self-beneficial traits, or virtues, aimed at securing a set of values across a lifetime. On this view, every moral norm identifies a need generated by the requirements of our flourishing. Since flourishing is a thoroughly empirical phenomenon, moral norms merely state empirical generalizations about its requirements. As Douglas Rasmussen and Douglas Den Uyl argue in their neo-AL book *Liberty and Nature*, the Aristotelian analysis of the good is

not the result of an *inspectio mentis* procedure but is discovered through a scientific, empirical process. An Aristotelian ethics, then, appeals to all that the various sciences can tell us regarding the nature of a human being in developing its account of the good human life and does not confine itself to some *a priori* definition.⁴

It would beg the question, then, to foist the normative/empirical distinction on the neo-AL view when defining "individualism." The distinction has no place in the theory.

Let's move now to Bird's exclusion of egoism. As he puts it, *TMLI* excludes egoism from consideration as a form of individualism because "liberals [in the broad sense that includes neo-Aristotelian libertarians] *invariably* protest against any attempt to confuse their kind of individualism with egoism..."(*TMLI*, 5; emphasis added). If liberals in this broad sense resist being called egoists, Bird reasons, it makes no sense to saddle them with a commitment that they consistently reject.

If that's true, however, it also makes little sense to include neo-AL within what Bird calls "liberalism." For even a cursory familiarity with neo-AL writings makes clear that neo-AL theorists explicitly *defend* ethical egoism! And that's exactly what we would expect of an Aristotelian theory. Neo-AL theory, as we've seen, rests on the Aristotelian thesis that flourishing is an individual's ultimate end, and the ultimate source of his or her obligations: what promotes the individual's flourishing is good;

what subverts it is bad, wrong, or evil. As Douglas Den Uyl aptly puts it, such an ethic is “supply-sided”:

it places the bulk of its attention on the agent’s own character, defines moral goodness in terms of the agent’s nature, and expects that goodness to be the direct product of the agent’s own actions. Moreover, the ‘beneficiary’ of this conduct is the agent himself.

This remains true, Den Uyl continues, both for self-regarding virtues (e.g., self-control, pride) as well as for such inherently other-regarding virtues as justice, charity, and friendship. The focus of the agent practicing the virtues may be the good of another, but the virtues’ *justification* lies in their contribution to the good of the benefactor.⁵ So egoism is not merely incidental to the neo-AL view, but is essential to it.

The textual evidence on this point is overwhelming—so overwhelming, in fact, that Bird’s apparent indifference towards it constitutes something of a puzzle. Neo-AL theorist Tibor Machan has for three decades, and in dozens of books and articles, consistently argued in defense of what he calls “classical egoism” as the basis of individualism and libertarian politics.⁶ In fact, Machan defends egoism in the very book that Bird cites in *TMLI*, *Individuals and Their Rights*. Oddly, Bird mentions Machan’s book but never mentions the discrepancy between the book’s conception of individualism and his own (*TMLI*, pp. 94, 139). Though they shy away from using the term “egoism” (preferring the more classical-sounding term “self-perfectionism”) Rasmussen and Den Uyl also defend an obviously egoistic theory of human flourishing in a series of books and articles. Mysteriously, Bird discusses Rasmussen-Den Uyl’s *Liberty and Nature* at some length in *TMLI* (pp. 139, 167-9, 173), but mentions neither the authors’ account of the basis of individualism in that book, nor that in any of their other (abundant) work on the subject.⁷ One can’t simply wish away evidence that undermines one’s thesis, however: one either has to accommodate the evidence somehow, or modify the thesis accordingly. Bird does neither.

In one sense, the preceding should be enough to convince us that Bird’s book is irrelevant to the assessment of neo-Aristotelian libertarianism. After all, if individualism B omits one or perhaps two of the essential features of neo-AL individualism, there’s little reason to think that criticisms of individualism B can represent criticisms of neo-AL.

Though I regard that as problematic for Bird’s thesis, it would be premature to stop there. It is, I think, still worth seeing *how* Bird’s inconsistency determines his treatment of neo-AL in the rest of the book. An inconsistency, after all, can be superficial or systematic: a superficial inconsistency might constitute an isolated mistake, safely cordoned off from the rest of the book; a systematic inconsistency would undermine the book’s thesis in a significant way. In what follows, I’ll argue that Bird’s initial mistake *systematically* skews his account of neo-AL throughout the book. By the time we get to the most direct critique of neo-AL toward the end of the book, we find Bird arguing against a strawman—ascribing

beliefs to the neo-Aristotelians that are flatly incompatible with what they've actually written.

First-Order Values: Individualism as a Political Ideal

Liberal individualism, as I defined it at the outset, consists of two sorts of claims—political claims about liberty, and what I called “philosophical” claims about individualism. The philosophical claims, as I put it there, justify and give content to the political ones. Bird makes a similar observation, describing what I call “the political” claims as liberal individualism’s “first-order” account, and describing “the philosophical” claims as its “second-order” account. Chapter 1 of *TMLI* lays out the first-order conception of the specifically individualist interpretation of liberty, i.e., liberal individualism as “a political ideal.” Chapter 2 discusses the second-order justification of the first-order account, i.e., philosophical individualism “as a theory.” In this section, I discuss the first-order issue; in the next section, I take up the second-order issue.

According to Bird, individualism’s first-order claims comprise two distinctively individualist values. The first is what he calls “liberty and inviolability,” discussed in a preliminary way on pages 30-32 of chapter 1, and more fully in chapter 4. The second is liberty’s relation to “the private sphere,” which gets a preliminary discussion on pp. 32-42 of chapter 1, and is discussed more fully in chapter 5. Let me take these in turn.

Liberty and inviolability. Etymology itself suggests that the root of any doctrine of “liberalism” will be some conception of liberty. Liberty is an important good because it protects individuals from being violated by force. But how important is it? At one (deontological) extreme, a theorist might argue that the requirements of liberty are unequivocally and absolutely inviolable: to paraphrase Kant, “liberty must be upheld though the heavens may fall.” On a deontic view, then, liberty’s value is *intrinsic*; no other value can ever override it for any reason in any context. At the other (pragmatist) extreme, a theorist (or politician) might assert that liberty can unhesitatingly be traded for virtually any other good at any time: to paraphrase Mussolini, “liberty may be violated that the trains may run on time.” On a pragmatist view, by contrast, liberty’s value is *subjective*; any value can override it for virtually any reason in any context.

Obviously, neither Kantian deontology nor fascist pragmatism are defensible conceptions of liberty. The defensible conception, one would think, is to be found in the mean between them. But what is that mean? What principles govern the conditions under which liberty is to operate? When, if ever, can we violate liberty for values higher than it, and when, if ever, must we insist on its inviolability by forgoing what we might otherwise obtain?

Bird summarizes the distinctively liberal-individualist conception of liberty in three propositions, as follows:

Liberty is not merely “a” good on par with others, but a special kind of good. Its uniqueness is such that it should never be sacrificed for the sake of *other* kinds of goods.

Like all goods, no matter how special, liberty can and must occasionally

be restricted for *some* reasons. The only justifiable reason for restricting liberty compatible with (1) is to permit liberty to be restricted “only for the sake of liberty itself.”

Principle (2) implies that liberty cannot be restricted for the sake of equality or justice. But equality and justice are fundamental political values. To reconcile liberty with equality and justice without violating liberty, we should combine liberty *with* them, as follows: “Each person has an equal right to a fully adequate scheme of equal basic liberties which is compatible with a similar scheme of liberties for all.”

Note that while justice is not mentioned in the third principle, the principle is itself an *instance* of it.

Bird summarizes the preceding three propositions in one economical formulation, the “distribution of liberty principle,” or DLP:

DLP: The only permissible restrictions of equal liberty are those necessary to secure the equal liberty of individual citizens. (*TMLI*, 30-31).

Having introduced DLP in chapter 1, Bird offers detailed discussion of various treatments of it in chapter 4 of *TMLI*. The discussion includes classical writers (Kant, Rousseau, Mill), redistributive liberals (Rawls, Dworkin, Isaiah Berlin, et. al.), and libertarians (Nozick, Lomasky, Narveson, Charles Murray, David Boaz, et. al.). I found aspects of these discussions illuminating and accurate, and other parts perversely wrongheaded. Suffice it to say, however, that *none* of it is relevant to the neo-AL conception of liberty.

Neo-Aristotelians agree with the spirit of principle (1) above: liberty is a special value, requiring special protection. They also agree at some level with principle (3): each individual is entitled to an equal right to liberty. What they emphatically reject, however, is principle (2): the idea that liberty “can only be restricted for the sake of liberty.” On the neo-Aristotelian view, since there are values higher than liberty, liberty can be restricted for the sake of such values, when the two conflict.

First, a primer account of the neo-AL conception of liberty. Neo-AL theorists define “liberty” in terms of rights, and define rights in terms of the requirements of flourishing. Since the requirements of flourishing are the same for each of us, each of us has the same rights, among them rights to life, liberty, and property. By implication, then, the conditions under which one’s liberties are “restricted” are the same as those under which one’s rights are violated: to restrict X’s liberties is to initiate force against X’s full exercise of his rights. Note that it’s somewhat unclear what it would *mean* on such a view to say that “liberty is restricted for the sake of liberty” so as to produce more liberty. To restrict someone’s liberty is to violate their rights. But if I violate your right, I deprive you of liberty, and I come into possession of the ability to do something without possessing the right to do it. If you have the right to read Colin Bird’s book, and I try to stop you, I violate your rights; but in doing so, I have augmented neither my liberty nor yours. I’ve merely violated yours.⁸ An

initial difficulty with DLP, then, is to make sense of what content principle (2) might have in a neo-AL ethic.

Second, even if we could give it content (which I doubt), neo-Aristotelians would reject it. The neo-AL ethics, as we've seen, is a teleological and egoistic ethic in which human life and flourishing is the ultimate end. Every other value is a value because (and to the extent that) it contributes to this end. That goes for liberty as well. Political liberty certainly is a value by the standard of flourishing, and it occupies a special place in the hierarchy of values. But the fact remains that it stands lower in that hierarchy than life itself. Consequently, the standard neo-Aristotelian view holds that *life* is the foundation for the rights to liberty and property. As David Kelley puts, neither liberty nor property

can be derived from the other, but rather both derive from an underlying principle that would normally be formulated as the right to life. That is, some fundamental end—life, happiness, self-realization—is an ultimate end, the source and standard of all values; society should be so organized as to allow people to pursue that end; and the rights to liberty and property, each in their way, are necessary elements in that organization.⁹

If the requirements of life justify the right to liberty, then the right to liberty exists *for the sake of* its contribution to life. It follows that when the two conflict, the requirements of life take precedence to those of liberty. Generally, the two rights *don't* conflict: that's the point of saying that the right to liberty "exists *for the sake of* its contribution to the right to life." Liberty's value is such as generally to *contribute* to life. But neo-Aristotelians have recognized that emergency cases can arise in which rigid adherence to the principles of liberty or property rights might result in death or serious injury.¹⁰ In such emergency cases, as we might call them, the requirements of someone's life (or by extension, physical integrity) override someone else's right to liberty. So contrary to point (2), it's *not* true that liberty is "only" violable in the name of liberty. In emergency cases, liberties are legitimately violated in the name of life or physical integrity (where the two conflict).¹¹

An example might help us understand this better. Imagine that I'm out for a walk, when I'm attacked by a large, vicious dog. My only hope for evading the attack is to climb over someone's fence, and to escape the dog through his or her backyard. Assume that I don't have the time to ask the owner's permission to do this. Ordinarily, my invasion of someone's backyard would be criminal trespass—a violation of his or her property rights, and by implication a violation of his or her liberty (i.e., their liberty to exclude me from their property).

I therefore seem to face a dilemma. I could either

Sacrifice my bodily integrity in order to respect the homeowner's liberty and property rights, or

Protect my bodily integrity at the homeowner's expense.

The neo-Aristotelian response to this apparent dilemma is simple. If the requirements of life provide the justification for liberty, then the requirements of liberty can never oblige me to act in defiance of the requirements of my life. A dog attack (by e.g., a Rottweiler or German shepherd) constitutes a significant threat to one's body, if not to one's literal survival. The magnitude of the threat is such that it is *not* in one's interest to acquiesce in the expected injuries merely to respect the conditions of someone else's liberty. Therefore, in such a case, it's both rational and morally justifiable to violate liberty to save oneself from serious injury.

Note that the emergency-case exception to rights is self-limiting. To make the exception, we have to begin by distinguishing emergencies from the larger background of non-emergency contexts. An emergency is a *radical* departure from normal conditions, not merely a continuation of suboptimal conditions. An emergency, to paraphrase Ayn Rand's definition, is a relatively temporary, unchosen, and unexpected event, which poses a danger to life or physical integrity, and creates a high probability of death.¹² One of the defining features of such events is that all or most of the actions of those involved in the emergency aim at transforming the emergency into a non-emergency with the greatest possible haste. It's important, then, to differentiate "emergencies" so conceived from other merely dysfunctional states of affairs. The two relevant differentiae are: (a) the unique etiology of an emergency (its randomness relative to a background of normality) and (b) the severity of its consequences on the lives of those involved.¹³

These two differentiae explain why emergencies pose an exception to rights: rights are not principles designed to handle cases of random danger; they're principles designed to handle situations where long-term planning and action are possible. But precisely because emergencies constitute an exceptional case, if and when an emergency requires a rights-violation, the violator is obliged to act in such a way as to return, as quickly as possible, to non-emergency conditions and thus to minimize to extent of the violation. In the dog-attack example cited above, while I could legitimately violate the owner's property rights to get away from the dog, I would not be justified in stopping in his backyard to ogle his sunbathing daughter. Having escaped the dog, of course, the *status quo ante* would obtain again in full force.¹⁴ Thus while emergencies can sometimes justify exceptions to rights, they don't provide *carte blanche* for subverting them altogether.

Finally, it's worth remembering that the emergency-case exception operates against a background context that presupposes a fundamental *harmony* between rights to life, liberty, and property. Rights to liberty and property exist for the sake of the contribution they make to life. Emergencies are an exception to that general harmony. But precisely because they *are* an exception, we can only grasp how to deal with them

by first grasping the normal cases in which the rights go together, and by defining the exceptional cases in terms of them.

Were Bird to offer a fair critique of the neo-AL conception of liberty, he'd have to recognize at a minimum that it is a normative conception based in the deeper value of human flourishing, and pay attention to specifically neo-AL accounts of it. Since he doesn't do this anywhere in his discussion of DLP, I conclude that what he says is (notwithstanding contrary appearances) irrelevant to neo-AL liberty.

Liberty and the private sphere. What about the second individualist value, liberty's relation to the private sphere? Here the issue concerns not whether liberty can be violated but the area within which individuals enjoy the liberty they have. I quote Bird at length:

The second category of individualist values specifies the archetypical liberal concern to define a private sphere of conduct insulated from public interference, an area within which citizens of a liberal order are free to think and act as they wish. Without wanting to make too much of a topological metaphor, it is nevertheless worth emphasizing one aspect of the spatial imagery implicit in the idea of a 'sphere' of personal action. To describe the area within which an individual may rightfully act as a 'sphere' tends to imply that the only relevant boundaries on legitimate personal action are external. In this view, there are no internal boundaries, no core elements within the sphere of private action towards which individuals are bound to act in particular ways, at least within the terms of a legitimate and politically enforceable public ethic. The internal structure of the private sphere is left to individuals to specify as they please (*TMLI*, 32).¹⁵

The liberal individualist view, Bird continues, distinguishes between the Right and the Good. The Right is the sphere of publicly-enforceable claims, based on the thesis of self-ownership. The thesis of self-ownership says that each of us owns ourselves and can use and dispose of ourselves as we please; each individual ought to respect the self-ownership claims of every other. Contrasted with the domain of the Right is that of the Good, which (evidently) is relative to what we ourselves take to be valuable. As Bird describes it (drawing, e.g., on Lomasky), liberal individualists do not have anything substantive to say about the Good, beyond asserting that each of us has a good constituted by our self-chosen projects. The individualist's real concern is the Right, which prevents infringements on the sphere of the self.

Bird makes much of the familiar problems that arise for this view (*TMLI*, chs. 1, 5). A liberal individualist, he argues, takes self-ownership as a kind of freestanding normative thesis, and interprets the thesis so that it bears no relation to any higher obligations we have to ourselves or others. But precisely for that reason, Bird argues, the self-ownership

thesis is incoherent: if there are no obligations higher than self-ownership, there turns out to be no reason to respect self-ownership itself.

I won't dwell on the details of this argument, which is ingenious in many ways, because from a neo-Aristotelian perspective, Bird's account of the whole topic of "the private sphere" is so far off base that it makes no contact with neo-AL theory at all. To show this, I have to sketch some of the more radical but counter-intuitive features of the neo-AL conception of justice.

On a neo-Aristotelian view, each human individual's flourishing is that individual's ultimate value—quite literally, his or her *raison d'être*. Since my flourishing is my reason for existing and acting, neither it exists nor I exist for any higher or more valuable end. Every human individual is, literally, an end-in-himself or -herself, not a means to the ends of others. Each of us lives for ourselves, and each of our obligations is justified by its contribution to our own interests. The requirements of egoistic flourishing consist of virtues and values which, in Ayn Rand's terms, are the "means to and realization of" my good; they promote, and constitute the core, of my interests.¹⁶ These requirements, it's worth remembering, are objective requirements of flourishing, not subjective matters of desire-satisfaction.

Given this emphasis on the objectivity of moral value, it may be a puzzle why should we be permitted as much "moral space" as neo-AL theorists demand. The answer arises from the nature of moral value itself. As Rasmussen-Den Uyl stress, virtue on the neo-AL view is a fundamentally *self-directed* phenomenon, initiated by the agent's own efforts on the basis of her own knowledge. In this respect, the neo-Aristotelian position on the value of self-directedness is similar to the classical Aristotelian position of the value of virtue itself.¹⁷ Virtue, the classical Aristotelians held, is the fundamental constituent of flourishing—not the only component, but the one most under the agent's control. By much the same logic, neo-ALs hold that self-directed-aiming-at-one's-own flourishing is the very essence of virtue itself. The aspect of one's own good that is most directly under one's control is whether or not one will direct oneself *to* the good on the basis of one's own apprehension of it. A virtuous person is not merely someone who performs actions that get the right results; she is someone who initiates a *whole causal sequence* that leads to the right results. And that is precisely what self-directedness is. A self-directed person is a one who focuses on the world before her and initiates action for her own good in the light of her best knowledge of the circumstances and foreseeable consequences of the action.

For this reason, moral agents function *best* when their actions are (in Aristotle's terms) neither involuntary nor non-voluntary, but fully voluntary, i.e., when the agent is the unhindered cause of the action, and is unhindered in taking responsibility for its effects. Since coercion subverts the conditions of voluntary action, the use of coercion must be strictly limited if agents are fully to realize their good.¹⁸ Note that the claim here is not that an agent cannot function *at all* when coerced, nor even

that all of an agent's self-directedness will be totally destroyed by the least coercion. The claim is, rather, that the *highest* degree of self-directedness is incompatible with the *least* degree of coercion. If and to the extent that the highest degree of self-directedness is obligatory for the agent, the least degree of coercion compromises it. Precisely because the neo-AL view is perfectionist, however, it obliges the agent to be as self-directed as possible.

Though a neo-AL ethic thereby specifies rights as one kind of interpersonal boundary, we might wonder whether this by itself takes the reality of other people sufficiently into account. Does a neo-AL agent have any conception of interpersonal ethics *beyond* respect for the rights of others? The answer comes in part from the neo-AL conception of *justice*. Justice is the virtue of evaluating others on the basis of their nature, character, and actions, and interacting with them by giving them what they deserve. Putting aside justified self-defense, justice so conceived involves a commitment to seeking and dealing with the *best* in those with whom one interacts. A genuine egoist seeks out the strengths and virtues of others in order to trade with them from positions of mutual strength and mutual benefit; she abjures as pathological (and irrational) the idea of attempting to benefit from others by exploiting their vices or weaknesses. To borrow a phrase of Tara Smith's, "justice" denotes the select route by which a rational agent attempts to benefit from other persons.¹⁹

With this account in hand, let's revisit Bird's treatment of the relation between liberty and the private sphere. If we do, we see a number of crucial incompatibilities between his treatment of that subject and the neo-AL treatment of it.

First, contrary to Bird's account, the neo-AL view leaves no room for the distinction between the Right and the Good. On the neo-AL view, justice is a personal virtue, and rights are a condition of flourishing. Both are derived from the good, not distinguished from it.

Second, contrary to Bird, neither Machan nor Rasmussen-Den Uyl make significant reference to self-ownership. Nor is self-directedness what Bird takes "self-ownership" to be. Unlike self-ownership, self-directedness is not a freestanding normative commitment, but one embedded in a deeper theory of the good.

Third, it's misleading to speak of a "sphere" in which we can "do as we please" on the neo-AL account. On the neo-AL account, every aspect of life is governed by virtue, so there is no sphere in which we can literally "do as we please." That includes both our personal lives and our interpersonal lives, since the latter is governed by justice.

Point three by itself suggests that Bird has overdone the topographical metaphor. The metaphor says that there are no "internal boundaries" in a liberal individualist ethic. But the neo-AL view holds that virtue is precisely that: an internal boundary. In fact, Aristotle goes so far as to describe virtue *explicitly* as an "internal boundary" of the agent.²⁰ A counterexample cannot get more direct than that.

Finally, Bird's account conflates two separate issues: (a) whether

internal boundaries exist, and (b) whether the requirements of internal boundaries should be externally imposed by force. The neo-AL answers “yes” to (a), and “no” to (b), on the grounds that force is an inappropriate instrument for inculcating a commitment to virtue—a topic that Bird never discusses in terms that connect with neo-AL theory.

I conclude, then, that Bird’s account of the second liberal individualist value is as irrelevant to neo-Aristotelianism as his account of the first one. In the next section, I turn to his treatment of individualism as the second-order doctrine that justifies liberalism’s first-order values.

Individualism: the Second-Order Doctrine

As mentioned earlier, on Bird’s view, the distinction between first- and second-orders of a political theory is a distinction between the values the theory espouses, and the method or framework the theory uses to justify those values. As we saw in the preceding section, the two liberal individualist values are the inviolability of liberty and its protection of a “private sphere.” The generic name for the second-order justification is “individualism.” Individualism, in all of its versions, is an attempt to justify liberty by defending some version of “the priority of the individual to the collective.” And, Bird argues in chapter 2, in each of its versions it fails. Not only does it not justify liberty, but it makes no coherent sense of the relevant conception of the individual’s “priority” to the collective, either.

Chapter 2 is in effect the heart of *TMLI*: it’s the longest and by far the most complex chapter in the book, and it offers the most direct critique of “individualism.” It’s important, then, to note a methodological difficulty at the outset. We’ve earlier seen what individualism is *not*, but in positive terms, what *is* it? Bird’s answer to this question sounds to me like special pleading mixed with an obnoxious tendentiousness:

The strategy I pursue [in discussing ‘individualism’ as a second-order theory] is somewhat inelegant. Ideally, we would want to isolate a core premiss to which all versions of the claim about the priority of the individual over society are committed. We could then proceed to burst this particular philosophical balloon with a single well-directed shot. But this is only possible when the target is well defined. The history of claims about the alleged priority of the individual in the liberal tradition and its supposed rejection in rival traditions offers up no such target. Instead, we confront a messy array of semi-articulated, often almost anecdotal, assertions, insinuations, and slogans. (*TMLI*, 47-48).

Consequently, Bird continues, he’s forced to “list six claims in which the priority of the individual has been alleged to consist,” and to “show how... each fails to do the appropriate work in identifying the individualist

political ideal... ” (*TMLI*, 48). By the end of the chapter, Bird claims, he has said enough to convince us to discard the concept of “individualism,” and by implication, the idea that liberalism rests on it.

Bird’s claim to have canvassed the entire “history of claims about the alleged priority of the individual in the liberal tradition” is both overstated and ambiguous. Even if we restrict ourselves to “the liberal tradition” as ordinarily construed, it would have impossible to do justice to the *entire* history of claims about the priority of the individual to the collective in the forty pages Bird devotes to the task. But apart from this, Bird simply ignores the fact that neo-ALs have a unique reading of the relevant history which makes Aristotle the precursor of the liberal tradition. As Rasmussen-Den Uyl put it in *Liberty and Nature*:

One of our purposes in writing this work is to defend the liberal political heritage. The reader, however, will quickly discover that we do so form a rather nontraditional perspective, as such defenses go. We attempt to defend the liberal tradition from an Aristotelian foundation.²¹

In *Classical Individualism*, Tibor Machan notes (quoting the nineteenth century Aristotelian scholar, Eduard Zeller) that this foundation depends on broader features of Aristotle’s philosophy:

In politics as in metaphysics the central point with Plato is the Universal, with Aristotle the Individual. The former demands that the whole should realise its ends without regard to the interests of individuals; the latter that it should be reared upon the satisfaction of all individual interests that have a true title to be regarded.²²

In *Nature, Justice, and Rights in Aristotle’s Politics*, Fred D. Miller Jr. provides a detailed discussion of what he calls Aristotle’s “moderate individualism”:

The criterion by which we evaluate a constitution as ‘best’ is thus whether it enables the members of the polis, considered as individuals, to attain the highest level of activity of which they are capable....This formulation thus supports an individualistic interpretation of [Aristotle’s conception] of the best constitution.²³

Finally, in “Aristotle’s Conception of Freedom,” Roderick Long has extended Miller’s discussion in a sophisticated defense of (a more radical form of) Aristotelian individualism.²⁴ None of this seems to me like “a messy array of semi-articulated” thoughts. None of it finds its way into *TMLI*, either.

It is *perhaps* true that there is no single volume that provides a unified account of “The Concept of the Individual in Aristotelian

Philosophy.” But it doesn’t follow from that fact—nor is it true—that there is no such concept or theory. On the contrary, Aristotelianism is probably the oldest and most comprehensive philosophical research program in human history. To “confront” the Aristotelian conception of the individual, one would have to engage in a study with at least two parts: first, a study of the Aristotelian conception of the individual, as presented in the Aristotelian Corpus and commentaries from ontology through politics; second, a discussion of the neo-Aristotelian appropriation of this conception by twentieth century liberals. At a minimum, such a study would have to include discussions of the following topics:

The ontology of individuals as primary *ousiai* (entities)

The “ontological individualism” of Aristotle’s natural teleology and meta-ethics

The individualistic implications of Aristotle’s philosophy of action (e.g., his account of agent-causation, voluntariness, and rational choice)

The individualistic nature of Aristotle’s theory of human flourishing and its relation to politics

The neo-Aristotelian conception of all of the above.

The literature on these subjects is rigorous and comprehensive.²⁵ Since Bird mentions none of it, I think it’s safe to say that he’s not in a position to dismiss it—or by implication, to dismiss individualism.

I don’t have the space to discuss all six of Bird’s theses. Putting aside (1), I didn’t find the critiques he offered of them particularly plausible, in light of what a neo-Aristotelian might say about them. For present purposes, however, I want to look at Bird’s treatment of thesis (6), since it turns out to be the one that Bird himself takes the most seriously (*TMLI*, 48-9).

Thesis (6) says: “The priority of the individual consists in the fact that individualists only recognize those social goods that are ‘decomposable’ or ‘reducible’ to individual goods” (*TMLI*, p. 65). Let me quote Bird’s initial characterization of this view, which I find unobjectionable:

This theory which (following Joseph Raz) I will call *value-individualism*, asserts something like the following: there are no irreducible social goods, interests, or values. Collective arrangements, structures, states-of-affairs only count as ‘goods’ to the extent that they have a positive effect on individuals or their lives. There are no values or interests assignable to society as such; there are only the interests and values of individuals who stand to gain or lose under different collective arrangements. Without an appraisal of these individual gains and losses, there is no politically relevant sense in which collective arrangements, or states of society as such, may be good or bad. They have no independent value taken by themselves.

If we grant these conditions, then *R* is an individualistic good for everyone in *S*: it facilitates the flourishing of each individual involved with it, and its absence would subvert their good in each case. My account of justice in the previous section should make clear why this is so. The rule of law makes justice possible, both for rulers and for those ruled; without law, anarchy reigns, and justice becomes impossible. Justice is a personal virtue, and an essential component of human flourishing; injustice is a vice, which subverts it. If the rule of law makes justice possible, and justice makes flourishing possible, and “making-possible” is a transitive relation (as it is in a teleological ethic), then the rule of law makes flourishing possible. Since flourishing is an individualistic phenomenon, the value of the rule of law can be explained individualistically as well. Hence the rule of law is no counterexample to value-individualism.²⁶

Suppose, however, that the rule of law was such that it required us to negate the preceding propositions. Then we could fairly infer that the rule of law was *not* an individualistic good, but a collective one: the collective good of law would somehow override the good of the individuals subject to it. But that is precisely what neo-AL denies. I conclude, then, that Bird’s counterexample fails.

To account for the apparent difficulty for value-individualism posed by this sort of case, Bird distinguishes between two forms of value-individualism, those committed to the value of internal states and those committed to the value of external states. He describes the distinction as follows:

Internal states are states of individuals that subsist without any relation to anything outside the individual. ‘Being exhausted’ ‘being miserable’, ‘being upset’, ‘being satisfied’ or ‘being content’ are internal states in this sense. They may be caused by something outside of the individual, but the state itself occurs within the individual, and is a self-contained disposition of that individual. External states are possible individual states relative to something outside: ‘being a victim’, ‘being in danger’, ‘being a friend’, ‘being famous’, ‘being a citizen’, ‘being treated equally’ are examples of individual states of this external kind. In order for individuals to enter such states, they must stand in a particular relation to something outside of themselves (aggressors, threats, friends, ‘the public eye’, the state, the acts of others). (*TMLI*, p. 70).

From this distinction, Bird infers that

Value-individualism becomes unintelligible if external states of individuals are included within the category of ultimately valuable states. The reason for this is that the inclusion of external states obliterates any meaningful

distinction between the value of states of individuals and the value of states of the collectivity *sui generis*. (TMLI, 70).

In other words, since value individualism entails the inclusion of what Bird calls external states, and external states blur into collectivism, value individualism is incoherent; but since a conception of value that restricted itself to internal states would be absurd, value-individualists have no choice but to include external states. Hence value individualism is either incoherent or absurd.

This entire analysis strikes me as a mess from start to finish. For one thing, its status as a counterexample depends on Bird's treatment of the rule of law case, which (I've argued) fails. Second, it presupposes that *states* are the primary bearers of value, which is incompatible with an Aristotelian meta-ethics (and in my view, false).²⁷

A third set of problems bears on the criteria by which Bird distinguishes between internal and external states. In the case of internal states, it's unclear how they can subsist apart from any relation to anything external; in the case of external states, it's unclear why their "externality" must imply collectivity as Bird suggests.

Consider what Bird says about internal states. Internal states, we're told, exist apart from any relation to what's external to the individual. I find it hard to grasp what that means, and none of Bird's examples really help to make it clear, since it's true of *none* of them that the states in question literally "subsist without any relation to anything outside the individual." Taken absolutely literally, the idea of mental states' "subsisting without any relation to anything outside of the individual" makes no sense at all. Mental states are states of consciousness. Consciousness derives its content from the external world: a consciousness conscious of nothing but itself would be a contradiction of terms. But if conscious states are ontologically dependent on what is external to them, it's futile to define a conception of conscious states that subsist *apart* from what's external to them, as Bird tries to do. Since Aristotelians ubiquitously think of consciousness as inherently relational or intentional, it makes even less sense than it otherwise would to try to saddle *them* with a commitment to the value of "internal states."

Bird seems to recognize this, and responds to it by saying that internal states can be "caused" by external things, but "occur" internally. This, however, doesn't make things any clearer: if the "internal occurrence" of a mental state depends for its existence on being *sustained* by an external cause, there is no coherent sense in which Bird's "internal states" in fact "subsist without any relation to anything outside the individual."

Consider one of Bird's own examples: "being upset," for instance. Suppose that I'm upset *because* I fear that my best friend has died in a car crash. *My fear that he's dead* is the cause of my so-called internal state. Note that that cause sustains the very *existence* of the state: remove the cause, and the internal feeling goes away. If I were to find out that my

fear was unjustified, for example, I would no longer be upset.

To be upset in the relevant sense, I have to perceive something external to me (a phone call, a letter) that informs me of my friend's predicament—which is also external to me. I then have to evaluate these external states of affairs. My evaluation of them, in turn, causes my emotional state. Since my “being upset” in this context depends for its existence on “fearing that he's dead,” which itself depends for its existence on “believing that he's dead,” which depends on my apprehending external facts concerning his death, which depends on the external facts themselves, it's hard to make sense of the idea that “being upset” in this context could subsist apart from external states of affairs. A similar analysis, I think, applies to Bird's other examples of “internal states.” I conclude, then, that the concept of an “internal state” fails to refer to anything real. There is no obvious sense in which internal states are as internal as Bird makes them.

Now consider “external states.” Bird asserts that the value-individualist will ultimately be pushed to admit the value of external states, which are “collectively valuable.” Since I can't make sense of the idea of an internal state, I suppose I agree that a value-individualist would endorse the value of external states. I don't see, however, why Bird thinks that external states are collectively valuable. I've already argued against the ‘rule of law’ case, and by implication, the case of ‘being treated equally’. But a similar—and even simpler—analysis applies to all of the other cases Bird mentions. ‘Being a victim’ is bad *for* the victim; ‘being in danger’ is bad *for* the person in danger; friendship is of mutual benefit *to* each friend; ‘being famous’ can potentially be beneficial or harmful *to* the famous person, as can ‘being a citizen’. It's unclear to me why Bird sees these external states as posing any threat at all to an objective version of value-individualism like neo-AL. Then again, he seems to collapse all value individualisms into subjectivism—thereby begging the question against neo-AL, and ignoring its theory of value.

When Bird finally reaches the conclusion that “value individualism is the view that for purposes of political justification, ultimate value only resides in internal states of individuals,” (*TMLI*, 71) he is right to criticize it, but wrong to think that anything he's said about it is in any way applicable to neo-AL. The “individualism” he's described is literally “worlds away” from anything of concern to that theory.

Self-ownership and individual inviolability

I've so far argued that every one of Bird's arguments against liberal individualism fails if construed as an argument against neo-Aristotelian libertarianism. His clarification of individualism has nothing to do with individualism as neo-Aristotelians conceive of it, his account of liberty is not what neo-Aristotelians make of it, and his account of individualism bypasses the distinctively neo-Aristotelian conception of it. We might wonder, then, whether the problem here is merely verbal. Could it be that Bird has defined a legitimate conception of individualism that simply has nothing to do with the neo-Aristotelian version and has included neo-

Those who reject value-individualism, by contrast, are willing to take seriously the possibility that certain collective entities, arrangements, and states-of-affairs are valuable by themselves, independently of their impact or effects on individuals. (*TMLI*, pp. 65-66).

On this interpretation, neo-Aristotelianism is certainly committed to a form of value-individualism. On the neo-Aristotelian view, “valuable” is analogous to “healthy”: just as everything healthy is healthy *to* specific agents, *for the sake of* promoting their lives, so what’s morally valuable is valuable *to* specific agents, *for the sake of* promoting their flourishing in a broader sense. “Valuable” denotes the attribute of a relation between an agent, a goal, and the action required of the agent to realize the goal: an action *f* is valuable to an agent *A* for the sake of realizing some goal *g*—where *g* is itself a means to *A*’s ultimate value, flourishing. On this schema, everything valuable can ultimately be explained as conducive to the flourishing of individuals.

Bird concedes that many values can be accounted for in this individualistic way. But not all can:

Consider, for example, the claim that ‘the liberal rule of law is good because under it individuals are treated fairly.’ Superficially, it looks here as if the value of a collective institution (the rule of law) is being accounted for in terms of its ‘impact’ on individuals (the fact that it causes individuals to be treated fairly). But... it is not so easy to claim that ‘being treated fairly’ is an individual as opposed to a collective state-of-affairs. After all, it would seem that ‘being treated fairly’ refers to a relation between an individual and the agents and institutions with which she is transacting. In other words, it refers to a collective state of affairs. (*TMLI*, 69).

The last sentence of this passage, I contend, is a non sequitur.

To see this, let’s consider a certain society, *S*, in which the rule of law, *R*, operates. Let’s divide the population of *S* into two groups, the *rulers* and the *ruled*. The rulers maintain *R* and comply with it; the ruled merely comply with it without doing anything to maintain it. Assume that the classification is not mutually exclusive; rulers can leave the government, and ruled can join it. Suppose now that the following is the case:

All of the rulers in *S* benefit more from *R* than from $\sim R$.

All of the ruled in *S* benefit more from *R* than from $\sim R$.

Rulers have the freedom to leave positions of rulership and become members of the ruled.

The ruled have fair opportunities to become rulers.

Aristotelianism by mistake? Prior to chapter 5 of *TMLI*, after all, there is only one reference to neo-Aristotelianism, and a quick one at that (*TMLI*, 94).

Were it not for chapter 5—"Self-Ownership and Individual Inviolability"—that would be a legitimate supposition. Chapter 5, however, makes absolutely clear that Bird's target includes *all* forms of libertarianism, neo-Aristotelianism included. "Few of the theoretical traditions that have flourished in the past three decades," Bird writes, "can match...libertarianism for the philosophical acuity of its main protagonists, its cohesiveness, its contagion within intellectual circles, its (malign) influence on political discourse and public policy and its evangelical vigor" (*TMLI*, 139). That (rather absurd) sentence ends with a footnote that includes both Rasmussen-Den Uyl and Machan among other libertarians. Bird writes throughout the chapter as though both sets of authors endorse the idea of self-ownership discussed in the chapter, and he devotes several pages to a critique of Rasmussen-Den Uyl's conception of rights as "meta-normative principles" (*TMLI*, pp. 166-179). The clear implication is that his critique of self-ownership in chapter 5—as well as the previous discussions of individualism as a political idea and as a second-order theory—apply to neo-AL.

Strictly speaking, chapter 5 of *TMLI* is less a critique of self-ownership than an attempt to show that the libertarian commitment to it leads to a dilemma. Bird defines what he takes to be the basic libertarian commitment to self-ownership as follows:

On the one hand, [libertarians] have insisted...that individuals and their rights are inviolable in a way that prohibits their sacrifice in order to optimize aggregate welfare. On the other hand, they have insisted...that inviolable individuals inhabit a private sphere within which they are free to act just as they please in what concerns only themselves. Libertarians usually render this second claim as a commitment to individual self-ownership. The thesis of self-ownership allows libertarians to reject paternalism, for if we are our own proprietors, it must in the end be up to us how we decide to invest our selves, talents, and personal resources: attempts to force us to act in ways that outsiders judge to be in our best interests violate self-ownership (*TMLI*, p. 140).

The commitment to self-ownership, Bird argues, entails that

If their position is to be fully consistent, libertarians must assume that individuals are comprehensive self-owners. That is, they must maintain that there is no part or aspect of the self and its capacities that is unowned or unownable by that same self. The self is, on this view, fully owned by itself. According to this view, there is no part or aspect of

the self's own activity over which others are entitled to make authoritative decisions (TMLI, p. 143).

Following Bird, let's call this latter commitment *comprehensive self-ownership*. Comprehensive self-ownership, Bird argues, leads libertarianism to the following dilemma, which corresponds to the "Kantian" and "Millian" strains within libertarianism.

Kantian horn of the dilemma. Suppose that we're comprehensive self-owners because we have some special attribute that gives us that status. Call this attribute X. In other words, since X (and only X) justifies comprehensive self-ownership, all and only X-possessors are comprehensive self-owners. It's clear that whatever X is, it justifies a form of obligation that binds others in a very stringent way. If I'm a comprehensive self-owner because I have X, then you are strictly obliged to respect my comprehensive self-ownership, merely because I have X.

The problem, however, is this: if *you* must respect my comprehensive self-ownership merely because I have X, doesn't *my having X* give *me* obligations in virtue of possessing it? After all, what "X" stands for is some equivalent of "human dignity." But if *you* are bound to respect my moral status because I have human dignity, why shouldn't *I* have special obligations to myself in virtue of that very fact? If X justifies obligations for *others*, in other words, there is no reason why it shouldn't justify obligations for its *possessor*. If so, comprehensive self-ownership entails stringent duties, not only to others, but to oneself. But stringent duties to oneself are at odds with libertarianism, which tells us that we can do with ourselves as we please. Hence the Kantian version of libertarianism is incoherent.

Millian horn of the dilemma. Suppose that instead of being self-owners in virtue of possessing X, we say instead that each of us ought to be granted a right of self-ownership because doing so will give us all a sphere of private action in which we can act as we please, and pursue our projects as we please—which, in turn, will maximize preference-satisfaction.

Assume, however, that the conditions for securing these private spheres of action *conflict* with one another. If so, we face the possibility of what Nozick called a "utilitarianism of rights": we may (sometimes) have to violate some persons' self-ownership rights to secure the self-ownership rights of others. At that point, however, it would become clear that the self-ownership of those whose rights were violated was not comprehensive; it would be less-than-comprehensive. But *ex hypothesi*, libertarianism requires comprehensive self-ownership. Thus Millian libertarianism is incoherent.

Unsurprisingly, I think Bird's supposed dilemma fails as applied to neo-Aristotelianism. The basic reason for its failure is Bird's failure to acknowledge that the neo-Aristotelian argument is neither reducible to a Kantian nor a Millian one. It's a fundamentally different argument—and a different kind of argument—and it can't without distortion be forced into categories defined by Kant or Mill.

Consider the Kantian horn of the dilemma. Putting aside the generally misleading nature of the Kantian language to describe a neo-Aristotelian argument, the simple fact is that stringent obligations to oneself hardly constitute a problem for a neo-Aristotelian view. Obligations to oneself are literally the whole *point* of the Aristotelian ethic: each of us, it tells us, has the moral obligation to strive to make the best possible life for ourselves. “Rights”—the neo-Aristotelian adds—identify the permissible boundaries of our strivings. It’s precisely the self-regarding aim of moral perfection on this view that underwrites our inviolability as persons.

Bird seems to suggest that a moral perfectionist ethic of this type must necessarily lead to coercive paternalism. But that’s precisely wrong: neo-ALs have always stressed that it’s the *perfectionism* of the Aristotelian ethic that vitiates arguments for coercive paternalism. Recall my earlier claim to the effect that the *least* coercion of an agent is incompatible with the *best* life for that agent. What this says is that the best life is best promoted by allowing the agent to live it in a fully voluntary manner. Stated in this way, the claim admits that paternalistic coercion can do an agent *some* good in *some* circumstances. What it insists on, however, is that non-coercion is lexically prior to coercion: when voluntary action is a possibility, an agent’s life is always better *without* coercion; paternalistic action without the agent’s consent can only be justified if the agent is incapable of voluntary action. Consider two cases.

Case 1: Suppose I’ve just been hit by a car, and am lying unconscious in the street. Someone calls the paramedics without my consent. The paramedics give me first aid without consent, and take me to the local hospital without my consent. The emergency room doctors then stabilize me without my consent. In this case, my survival has been promoted by actions that bypass my consent and qualify as involuntary paternalism. Nonetheless, such paternalism is entirely justified, since the only *possible* route to survival in this case is one that requires someone’s acting on my behalf: there is no physically possible way of my voluntarily choosing to call an ambulance if I’m unconscious. Once the conditions of voluntary action have been restored, however, the choice to receive or reject treatment is mine, even to the point of rejecting it, leaving the hospital, and immediately dropping dead on the street.

Case 2: Suppose I’m a thorough morally reprobate, but shrewd enough to know not to initiate force against anyone. I am, let’s say, a non-coercive sexist, racist, anti-gay bigot, liar, spendthrift, pimp, alcoholic, drug abuser (and dealer), avid consumer of hard-core pornography, and torturer of (unowned) animals. Coercing me into virtue could indeed do me *some* good: I might, under a rigorous regime of moral reform undertaken by highly devoted social workers, eventually learn to respect women and minorities, stop lying, balance my checkbook, quit drinking and doing drugs, stop pimping, cancel my subscription to *Hustler*, and stop torturing animals. (Then again, I might not.) But in forcing me to do the good, the social workers deprive me of the possibility of initiating the process of self-discovery and reform for myself, and thereby impose on me

what is at best a merely second-best life. That second-best life might be better than the life the I ultimately end up leading if left to my own devices, but it cannot in principle be better than the life I *could have* led if left alone. A commitment to moral perfection entails leaving the best life open, rather than foreclosing it by coercive means in the name of the merely satisfactory. Unless we are talking about a literal psychopath (and *ex hypothesi*, we're not), even the lowest moral reprobate has the volitional freedom to change his own ways, if only by asking others for help.²⁸ If an agent *can* reform himself, perfectionist justice requires leaving him politically free to do so.

Let's move now to the Millian horn of the dilemma. The assumption from which this horn proceeds is the idea that we should have a sphere within which "to do as we please." But as we've seen from the preceding, there is no such sphere in a neo-Aristotelian moral conception; everything we do is determined by the requirements of our flourishing. So the Millian horn of the dilemma fails.

Nor is there any genuine problem concerning "the utilitarianism of rights" on an Aristotelian view. The idea of a utilitarianism of rights comes from Nozick's discussion of rights in *Anarchy, State, and Utopia*. Nozick begins by considering conceptions of moral obligation that assume that moral concerns "can function only as moral goals" by contrast with views that assume that moral concerns function as "side-constraints" on goals.²⁹ Goal-oriented views, he continues, take moral obligations to be "productive of the greatest good, with all goals built into the good." The obvious example of such a view is Utilitarianism, and this is the theory Nozick explicitly discusses. In the context of this discussion, Nozick asks us to imagine a Utilitarian theory that endorses rights. Such a theory, Nozick suggests, will aim to maximize the good in an aggregative sense. If it endorses rights, it will regard rights-violations to undermine utility. But rights-violations in a Utilitarian theory would only undermine utility quantitatively: rights would enjoy no *a priori* priority to any other value or principle. If so, the best that Utilitarianism could do in the way of rights-protection would be to defend a conception "some condition about minimizing the total (weighted) amount of violations of rights," which would be "built into the desirable end state" posited by the theory.

If this is correct, Nozick argues, such a theory will entail a "utilitarianism of rights" in which some rights will have to be violated in order to maximize utility. Utilitarian end states only justify *minimizing* rights violations, not absolutely proscribing them. But such a view of rights is incompatible with the demands of comprehensive self-ownership, which requires an absolute proscription on violations of self-ownership, not their mere minimization.

Nozick's argument, though widely accepted, is based on a false alternative. It's true that there is a class of normative theories that sees moral concerns as equivalent to moral goals. It doesn't follow from that fact—nor is it true—that all such theories are Utilitarian, that they are aggregative, or that they require conditions minimizing the total weighted amount of violations of moral principles.

The obvious alternative to Utilitarianism in this respect is ethical egoism. Because egoism is an agent-relative theory, it's incompatible with Utilitarianism, it's not aggregative, and it does not involve maximizing cardinal welfare orderings. Instead, an Aristotelian egoist sees his own flourishing as his fundamental moral concern, and his fundamental goal. Because justice is a component of that goal, and rights protect the conditions of just action, the goal itself requires a stringent conception of rights for its realization. As an egoist qua egoist, I need stringent rights in order to be protected from those who might violate me; but because my interest as a rational agent lies in dealing with the virtues and strengths of others (i.e., their reason), I need *them* to be protected from those who might violate *them* as well. In other words, I have no stake in violating the rights of others, and I have a strong stake in ensuring that the rights of *others* are not violated, either.

What a society of egoists needs, then, is a system of *stringent* rights—not a utilitarianism of rights. Egoists seek mutual advantage, but a system that merely minimized rights-violations would be less effective at protecting the mutual advantage than one that put rights-violations altogether off-limits. The alleged problem of a “utilitarianism of rights” would therefore not arise on an egoistic view

I conclude, then, that Bird's argument against self-ownership, like his other arguments, fails.

Conclusion

In criticizing Bird so heavily for his treatment of neo-Aristotelianism, I don't want to leave a generally negative impression of the book. In fact, *TMLI* is a remarkable, ingenious, and provocative book. Bird generally writes well, has an encyclopedic knowledge of (most of) the literature he discusses, and knows how to argue. His discussions of classical authors (especially Kant and Rousseau) is excellent, and many of his criticisms of contemporary writers hit their mark. What he doesn't do, however, is to offer a single significant criticism of neo-Aristotelian libertarianism.

To his credit, Bird concedes that it is conceivable for libertarians to devise a theory, which combines something like self-ownership with strong rights to liberty. But as he himself puts it, “I do claim that such a theory would have to be of a radically new sort: it could not be based on an effort to combine the historical traditions of thought which have put these ideas into circulation” (*TMLI*, 165, cf. 182, 191). That is admirably and precisely expressed. I would only reply that I think that Ayn Rand's Objectivism is that theory, and that neo-Aristotelian libertarianism is a worthy runner-up. *TMLI* touches neither.

Though I don't think Bird's criticisms of neo-AL hit the mark, I do think they should leave neo-Aristotelians with something to think about—namely, the propriety of using the label “libertarianism” to describe a neo-Aristotelian theory. Both Rasmussen-Den Uyl and Machan accept the label to describe their theories; only Machan explains why he accepts it, and the explanation he gives is a rather unconvincing appeal to common usage.³⁰ Bird's book, however, gives us a good illustration of what is wrong

with the term “libertarian” as applied to neo-Aristotelianism. If neo-Aristotelianism is really as different from other libertarian theories as I’ve suggested it is—and it had better be!—it makes no sense to subsume “neo-Aristotelianism” under the heading of “libertarianism.” The use of the latter term misleads us into thinking that neo-Aristotelianism shares common premises with other forms of libertarianism, when it clearly does not. It also suggests, in highly unAristotelian fashion, that radically different theories, based on incommensurable premises, can somehow be subsumed as species under a common genus. But that makes no sense. If Bird is right, the Aristotelian argument for a free society is a radically novel argument of a historically unprecedented sort—not a reversion to an older, established tradition or a set of recognizable premises. If so, it needs a name of its own; we do it a disservice by giving it less than the name it deserves.³¹

Notes:

1. Ayn Rand, " 'Extremism,' or the Art of Smearing," p. 176 in *Capitalism: The Unknown Ideal*, (New York: Signet Books, 1967).
2. It's odd that Bird decides to discuss the term's connotation instead of its denotation. Semantically and conceptually, denotation is more fundamental to a term than connotation.
3. See, e.g., Greg Pence, "Virtue Theory," (essay 21) and Charles Pigden, "Naturalism," (essay 37) in *A Companion to Ethics*, (Malden, MA: Blackwell Publishers, 1993), edited by Peter Singer.
4. Douglas Rasmussen and Douglas Den Uyl, *Liberty and Nature: An Aristotelian Defense of Liberal Order*, (La Salle, IL: Open Court Press, 1991), p. 32.
5. Douglas Den Uyl, "The Right to Welfare and the Virtue of Charity," pp. 205-6 in *Altruism*, (Cambridge, UK: Cambridge University Press, 1993), edited by Ellen Frankel Paul, Fred D. Miller, and Jeffrey Paul. Den Uyl mentions *Nicomachean Ethics* V.11 with respect to justice; on charity and friendship, see *Nicomachean Ethics* IX.4-9.
6. Tibor Machan, *Human Rights and Human Liberties: A Radical Reconsideration of the American Political Tradition*, (Chicago, IL: Nelson Hall, 1975); *Individuals and Their Rights*, (La Salle, IL: Open Court Press, 1989); *Classical Individualism: The Supreme Importance of Each Individual* (New York: Routledge, 1998). See also "Recent Work in Ethical Egoism," *American Philosophical Quarterly*, vol. 16 (January 1979).
7. For egoism in *Liberty and Nature* see the discussion of flourishing in chapters 1 and 2, and the discussion of self-love and friendship in chapter 5. See also Douglas Rasmussen, "Perfectionism," in *The Encyclopedia of Applied Ethics* (San Diego: Academic Press, 1997), edited by Ruth Chadwick; and Rasmussen, "Human Flourishing and the Appeal to Human Nature," in *Human Flourishing*, (Cambridge, UK: Cambridge University Press, 1999). See also note 4 and references cited in Den Uyl's article.
8. Cf. David Kelley, "Life, Liberty, and Property," *Social Philosophy and Policy*, vol. 1 (1984), p. 115; Tibor Machan, *Classical Individualism*, p. 164.
9. Kelley, "Life, Liberty, and Property," p. 109.
10. The *locus classicus* is John Locke's discussion in his *First Treatise of Government*, I.41-2. See also Ayn Rand, "The Ethics of Emergencies," ch. 4 in *The Virtue of Selfishness: A New Concept of Egoism*, (New York: Signet Books, 1964); Tara Smith, *Moral Rights and Political Freedom*, (Lanham, MD: Rowman and Littlefield, 1995), pp. 112-116; Rasmussen-Den Uyl, *Liberty and Nature*, pp. 144-15. Tibor Machan, *Human Rights and Human Liberties*, pp. 213-222, *Individuals and Their Rights*, pp. 105-9; *Generosity: Virtue in Civil Society*, (Washington, DC: Cato Institute, 1998), pp. 62-66.
I should emphasize that these are different arguments to similar conclusions, not identical arguments to the same one. Further, on my classification, Rasmussen-Den Uyl and Machan are neo-AL theorists; Rand, Smith, and Locke are not.
11. Note that in such cases, the result is not an augmentation of liberty. If, in an emergency, I violate your liberties, *your* liberty is decreased—but my liberty is *not increased*. In this case, I simply have no choice but to decrease your liberty to save (not my liberty but) *my* life.
12. The definition draws on Rand's; see "The Ethics of Emergencies," p. 54.
13. Note that *both* differentiae are necessary conditions of something's being an emergency. Wars threaten life but aren't random; misfortune can be random, but rarely brings the danger of death. Neither wars nor misfortune as such are emergencies. There are of course complicated borderline cases. All of these would require separate analysis.
Crises provide an interesting contrast to emergencies. As an example of a private crisis, Tibor Machan gives the example of one's car breaking down in the middle of an unfamiliar neighborhood (*Individuals and Their Rights*, p. 108). I agree with Machan's analysis of the case: this can't be an emergency because there's no significantly increased probability of death in the situation; the probability of death is probably *lower* if one isn't driving than if one is. Even someone on her way to an important job interview could not claim to be in an "emergency" in the sense discussed in the text, however frustrating her circumstances. The stakes in such a case are simply not high enough to qualify as an emergency.
As examples of public crises, consider the nation's "health care crisis" or the "crisis of America's inner cities." These are ongoing, dysfunctional states of public affairs, not emergencies. Public crises, in this sense, are typically if not invariably due to long-term and intentional departures from neo-AL principles. Emergencies, by contrast, are temporary and unplanned events due to relatively random factors.
14. The view I defend entails that if I somehow damage the homeowner's property while escaping from the dog (e.g., break the fence, trample the bushes), it's morally justifiable for me to ignore the issue of damage *during* the attack, but obligatory for me to send the homeowner a check for the damage afterwards. The mere fact that I did the damage "during an emergency" doesn't absolve me from liability for the damage. After all, the emergent nature of the attack doesn't imply that I *didn't* violate the homeowner's rights; it only implies that I *had* to, because something more important was at stake (my body). But that "something" is no longer at stake when I get safely home. (It goes without saying that the situation is fundamentally different if the homeowners *own* the dog!)
I thank Beau Bratton and Gregory Salmieri for useful discussions of this issue, and also thank "Rocky," the German shepherd who made it all so vivid for me.

15. Cf. Machan, *Classical Individualism*, p. 122.
16. Ayn Rand, "The Objectivist Ethics," in *The Virtue of Selfishness*, p. 15.
17. Richard Kraut, "Aristotelianism and Libertarianism," *Critical Review*, vol. 11:3 (Summer 1997), pp. 369-70.
18. See Aristotle, *Nicomachean Ethics*, 1111a20-23. What is fully voluntary has its origin most *fully* "in the agent in himself," i.e., in his own deliberations about what to do.
19. Tara Smith, *Moral Rights and Political Freedom*, p. 107.
20. Perhaps the single clearest occurrence is *Nicomachean Ethics*, 1170a20. The Greek runs: *to de zen ton kath' auto agathon kai hedeon—horismenon gar, to d' horismenon tes t'agathou phuseos*, which I would translate, "for life is a good and pleasant thing as such—and bounded, for boundedness is the nature of the good." Aristotle's theory of the mean may also be seen as a theory of "internal boundaries."
21. Rasmussen-Den Uyl, *Liberty and Nature*, p. xiv.
22. Machan, *Classical Individualism*, p. 175 (and p. 224n.18), citing Eduard Zeller's *Aristotle and the Earlier Peripatetics*, trans. B.F.C. Costelloe and J.H. Muirhead, (London: Oxford University Press, 1897).
23. Fred D. Miller, *Nature, Justice, and Rights in Aristotle's Politics*, (Oxford: Oxford University Press, 1995), p. 214, and generally, ch. 6.
24. Roderick T. Long, "Aristotle's Conception of Freedom," *Review of Metaphysics*, vol. 49:4 (June 1996).
25. For a start, see Terence Irwin, *Aristotle's First Principles*, (Oxford: Clarendon Press, 1988), and Fred D. Miller Jr., *Nature, Justice, and Rights in Aristotle's Politics*, cited above.
26. This is the whole point of ch. 4 of *Liberty and Nature*. See especially p. 137.
27. For further discussion, see Tara Smith, *Viable Values: A Study of Life as the Root and Reward of Morality*, (Lanham, MD: Rowman and Littlefield, 2000).
28. For a dramatic illustration of this point, see the PBS POV documentary, "Blink," by Elizabeth Thompson, on the moral (quasi) rehabilitation of the white supremacist Greg Withrow (July 18, 2000): <http://www.pbs.org/pov/pov2000/blink.html>. As the documentary makes clear, a person can voluntarily bind himself to moral strictures more severe than those that prevail in a prison. As the documentary also makes clear, there are no guarantees in moral rehabilitation, whether of a voluntary or involuntary nature.
29. Robert Nozick, *Anarchy, State, and Utopia*, (New York: Basic Books, 1974), p. 28-9. All further references to Nozick in the text are to these pages.
30. Machan, *Individuals and Their Rights*, p. xiii. To be fair, Rasmussen-Den Uyl generally avoid the term "libertarianism," but not consistently.
31. I think my argument here successfully responds to the challenge issued in Roderick T. Long's "Toward a Libertarian Theory of Class," p. 321n.28 in *Problems of Market Liberalism*, (Cambridge, UK: Cambridge University Press, 1998), edited by Ellen Frankel Paul, Fred D. Miller Jr. and Jeffrey Paul.

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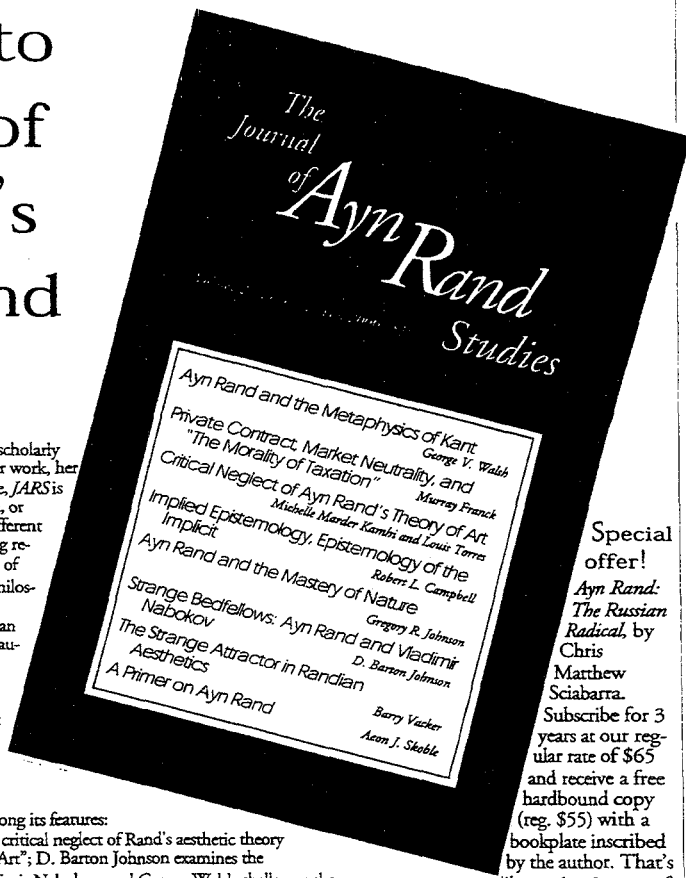
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Sex Skeptics: Speech is Free but Thought Remains In Chains

Joan Kennedy Taylor, *What to Do When You Don't Want to Call the Cops*. New York and London: New York University Press, A Cato Institute Book, 1999.

Elizabeth Brake

I

Of course hardly anyone could really be a skeptic about sex — that is, not many are likely to deny that there is sex or that we know that there is sex; but I am addressing those who are skeptical (in particular, Joan Kennedy Taylor) of a particular philosophical view about sex. Perhaps I should be careful, because to be skeptical about a view, one must be aware of its existence; and in fact, on the evidence of her book, one might judge Taylor to be rather cheerily oblivious to the issue at hand. Perhaps she has not been reading the same books as the rest of us ('us' being millennial feminists, a group to which she claims to belong); perhaps she has, but their meaning has not hit home. As we shall see, in this case it is better to have known and doubted than never to have known at all, so I shall be charitable and assume that Taylor is simply a skeptic.

The view which I think Taylor doubts is itself a skeptical view, skeptical of received truths — or what were once received truths — about sex and the sexes. (Then again, if we broaden the definition that way, what views aren't skeptical?) In fact, the view is not young and is getting older, but that's all the more reason why oblivion is unforgivable. The view I want to lay on Taylor's table is this: significant behavioral differences between men and women should not be uncritically accepted as natural, especially when such differences involve the exercise of power. Sex, and the way we talk about it, are not just instinctual. Sometimes our sexual feelings and expressions are related, in complicated ways, to sexist ideas and behavior and institutional arrangements. (And then again, sometimes a cigar is just a cigar, and sex is just sex.) And finally, when a feminist investigates an issue involving sex and power and men and women, she or he will usually spend some time analyzing it in terms of inequality between men and women.

Taylor's issue is sexual harassment, and her book is a libertarian feminist discussion of the same.¹ She is consistent: her libertarianism is as restrained as her feminism. Her libertarianism shows in her

arguments that sexual harassment cases too frequently end up in litigation, that existing sexual harassment law punishes too many activities, and that it conflicts with First Amendment rights. (One need not be a libertarian to agree with all that.) Her feminism consists mainly in her supportive attitude towards women in the workplace. (Ditto, *mutatis mutandis*.) The book—though certainly not a comprehensive survey—synthesizes “hundreds of articles” from “business, psychology, sociology, and gender studies” journals, as well as *Ms.*, *Working Woman*, and *The New York Times* (p. 7). Taylor has collected some fascinating material on group behavior, cross-cultural communication, fitness standards in the armed forces, hazing rituals, rape law, and the history of Title VII. There are also some rather tedious descriptions of sexual harassment sensitivity training videos, course materials, and seminars. There are many anecdotal accounts of the experiences of women in non-traditional workplaces, and of women who run the aforementioned training seminars. Whether these strike the reader as tiresome or fascinating is a matter of taste (readers hoping for prurient details or off-color jokes will, however, be disappointed).

What to Do When You Don't Want to Call the Cops is an informative layperson's manual on sexual harassment. Taylor addresses it to female workers, managers, and the interested general reader. It is the third category to whom I would most recommend it. I cannot imagine giving it to one of my female students on her entrance to the work force; if a concerned student asked for material, I would direct her to NOW or the AAOWW, which publish reliable self-help books. Taylor's book would most likely induce paranoia (I shall explain why shortly). If I were in management, I would simply retain a good lawyer. (Though, for Taylor, the book would be cheaper.) To the interested general reader, I would say that Taylor's account of harassment law is clear, concise, and up-to-date. I would add that she manages to convey a good deal of information while maintaining a line of argument throughout, which adds interest. I would hasten to mention that her approach has the merit of being likable: Taylor writes in a common-sensical vein which is far preferable to the strident lecturing or grandiose claims which the interested general reader might anticipate in a feminist book on sexual harassment.

But I would also sadly inform the interested general reader that, if his interest issues from a sincere love of wisdom, he must prepare himself for strident lecturing and grandiose claims. (Not many will seek this Grail.) For a profoundly influential and provoking legal, social, political, and economic analysis of sexual harassment, the interested general reader would be best advised to go straight to Catharine MacKinnon's *Sexual Harassment of Working Women*.² I would send him off with some trepidation, since I disagree with much of what she writes.³ But I expect that many feminists today would both disagree with MacKinnon and send the truth-loving reader there (either that or Judith Butler). Given the dissension from MacKinnon, this is no feminist dogma. She is as important for the questions she asks as for the answers she gives. Her

project is central to serious feminist theory today: understanding how sexism is maintained, and how we can bring about change. MacKinnon — like John Rawls in political philosophy — draws constant criticism but defines the questions of her discipline.⁴ As Martha Nussbaum wrote, “If one disagrees with her proposals — and many feminists disagree with them — the challenge posed by her writing is to find some other way of solving the problem that has been vividly delineated.”⁵

II

But let us return to Taylor, whose argument also deserves discussion. Her central thesis is that much of what is considered harassment is in fact the result of misunderstandings, or failures of communication, between men and women. Women could combat this more effectively through ignoring it or confronting the harasser than through law. Taylor’s solution would benefit women (‘Avoid costly court cases, career setbacks, and emotional distress!’) and companies (‘Avoid costly court cases!’) and should please those who feel harassment is currently over-regulated (‘Avoid court cases!’). Sexual harassment, on Taylor’s view, is a problem of *communication*, and the best remedy is for women to come to understand “male group culture.” After all, it is *women* who want to enter *male* workplaces; they should therefore be prepared to alter their behavior and expectations accordingly.

This makes the book useful as a self-help manual for nervous ingénues (is *anyone* that sheltered anymore?): “swearing *in front of* someone is different from swearing *at* them” (p. 96). But not all harassment can be construed as sheltered young ladies misunderstanding male humor. For instance, can the accusations of Lt. Gen. Claudia Kennedy — “the Army’s top intelligence official” — be understood as a naïve misunderstanding?⁶ And what about the Navy’s Tailhook scandal? Of course, Taylor would probably not describe such extreme cases as communication problems. But one would expect a consideration of such counter-examples, and none is forthcoming.

The careful reader will, in fact, find an array of fallacious arguments here. Taylor’s favorite fallacy is that of unqualified authority. We are given theories from the social sciences, such as group behavioral theory or ‘sex-role spillover theory’, and expected to accept analyses of harassment based on these theories. But Taylor explains little and justifies less. She seems unaware that a behavioral theory is not justified just because some sociologists have held it. She also delights in anecdotal evidence. For example, we are told, “One telephone company manager agrees... ” (p. 97). This is presented as evidence about workplace dynamics. Elsewhere, a long e-mail sent anonymously to the ‘Feminists for Free Expression’ website is reprinted as an “example” of a general claim for which adequate evidence is not given (p. 53).

And then, Taylor’s flair for stating the obvious entertains only for a while: sexual harassment at work, it turns out, is a reaction to women entering the work force (p. 56). Both “the view that there is no such offence as sexual harassment and the view that any behavior to do with

sex that makes someone uncomfortable should be actionable" are mistaken (p. 17; this is also a nice example of a straw man fallacy). No doubt there is need for sensible commentary in this area. No doubt some people need to be reminded of the distinction between swearing *in front of* and swearing *at*. But will these people be reading this book?

Moreover, Taylor herself does not escape the lure of making insane pronouncements which afflicts so many scholars in this area. We learn that men get angry when they accidentally swear in front of women because "[t]hey are terrified that they might inadvertently slip into the male pornographic communications argot" (p. 99). To be fair, Taylor is quoting here, but she endorses the passage.⁷ This quotation has plenty of company in Taylor's study of "male group culture" which is central to her analysis of harassment. Much of what Taylor has to say about men, though she disapproves of male-bashing, is not at all flattering. I will seek to offer persuasive reasons against taking her analysis of harassment as definitive.

III

Any adequate discussion of this topic must undertake three tasks, as Taylor does. The first is to describe harassment law. Taylor's reports are informative and I direct the interested reader there (or to the EEOC web-site, which contains updated information). I will limit myself to a few pertinent reminders. Sexual harassment lawsuits are brought under Title VII of the 1964 Civil Rights Act, which forbids discrimination in employment on the basis of sex (as well as race, color, religion, and national origin). Since 1972, the (federal) Equal Employment Opportunity Commission has been empowered to enforce this statute. Its operation is somewhat unusual. Someone wishing to bring a sexual harassment suit must submit her or his claim to the EEOC for approval. Once approved, the suit may be brought against the *employer* (not the harasser) for failing to comply with Title VII.

The law in this area undergoes continual change as new cases are tried. The two main types of suits are *quid pro quo* (in which a supervisor threatens punishment, or the withholding of some benefit, if sexual favors are not given) and hostile environment (in which there is persistent intimidating harassing behavior). However, variations are endless and judicial rulings unpredictable (as Taylor points out, statutory vagueness leaves judges with much discretion). For same-sex, or female-on-male, harassment, incidents between peers, workplace displays of pornography (what counts?), joking, dating, harassment by nonemployees, for these and many other cases, employers might be held liable, *even if they were unaware of the harassment*. Supreme Court rulings have suggested that the only way an employer can effectively defend themselves against suits is by instituting and promulgating sexual harassment policies and user-friendly complaint procedures.

The rest of this essay will be concerned with the other two tasks. The second is an analysis of harassment. Defining harassment belongs to the task of analysis, since definitions (here) are not value-free, especially

if the definer assumes that all instances which fall under her definition are punishable. A definition can fail by making too many acts actionable. It can fail (arguably) by being too broad in another way: by defining *all* anti-woman jokes or comments, or *all* sexual jokes or comments, as harassment. (It seems plausible that not all sexual jokes, for instance, are harassing. As Thomson writes on abortion, “there are cases and cases, and the details make a difference.”⁸ Surely not all anti-woman jokes should be considered actionable, and, depending on how we take ‘anti-woman’, even harassing.) In the next section, I will contrast my preferred analysis with Taylor’s. Like her, I will ask why harassment occurs, but I will include an ethical analysis of it. Once we have figured out what it is, we must ask why is it wrong. The purpose of this essay is to persuade the reader of the superiority of MacKinnon’s view, despite its demerits, to Taylor’s.

We must distinguish our understanding of harassment (we might say, “the ethics of...”) from our views on how law and management and individuals should deal with it. The writer’s third task is to issue prescriptions. Prescriptions are a function, among other things, of the writer’s analysis, her goals, and her political theory. Beliefs about human nature and psychology, sociological data, and the possibilities of change given the current state of affairs will also factor in a complete account. In the final section of this essay, I will describe what I believe the goals of a sexual harassment policy should be, and advance some supporting considerations.

IV

My analysis will start with definition, and definition will start with distinctions: what exactly are we talking about when we talk about sexual harassment? First and foremost, a legal category: sexually harassing acts are those actionable under sexual harassment law. But surely it makes sense to say that sexual harassment existed before the law (otherwise ...), so it cannot be just a legal category. Someone defending the view that it is merely a legal category, perhaps for simplicity’s sake, might suggest that when we speak of pre-Title VII harassment, we mean behavior which Title VII, and judicial rulings, would count as harassment. But this will mean that the definition of harassment is changing all the time, with the law. Moreover, we want to be able to say (for instance): “The judge didn’t rule that Clinton’s act was harassment, but surely it is — and even if the Supreme Court were to rule otherwise, it still would be!”

Since it is part of the definition of sexual harassment that it is unjust, vicious, harmful, or immoral, I suggest that we think of the definition as a moral (as opposed to legal) category. Just in the same way, ‘murder’ is defined as ‘unjust killing’; the term contains evaluative import. Someone might balk at this definition, claiming that some acts — for instance, displaying girlie calendars in the workplace — which have been considered harassment aren’t immoral. But this is just to dispute whether or not the act really was harassment. Just in the same way, we argue over whether or not abortion is murder; we would not say,

“Abortion is murder, but it’s not unjust.” So when we seek to define harassment, we must keep in mind that it is immoral.

It is also behavior which often involves expressing sexual thoughts or desires, or talking about them, or implying them; but it is not just any behavior which involves sex and is immoral. For instance, it is not date rape or incest. It is workplace-related (although it need not occur in the workplace, nor must the harasser be another employee!). The harassment must be somehow encouraged or allowed by the employer’s policies. But there is another dimension to sexual harassment: it is sexist, that is, discriminatory on the basis of sex (analogous to *racial* harassment). A harassing act, or remark, need not involve a grope or dirty joke; it might be a derogatory remark about women in general, for instance, about their abilities. So sex-as-in-intercourse is not essential to harassment; sex-as-in-male-and-female *is*. (This seems to make unwanted same-sex overtures not harassment; but the account I prefer will explain their inclusion.) Additionally, harassment operates through intimidation or abusive behavior; by some objective standard (“the reasonable woman”), it must be intended to, or likely to, produce distress, offence, fear, or some harm. ‘Harassment’ is not a success term. Finally, someone may be blamed for harassing despite his good intentions, since he may be negligent.

V

Taylor fails to make such distinctions. Her thesis, as summarized above, is that women’s perceptions of harassment result from their failure to understand male group culture. Men alone together behave differently than they do with women, and women entering a male environment may feel harassed when they are simply being treated as one of the boys. The resulting litigation is wasteful, and tending to erode First Amendment rights; it would be better for everyone if women adapted to male group culture, and men became — a little — more sensitive.

These are the things we need to know about men (if you are a man, I apologize in advance): “*Men alone together use vulgar language that they are sure women won’t like.*” (In fact, this is said to explain why Nixon censored transcripts of the Watergate tapes.) “*Men tell dirty and anti-female jokes among themselves.*” “*Men enjoy, or at least tolerate, displays of visual pornography.*” “*Men are routinely competitive and are expected to be.*” “*Men haze newcomers to the group.*” (Taylor’s italics; pp. 92, 103, 111, 119, 129) Each of these claims gets a chapter of mostly anecdotal support. I have complained above that this analysis makes light of harassment, which can be severe, intentional, and harmful. It also seems doubtful that many women are as naive and sheltered as Taylor thinks. Nor are women entirely innocent (if that is the right word) on all these counts. I will leave it to readers to judge the fairness of her claims about men. In short, this analysis of harassment seems to be based on false empirical claims and to present an ineffective strategy for dealing with harassment. The account has, in addition, a major *moral* failing.

A general point is that such group behavior to outsiders is

immoral. Sociological or biological explanations do not exculpate the offenders, or render it permissible. One could compare an incident in Celine's novel, *Journey to the End of the Night*, in which the hero is nearly killed as fellow passengers on a ship turn against him, an outsider, and plot to throw him overboard. Now, just because something is immoral does not mean it should be illegal, or actionable, or even regulated by employers. But neither should an analysis overlook this dimension of harassment, because it makes a difference. Sexual harassment is immoral, first, because it is harmful. But, second, it is also unjust or unfair. Sexual harassment does not arbitrarily pick out females, but issues from and contributes to inequality between men and women. Feminism sees this situation as bad, because it is harmful to women and because it is unfair, and needing change. Whether or not law is the proper instrument of change is a separate question.

Someone might reply to the charge of unfairness that, while harassment is not random, it is inevitable: it is simply a male biological imperative. But this, even *if* it were shown to be true, is an inadequate response. We do not in general excuse people's acting out their instinctual drives, morally or legally. We are civilized, we can do something about unfairness. (Abolish slavery, for example, or extend suffrage to women, or teach children to share.) Taylor's analysis is a sociological variant of the biological approach, with all its moral blindness. Why I am criticizing her is not because she would limit harassment law, but because she does not advocate a radical change in the status quo. (Advocating is different than enforcing; what I am complaining about is Taylor's failure to see that the situation she describes is wrong.) Taylor writes that her analysis "explain[s] that male behavior that may seem directed at women in a hostile way may just be treating them as women often say they wish to be treated — like men" (p. 7). In other words, men treat women with hostility, but not because they are *women*.

But why is part of men's culture to tell "dirty and anti-female jokes," as Taylor claims? She writes that women should shrug off such joking; "[g]enerally, it's not really directed at her, except perhaps as a representative of Sex Objects Unlimited" (p. 98). Compare relations between blacks and whites. Would the workplace situation that Taylor describes seem as harmless if she wrote, "Whites tell dirty and anti-black jokes among themselves"? Would she still counsel that the targets of such jokes should toughen up, rather than advocating a behavioral change on the part of the jokers? One might balk at the comparison between racism and sexism. Differences between men and women (unlike racial differences) are sometimes thought to be deep, natural, and morally significant. But how do we know that? And even if they are, why should women have to put up with "anti-female jokes"? It is staggering that Taylor forgets to ask *why* these jokes target women. And why does the hazing or teasing of women take a sexual form? I take it that men do not grope each other as part of their hazing rituals.

Taylor's analysis ignores feminist theory (she shows no familiarity with recent literature). This is an intellectual flaw, but ignoring the

underlying sexism of harassment also skews her prescriptions for its cure. "Women have to do most of this work [of changing behavior] because ... the workplaces they usually want to be in are predominantly male" (p. 73). "Once more, it should be the woman, and not the man, whose behavior is modified. Because we are talking about women wanting to enter male workplaces that are permeated by male culture" (p. 200). These are claims that drive a feminist (which Taylor claims to be) crazy. Once again, in a new way, stunningly, what we thought was aggression against women turns out to be women's fault. To make sexual harassment go away, *women* will have to change their behavior. Aside from the moral imbecility and intellectual obtuseness of this, it means that — if Taylor is right about the deep differences between male and female culture — she thinks that women who cannot adapt will have to continue to suffer in the male workplace.

VI

Seyla Benhabib writes that feminist theory assumes that "the gender-sex system is not a contingent but an essential way in which social reality is organized.... Second, the historically known gender-sex systems have contributed to the oppression and exploitation of women."⁹ A clear-eyed assessment of harassment should see its roots in the oppressive gender-sex system of our society (in which, for instance, women are treated as sex objects) and should see its contribution to that system (by, for instance, helping to impede women's entry into male workplaces). Seeing this, in turn, helps us to see why harassment is wrong and why its effects are so damaging. Behavior which seems threatening to a reasonable woman might not seem so to a reasonable man; he might even find it flattering.

On MacKinnon's view (and this is what Benhabib is getting at too), differences between the sexes are socially taught, and their teaching results from and contributes to the oppression of women.¹⁰ In particular, MacKinnon sees the "construction" of gender as entwined with that of sexuality: both are "defined by" inequality. "Stopped as an attribute of a person, sex inequality takes the form of gender; moving as a relation between people, it takes the form of sexuality" (1987, p.6). "[T]he sex difference and the dominance-submission dynamic define each other. The erotic is what defines sex as an inequality, hence as a meaningful difference" (1987, p. 50). On this view, harassment should be understood as anti-female behavior, not as resulting from men's uncontrollable sex drive or pack behavior. Men seeing sex as dirty and women as sexual objects and so forth is not simply a given, but is part of systematic sexism. (This is not new with MacKinnon. Simone de Beauvoir makes this point, and this is what the 1970's feminists writing about patriarchy — Betty Friedan, Eva Figes, Kate Millett — try to show. MacKinnon is ground-breaking in her systematization of the claim, and, for better or worse, her Marxist method of analysis.)

A gloss on MacKinnon's view is that sex is not always just sex. MacKinnon thinks that sexuality and gender roles, or our "constructions"

of them, are linked in deep ways we don't anticipate. (Then again, who is likely to be surprised if we continually turn up new complications in sex and sex roles and relationships between men and women? Given such complexity, surely her analysis could not be *exhaustive*.) So harassment is not just joking, or a natural expression of desire: it is an assertion of male dominance. Now, this might not be what the harasser thinks he's doing, and I am not inclined to defend the view in its entirety. But here are three considerations in favor of admitting a connection: only a system which routinely places men, and not women, in positions of power gives them the opportunity routinely to abuse it, as in harassment. And a system which sees women as sexual objects encourages treating them as sex objects. And harassment has the effect of weakening women (not just psychologically; women's authority can be undermined through harassing behavior). This feminist analysis explains what is wrong with sexual harassment, and why it is unfair.

Now, again, someone might object that Taylor is talking about law and business. Ethics and feminist theory are beside the point. Three more considerations: first, our understanding of what the acts are may affect what we think the law should do. For example, in a recent sophisticated treatment of pornography, MacKinnon uses philosophy of language to analyze hate speech as criminal speech-acts.¹¹ And, surely we should be concerned to arrive at the best understanding, if not for its intrinsic merit, then for prescribing a cure. Taylor's forays into sociology show the relevance of disciplines outside law and business. Finally, we can't get a thorough analysis of the topic without a moral analysis. Otherwise, we don't have the needed categories: for example, "legal but not good."

VII

I have argued that a moral analysis of this topic requires feminist theory, in order to show why harassment is unfair. It hinders women from achieving equality in the workplace, and it is an expression of institutional sexism. But there are other moral considerations. Let us imagine a case of same-sex or female-on-male harassment, and let us focus, since space is limited, on *quid pro quo*: demanding sexual favors as the price for keeping one's job. Clearly this is harmful (psychologically, emotionally, and possibly physically unpleasant) to the (psychologically normal) victim, and likely to bring greater harm to him than pleasure to his harasser. It is also likely to reduce the efficiency and productivity of the workplace (people are worrying about matters other than work; people take time off or leave their jobs as a result). Rule-utilitarianism would then forbid the practice, or benevolence the act.

But there are reasons why the act is wrong in itself — even if it increased workplace efficiency and total happiness. It is unfair, not just because it is sexist, but because it makes someone's job depend on something irrelevant to their performance. (I am not asserting that anyone has a right to a job, but that it is unfair to fire an otherwise adequate employee on such grounds.) Most importantly, from a Kantian standpoint, this behavior treats someone as a means only. The victim's

needs and well-being are not considered; instead, he is seen as an object to be used for the harasser's satisfaction. Say that he uses the harasser in return, to keep his job. What is wrong with the scenario then? Isn't it simply contractual? Well, we should keep in mind that what the harasser is offering in fact (usually) belongs to someone else: the employer.

But the abuse of the employer's property is not the main problem. The harasser is using her power to get the victim to do something they may find unpleasant, disgusting, or immoral. In this way, a sexual act carried out under these circumstances is not fully voluntary. I do not want to compare it to rape, because this would be to take rape too lightly. However, I am inclined to say that in such an act, the victim has not given his full consent. Perhaps it could be compared to certain cases of statutory rape, or an act of prostitution in which the prostitute is desperate, or a relationship between a young intern and a powerful politician. There is no exact analogy. But what makes *quid pro quo* harassment a treating of another as a means only, and not as an autonomous agent, is that a sexual act carried out under such circumstances is not fully consensual. It violates the principle of consensuality, which gives, plausibly, a morally necessary condition for permissible sex: it must be consensual.¹²

Objections might arise here. Could we then say that prostitution, or sexual acts within (say) Victorian marriages, are not fully consensual? I part company with MacKinnon (who would say yes) at about this point.¹³ To resist this conclusion, notice that the husband, or the prostitute's client, do not create the situation in which the woman feels compelled (for different reasons) to have sex in order to meet her basic material needs. The harasser, on the other hand, does create the dilemma for her victim. This may not seem to show that consent is vitiated, only that the harasser is culpable. But there is more: the harasser arranges circumstances in order to obtain a particular sexual act, with this person. The victim's scope of choice is narrowed. One can still say he chooses to participate. But we can also say that if the harasser holds a gun to his head, he chooses to have sex rather than to die. So there is some level, as we know, at which consent loses its moral significance. This is coercion, and is notoriously difficult to define.¹⁴ Now, one might think sex in a Victorian marriage is not coercive because no individual is compelling her; it is society's fault. But plausibly, sexual harassment is wrong because it obtains, or seeks to obtain, sexual acts in a context in which consent is reduced below the level at which it is morally significant.

A second objection might focus on the notion of consent. If we accept the claim that the victim's consent is so significantly reduced in this exchange that the action is immoral (not rape, but not morally permissible sex either), might this not be applied in other circumstances, to criticize, for instance, capitalist employment practice? (So we could say that workers are not free.¹⁵) Again we might note the different placement of responsibility (the harasser arranges the situation, whereas no-one is directly and intentionally responsible for the poor worker's plight). Moreover, we might want to consider whether we need a special notion of

sexual consent as more than just not saying 'no'.¹⁶ Or perhaps we want to shore up the principle of consensuality with some other criterion for permissible sex: love, or communication, or reciprocity.¹⁷ Finally, we could focus on the character of the harasser. She is irresponsible, predatory, insensitive, selfish, and disrespectful.

The form of harassment with which Taylor is most concerned — hostile environment — deserves a separate analysis. Here there are no explicit demands for sex from a superior. Although sexual remarks and (aggressive) sexual teasing might be involved, in which case hostile environment might share moral characteristics with *quid pro quo*, it generally functions, instead, to intimidate, disconcert, and upset. The best analogy here would be with racist remarks and name-calling. This comparison is in fact much closer than that between *quid pro quo* harassment and rape.

VIII

I have attempted a brief ethical analysis of harassment, but what about law? Remember that law and morality are distinct: not all impermissible acts should be illegal. Taylor makes a compelling case that making employers liable for hostile environment harassment comes into conflict with First Amendment rights: not directly, since the government is not prohibiting any speech, but indirectly, since employers will prohibit certain speech to avoid lawsuits.

I think that gender equality will not be achieved until women can go to work without worrying about harassment any more than men do. I also look forward to women's representation in positions of power being proportionate to their numbers in society, and I believe that such a demographic change will change the atmosphere of the workplace. But feminists must ask not only what means will best achieve that goal, but what means are permissible, constitutionally and morally. First Amendment rights, for example, might override a course of action which seems promising for achieving gender equality, such as outlawing pornography. And here we see a problem which libertarian feminists like Taylor must address.

Political philosophy asks what role the state is justified in playing in our lives, and libertarianism would minimize that. But feminist theory has redrawn the landscape of justified intervention, especially by insisting that the demarcation between public and private needs revision.¹⁸ And, as Taylor realizes, minimal adherence to law in order to avoid lawsuits will not change deep-rooted behavior (p. 152). But this is just why MacKinnon thinks the law must be used to reconstruct that behavior — to achieve not just formal but substantive equality! This tension between feminist goals and libertarian values is one I would like to see creatively resolved by libertarian feminists. For now, some freedoms valued by libertarians still seem to be in conflict with achieving women's freedom from sexism.¹⁹

Notes:

1. Joan Kennedy Taylor, *What to Do When You Don't Want to Call the Cops* (New York and London: New York University Press, A Cato Institute Book, 1999). Future references to Taylor will be inserted into the text. Throughout, 'harassment' is short for 'sexual harassment'.
2. Catharine A. MacKinnon, *Sexual Harassment of Working Women* (New Haven: Yale University Press, 1979).
3. I have argued against MacKinnon's view of gender elsewhere; see Elizabeth Brake, "A Liberal Response to Catharine MacKinnon," *Southwest Philosophical Studies*, vol. 22, 2000 (forthcoming).
4. See Victoria Davion and Clark Wolf, eds., *The Idea of Political Liberalism: Essays on Rawls* (New York: Rowman and Littlefield, 2000), p. 14 (on Rawls).
5. Martha Nussbaum, "The Professor of Parody" (a review essay on Judith Butler) in *The New Republic*, 2/22/99, p. 37.
6. Paul Richter, "Female General Truthful on Groping, Investigators Say," *L.A. Times*, 5/11/00.
7. She quotes from Betty Lehan Harragan, *Games Mother Never Taught You: Corporate Gamesmanship for Women* (New York: Warner Books, 1978), pp. 110 ff. Be warned.
8. Judith Jarvis Thomson, "A Defense of Abortion," *Philosophy and Public Affairs*, vol. 1, no. 1, 1971, pp. 47-66, p. 58.
9. Seyla Benhabib, *Situating the Self: Gender, Community and Postmodernism in Contemporary Ethics* (Cambridge: Polity Press, 1992), p. 152.
10. Catharine A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Cambridge, Mass.: Harvard University Press, 1987), p. 49.
11. Catharine A. MacKinnon, *Only Words* (Cambridge, Mass.: Harvard University Press, 1993).
12. David Archard, in *Sexual Consent* (Oxford: Westview Press, 1998), engages in a book-length discussion of the merits and demerits of this principle.
13. "Never has it been asked whether, under male supremacy, the notion of consent has any real meaning for women.... Consent is not scrutinized to see whether it is a structural fiction to legitimize the real coercion built into the normal social definitions of heterosexual intercourse.... If consent is not normally given but taken, it makes no sense to define rape as different in kind." MacKinnon 1979, p. 298, fn. 8.
14. For a discussion, see Jon Elster's *Making Sense of Marx* (Cambridge: CUP, 1985), esp. pp. 211-12.
15. MacKinnon compares 'compulsory heterosexuality' to capitalism; see MacKinnon 1987, p. 60. For MacKinnon, consent is vitiated not just by the threat involved, but also (when the harassment is male-on-female) by the social conditioning of women.
16. MacKinnon is famous for claiming that ordinary consensual heterosexual sex is on a continuum with rape due to the inadequacy of the patriarchal definition of women's consent; see quotation in footnote 13.
17. Kant, Thomas Nagel, Robert Solomon, and Roger Scruton, among others, have suggested such conditions.
18. See Susan Moller Okin, *Justice, Gender, and the Family* (New York: Basic Books, 1989); Benhabib 1992, pp. 107-113; Will Kymlicka, *Contemporary Political Philosophy* (Oxford: OUP, 1990), Chapter 7, section 2.
19. Thanks to Michael Watkins for his contributions, to Kelly Jolley and Roderick Long for comments on a draft, and to David Archard for many helpful discussions.

Book Reviews:

Darwinian Natural Right: The Biological Ethics of Human Nature by Larry Arnhart. Albany: SUNY Press, 1998.

Does Darwinian biology have anything important to contribute to political philosophy? A simple argument suggests that the answer is 'yes'. The results of modern Darwinian biology, if true, reveal important information about human nature. Any adequate political philosophy must be based on a correct understanding of human nature. Therefore, Darwinian biology has the potential to make important contributions to political philosophy.

But this quick and simple answer does not tell us *how* a better understanding of human nature is relevant to political philosophy. And, on this matter, at least two possibilities need to be distinguished. First, the study of human nature may be important to political philosophy because it reveals or helps us understand the limits of politics. For example, if we come to believe that a strong disposition to aggression is sown in the nature of human beings, we may come to doubt that any political program that seeks to eliminate all violence among human beings is realistically achievable. Second, the study of human nature may be important to political philosophy because it reveals or helps us understand what human beings ought to value, or what the good for human beings is?

These two possibilities need to be distinguished, for it may be the case that the first possibility will bear fruit while the second will not. Thus a rejection of the second possibility does not imply that Darwinian biology has no contribution to make to political philosophy. Clearly, however, the second possibility is the more ambitious one. It holds out the hope that ethics in general, and political morality in particular, can become a natural science. The scientific study of the evolutionary history of mankind can disclose what is good for us and how we ought to treat one another. This was Darwin's hope, and it is a hope shared by Larry Arnhart in his provocative new book *Darwinian Natural Right*.

Darwin did not develop a philosophically satisfying account of how human nature, as he understood it, could inform judgments about what is good for human beings. But Arnhart self-consciously attempts to provide such an account, enlisting Aristotle and Hume on his behalf. As befits a review, my critical remarks will apply to Arnhart's arguments only. They will not establish that no such account could succeed.

The linchpin of Arnhart's account is the idea that the good is the desirable. More precisely, the idea is that the good for human beings lies in the fullest satisfaction of their natural desires, where natural desires refer to desires that "are so deeply rooted in human nature that they will manifest themselves in some manner across history in every human

society.” (29) Arnhart presents a non-exhaustive list of twenty categories of such desires. The list includes, among others, desires associated with parental care, sexual mating, war, social dominance, friendship, justice, aesthetic pleasure, wealth and religious understanding. As is evident, many of these desires presuppose social interaction. Solitary individuals cannot have friends, fight wars or pursue justice. For this reason, Arnhart sides with Aristotle and against Hobbes in holding that human beings are by nature social and political animals.

According to Arnhart, the satisfaction of these natural desires constitutes the good for human beings. He also claims that the satisfaction of these desires provides a normative standard for judging social practices and institutions — for “we can judge societies as better or worse depending on how well they satisfy those natural desires.” (17) Not surprisingly, Arnhart believes that Darwinian biology explains why natural desires are natural. He claims that these desires are based in the physiological mechanisms of the brain and that they have evolved by natural selection over millions of years of human history. Of course, as Arnhart himself acknowledges, these desires will be expressed in different ways by different people in different circumstances. And, as he also points out, natural desires refer to general proclivities. Not every human being will have every natural desire, but all human societies will contain people who have them.

To his credit, Arnhart is aware of the obvious objection to his account and spends some time attempting to respond to it. The obvious objection holds that even if Darwinian biology can identify a set of natural desires, this would not show that the satisfaction of these desires is good for human beings. Nor would it show that the satisfaction of these natural desires could provide a normative standard for judging social practices and institutions. At most, reference to these desires could help us explain or predict human behavior. It could not enable us to judge human behavior as good or bad, right or wrong. We can refer to this as Hume’s objection, since it is derived from Hume’s famous remarks about the gap that exists between factual and evaluative claims.

Interestingly, in attempting to respond to Hume’s objection, Arnhart draws on Hume’s own discussion of the moral sentiments. On the view attributed to Hume by Arnhart, a correct moral judgment is a factually correct report of what human moral sentiment would be in a particular set of circumstances. (70) So, for example, if it is true that human beings would express approval when considering an act of kindness in a particular set of circumstances, then it would be correct to judge this kind act to be morally praiseworthy. In this way, Arnhart’s Hume bridges the gulf between facts and values. Moral judgments are factual claims about the shared moral sentiments of human beings. Moreover, according to Arnhart, Darwinian biology explains why we have the moral sentiments that we have.

Having dispensed with Hume’s objection (at least to his own satisfaction), Arnhart proceeds to consider and reject a number of other objections to Darwinian morality. These include the charge that

Darwinism denies human beings the freedom that morality presupposes and the charge that Darwinism cannot account for the transcendent religious ground that morality requires. Against the first of these objections, Arnhart contends that the freedom that morality presupposes requires only that human beings have the capacity to make deliberative choices and that Darwinism does not deny that human beings have this capacity. Against the second of these objections, Arnhart contends that Darwinism reveals morality to be a natural phenomenon; and, as such, it is not necessary for it to be grounded in a supernatural reality.

The remainder of *Darwinian Natural Right* consists of a series of illustrations that purport to show how Darwinian morality can distinguish natural social relationships from those contrary to nature. The illustrations concern the familial bonding of parents and children, the relations between the sexes and the institution of slavery. Arnhart's views on these matters are fairly traditional. He defends the private family over communistic arrangements for raising children on the grounds that parents have a natural desire to care for their young. He defends monogamous marriage on the grounds it satisfies natural desires for mating and a sexual division of labor. And he rejects female circumcision and slavery because these practices frustrate important natural desires.

The major problem with Arnhart's argument is that he provides almost no defense of his linchpin idea that the good consists of the satisfaction of natural desires. The closest he comes to offering support for this idea is the claim that "If we find that we are naturally inclined to something or adapted for something, then we believe this helps us to know what is good for us." (23) This claim is clearly false. Quite frequently, we believe that the satisfaction of a strong desire, even a strong natural desire, will set back rather than advance our good. For example, a man may realize that his desire for multiple sexual partners, if acted upon, will make his life go less well as it will prevent him from having deep personal relations with the one woman he really cares about.

Sensing this difficulty, Arnhart claims at one point that "what is 'desirable' for human beings is whatever promotes their human flourishing." (82) But this is unhelpful, for he defines human flourishing in terms of the fullest satisfaction of our desires. Thus, for Arnhart, we may have reason to resist a natural desire such as the desire to be sexually promiscuous if we correctly judge that acting on that desire will frustrate our desire to lead a life that achieves the fullest satisfaction of our desires. Quite clearly, this response will not do. It still leaves us with no explanation for why the mere satisfaction of a desire, natural or not, contributes to our good.

The natural move to make at this point would be to claim that it is only the satisfaction of rational desires that contribute to the good of human beings, where rational desires are related to intelligible human goods. But this move is unavailable to Arnhart. It would require an independent account of intelligible human goods, one that was not simply derived from the natural desires that human beings happen to have. This may account for why Arnhart offers no defense for the claim that the

human good consists in the satisfaction of natural desires. He may sense that no such defense can be offered within his Darwinian framework. Thus, Arnhart rests content with an implausible, undefended conception of the human good.

For similar reasons, the normative standard that Arnhart appeals to — the standard that holds that social relationships that satisfy our natural desires are morally sound whereas those that frustrate our natural desires are morally suspect — is implausible. This is well illustrated by his discussion of slavery. Arnhart writes that “the practice of slavery has always displayed the fundamental contradiction of treating some human beings as if they were not human.” (162) This is true, but beside the point. For all we know social practices that display fundamental contradictions might satisfy important natural desires. After canvassing the thoughts on the subject of a number of historical writers from Aristotle to Lincoln, Arnhart finally presents an argument that purports to show that slavery is wrong that looks like it might follow from Darwinian morality. The argument is that unlike the relations between parents and children and the relations between men and women, “the coercion of slaves cannot be based on a natural complementarity of desires. The master’s desire to exploit the slave clashes with the slave’s desire to be free from exploitation. Consequently, slavery is contrary to human nature and thus contrary to natural right.” (210)

This argument does not work. By parallel reasoning, one could establish that societies that have a social practice of not permitting slavery are also contrary to natural right. One could claim that in free societies the desire of people to be free from exploitation clashes with the desire of people to exploit others. Since Arnhart believes that the desire to exploit others is a natural desire, he cannot believe that in free societies there is a “natural complementarity of desires.” This suggests that to establish that a social practice like slavery is wrong one needs to do more than simply point out that the practice frustrates the natural desires of some people. But to do this would require Arnhart, once again, to go beyond his assumptions. He would need to appeal to a normative standard other than the one that he thinks follows from Darwinism.

These problems with Arnhart’s argument likely stem from a deeper confusion. Throughout *Darwinian Natural Right* he offers naturalistic explanations for a wide range of human behaviors, often comparing them with similar or related behaviors of non-human animals. These explanations may explain how human beings have developed the capacity to do various things. For example, there may be a satisfying Darwinian explanation for how human beings have developed the capacity for moral reflection. But it is a mistake to think such an explanation can tell us how this capacity ought to be exercised. Like logical or mathematical reasoning, moral reflection is subject to its own standards — standards that are not grasped by attending to the processes that explain how beings emerged with the capacity to be governed by them.

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