

BOUNDARIES ON SOCIAL CONTRACT**'

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Introduction

The central question examined in this paper may be stated at the outset. What are the boundaries or limits on changes in the distribution or assignment of rights among persons in a society that may be "explained" on grounds of continuing social contract? I do not provide more than a few suggestions toward a set of answers. I should argue, nonetheless, that the question is of vital importance in the 1970s. We witness everywhere what must be described as an erosion in the rights of individuals, rights that were previously acknowledged. As social scientists, we are under some obligation to "explain" what is happening, and we must keep in mind that simplest of principles; diagnosis precedes prescription for cure.

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**The central arguments of this paper were initially presented in a seminar on Anarchy at Blacksburg, Virginia in the Spring of 1972. This earlier presentation, under the title, "Before Public Choice", appears in the volume of essays, *Explorations in the Theory of Anarchy*, edited by Gordon Tullock (Center for Study of Public Choice, Virginia Polytechnic Institute and State University, Blacksburg, Virginia, 1973).

The general position expressed in this paper is developed more fully in my book, *The Limits of Liberty: Between Anarchy and Leviathan* (Chicago: University of Chicago Press, 1975).

The Social Function of Social Contract

A contract theory of the State is relatively easy to derive on the basis of plausibly acceptable assumptions about individual evaluations, and careful use of this theory can yield major explanatory results. To an extent at least, a "science" exists for the purpose of providing psychologically satisfying explanations of what men can commonly observe about them. Presumably, we "feel better" when we possess some explanatory framework or model that allows us to classify and interpret disparate sense perceptions. This imposition of order on the universe is a "good" in the strict economic sense of this term; men will invest money, time, and effort in acquiring it. The contract theory of the State, in all of its manifestations, can be defended on such grounds. It is important for sociopolitical order and tranquility that ordinary men explain to themselves the working of governmental process in models that conceptually take their bases in cooperative rather than in noncooperative behavior. Admittedly and unabashedly, the contract theory serves, in this sense, a rationalization purpose or objective. We need a "logic of law", a "calculus of consent", a "logic of collective action", to use the titles of three books that embody modern-day contract theory foundations.¹

Can the contract theory of the State serve other objectives, whether these be normative or positive in character? Can institutions which find no conceivable logical derivation in contract among cooperating parties be condemned on other than strictly personal grounds? Can alleged improvements in social arrangements be evaluated on anything other than contractarian precepts, or, to lapse into economists' jargon, on anything other than Paretian criteria? But, even here, are these criteria any more legitimate than any other?

In earlier works, I have tended to ignore or at least to slight these fundamental questions. I have been content to work out, at varying levels of sophistication, the contractarian bases for governmental action, either that which we can commonly observe or that which might be suggested as reforms. To me, this effort seemed relevant and significant. "Political economy" or "public choice"--these seemed to be labels assignable to work that required little or no methodological justification. It was only when I tried to outline a summary treatment of my whole approach to sociopolitical structure that I was stopped

short. I came to realize that the very basis of the contractarian position must be examined more thoroughly.

We know that, factually and historically, the "social contract" is mythological, at least in many of its particulars. Individuals did not come together in some original position and mutually agree on the rules of social intercourse. And even had they done so at some time in history, their decisions could hardly be considered to be contractually binding on all of us who have come behind. We cannot start anew. We can either accept the political universe, or we can try to change it. The question reduces to one of determining the criteria for change.

When and if we fully recognize that the contract is a myth designed in part to rationalize existing institutional structures of society, can we simultaneously use the contractual derivations to develop criteria for evaluating changes or modifications in these structures? I have previously answered this question affirmatively, but without proper argument. The intellectual quality as well as the passionate conviction of those who answer the question negatively suggest that more careful consideration is required.

How can we derive a criterion for determining whether or not a change in law, or, if you will, a change in the assignment of rights is or is not justified? To most social scientists, the only answer is solipsist. Change becomes desirable if "I like it," even though many prefer to dress this up in fanciful "social welfare function" or "public interest" semantics. To me, this seems to be pure escapism; it represents retreat into empty arguments about personal values which spells the end of rational discourse. Perhaps some of our colleagues do possess God-like qualities, or at least they think they do, but until and unless their godliness is accepted, we are left with no basis for discourse. My purpose is to see how far we can rationally discuss criteria for social change on the presumption that no man's values are better than any other man's.

Wicksellian Contract, Constitutionalism, and Rawlsian Justice

Is *agreement* the only test? Is the Wicksellian-contractarian-Paretian answer the only legitimate one here? If so, we are willing to accept its corollaries? Its full implications? Are we willing to forestall all social change that does not

command unanimous or quasi-unanimous consent?

Provisionally, let us say that we do so. We can move a step beyond, while at the same time rationalizing much of what we see, by resorting to "constitutionalism," the science of rules. We can say that particular proposals for social change need not command universal assent provided only that such assent holds for the legal structure within which particular proposals are enacted or chosen. This seems to advance the argument; we seem to be part of the way out of the dilemma. But note that this provides us with no means at all for evaluating particular proposals as "good" or "bad". We can generate many outcomes or results under nonunanimity rules. This explains my initial response to the Arrow impossibility theorem, and to the subsequent discussion. My response was, and is, one of non-surprise at the alleged inconsistency in a social decision process that embodies in itself no criteria for consistency. This also explains my unwillingness to be trapped, save on rare and regretted occasions, into positions of commitment on particular measures of policy on the familiar efficiency grounds. We can offer no policy advice on particular legislative proposals. As political economists, we examine public choices; we can make institutional predictions. We can analyze alternative political-social-economic structures.

But what about constitutional change itself? Can we say nothing, or must we say that, at this level, the contractarian (Wicksellian, Paretian) norm must apply? Once again, observation hardly supports us here. Changes are made, changes that would be acknowledged to be genuinely "constitutional", without anything remotely approaching unanimous consent. Must we reject all such changes out of hand, or can we begin to adduce criteria on some other basis?

Resort to the choice of rules for ordinary parlor games may seem to offer assistance. Influenced greatly by the emphasis on such choices by Rutledge Vining, I once considered this to be the key to genuinely innovative application of the contractarian criteria. If we could, somehow, think of individual participants in a setting of complete uncertainty about their own positions over subsequent rounds of play, we might think of their reaching genuine agreement on a set of rules. The idea of a "fair game" does have real meaning, and this idea can be transferred to sociopolitical institutions. But how far can we go with this? We may, in this process, begin to rationalize

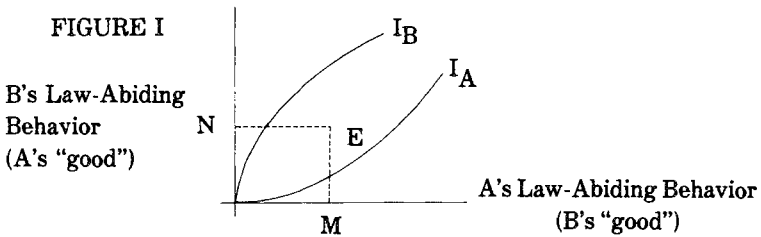
certain institutions that cannot readily be brought within the standard Wicksellian framework. But can we do more? Can we, as John Rawls seems to want to do in his *A Theory of Justice*,² “think ourselves” into a position of original contract and then idealize our thought processes into norms that “should” be imposed as criteria for institutional change? Note that this is, to me, quite different from saying that we derive a possible rationalization. To rationalize, to explain, is not to propose, and Rawls seems to miss this quite critical distinction. It is one thing to say that, conceptually, men in some genuinely constitutional stage of deliberation, operating behind the veil of ignorance, might have agreed to rules something akin to those that we actually observe, but it is quite another thing to say that men, in the here and now, should be forced to abide by specific rules that we imagine by transporting ourselves into some mental-moral equivalent of an original contract setting where men are genuine “moral equals”.

Unless we do so, however, we must always accept whatever structure of rules that exists and seek constitutional changes only through agreement, through consensus. It is this inability to say anything about rules changes, this inability to play God, this inability to raise himself above the masses, that the social philosopher cannot abide. He has an ingrained prejudice against the *status quo*, however this may be defined, understandably so, since his very role, as he interprets it, is one that finds itself only in social reform. (Perhaps this role conception reflects the moral inversion that Michael Polanyi and Craig Roberts note; the shift of moral precepts away from personal behavior aimed at personal salvation and toward moral evaluation of institutions.)

Hobbes and the Natural Distribution

Just what are men saying when they propose nonagreed changes in the basic structure of rights? Are they saying anything more than “this is what I want and since I think the State has the power to impose it, I support the State as the agency to enforce the change”? We may be able to get some handles on this very messy subject by going back to Hobbes. We need to examine the initial leap out of the Hobbesian jungle. How can agreement emerge? And what are the problems of enforcement?

We may represent the reaction equilibrium in the Hobbesian jungle at the origin in the diagrammatics of Figure 1.



If we measure "B's law abiding behaviour" on the ordinate, and "A's law abiding behavior" on the abscissa, it is evident that neither man secures advantage from "lawful" behavior individually and independently of the other man's behavior. (Think of "law abiding" here as "not stealing".) Note that the situation here is quite different from the usual public-goods model in which at least some of the "good" will tend to be produced by one or all of the common or joint consumers even under wholly independent adjustment. With law-abiding as the "good", however, the individual cannot, through his own behaviour, produce so as to increase his own utility. He can do nothing other than provide a "pure" external economy; all benefits accrue to the other parties. Hence, the independent adjustment position involves a corner solution at the origin in our two-person diagram. But gains-from-trade clearly exist in this Hobbesian jungle, despite the absence of unilateral action.

It is easy enough to depict the Pareto region that bounds potential positions of mutual gains by drawing the appropriate indifference contours through the origin as is done in Figure 1. These contours indicate the internal or subjective rates of tradeoff as between *own* and *other* law-abiding. It seems plausible to suggest that the standard convexity properties would apply. The analysis remains largely empty, however, until we know something, or at least postulate something, about the descriptive characteristics of the initial position itself. And the important and relevant point in this respect is that individuals *are not equal*, or at least need not be equal, in such a setting, either in their relative abilities or in their final command over consumables.³ To assume symmetry among persons here amounts to converting a desired normative state, that of equality among men, into a fallacious positive proposition. (This is, of course, a pervasive error, and one that is not

only made by social philosophers. It has had significant and pernicious effects on judicial thinking in the twentieth century.) If we drop the equality or symmetry assumption, however, we can say something about the relative values or trade-offs as between the relative "haves" and "have-nots" in the Hobbesian or natural adjustment equilibrium. For illustrative purposes here, think of the "natural distribution" in our two-person model as characterized by A's enjoyment of ten units of "good", and B's enjoyment of only two units. Both persons expend effort, a "bad" in generating and in maintaining this natural distribution. It is this effort that can be reduced or eliminated through trade, through agreement on laws or rules of respect for property. In this way, both parties can secure more "goods". The post-trade equilibrium must reflect improvement for both parties over the natural distribution or pretrade outcome. There are prospects for Pareto-efficient or Pareto-superior moves from the initial no-rights position to any one of many possible post-trade or positive-rights distribution.

Let us suppose that agreement is reached; each person agrees to an assignment of property rights and, furthermore, each person agrees to respect such rights as are assigned. Let us suppose, for illustration, that the net distribution of "goods" under the assignment is fifteen units for A and seven units for B. Hence, there is a symmetrical sharing of the total gains-from-trade secured from the assignment of rights. Even under such symmetrical sharing, however, note that the relative position of B has improved more than the relative position of A. In our example, A's income increases by one-half, but B's income increases more than twofold. This suggests that the person who fares relatively worse in the natural distribution may well stand to gain relatively more from an initial assignment of rights than the person who fares relatively better in the pretrade state of the world.

The Dilemma in Maintaining Contract

Agreement is attained; both parties enjoy more utility than before. But again the prisoner's dilemma setting must be emphasized. Each of the two persons can anticipate gains by successful unilateral default on the agreement. In Figure 1, if E depicts the position of agreement, A can always gain by a

shift to N if this can be accomplished; similarly, B can gain by a shift to M. There may, however, be an asymmetry present in prospective gains from unilateral default for the person who remains relatively less favored in the natural distribution. In one sense, the "vein of ore" that he can mine by departing from the rules through criminal activity is richer than the similar vein would be for the other party. The productivity of criminal effort is likely to be higher for the man who can steal from his rich neighbor than for the man who has only poor neighbors.

This may be illustrated in the matrix of Figure 2, where the initial pretrade or natural distribution is shown in Cell IV, and the post-trade or positive rights distribution is shown in Cell I.

FIGURE 2

		B	
		Abides by "Law"	Observes no "Law"
A	Abides by "Law"	I 15,7	II 6,12
	Observes no "Law"	III 17,3	IV 10,2

Note that, as depicted, the man who is relatively "poor" in the natural equilibrium, person B in the example, stands to gain relatively more by departing unilaterally from Cell I than person A. Person B could, by such a move, increase his quantity of "goods" from seven to twelve, whereas person A could only increase his from fifteen to seventeen. This example suggests that the relatively "rich" person will necessarily be more interested in policing the activities of the "poor" man, as such, than vice versa. This is of course, widely accepted. But the construction and analysis here can be employed for a more complex and difficult issue that has not been treated adequately.

Dynamics and the Atrophy of Rights

Assume that agreement has been attained; both parties abide by the law; both enjoy the benefits. Time passes. The "rich" man becomes lazy and lethargic. The "poor" man increases his strength. This modifies the natural distribution. Let us say that the natural distribution changes to 6:6. The "rich" man now has an overwhelmingly more significant inter-

est in the maintenance of the legal *status quo* than the "poor" man, who is no longer "poor" in natural ability terms. The initial symmetry in the sharing of gains as between the no-trade and the trade position no longer holds. With the new natural distribution, the "rich" man secures almost all of the net gains.

The example must be made more specific. Assume that the situation is analogous to the one examined by Winston Bush. The initial problem is how is manna which drops from Heaven to be divided among the two persons. The initial natural distribution is in the ratio 10:2 as noted. Recognizing this, along with their own abilities, A and B agree that by assigning rights, they can attain a 15:7 ratio, as noted. Time passes, and B increases in relative strength, but the "goods" are still shared in the 15:7 ratio. The initial set of property rights agreed to on the foundations of the initial natural distribution no longer reflects or mirrors the existing natural distribution. Under these changed conditions, a lapse back into the natural equilibrium will harm B relatively little whereas A will be severely damaged. The "poor" man now has relatively little interest in adherence to law. If this trend continues, and the natural distribution changes further in the direction indicated, the "poor" man may find himself able to secure even net advantages from a lapse back into the Hobbesian jungle.

The model may be described in something like the terms of modern game theory. If the initial natural distribution remains unaltered, the agreed-on assignment of rights possesses qualities like the core in an n -person game. It is to the advantage of no coalition to depart from this assignment or imputation if the remaining members of the group are willing to enforce or to block the imputation. No coalition can do better on its own, or in this model, in the natural distribution, than it does in the assignment. These core-like properties of the assigned distribution under law may, however, begin to lose dominance features as the potential natural distribution shifts around "underneath" the existing structure of rights, so to speak. The foundations of the existing rights structure may be said to have shifted in the process.

This analysis opens up interesting new implications for net redistribution of wealth and for changes in property rights over time. Observed changes in claims to wealth take place without apparent consent. These may be interpreted simply

as the use of the enforcement power of the State by certain coalitions of persons to break the contract. They are overtly shifting from a Cell I into a Cell II or Cell III outcome in the diagram of Figure 2. It is not, of course, difficult to explain why these coalitions arise. It will always be in the interest of a person, or a group of persons, to depart from the agreed-on assignment of claims or rights, provided that he or they can do so unilaterally and without offsetting reactive behavior on the part of the remaining members of the social group. The quasi equilibrium in Cell I is inherently unstable. The equilibrium does qualify as a position on the core of the game, but we must keep in mind that the core analytics presumes the immediate formation of blocking coalitions. In order fully to explain observed departures from *status quo* we must also explain the behaviour of the absence of the potential blocking coalitions. Why do the remaining members of the community fail to enforce the initial assignment of rights?

Enforcement Breakdown

The analysis here suggests that if there has been a sufficiently large shift in the underlying natural distribution, the powers of enforcing adherence on the prospective violators of contract may not exist, or, if they exist, these powers may be demonstrably weakened. In our numerical example, B fares almost as well under the new natural distribution as he does in the continuing assignment of legal rights. hence, A has lost almost all of his blocking power; he can scarcely influence B by threats to plunge the community into Hobbesian anarchy, even if A himself should be willing to do so. And it should also be recognized that "willingness" to enforce the contract (the structure of legal rules, the existing set of claims to property) is as important as the objective ability to do so. Even if A should be physically able to enforce B to return to the *status quo ante* after some attempted departure, he may be unwilling to suffer the personal loss that might be required to make his threat of enforcement credible.⁴ The law-abiding members of the community may find themselves in a genuine dilemma. They may simply be unable to block the unilateral violation of the social contract.

In this perspective, normative arguments based on "justice" in distribution may signal acquiescence in modification in the

existing structure of claims. Just as the idea of contract, itself, has been used to rationalize existing structure, the idea of "justice" may be used to rationalize coerced departures from contract. In the process those who advance such arguments and those who are convinced may "feel better" while their claims are whittled away. This does, I think, explain much attitudinal behavior toward redistribution policy by specific social groups. Gordon Tullock has, in part, explained the prevailing attitudes of many academicians and intellectuals.⁵ The explanation developed here applies more directly to the redistributionist attitudes of the scions of the rich, *e. g.*, the Rockefellers and Kennedys. Joseph Kennedy was less redistributive than his sons; John D. Rockefeller was less redistributive than his grandsons. We do not need to call on the psychologists since our model provides an explanation in the concept of a changing natural distribution. The scions of the wealthy are far less secure in their roles of custodians of wealth than were their forebears. They realize perhaps that their own natural talents simply do not match up, even remotely, to the share of national wealth that they now command. Their apparent passions for the poor may be nothing more than surface reflections of attempts to attain temporary security.

The analysis also suggests that there is a major behavioral difference fostered between the intergenerational transmission of nonhuman and human capital. Within limits, there is an important linkage between human capital and capacity to survive in a natural or Hobbesian environment. There seems to be no such linkage between nonhuman capital and survival in the jungle. From this it follows that the man who possesses human capital is likely to be far less concerned about the "injustice" of his own position, less concerned about temporizing measures designed to shore up apparent leaks in the social system than his counterpart who possesses nonhuman capital. If we postulate that the actual income-asset distribution departs significantly from the proportionate distribution in the underlying and existing natural equilibrium, the system of claims must be acknowledged to be notoriously unstable. The idle rich, possessed of nonhuman capital, will tend to form coalitions with the poor that are designed primarily to ward off retreat toward the Hobbesian jungle. This coalition can take the form of the rich acquiescing in and providing defense for overt criminal activity on the part of the poor, or the more

explicit form of political exploitation of the "silent majority", the constituency that possesses largely human rather than non-human capital.

This description has some empirical content in 1976. But what can the exploited groups do about it? Can the middle classes form a coalition with the rich, especially when the latter are themselves so insecure? Or can they form, instead, another coalition with the poor, accepting a promise of strict adherence to law in exchange for goodies provided by the explicit confiscation of the nonhuman capital of the rich? (Politically, this would take the form of confiscatory inheritance taxation.) The mythology of the American dream probably precludes this route from being taken. The self-made, the *nouveau riche*, seek to provide their children with fortunes that the latter will accept only with guilt.

All of this suggests that a law-abiding imputation becomes increasingly difficult to sustain as its structure departs from what participants conceive to be the natural or Bush-Hobbes imputation, defined in some proportionate sense. If the observed imputation, or set of bounded imputations that are possible under existing legal-constitutional rules, seems to bear no relationship at all to the natural imputation that men accept, breakdown in legal standards is predictable.

We Start From an Ambiguous "Here"

Where does this leave us in trying to discuss criteria for "improvement" in rules, in assignments of rights, the initial question that was posed in this paper? I have argued that the contractarian or Paretian norm is relevant on the simple principle that "we start from here". But "here", the *status quo*, is the existing set of legal institutions and rules. Hence, how can we possibly distinguish genuine contractual changes in "law" from those which take place under the motivations discussed above? Can we really say which changes are defensible "exchanges" from an existing *status quo* position? This is what I was trying to answer, without full success, in my paper in response to Warren J. Samuels' discussion of the *Miller et al. v. Schoene* case.⁶ There I tried to argue that, to the extent that existing rights are held to be subject to continuous redefinition by the State, no one has an incentive to organize and to initiate trades or agreements. This amounts to saying that

once the body politic begins to get overly concerned about the distribution of the pie under existing property-rights assignments and legal rules, once we begin to think either about the personal gains from law-breaking, privately or publicly, or about the disparities between existing imputations and those estimated to be forthcoming under some idealized anarchy, we are necessarily precluding and forestalling the achievement of potential structural changes that might increase the size of the pie for *all*. Too much concern for "justice" acts to insure that "growth" will not take place, and for reasons much more basic than the familiar economic incentives arguments.

In this respect, the early 1970's seemed a century, not a mere decade, away from the early 1960's when, if you recall, the rage was all for growth and the newfound concern about distribution had not yet been invented. At issue here, of course, is the whole conception of the State, or of collective action. I am far less sanguine than I once was concerning the possible acceptance of a reasonably well-defined constitutional-legal framework. If put to it, could any of us accurately describe the real or effective constitution of the United States in 1976? Can we explain much of what we see in terms of continuing change in this effective constitution while we continue to pay lip service to nominal constitutional forms?

The basic structure of property rights is now threatened more seriously than at any period in the two-century history of the United States. In the paper, "The Samaritan's Dilemma," noted above, I advanced the hypothesis that we have witnessed a general loss of strategic courage, brought on in part by economic affluence. As I think more about all this, however, I realize that there is more to it. We may be witnessing the disintegration of our effective constitutional rights, regardless of the prattle about "the constitution" as seen by our judicial tyrants from their own visions of the entrails of their sacrificial beasts. I do not know what might be done about all this, even by those who recognize what is happening. We seem to be left with the question posed at the outset. How do rights re-emerge and come to command respect? How do "laws" emerge that carry with them general respect for their "legitimacy"?

¹ See Gordon Tullock, *The Logic of Law* (New York: Basic Books, 1970); James M. Buchanan and Gordon Tullock, *The Calculus of Consent* (Ann Arbor: University of Michigan Press, 1962); Mancur Olson, *The Logic of Collective Action* (Cambridge: Harvard University Press, 1965).

² John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971).

³ The formal properties of the "natural distribution" that will emerge under anarchy have been described by Winston Bush in his paper, "Income Distribution in Anarchy" (Virginia Polytechnic Institute and State University, Center for Study of Public Choice Research Paper No. 808231-17, March 1972).

⁴ For a more extensive discussion of these points, see my paper, "The Samaritan's Dilemma" in Edmund Phelps (ed.) *Altruism, Morality and Economic Theory* (New York: Russell Sage Foundation, 1975), pp. 71-86.

⁵ See Gordon Tullock, "The Charity of the Uncharitable", *Western Economic Journal*, IX (December 1971), 379-91.

⁶ See Warren J. Samuels, "Interrelations Between Legal and Economic Processes," *Journal of Law and Economics*, XIV, 2 (October 1971), 435-50, and my, "Politics, Property and the Law," *Journal of Law and Economics* XV (October 1972), 439-452.

⁷ William Niskanen offers this as an explanation for public-sector growth. See, his, "The Pathology of Politics," in R. Selden (ed.) *Capitalism and Freedom: Problems and Prospects* (Charlottesville: University Press of Virginia, 1975), pp. 20-35.