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THE RIGHT TO DEATH*

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I WANT TO START WITH a phrase from the Declaration of Independence, but by the slightly indirect approach of quotation within a quotation. With his usual shrewd grasp of fundamentals, the lawyer Lincoln once wrote: "The authors of that notable instrument... did not intend to declare all men equal in all respects. They did not mean to say that all men were equal in color, size, intellect, moral developments, or social capacity. They defined with tolerable distinctness in what respects they did consider all men created equal—equal in certain 'unalienable rights, among which are life, liberty, and the pursuit of happiness.' "

It is perhaps tempting to digress to support and to labor the point that neither Lincoln nor the Founding Fathers believed: either that "at birth human infants, regardless of heredity, are as equal as Fords" or that some such repudiation of genetic fact is implied or presupposed by any insistence upon an equality of fundamental human rights.[1] But our present concern is with the actual prescriptive and proscriptive content of these particular norms. For us the crux is that they are all, in M. P. Golding's terminology, *option* as opposed to *welfare* rights: the former forbid interference, within the spheres described, entitling everyone to act or not to act as they see fit; whereas the latter entitle everyone to be supplied with some good, by whom and at whose expense not normally being specified.[2] Hence, with that "peculiar felicity of expression" that led to his being given the drafting job, Thomas Jefferson spoke: not of rights to health, education, and welfare—and whatever else might be thought necessary to the *achievement* of happiness; but of rights to life, liberty, and the *pursuit* of happiness—it being up to you whether you do in fact pursue (and to the gods whether, if so, you capture) your prey. An option right is thus a right to be allowed, without interference, to do your own thing. A welfare right is a right to be supplied, by others, with something that is thought to be, and perhaps is, good for you, whether you actually want it or not.

To show that the Founding Fathers were indeed thinking of option rather than welfare rights, it should here be sufficient to cite a passage from Blackstone, which has the further merit of indicating

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upon what general feature of our peculiarly human nature such fundamental rights must be grounded. From their first publication in 1765, his *Commentaries on the Laws of England* had a profound influence on all the common law jurisdictions in North America, an influence that continued well into the Federal period. Blackstone wrote:

> The absolute rights of man, considered as a free agent, endowed with discernment to know good from evil, and with the power of choosing those measures which appear to him to be most desirable, are usually summed up in one general appellation, and denominated the natural liberty of mankind.... The rights themselves... will appear from what has been premised, to be no other, than that *residuum* of natural liberty, which is not required by the laws of society to be sacrificed to the public convenience; or else those civil privileges, which society has engaged to provide in lieu of the natural liberties so given up by individuals.[3]

But now, if those self-evident fundamental and universal rights are thus option rights, and they surely are, then the right to life must be at the same time and by the same token the right to death: the interference forbidden must be the killing of anyone against that person's will, and that person's entitlement, the entitlement to choose whether or not to go on living as long as nature would permit. In saying this I am not, of course, so rash as to maintain that it is something which all or any of the signers of the Declaration saw and intended. The claim is, rather, that, irrespective of what they or anyone else appreciated in 1776, this does necessarily follow from what they did then so solemnly attest and declare. It is today even more obvious that, if all men are endowed with certain natural and unalienable rights, then all must include all: black and white together. Yet this now so manifest consequence seems for many years to have escaped many people, up to and including justices of the Supreme Court. So a widespread failure to appreciate what may now appear an obvious implication is not sufficient to show it not really an implication at all.

Option Right or Welfare Right?

In the lower court decision in the now famous case of Karen Ann Quinlan, Judge Muir denied the plaintiff's request to have the life-sustaining apparatus switched off, indicating that he did not

find grounds in the Constitution for any right to die. Insofar as the Declaration is not part of the Constitution we might give him the point. Yet, in my very unlegal opinion, if the amendment on which *Roe* v. *Wade*[4] was decided really does warrant what the Supreme Court decided that it did warrant, then it must surely warrant both suicide and assisted suicide. For in abortion what the pregnant woman is killing, or getting her doctor to kill for her, is arguably—notwithstanding that this is not an argument that I myself accept—another person with his or her right to life. So, if it would be a constitutionally unacceptable invasion of privacy to prevent a woman from killing a fetus or getting someone else to kill it for her, then surely it must be a far more unacceptable incursion to prevent women, or for that matter, men, from either killing themselves or getting someone else to kill them. For in all those secular systems of law in which suicide still is a crime, it is a much less serious crime than murder.

(*a*) Judge Muir next went on to say, that, if he were to grant the request of the plaintiff, then "such authorization would be homicide and a violation of the right to life."[5] Since it was not disputed that Karen Quinlan had on at least three occasions insisted that, should this sort of situation arise, she would not wish to be maintained in the condition in which she then was—and still is—Judge Muir's "right to life" becomes one that is at the same time a legal duty. Just that, or substantially that, does seem to be the present position in all those jurisdictions that recognize a right to life. For even where, as in my own country today, suicide itself is not a crime, to assist it still is; while, with very few exceptions, doctors and others are legally required to employ every available means to prolong life of any kind.

For good measure consider two further statements, one from each side of the Atlantic. The first was made by Mr. James Loucks, president of the Crozer Chester Medical Center of Chester, Pennsylvania. He had obtained a court order to permit his hospital to force a blood transfusion on a Jehovah's Witness who had previously requested in writing that, out of respect for her religious convictions, the hospital do no such thing. Mr. Loucks explained that he and his staff overrode her wishes "out of respect for her rights." The second statement was made by the chairman of a group calling itself the Human Rights Society, set up in 1969 to oppose the legalization of voluntary euthanasia. He said: "There are really no such things as rights. You are not entitled to anything in this universe. The function of the Human Rights Society is to tell men their duties."[6]

It has sometimes been suggested that it is contradictory to speak of a right where the exercise of that putative right is compulsory.[7] This is certainly a tempting suggestion, and it may be what led the chairman of the Human Rights Society thus categorically to deny what his society pretends to defend. But if we are going to allow welfare as well as option rights, then this contradiction seems to arise only with the latter and not the former. If that is correct then we can pass, for instance, Article 26 of the 1948 United Nations Universal Declaration of Human Rights: "Everyone has the right to education. . . . Elementary education shall be compulsory." Yet it will still allow us to reject the combination of a right to join a labor union with any corresponding compulsion so to do. For if the exercise of a welfare right is to be made compulsory, then the justification of the compulsion can only be the good, the welfare, of the persons so compelled. Yet, in England at any rate, the spokesmen for the labor unions, and their political creatures in the Labour Party, try to justify forced recruitment on the grounds: not paternalistically, that membership is in the best interests even of those who fail to see this themselves; but indignantly, that all holdouts are freeloaders enjoying the benefits, which it is alleged that the union has brought, without undertaking the burdens of membership.

So, allowing that it can be coherent to speak of a right that its bearers are to be forced to exercise, could there be such a compulsory welfare right to life? The crux here is whether the prolongation of life which it is proposed to impose can plausibly be represented as being good for the actual recipients of this alleged benefit. But perhaps, before tackling that question, it needs to be said that any answer will leave open the different issues raised by considering the good of others. Certainly, while insisting on a universal human option right to life, in the sense explained earlier, and while urging always that it is overtime for this to be recognized and protected by our laws, I am myself ever ready to maintain that such most proper considerations of the good of others make some suicides morally imperative and others morally illicit: the suicide of Wilson, to better the chances of the remaining members of Scott's last expedition, provides an example of the one; and of the other that of the English poetess Sylvia Plath, effected in another room of the house in which she was living with her two young and dependent children.

So long as we confine our attentions to what may vaguely but understandably be called normal times, and to the suicides and suicide attempts of the tolerably fit and not old, it is reasonable enough to hold that in general the frustration of such attempts does

further the good of the attemptors. Indeed, any realistic discussion in this area has to take account of the facts, that a great many of what look like attempted suicides are in truth only dramatized appeals for help and that many of those genuine attemptors whose attempts are aborted by medical or other interference survive to feel grateful to the interferers. But when we turn to the old, faced perhaps with the prospect of protracted senility, of helpless bedridden incontinence, of lives that will be nothing but a burden both to the liver and to everyone else, then the story is totally different. Here you do have to be some sort of infatuated doctrinaire to maintain an inflexible insistence that all life, any life, is good for the liver.

I will not now repeat more than a word or two of what was last year said with such force and charm by the splendid Doris Portwood in her book *Common-sense Suicide.*[8] It should be enough to report that as a woman over 65 she sees herself as making, and encouraging her peers to join with her in making, a distinctive contribution to the women's movement. "How many of us," she asks those peers, "attending a friend or relative in her final days (or weeks, or months, or years) have said, 'It won't happen to me. I'll take care of that.' But did we say it aloud? It is time to say it loud and clear. And often." It is time, she concludes, mischievously mimicking the jargon of her juniors, to "declare our intention to start a meaningful dialogue on common-sense suicide."[9]

What I will quote instead comes from a newspaper letter written by Mrs. Margaret Murray, a still very active and much valued member of Britain's Voluntary Euthanasia Society. Two years ago she published an article "declaring my intention to end my own life when increasing helplessness from multiple sclerosis makes it a hopeless, useless burden." This led to the production of a memorable television program. The present letter was a response to the statement by the medical director of St. Christopher's Hospice that "requests to end life are nearly always requests to end pain." That medical director had in that program asserted "that though I might be helpless and actually fed and washed and have other sordid details attended to, my life had a value and I still had something to give." Dismissing this particular piece of sanctimonious self-deception with the question "Who are these greedy takers?" Mrs. Murray proceeded to deploy three cases:

> An eighty-year old army colonel, who realised he was becoming senile, flung himself in front of an Inter-City express as it went through the village where I live. A few months later a New-

> bury coroner gave a verdict of "rational suicide" on a retired water bailiff who took his own life because increasing infirmities meant it was no longer worth while to him.
>
> And what of sufferers from Huntington's Chorea, never still a moment and unable to speak clearly enough to be intelligible? One of these unfortunates who is well known to me has tried three times to end her own life.[10]

(*b*) The previous subsection dealt with the question whether there could be a right to life, the exercise of which is not allowed to be a matter for the choice of the individual: such a right, of course, could only be a welfare not an option right. The issue in the present subsection is wether the option right to life, as explicated above, covertly contains an incongruous and unacceptable welfare element. The suggestion is that a right to life which is at the same time and by the same token a right to anticipate the death that would otherwise have occurred later must impose on some other person or persons a corresponding duty to bring about that earlier death: "A person's right to be killed gives rise to someone's (or everyone's) duty toward that person. If anyone can be said to have a right to be killed, someone else must have a duty to cooperate in the killing. . . . The important thing is that someone—a doctor, a nurse, a candystriper, a relative—intervene actively or passively to end the right-holder's life."[11]

This passage is, on the one hand, entirely sound insofar as it is insisting that all rights must impose corresponding duties; though, since all duties do not give rise to corresponding rights, the converse is false. This logical truth constitutes the best reason for saying that welfare rights do not belong in a Universal Declaration of Human Rights. For who are the people who have at all times and in all places been both able and obligated to provide for everyone: "social security" (Article 22), "periodic holidays with pay" (Article 24), "a standard of living. . . including. . . necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control" (Article 25 (1)); to say nothing of the provision that that compulsory elementary education aforementioned "shall further the activities of the United Nations for the maintenance of peace" (Article 26 (2))?

But the same passage is, on the other hand, entirely wrong insofar as it is trying to draw out the implications of an option right to life.

Such rights do necessarily and as such impose corresponding obligations. These obligations rest uniformly and indiscriminately upon everyone else, not just upon some unspecified and unspecifiable subclass of providers, who may or may not in fact be available and able to provide. But these obligations are obligations not to provision but to noninterference. In a jurisdiction, therefore, that recognized and sanctioned the option right to life, the people who decided that they wanted to suicide[12] would, if they needed assistance, have to find it where they could. Their legal right to noninterference imposes no legal duty on anyone else to take positive steps to assist, although, of course, this is quite consistent with its being the case that someone is under a moral obligation so to do. Here as always we have to distinguish questions about what the laws do or would permit or prohibit from questions about what people are morally obliged to do or not to do.

Doctors and the Right to Die

When, a quarter of a century or more ago, I first joined the Voluntary Euthanasia Society the emphasis was on extremes of physical pain. The main policy objective was to get a Voluntary Euthanasia Act that would establish official machinery to implement the wishes of those terminal patients who urgently and consistently asked for swift release. In response to medical and other developments in the intervening years the emphasis has shifted. It is now on irreversible decay into helpless futility and on operations resulting in prolonged but not especially painful survival at a subhuman level of existence. The chief and most immediate objectives are also different. The Young Turks, at any rate, as well as their more wide-awake and forward-looking seniors, are now pushing for amendment of the Suicide Act and for measures to enable patients and their representatives to ward off unwanted treatment and vexatious life-support, rather than for an act setting up the paraphernalia of panels considering applications and directing that their decisions be implemented.

(*a*) It is in consequence no longer so true as once it was that "supporters of voluntary euthanasia do not merely want suicide or refusal of treatment or allowing a patient to die. They want the patient dead when he wants to be dead, and they want this accomplished through the physician's agency."[13] In the great majority of cases such as

Doris Portwood or Margaret Murray have in mind, the agent would be the patient or, with patients too far gone to act themselves, the spouse or other close relative or friend. Consider, for example, Lael Wertenbaker's *Death of a Man* or Derek Humphry's *Jean's Way*:[14] as both would have wished, the prime agent in the former was the wife and in the latter the husband. The only necessary involvement of the medical profession here is through the providing of advice on instruments, and maybe the instruments themselves; and not insisting on mounting an all-out campaign to revive the patients.

The desired amendment of the United Kingdom Suicide Act 1961, an act that already decriminalizes the deed itself, would replace the present general offense of "aiding, abetting, counselling or procuring the suicide of another" by the limited and in fact very rare one of doing this "with intent to gain or for other selfish or malicious reasons," leaving the courts to decide, as they so often do elsewhere, when the motives of the assistance were indeed discreditable.[15] From a libertarian point of view this suggestion has, as against any Voluntary Euthanasia Act, the great advantage of specifying, not what is legal, but what is illegal.

(*b*) Finally, and with special but not exclusive reference to the other sort of case, in which it is almost bound to be the doctors who would be either killing or letting die, I have a few brief and insufficient words about the absolute sanctity of all (human) life and the idea that killing (people) is always wrong. My suggestion is that, if these so often mentioned principles are to stand any chance of being ultimately acceptable, then both need to be amended in at least two ways.

The first amendment is already accepted almost universally when people think of it. It consists in actually inserting the unstated qualification "innocent." The point is to take account of killing in self-defense and of the execution of those who have committed capital offenses. In our terms, people who launch potentially lethal assaults thereby renounce their own claims to the option right to life. Reciprocity is of the essence; just as one person's option right gives rise to the corresponding obligations of all others to respect that right, so, if people violate the rights of others, then that nullifies the obligations of those others to recognize any corresponding rights vested in the violators.[16]

The second amendment consists in adding some indication that what is to be held sacred and inviolate is a person's wish to go on living. This takes account of the enormous, and in almost all

contexts crucial, differences between murder and suicide. These are that murderers kill other people, against their will, whereas suicides kill themselves, as they themselves wish. It is perverse and preposterous to characterize suicide, and to condemn it, as self-murder. You might as well denounce intramarital sex as own-spouse adultery.

In the present context the importance of this second amendment is that it attends to those particular human essentials that provide the grounds upon which all claims to universal human rights must be based. It was to these that Blackstone was referring when, in discussing "the absolute rights of man," he wrote "of man, considered as a free agent, endowed with discernment to know good from evil, and with the power of choosing these measures which appear to him to be most desirable." It was on these same universal features that Thomas Jefferson himself insisted. In Query (XIV) to the *Notes on the State of Virginia* he made various lamentable remarks about blacks, remarks that I shall not repeat and that would today disqualify him from all elective office. For Jefferson, it was notwithstanding all these alleged racial deficiencies that blacks (and Indians) certainly do have what it takes to be endowed with the "rights to life, liberty, and the pursuit of happiness." Again, it was to these same essential features of people as beings capable of choosing values and objectives for themselves, and of having their own reasons for these choices, that Immanuel Kant was referring when he laid down that famous but most confused formula: "Act in such a way that you always treat humanity, whether in your own person or in the person of another, never simply as a means, but always at the same time as an end."[17]

On some other occasion I might try to spell out more fully the rationale for the fundamental option rights and, in particular, to dispose of Kant's own topsy-turvy contention that the respect for persons as self-legislating choosers of their own ends requires that they not choose their own end as an end. But here and now I will instead conclude by relating that right to die, which I take to be part of the option right to life, to the Hippocratic Oath. This is still often cited as a decisive reason why doctors and other health-care professionals must strive always and by all means to maintain life, irrespective both of the quality of that life and of the wishes of its liver. This reason is still frequently flourished, notwithstanding that nowadays probably only a small minority of doctors outside the ever-expanding socialist bloc do in fact swear that oath. (It is, of course, within the socialist bloc outlawed, precisely because it makes

doctors the servants of their patients, rather than of society or the state.)

The relevant sentences of the Hippocratic Oath read: "I will use treatments to help the sick according to my ability and judgment, but never with a view to injury and wrong-doing. I will not give anyone a lethal dose if asked to do so, nor will I suggest such a course."[18] It is obvious that, in the area of today's gerontological concerns, the second and subsidiary undertaking may come into conflict with the primary promise to "use treatments to help the sick according to my ability and judgment."

In such situations it is impossible to keep the oath. Happily, there is no doubt which of the incompatibles should then be preserved. For at the heart of the entire Hippocratic tradition is the ideal of the independent professional who—always, of course, within the framework formed by the universal imperatives of moral duty—puts his skills at the service of his patients. So it is quite clear, to me at any rate, that, given a more libertarian system of public law, that service must: not only exclude forcing unwanted treatment upon those who have, either directly or indirectly, asked to be left alone; but also include providing instrumental advice on suicide, and maybe the means too, if suicide is the considered wish of their patients.

* First delivered at the Sangamon State University Gerontology Institute Conferences 1979, Springfield, Illinois. Included as a chapter in *Aging and the Human Condition*, Frontiers in Gerontology Series, ed. Gari Lesnoff-Caravaglia (New York: Human Sciences Press).

1. The quotation is borrowed from F. A. Hayek, *New Essays* (London: Routledge and Kegan Paul, 1977), p. 290, and it is there said only to be taken from an old *Encyclopedia of the Social Sciences.* On the substantive issues see "The Jensen Uproar" in my *Sociology, Equality and Education* (New York: Barnes and Noble, 1976).

2. See E. L. Bandman and B. Bandman, eds, *Bioethics and Human Rights* (Boston: Little Brown, 1978), chap. 4.

3. Pp. 125 and 128 in the Cadell and Butterworth edition (London, 1825).

4. 410 U.S. 113, 93 S A. 705 (1973).

5. In the Opinion of Robert Muir, Jr., in the Matter of Karen Quinlan: An Alleged Incompetent. Super. A.N.J., Chancery Division, Morris Company, C-201-75 (Nov. 10, 1975).

6. The first statement is copied from a report in *The General Practitioner* (London), Nov. 26, 1978. The other comes from the September 1978 issue of that doughtily libertarian magazine *Reason.*

7. See, for instance, Bertram Bandman in Bandman and Bandman, *Bioethics and Human Rights,* chap. 5.

8. New York: Dodd Mead, 1978.

9. Ibid., p. 10.

10. *The Guardian* (London), Jan. 20, 1979.

11. Bandman and Bandman *loc. cit.*, p. 141.

12. My employment of either the single word as an intransitive verb or the affected-sounding gallicism "suicide themselves" is calculated. For the ordinary English expression "commit suicide" is one of those expressions— first noted in Aristotle's *Nicomachean Ethics,* 1107A 8-13—that "already imply badness." Since I do not hold that suicide is always wrong I deliberately eschew that implication.

13. Bandman and Bandman, *Bioethics and Human Rights,* p. 130.

14. Boston: Beacon, 1957.

15. We owe the precise terms of this suggestion to Tom Parramore, secretary of our sibling society in Australia.

16. It is here to the point to quote words from a now perhaps no longer disfavored Sage. A pupil once asked Confucius whether his rule of conduct might not perhaps be epitomized in a single word: "The Master replied, 'Is not "reciprocity" the word?' " See *The Analects,* translated and edited by W. E. Soothill (Taiyuanfu, Shansi: Soothill, 1910), XV§23.

17. *Groundwork of the Metaphysic of Morals,* in *The Moral Law,* trans. H. J. Paton (London: Hutchinson, 1968), p. 94 (italics removed).

18. *Hippocrates and the Fragments of Heracleitus,* ed. and trans. W. H. S. Jones and E. T. Withington (Cambridge, Mass.: Harvard University Press; and London: Heinemann, 1959), 1: 298. The translation here is in fact my own.

ENTITLEMENTS AND THE THEFT OF TAXATION

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AS DID THE TELEVISION ANCHORMAN in the movie *Network*, Howard Jarvis, author of California's Proposition 13, came on to the national scene in the 1970s shouting, "I'm mad as hell, and I'm not going to take it any longer!" The "tax revolt" that began in California has been called a "revolt against spiraling taxes and profligate government spending, the renunciation of big-government politicians, a reaffirmation of free-enterprise priorities";[1] but the campaign against taxes has been conducted much like a crusade by people who have felt that they have been "morally wronged" by the government that was supposed to serve them.

Proposition 13 effectively cut property taxes by two-thirds of their level in 1978 and placed stringent restrictions on the ability of the state and local governments to raise property taxes in the future and to substitute other taxes for the revenues that had been lost. In approving Proposition 13 by a more than two-to-one majority, the voters of California, like everyone else in other parts of the country, were concerned with their own welfares and their ability to spend their own incomes. Undergirding those concerns, however, was the more fundamental question, How large should the government be? Where should we draw the line between public and private decisionmaking? How do we control the government that is supposed to provide for the general welfare? And is taxation not a form of theft?

This paper is concerned with all of those questions indirectly, but it is directly concerned with the last question, the theft of taxation. The immediate interest of the taxpayers in California in 1978 was the rather large increase in their property taxes that resulted from an increase in the tax rate and a dramatic increase in the assessed value of the taxable property. Property values, at the time, were rising in many areas of California by as much as 20 percent a year. Since property tax revenue is tied to the dollar value of property, the local governments in California experienced increases in their tax collections without explicit action on the part of political

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representatives. There was, in effect, a form of "taxation without representation."[2] Some may regard such increases in tax collections as a form of "theft" by local government, as something that is morally wrong and should be changed; the issue of theft and taxation considered in this essay, however, is more fundamental: the issue is whether or not and under what conditions do taxes of any form take on the characteristics of theft.

Nozick on Taxation: Taxation Is Theft

Robert Nozick, a Harvard philosopher, has developed an "entitlements theory of distributive justice" that has caused philosophers and economists alike to reexamine the morality of taxation.[3] Succinctly, Nozick's theory justifies taxation only to the extent that the "minimal state," which is limited to establishing and enforcing property rights, is maintained. Taxation beyond that level can be construed as theft simply because it involves the type of coercion that a common thief exerts over his victim. Nozick writes:

> Taxation of earnings is on a par with forced labor. Some persons find this claim obviously true; taking the earnings of *n* hours labor is like taking *n* hours for another's purpose. Others find the claim absurd. But even these, *if* they object to forced labor, would oppose forcing unemployed hippies to work for the benefit of the needy. And they would also object to forcing each person to work five extra hours each week for the benefit of the needy. But a system that takes five hours' wages in taxes does not seem to them like one that forces someone to work five hours since it offers the person forced a wider range of choice in activities than does taxation in kind with the particular labor specified.... Furthermore, people envisage a system with something like a proportional tax on everything above the amount necessary for basic needs. Some think this does not force someone to work extra hours, since there is no fixed number of extra hours he is forced to work, and since he can avoid the tax entirely by earning only enough to cover his basic needs.... The fact that others intentionally intervene, in violation of a side constraint against aggression, to force to limit the alternatives, in this case to paying taxes or (presumably the worse alternative) bare subsistence, makes the taxation system one of forced labor and distinguishes it from other cases of limited choices which are not forcings.[4]

Nozick goes on to point out the inevitable benefit gained from an income tax system by a person who likes leisure. A person who does not work, because he likes leisure or likes the things that leisure time affords, does not earn a money income that is subject to taxation. He gets the benefits of non-work but does not have to pay taxes on those benefits, simply because the benefits are not in money income terms that are taxable. On the other hand, the person who prefers goods—whether Shakespearean plays or suits of clothes—must give up leisure and the things that he can do with leisure time in order to earn the necessary money to buy goods; the money income that is earned is taxable, whereas the leisure, as noted, is not. The person who likes goods must either work longer, because of taxes, in order to obtain a given amount of goods or must forgo some of the goods he planned to buy. Nozick adds:

> Given this, if it would be illegitimate for a tax system to seize some of a man's (*forced*) labor for the purpose of serving the needy, how can it be legitimate for a tax system to seize some of a man's goods for that purpose? Why should we treat the man whose happiness requires certain material goods or services differently from the man whose preferences and desires make such goods unnecessary for this happiness? Why should the man who prefers seeing a movie (and who has to earn money for a ticket) be open to the required call to aid the needy, while the person who prefers looking at a sunset (and hence need earn no extra money) is not? Indeed, isn't it surprising that redistributionists choose to ignore the man whose pleasures are so easily attainable without extra labor, while adding yet another burden to the poor unfortunate who must work for his pleasures?[5]

To Nozick, taxation is characteristically similar to theft because the implied coercion causes one person to gain at the expense of another in much the same way that a mugging causes the mugger to gain at the expense of the person who is mugged.

Kearl on Taxation: Taxation Is Not Theft

In an important counterargument, J. R. Kearl attempts to dispute Nozick's argument. He writes:

> I will suggest in this essay that private rights over property, which are essential to the efficient use of resources in a price-market system of allocation, are socially defined. If one then

> accepts Nozick's rationalization of the minimal state and its monopoly position in "protection," the minimal state has a claim to social output. Moreover, this claim would allow it to engage in redistributive activities other than those necessary for maintaining the enforcement apparatus of the minimal state. Hence, taxation is not theft and limited redistribution is not immoral.[6]

With the use of the numerical example relating to a newly discovered fishing grounds, Kearl makes what is now a standard argument that, under common property rights (in contrast to private property rights), individual producers will ignore the external effects of their own fishing activities on the productivity of other fishermen: individual fishermen will not consider the cost they impose on each other and will therefore tend to "overproduce." When a fisherman goes out to fish in the "common fishing grounds," he must consider his expenses in labor and equipment in determining how long to fish and how many fish to catch. When the fishing grounds are common property, however, there is one cost that he is unlikely to consider: the increased difficulty that others will have in catching fish. Because some fish are caught, other fishermen will have more difficulty, incur greater costs, to catch their fish. In this way, the actions of any fisherman imposes an *external cost* on others. If the individual fisherman had to incur the external cost, then he would catch fewer fish. Indeed, all fishermen would have higher cost structures, the price of fish would rise, and fewer fish would be caught and sold on the market.

When access to the fishing grounds is "free," which it is when the grounds are common property and when there are many fishermen, each individual fisherman is unlikely to restrain his own fishing for two basic reasons. First, any one fisherman is unlikely to affect significantly the total quantity of fish on the market or the market price for fish. He simply isn't large enough when the group is large; therefore, there are no realized benefits to the *fisherman* for cutting back *his* production; the benefits are external, received by others who find fishing easier. Second, the individual fisherman can reason that, if he cuts back his production, some other fisherman will very likely come into the fishing grounds and take the fish that he does not take. If the stock of fish is being depleted by "overfishing," then the actions of the individual fisherman will not materially affect that outcome.

Furthermore, an individual fisherman is unlikely to do anything

to contribute to the procreation of fish in the common grounds. If he does make any investment to increase the stock of fish, the cost of fishing to others will be reduced and others will tend to fish more, negating the "good intentions" of the individual who undertook the investment. From this line of reasoning, we can deduce that the common grounds will be "overfished" and nothing will be done by individual fishermen; all will tend to "free ride" (or will attempt to "free ride") on the efforts of others. By assigning private rights (presumably, territorial rights) to individual fishermen, use of the fishing grounds will command a price, production will be reduced, and net social product will rise.

Kearl argues that, because the collectivity must be involved in any such assignment of rights or entitlements, the collectivity is productive and has legitimate claim on the *increased* output of society: "We must acknowledge that a minimal state which does nothing more than define and protect private rights over property has a rightful claim to real output."[7] The state can, therefore, become more than "minimal" and remain moral; it can take a part of the greater social output from those who receive it and transfer it to those who are deemed in need or, perhaps, to those who may lose because of the initial assignment of private property rights.

Capitalized Entitlements: A Critique

Nozick and Kearl present sharply contrasting arguments on the moral merit of taxation. Taken in isolation, each argument seems to have a great deal of merit. This is partly because each does not deal directly with the issues the other raises. Nozick is concerned with the morality of the coercive power of government and how it is used in collecting taxes. Kearl, however, points out a situation in which all parties can agree to distribute private property rights and to use some of the increase in social product to distribute to the "poor." Indeed, although Kearl does not raise the point, it can be noted that, in order to get the agreement of the "poor" to *the* distribution of private property rights, those who get the rights and are "rich" may have to give up some of their income to the "poor" in the form of income grants or other welfare programs. The "rich" may not want to do that, but they may reason that they will be better off by having private property and by being "taxed" than by not having the private property and the resulting higher income levels.

Kearl's argument also has weaknesses. Although the contractarian perspective he employs is useful to gain insight about the

moral merit of taxation, his argument is for several reasons open to criticism. First, it assumes that property rights are defined and protected solely by the state. Hence, the implication is that the state has a significant claim on the social product, a claim that enables the state to expand beyond Nozick's minimum. But that conclusion does not necessarily follow from Kearl's analysis. Property rights—that is, socially recognized limits to individual and collective behavior—have frequently existed prior to formal government.

Further, the property rights that have been recognized have been protected, not by the state, but by individuals. Even when a state exists as an enforcer of property rights, those rights are only marginally protected by the state; they are overwhelmingly protected by individuals who have a private stake in the retention of those rights. A person's "right" to his household furnishings, for example, is typically far more dependent upon his willingness to install locks on the doors and windows of his house than it is on the state's police force. In a study of business contracts, Stewart Macaulay found that 85 percent of the contracts evaluated were actually unenforceable in the courts. The contracts had force, however, because of the parties' private interests in a continuation of their mutually beneficial business relationships.[8] Granted, the state may add to the security of property and may therefore enhance, as Kearl argues, the social product. If we are to follow the spirit of Kearl's argument, however, we must conclude that the state has a claim on only the *marginal increase* in the social product that results from the state's *marginal contribution* to the definition and protection of property.

Looked at this way, there is no reason to believe that the state's claim to the social product is sufficiently great to enable the state to expand beyond Nozick's minimum. True, the claim may be sufficient for the state to engage in redistributive activity, but Kearl's argument does not really demonstrate that that is the case. Given the monopoly position the state has in the definition and protection of property rights, we cannot be sure that the state will operate efficiently in carrying out its basic function and that the state's legitimate claim to the social product, if there is one, will enable it to do more than protect basic rights.

Second, Kearl implicitly assumes that the state is an agent that exists prior to and independent of the people who wish to have property rights defined and protected; he assumes the state holds the rights before the initial distribution and that the state, not the property owners, is therefore "entitled" to a fraction or all of the expansion of the social product that results from the definition and

enforcement of property rights. If the state is viewed, however, as an agent of the people who collectively agree, in a social contract setting, to define and protect property, then it does not necessarily follow that the state is "entitled" to any claim on social product: the people who take the necessary steps to have property defined and protected—who set up the state—are the ones who are responsible for what the state does. Therefore, one can reasonably argue that the property owners themselves have full claim to the fruits of the property they own.

Third, Kearl implicitly assumes that the state, as an independent agent, contracts with property owners for a portion or all of the increase in the social product that results from the state's definition and protection of property. There need not be any such contract. The state, as an independent agent, may act "out of the goodness of its heart," relinquishing all claim to the social product. If there were a contract, there would be no reason to believe that the contractual payments made to the state would be sufficient to allow the state to expand beyond Nozick's minimum. Indeed, Nozick seems to suggest that a social contract conception of the state would and should hold the state to a minimal set of activities. If the state has a contract that gives it a claim to the social product, then property owners, even in Nozick's theory of justice, would have an obligation to make the payment. But, we must ask, Where is the contract? The fact that the activities of the state are "productive," in the sense that they contribute to economic efficiency, does not, in and of itself, give the state entitlement to anything, much less a "rightful claim to real output" for purposes of income redistribution.

Fourth, Kearl implicitly assumes that taxation and the assignment of rights are separate and not interrelated events. In organizing the criticisms presented here, assume, as does Kearl, that markets work reasonably well, if not perfectly, to reflect the value of the entitlements that have been granted. When markets work well (and Kearl's purpose was not to argue otherwise), the value of the private property (or wealth) initially distributed will tend to be the equivalent of the present value of the future income stream that can be received from the entitlements possessed. (People will simply base their bids for the property on how much income or benefits they can expect to receive from owning the property; at the limit, in a competitive market people will bid prices that equal the expected value of the future income stream.) If at the time of the initial distribution of property rights, the state gives clear notice of any plans to tax

away a portion of the greater social output that results from the assignment of rights, then no harm will be done: redistributing future income will not be a problem. This is because the state has not fully distributed all the rights (or entitlements) that are available; it has not given people *full* claim to the existing fishing grounds, to use Kearl's example. The capitalized value of the rights that are distributed will reflect the claim of the state to the future income stream from the property and will thus be less than it would have been in the absence of the state's claim or threat of taxation. What the state has not given, it cannot take away in an overt or covert manner.

Taxation may become, however, the practical equivalent of theft and morally suspect when clear notice of the state's intentions at the point of initial distribution of rights is not given. For example, if at the time of the initial distribution the state does not assert its claim to the increase in social output and does not reveal its intentions to tax away a part of the increase in social output, then the state has effectively distributed all entitlements and has reserved nothing for itself. The capitalized value of the fishing grounds, or anything else subject to distribution, will reflect the full value of the rights that have been distributed: the capitalized value will be greater than it would have been in the above case in which the state asserts its residual claim.

As time goes by, the rights subject to the initial distribution will be traded for prices that approximate their capitalized values. If the state, at some future point in time, asserts claim to the greater social product that results from the initial assignment of rights, then markets will adjust to what amounts to a redefinition and redistribution of rights. The market value of the assigned segments of, for example, the fishing grounds will fall, reflecting the lower net, after-tax income of the property. The people involved suffer a wealth loss: that which has been effectively given is taken away. Even if the people have adhered fully to the principle of justice in transfer they may have collectively accepted at the time of the initial distribution, the property is taken anyway, albeit covertly, via the market's reevaluation of the entitlements that remain. It is in this sense that taxation can take on characteristics of theft.

In addition to coercion, the act of theft can suggest total or partial deception or secrecy. If at the time of the initial distribution the state discloses its intentions to tax future income streams, either immediately or at some future point in time, then theft cannot be

involved in taxation and no harm is done to future holders of the entitlements. Holders of property rights then know the full scope of the rights they hold. The market price of the rights then reflects what the state discloses about its claim to future income. (The market price of the property will be lower, the closer to the present the state plans to begin taxation.) People who buy property will pay only a price that reflects the present value of the future net, *after-tax* income stream. When taxation commences, entitlement holders will lose nothing in the way of wealth for which they have "justly" paid. The principle of justice in transfer will be fully operative.

The analysis of this section suggests that Kearl's argument is defective because it fails to account for the fact that future income streams are capitalized into the value of the rights that are subject to transfer. Furthermore, the analysis suggests that redistribution of wealth (from that which occurs at the time of initial distribution) can only occur when the intentions of the state to tax and redistribute income are, to one degree or another, kept secret. Taxation is objectionable to many simply because they prefer to keep that portion of the greater social output over which the state has an *announced* claim; the morality of state action is not *necessarily* at issue in such objections. Taxation can, however, become morally questionable and pejoratively equated with theft when the intentions of the state are not announced.

Furthermore, it should be understood, the state has reason, albeit weak, to hide its intentions to tax in some future time period. Taxes (other than lump-sum or perfectly general taxes) at levels that go beyond the function of the minimal state to provide protection of private property rights dampens productive efforts and thereby keeps the net social product from reaching the levels it will otherwise reach. This is one of Nozick's points. If the state assigns rights and at the same time announces its intentions to tax away a portion of the greater social product, then the social product, as Kearl suggests, can be greater than otherwise. The point suggested is that the social product will be even greater if the state's intentions to tax are kept secret. This is because the net marginal return to effort will be *perceived* to be greater than it actually is. When this happens, the state has not fully eliminated the problem of overproduction, which the assignment of private rights is intended to solve. Put bluntly, and less kindly, the state knows that by keeping secret its intentions to tax, there will be more to steal when its intentions are not fully revealed.

Summary and Conclusion

Kearl concludes that "the state can, in fact, use its coercive apparatus to force some individuals to help others, since within the limits we have defined, it has been a contributor to the fruits of their labor."[9] The lesson of a "capitalized entitlements" approach to the question of taxation can be put succinctly: Before we can comment on the morality of taxation, we need to know more than the fact that governmentally defined and protected property rights contribute to economic efficiency. We need to know exactly what rights are distributed initially and the announced or unannounced taxation intentions of the state.

Having recognized those basic points, on the other hand, we are led to consider another question—How can the state know, when it is constructing a constitution like the one for the United States, what its taxation intentions will be tens or hundreds of years in the future? Perhaps, all that can be done is to let people know initially that taxation is at least possible, if not probable. This all brings us back to Howard Jarvis and people's current concern over the taxes they are paying. Many people have become distressed about their taxes because they have been led to believe that the property they acquired would not be taxed to the extent that it has been. Accordingly, they have paid prices for the property that have reflected those expectations. They may be "mad as hell" simply because they feel that they have been misled by their government and that they not only have had to give up taxes but also have had to give up wealth in terms of reduced market prices for their property. A common thief does not typically act with greater force or stealth.

* I am indebted to an anonymous referee for helpful comments.

1. Richard Boeth et al., "The Big Tax Revolt," *Newsweek*, June 19, 1978.
2. For further comments on this thesis, see Holley Ulbrich, "The Message from California," *Collegiate Forum*, Winter 1979, p. 9.
3. Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974).
4. Ibid., p. 169.
5. Ibid., p. 170.
6. J. R. Kearl, "Do Entitlements Imply That Taxation is Theft?" *Philosophy and Public Affairs*, Fall 1977, p. 76. For additional comments, see J. S. Coleman, "Rawls, Nozick and Educational Equality," *Public Interest*, Spring 1976, pp. 121-28.
7. Kearl, "Entitlements," p. 81.
8. Stewart Macaulay, "Elegant Models, Empirical Pictures, and the Complexities of Contracts," *Law and Society Review*, Winter 1977, pp. 507-28.
9. Kearl, "Entitlements," p. 81.

ON MODELING THE ORIGINAL POSITION

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STEVEN STRASNICK, in his paper "Social Choice and the Derivation of Rawls's Difference Principle,"[1] claims to have provided a "formal model" of Rawls's original position (p. 85). The model, adopting the framework of social choice theory, consists of a "weak set of axioms" and a "judgment of priority" (p. 86). The axioms represent the "constraints on information" in the original position and a "weak notion of rationality" (p. 90). Strasnick believes the priority judgment is entailed by the initial equality assumption of the original position (p. 88-89). From the statements of this model Strasnick deduces the difference principle.

Strasnick claims that his formal procedure verifies Rawls's controversial derivation of the difference principle (which many critics have thought invalid). Since "One cannot criticize the difference principle from the context of the original position without falling into contradiction" (p. 86), he suggests that critical discussion of Rawls's theory should turn from the derivation (now proven valid) to the assumptions of the original position (p. 99). Following Nozick, Strasnick is skeptical about these assumptions, since they appear to rule out consideration of morally legitimate prior claims to the goods that are to be distributed in the original position (pp. 87-88). In overall intent, Strasnick sets the stage for using Nozick's criticisms of the original position assumptions to dispose of the difference principle.

In this paper I will (1) characterize Strasnick's formulation of the social choice problem and his use of his formal model. I will (2) develop an example in which Strasnick's social preference function and Rawls's agents in the original position would clearly make different choices, thus proving that Strasnick's model misrepresents the original position in some respect at least. I will then (3) show how this discrepancy comes about as the result of fundamental differences between Strasnick's formulation of the social choice problem—as one of finding a suitable way of aggregating individual preferences over known outcomes—and Rawls's formulation, which

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is quite different. I will show that no model using a preference aggregation framework like Strasnick's can represent all essential elements of justice as fairness. Finally I will (4) raise some questions about the Nozick-Strasnick interpretation of the original position and suggest an alternative interpretation, according to which Rawls is not vulnerable to Nozick's criticisms.

(1) Strasnick, like Arrow, formulates the problem of social choice as one of finding a suitable way of aggregating individual preferences over available alternatives to form a social preference ordering of these alternatives. (Here, alternatives are distributive states, or possible distributions of primary goods among individuals.) Strasnick modifies Arrow's formulation by allowing ordinal interpersonal comparisons of utility. Such comparisons are made by simply using a numerical index of the amount of primary goods (or income) individuals receive in some distribution as an ordinal utility index with interpersonal significance. (If Jones receives 5 units of primary goods, and Smith receives 7, then Smith's utility is greater than Jones's.) Utility comparisons are used to develop a notion of preference priority, which identifies the individuals whose preferences are weighted more heavily in deciding social preference in those cases where individual preferences conflict. Preference priorities thus make it possible for Strasnick to avoid Arrow's celebrated paradox, which is due to the unavailability in his formulation of any procedure for "handling" conflicting preferences.

In the treatment under discussion here, Strasnick assigns the highest priority to the preference of the individual who would be worst-off (whose payoff in primary goods would be lowest) if his preference were frustrated. Social preference is then identical to the preference of the "worst-off" individual, the preferences of other individuals are disregarded, and no inconsistency in the social preference ordering can occur. (Strictly speaking, social preference is that of the worst-off individual only for choices among pairs of distributions. For choices among three or more distributions a series of pairwise comparisons must be performed. The transitivity of social preference can then be used to identify the socially most preferred distribution. This will always be the distribution with the highest minimum payoff, not necessarily the distribution that would be most preferred by the individual with the lowest possible payoff.)

Social choice, then, for Strasnick involves (*a*) individual preference orderings, (*b*) judgments of preference priority, and (*c*) moving from

(*a*) and (*b*) to a social preference, via some social preference function, or SPF. Given appropriate priority judgments, said to represent the initial equality assumption of the original position, and other axioms said to represent its information constraints and conception of rationality, Strasnick proves the theorem that the SPF must be the difference principle. His procedure is comparable to any use of a formal logic to test the validity of some informal argument. One must identify and paraphrase appropriately the premises and the conclusion of the informal argument. Then one must reconstruct a formal argument that proves the conclusion, given the premises. Strasnick's formal model of the original position consists simply of a set of premises that are paraphrases in his formalism of Rawls's premises, that is, Rawls's assumptions concerning freedom and equality, the veil of ignorance, and rational self-interest. Strasnick's claim to have used this formal model to verify Rawls's derivation can fail in several ways. His premises (or conclusion) may not be suitable paraphrases of Rawls's premises (or conclusion). His formal deduction may not be valid. If his deduction is valid, it is still possible that it is a different argument from the one Rawls uses, which could be invalid even though a valid argument from his premises to his conclusion exists.

One would expect that the least vulnerable part of Strasnick's procedure would be his formal deduction (though R. P. Wolff has pointed out some problems concerning its validity).[2] Raising questions concerning the appropriateness of his premises (his formal model) would seem a more promising line of attack. I will give very brief informal characterizations of Strasnick's four axioms here, even though I do not intend to criticize them, since this will provide useful detail concerning the nature of Strasnick's model. Strasnick's first axiom is Binariness and is said to make social choice a function of individual preferences and their priorities only (p. 91). (This axiom is analogous to Arrow's Independence of Irrelevant Alternatives.) His second and third axioms are Anonymity and Neutrality, which are intended to make social choice independent of the labels used to designate different individuals or alternative distributions (pp. 91-92). These three axioms are said (rather incredibly) to represent the information constraints of the original position. The fourth axiom, Unanimity, imposes a consistency requirement on the SPF. For example, if X is preferred to Y in a subsociety consisting of Smith and Jones, and similarly in a subsociety consisting of Riley and O'Brien, then X is preferred to Y in the society consisting of all four. This axiom is said to capture "an

element of rationality" that is part of "the significance of the original position" (p. 93). It would seem that these axioms are extremely questionable as paraphrases of the information and rationality premises (assumptions) in Rawls's derivation argument, though I do not pursue this here.

Strasnick claims that his four axioms are consistent with most major theories of distributive justice, including utilitarianism (p. 90). It is addition of the Priority Principle to the model that renders it inconsistent with any SPF other than the difference principle. My criticism of Strasnick's model will be restricted to his Priority Principle (though in my third section I will criticize the approach to the problem of social choice embodied in his axioms).

(2) Strasnick arrives at his Priority Principle through analysis of a kind of choice situation. "In the initial situation of equality, individuals i and j will each possess the same amount of primary goods (see 62). Suppose we can increase the allotment of primary goods for one individual by transporting him to another state. If we place individual j in state u, he will receive a higher allocation of primary goods than would individual i if he were placed in state x. Since only one of these individuals may benefit, we must decide whose preference for the new state is to have greater priority." (P. 88)

I believe the following payoff matrix exemplifies the kind of situation Strasnick has in mind. Let individual i be Smith, individual j be Jones, and e be the initial situation of equality:

	Smith	Jones
e	5	5
x	6	5
u	5	7

Smith prefers x to e and is indifferent between e and u. Jones prefers u to e and is indifferent between e and x. Treating amounts of primary goods as an ordinal utility index with interpersonal significance, Smith and Jones have the same utility in e, Smith has more utility than Jones in x, Jones has more utility than Smith in u, and Jones in u has more utility than Smith in x. Total utility is greatest in u, less great in x, and least in e.

Strasnick points out that a utilitarian would assign greater priority to Jones's preference, since his gain in moving to his preferred state would be greater than Smith's gain in moving to his preferred state. Hence u would be the socially preferred state (in this two-

person case) using a utilitarian SPF, since total utility is greatest in u. (P. 89) What priority judgment would be required by the original position assumptions? According to Strasnick, assigning higher priority to Jones's preference would "involve denial of a necessary property of primary goods... that all individuals have the same claim to them.... if we were correct in according j's preference a greater priority from a moral point of view, that would entail that j was entitled to more primary goods than i" (p. 89). So the preferences of Smith and Jones must be assigned the same priority in such a case. Otherwise the initial equality assumption of the original position is violated.

Strasnick formalizes this conclusion in his Priority Principle, which reads: "For all i, j, x, y, u, z, if $y_i=z_j$, then $xP_i{\sim}uP_jz$" (p. 89). Here, y_i is i's payoff in state y, and z_j is z's payoff in state z. The Principle says that in a case where individuals i and j receive the same payoffs in their less-preferred states, their preferences for their more-preferred states must be assigned the same priority. The symbols "$xP_iy{\sim}uP_jz$" are read "i's preference for x over y has the same priority as j's preference for u over z." The case represented by my matrix is obtained by letting both y and z be the same state, e, initial equality, where both individuals receive 5 units of primary goods.

Thus Strasnick's formulation assigns the same priority to Jones's preference for u over e as it does to Smith's preference for x over e. Strasnick points out later that in the two-person case the Priority Principle becomes the SPF, "a special case of the difference principle.... if two persons with conflicting preferences would be left equally badly-off if their preferences were frustrated, the social preference must be indifferent between them" (p. 98). So in the two-person case of my example, social choice is indifferent between x and u, that is, between the distributions (6, 5) and (5, 7).

How would agents in the original position, in Rawls's own formulation, view the choice between x and u? This question concerns specific properties of the choice situation defined by the original position assumptions. It is different from the question of how Rawls's difference principle would choose between x and u. According to the rational self-interest assumption of the original position, agents in it will attempt to identify the distributive arrangements in which their overall prospects are best, given that they do not know what their position will be in any of the distributions under consideration. They will choose the arrangements in which their overall prospects seem best to them. In this example there is no

difficulty identifying the arrangement that offers the best prospects, since (5, 7) is obviously better than (6, 5): the two distributions have the same minimum, (5, 7) has a higher maximum, and no distinctions can be made concerning the probabilities of being in either of the two positions—an extremely easy case to decide, it would appear, given the original position choice assumptions.

So in this example, agents in Rawls's original position would prefer (5, 7) to (6, 5), while Strasnick's formal model entails that social preference will be indifferent. Since the two formulations make different choices in at least some cases, neither can be a model of the other.[3] This proves that Strasnick's claim to have provided a formal model of the original position is mistaken.

(We may note that Strasnick, in developing his Priority Principle, uses information about the payoffs individuals will receive—that is, their places in some distribution—and information concerning what their payoff will be in some second distribution, given what it was in some prior distribution. None of this is admissible in Rawls's original position.)

(3) Let us consider how the above discrepancy arises. In Strasnick's formulation, individuals form preferences over distributive states on the basis of known payoffs they will receive in each state. Individuals simply prefer more to less. Then a priority judgment is invoked, which identifies the individual whose preference is to be decisive. A social preference follows, with no danger of inconsistency, since other possibly conflicting preferences are ruled out of consideration.

In Rawls's formulation it is also true that only one preference decides the matter, and problems resulting from conflicting preferences are thereby avoided. But Rawls's ruling preference is arrived at in an entirely different way, without invoking anything resembling a notion of preference priority. Agents in the original position are asked to form preferences over entire distributions of payoffs, on the assumption that they do not know what their position will be in any distribution. They must find some rational procedure for comparing their overall prospects under one distribution with their overall prospects under another: how does one weigh possible gains and losses under one distribution against possible gains and losses under an alternative distribution? Since the agents will have to consider the possibility of being in any position, high or low, they will in effect have to take into account the interests of every person in their choice of distributive principles. For this reason, the original position

choice can be viewed as a device for giving appropriate weight to the potentially conflicting interests of every person affected by the choice. Claims that principles chosen in such circumstances would be fair depend on the adequacy of this device (as much as on the elimination of biased choices by means of information restrictions). Thus the task facing agents in the original position of forming rational preferences over entire distributions of payoffs is an essential element of justice as fairness. It is entirely different from trying to establish preference priorities or deciding whose preference is to rule.

Strasnick's formulation cannot yield a social preference for (5, 7) over (6, 5), or vice versa, because suitable grounds for assigning higher priority to either individual's preference cannot be found, given his interpretation of the initial equality assumption. For Rawls, (5, 7) can be chosen over (6, 5), with no need for an account of why some person's preference should be given greater priority, since the choice is made on an entirely different rationale: when the two distributions are considered in their entirety, overall prospects are clearly better in (5, 7) than in (6, 5). If the task of forming rational preferences over entire distributions is essential to the Rawlsian conception of justice as fairness, then no social choice formulation that employs individual preferences based on known payoffs can possibly provide a model of it, since the essential task of forming such complex preferences cannot be represented within that kind of social choice framework. The example of the preceding section is thus symptomatic of a fundamental difference in approach to the problem of social choice. Rawls makes no attempt to aggregate individual preferences nor to form priority judgments. Strasnick makes no attempt to form preferences over entire distributions of payoffs.

Some additional remarks may bring out this important difference more clearly. One hard part of the choice problems facing agents in the original position is to solve the problem of how rational preferences over entire distributions of payoffs are to be formed. (A second hard part of the choice concerns estimating, as closely as possible given admissible information, the distributions likely to result under the various principles of justice being considered, but this does not concern us here.) The assumptions of the original position are not decisive concerning a proper method for forming such complex preferences. Rawls argues (rather than assumes) that maximin is the proper method, at least for the peculiar features of the choice of principles of justice in the original position. (He does

not defend maximin as a general method for forming such preferences.) If maximin is adopted, then the difference principle, in some form, is chosen. Harsanyi argues, contrary to Rawls, that agents in the original position should maximize expected utility (and he claims to have the weight of Bayesian decision theory behind his argument). If his method is adopted, then the principle chosen is a kind of average utilitarianism (though this principle differs from classical principles in important ways, because of Harsanyi's employment of von Neumann-Morgenstern utilities in the choice).[4] Hare, contrary to both Rawls and Harsanyi, argues for a conservative "insurance" strategy, which assures a decent minimum income (unlike average utilitarianism) but not the highest possible, since the latter could result in excessive losses at the higher end of the distribution in exchange for small gains at the lower end, thus worsening overall prospects.[5]

The original position assumptions thus seem to allow for considerable argument about which method is most appropriate. Its direct assumptions do not obviously rule out any of the methods mentioned above. But for Strasnick, any method that does not result in the choice of the difference principle must conflict with the initial equality assumption (when conjoined with the other axioms). Yet it is hard to see where any such contradiction actually arises, and (so far as I know) no defender of maximin against critics like Harsanyi and Hare has attempted to show that these critics' choice strategies are logically incompatible with the initial equality assumption of the original position.

In Strasnick's formalism it seems impossible to even represent the essential Rawlsian task of forming rational individual preferences over entire distributions of payoffs. Consequently, he can find little sense in the critical debate concerning this aspect of Rawls's derivation (for Strasnick, such criticisms of Rawls are self-contradictory). If arguments like those of Harsanyi or Hare are even consistent—that maximin is not appropriate, that some principle other than the difference principle could be chosen, and so on—then they provide another display of the inappropriateness of Strasnick's model.

(4) Now I would like to examine the Nozick-Strasnick interpretation of the original position, particularly the initial equality assumption that gave rise to the Priority Principle and the immediate discrepancy between Strasnick's SPF and the original

position pointed out in my example. On this interpretation the choice seems to be of a rather concrete sort, concerning the fair division of some preexisting stock of goods. As Nozick puts it (quoted by Strasnick): "Imagine a social pie somehow appearing so that *no one* has any claim on any portion of it, no one has more of a claim than any other person" (p. 88). This interpretation does not allow for any functional dependence of the amount of goods available for distribution on the way such goods are to be distributed. It also does not allow for morally legitimate prior claims to a part of these goods, or to an unequal amount of them, based on an individual's role in producing them (one of Nozick's objections to Rawls).[6]

In Strasnick's words, "We must assume that all individuals have an equal claim to these goods in the initial situation, or none at all" (p. 88). On this interpretation I do not see how the kind of cases Strasnick discusses to develop his Priority Principle could come up for serious consideration. The social pie simply appears, and there is no dependence of its size on how it is distributed. But then only strict equality can be considered as a distributive policy. If 10 units were available in e, and u suddenly became an option with 12 units, why not distribute them (6, 6)? The amount of goods available will not be lessened by an equal distribution, so why even consider (5, 7)?

Furthermore, Strasnick rules out preference of (5, 7) over (6, 5) on the grounds that this grants one individual an entitlement to a greater-than-equal share of primary goods, in violation of the equality assumption. But shouldn't preference for (6, 7) over (5, 5) be ruled out on the same grounds? Surely this grants unequal entitlements. Rawls's difference principle would, of course, sanction such a preference, and Strasnick's SPF would also. But apparently this is not consistent with the interpretation of the initial equality assumption that led to the Priority Principle. This interpretation should rule out any distribution other than strict equality. And since the amount of goods available for distribution will not be affected by the way they are distributed, there is no need to consider any unequal distributions in the first place. ("individuals have an equal claim . . . or none at all.")

It is clear, however, that Rawls assumes a functional dependence of the amount available for distribution on the way it is distributed. He also allows claims to unequal parts of the social pie, based on roles in producing the pie. Larger incomes are viewed as incentives to greater production (or as a means of achieving an efficient allocation of labor) and are justified when they contribute (maximally) to the

welfare of the lowest station. If, following a suggestion of Nozick's, we were to start with a Rawlsian just distribution and interchange persons in income stations in such a way as to maintain the same distributive pattern, or the same minimum income—assuming this were even possible—the resulting new distribution would not necessarily be just on the Rawlsian test, because income difference would no longer be tied to and justified by their contribution to the welfare of the lower positions.[7] These overt features of Rawls's theory are plainly incompatible with Nozick's interpretation of the original position choice, as one concerning the distribution of a preexisting stock of goods, without consideration of claims or unequal entitlements based on productive roles.

A variety of considerations seem, then, to call for an alternative to the Nozick-Strasnick interpretation of the original position choice. In speaking of morally legitimate claims to parts of the social pie that are prior to the original position, Nozick clearly presupposes some kind of more fundamental normative structure upon which such claims are based. Rawls's use of the original position choice, however, seems to be directed at the most fundamental normative questions possible and thus does not allow for any prior claims of the kind Nozick mentions. It is intended to establish the most basic normative structures within which all kinds of claims arise, including those based on productive roles. The choice should not be interpreted as concerning anything as concrete as the distribution of a fixed stock of goods. Rather, it should be interpreted as establishing a basic structure within which claims arise, including those stressed by Nozick. It seems that the claims due to productive role that are recognized in the Rawlsian basic structure are more restricted than Nozick believes just. But it is not true that the original position ignores them. On the contrary, it attempts to provide a theory of their basis.[8]

If we interpret the original position choice as here suggested, the objections of Nozick and Strasnick no longer apply. There are no morally legitimate claims prior to the original position, and the problem is no longer the fair division of a preexisting fixed stock of goods—a formulation that gave rise to Strasnick's problematic, apparently incoherent, interpretation of the initial equality assumption.

I have shown by example that Strasnick's SPF and Rawls's original position yield different choices in at least some cases, thus proving that Strasnick's four axioms and Priority Principle are not a correct formal model of the original position. This discrepancy was traced to

fundamental differences between Strasnick's formulation of the social choice problem—as one of finding a suitable way of aggregating individual preferences over known payoffs—and Rawls's formulation—which requires the formation of rational individual preferences over entire distributions of payoffs. This is an essential element of justice as fairness that cannot even be represented in a social choice framework like Strasnick's (an "impossibility" result of some generality). I have offered a number of criticisms of the Nozick-Strasnick interpretation of the original position choice, particularly its initial equality assumption. Some raise questions about the coherence of Strasnick's argument for the Priority Principle; others raise questions about viewing the choice as one concerning the fair division of a preexisting stock of goods. Finally, I suggested an alternative interpretation of the original position choice—as establishing the framework within which various claims may arise—which is more consistent with overt features of Rawls's theory and which is not vulnerable to the criticism that the original position assumptions rule out recognition of morally legitimate prior claims to the goods being distributed.

We may understand Strasnick's article overall as an attempt (*a*) to shift critical scrutiny of Rawls's theory away from the derivation, on the grounds that the formal model has proven it valid, and to the original position assumptions; and then (*b*) to suggest that these are vulnerable to criticisms like Nozick's, thereby disposing of the difference principle. If my analysis is correct, Strasnick has failed seriously on both points.

1. *Journal of Philosophy* 73 (1976), no. 4, pp. 85-99. All parenthetical page references in the text are to this paper.

2. Robert Paul Wolff, "On Strasnick's 'Derivation' of Rawls's 'Difference Principle,' " *Journal of Philosophy* 73 (1976), no. 21, pp. 849-58.

3. A similar example and related point can be found in Alan H. Goldman, "Rawls's Original Position and the Difference Principle," *Journal of Philosophy* 73 (1976), no. 21, pp. 845-49.

4. John C. Harsanyi, "Cardinal Utility in Welfare Economics and in the Theory of Risk-Taking," *Journal of Political Economy* 42 (1953), no. 5, pp. 434-35. Also "Can the Maximin Principle Serve as a Basis for Morality?" *American Political Science Review* 69 (1975), no. 2, pp. 594-606.

5. R. M. Hare, "Rawls's Theory of Justice," in *Reading Rawls*, ed. Norman Daniels (New York: Basic Books, 1975), pp. 104-5.

6. Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), p. 198 (and elsewhere).

7. Ibid., p. 154.

8. For a similar claim, see Goldman, "Rawls's Original Position," p. 847.

HAYEK'S CONCEPTION OF FREEDOM, COERCION, AND THE RULE OF LAW

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IT IS F. A. HAYEK'S STATED OBJECTIVE in *The Constitution of Liberty*[1] to examine the state of liberty, that is, "the condition of men in which coercion by others is reduced as much as is possible in society" (p. 11). The crucial question to be raised about this work is, To what extent has this inquiry proved instructive in delimiting the range of both freedom and coercion compatible with a free individual's existence as a member of society?

That freedom is good for people to possess is not a moral injunction the force of which derives from natural rights, but rather, for Hayek, is a good that must be justified by recourse to arguments about the conditions that best further the growth of knowledge in civilization. Freedom, consequently, is not an absolute right but a qualified right, the strongest argument for which is the inability of humans to foresee which particular circumscriptions of liberty will be most deleterious to the future good of society.[2] "What is important," he writes, "is not what freedom I personally would like to exercise but what freedom some person may need in order to do things beneficial to society" (p. 32).

The corollary to this conception of liberty as instrumentally justifiable because people are largely ignorant of the future ramifications of their own actions is precisely this: that, should an instance arise in which there were an apparently overriding case for the suspension of a particular liberty in the interest of some other preponderant good, then that liberty should be curtailed in favor of this almost certain common benefit. In order to determine whether this conditional interpretation of liberty provides us with a principle that reduces coercion to the bare minimum and thus maximizes liberty, it is essential that we examine exactly what Hayek means when he uses the term *coercion*.

Hayek begins by distinguishing between the free man and the slave: the relevant distinction being that the former as opposed to

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the latter is independent of the "arbitrary will of another." Individual freedom, "the state in which a man is not subject to coercion by the arbitrary will of another or others," means that its possessor has the opportunity to act in accordance with his own decisions, rather than being subject to the will of another "who by arbitrary decision could coerce him to act or not act in a specific way" (pp. 11, 12). This freedom refers solely to the relations among individuals and its only infringement is coercion by others; it does not apply to the range of physical capacities open to particular individuals or to their power to effect their ends. What the exercise of this freedom does depend upon is the securing of an assured private sphere, in which framework individual decisions can be undertaken.

Coercion is pernicious precisely because it prevents individuals from making the greatest contribution possible to the good of society (p. 134). It is Hayek's intention to define exactly what coercion means so that it will be clear in which cases it will be accurate to say that someone has, in fact, been coerced. According to his initial definition:

> Coercion occurs when one man's actions are made to serve another man's will, not for his own but for the other's purpose. It is not that the coerced does not choose at all; if that were the case, we should not speak of his "action." If my hand is guided by physical force to trace my signature or my finger pressed against the trigger of a gun, I have not acted. Such violence, which makes my body someone else's physical tool is, of course, as bad as coercion proper and must be prevented for the same reason. Coercion implies, however, that I still choose but that my mind is made someone else's tool, because the alternatives before me have been so manipulated that the conduct that the coercer wants me to choose becomes for me the least painful one. Although coerced, it is still I who decide which is the least evil under the circumstances. [P. 133]

One is coerced, then, when another individual so controls one's environment that one is made to serve as a tool for the attainment of that person's ends.

As the discussion progresses, several crucial qualifications are appended to this original definition. "Coercion implies both the threat of inflicting harm and the intention thereby to bring about certain conduct." While the coerced still chooses, the alternatives open to him are determined by another so that he will choose what the

coercer wishes. The coerced is deprived of the possibility of using his knowledge for his own aims because the effective use of intelligence requires that one be able to foresee some of the conditions of one's environment and adhere to a plan of action. "But if the facts which determine our plans are under the sole control of another, our actions will be similarly controlled." (P. 134)

In order to exclude from the category of coercive actions those market activities in which one party has his expectations disappointed, Hayek introduces another qualification:

> So long as the services of a particular person are not crucial to my existence or the preservation of what I most value, the conditions he exacts for rendering these services cannot properly be called "coercion." [P. 136]

But it is, he quickly assures us, only in exceptional cases that the sole control of a service or resource would enable another person to exercise true coercion over us. Thus, he presents his "oasis case" as an interesting rarity:

> A monopolist could exercise true coercion, however, if he were, say, the owner of a spring in an oasis. Let us say that other persons settle there on the assumption that water would always be available at a reasonable price and then found, perhaps because a second spring dried up, that they had no choice but to do whatever the owner of the spring demanded of them if they were to survive: *here would be a clear case of coercion.* One could conceive of a few other instances where a monopolist might control an essential commodity on which people were completely dependent. But unless a monopolist is in a position to withhold an indispensable supply, he cannot exercise coercion, however unpleasant his demands may be for those who rely on his services. [P. 136]

But what of cases in which the withholding of a benefit by another person, a person who does not hold monopoly powers, affects me drastically and adversely; are these cases examples of coercion? Hayek thinks not and therefore offers another modification of the term *coercion* to deal with these occurrences:

> Even if the threat of starvation to me and perhaps to my family impels me to accept a distasteful job at a very low wage, I am not coerced by him or anybody else. So long as the act that has placed me in my predicament is not aimed at making me do or

> not do specific things, so long as the intent of the act that harms me is not to make me serve another person's ends, its effect on my freedom is not different from that of any natural calamity—a fire or a flood that destroys my house or an accident that harms my health. [P. 137]

The discussion is brought to a close with the observation that what is coercion to some may not be coercion to others and that what we should be concerned about is the coercion which will affect the "normal, average person."

It is Hayek's contention, then, that the following conditions must be fulfilled in order to say that a person has been coerced: (1) the coerced person's environment must be controlled by another so that, while he does choose, he is made to choose what will serve the ends of another rather than his own ends; (2) the coercer must threaten to inflict harm with the intention, thereby, to bring about certain ends; (3) that which the coercer denies to me must be crucial to my existence or to what I most value; and, finally (4) the act of the coercer must be directed at me. Upon careful examination, it will become apparent that Hayek's definition of coercion is radically defective, primarily because it provides no objective and clearcut standard of what is a coercive act but rather leaves to individual judgment (with reference to what the individual most values) the determination of when a coercive action has been perpetrated.

Hayek's definition of coercion fails most conspicuously when we turn to an examination of monopoly cases. A clear case of coercion arises, he claims, when our oasis owner is able to exact whatever he demands from the settlers in return for water from his spring, this water being the only water available. In contrast to this case, we are offered that of a man who greatly desires to have his portrait painted by a famous artist who refuses to paint him except at an exorbitant fee. The artist would have a monopoly because the man desires to be painted by this particular artist with his particular skills and not just by any artist. But Hayek contends that this artist would not have coercive power over the man because he could do without the painter's services. The distinction he wishes to draw between these two cases is that in the former the commodity at issue is one that cannot be dispensed with, while in the latter the victim is not vitally affected as to life or the preservation of what he most values.

Now, it is apparent that conditions (1), (3), and (4) of coercion obtain in the oasis case, but it is not at all clear in what way (2) holds. If we assume that the oasis owner offers the settlers as a condition for

obtaining one cup of water the payment of one million dollars, without which payment they will not get the water and will most likely die, then it is incorrect to say that the owner has inflicted harm on the settlers in the event that they cannot pay his price for the water. Hayek claims that the mere power of withholding a benefit will not produce coercion, and that is all the owner has done. To then claim, as Hayek does, that in cases of monopoly ownership of essential services, the mere withholding of a benefit *will* produce coercion, is to import an *ad hoc* assumption to deal with this disturbing case, an assumption that does not follow from any principle he has given us.

How does this case differ from the case where there are three spring owners who, without operating in collusion, offer the following conditions—one cup of water in exchange for $900,000, $500,000, and $50,000, respectively? They are not monopolists, and yet the people still cannot afford the price. In this second example, the spring owners, Hayek would have to say, were not acting coercively while the single spring owner was coercing. If he wished to assert that the three spring owners were acting coercively, because in some sense they collectively held a monopoly over the water supply, then it would follow that whenever an industry as a whole offered essential products at a price that *some individual* could not afford, then it would be acting coercively. This is surely not a consequence that Hayek could accept, because it would leave to every person arbitrary discretion over the prices at which he should get what he considers "essential" goods.

Furthermore, the premise built into the example that the settlers moved to the oasis on the assumption that water would always be available at a reasonable price is both irrelevant and illicit. Since an "assumption" is not a contractual relationship, the spring owner owes these people nothing. Unless Hayek wishes to maintain that all those in need of some commodities or services have a claim upon those who, through foresight or skill, have possession of these goods, then the settlers have no legitimate claim upon the owner, and he cannot be said to have harmed them by refusing his services to those who do not meet his conditions. In fact, it is not clear that the first condition of coercion has been satisfied by this example, either, because the spring owner did not cause the second spring to be dessicated. The real difficulty here is that Hayek is introducing irrelevant factors by focusing upon the need of the people or the exclusive nature of the possession. If an owner of a business is justified in charging whatever price he wishes for the products he owns

when he is in a competitive market, then why should it be illegitimate for him to exercise this same right when his competitors have, for whatever reason, "dried up"? Hayek offers no principle for aborting this right; what he does is, in effect, assert that *he* doesn't think this right is desirable any longer because it endangers the communal good. But is his dislike any reason for expropriating the spring owner who, through no fault of his own, lost all his competitors?[3]

The difficulty will be made even clearer if we examine a case that excludes the question of ownership of natural resources. Take the example of a man on the verge of death who can only be saved by a new and difficult operation that can be performed only by one doctor, its inventor. Without this operation the man will most certainly die, but the doctor refuses to perform the delicate operation without receiving a certain fee that the sick man cannot afford. This case differs from the "painter" example, because the service withheld is crucial to the existence of the person affected and it parallels the oasis case because this is a monopoly situation. If the action of the spring owner is not coercive, as I have shown, then the action of the doctor is not coercive, either. But Hayek would have to claim that both cases are instances of coercion. What follows from this claim? It is Hayek's argument that the government must step in to protect people from coercion, so the doctor should be compelled to perform the operation just as the spring owner should be compelled to sell his water at prices that people can afford. But now look at the state of affairs that arises: (1) the doctor is being forced to serve as a tool for another man's ends that are not his own; (2) the state has threatened him, or else he would have stuck to his original conditions for the performance of the operation, (3) the state is depriving him of what he most values (that without which he cannot be free, says Hayek), the liberty to pursue his vocation as he sees fit; and (4) the act is clearly directed at him, since he is the only person who can perform the operation. Clearly, now, it is the doctor who meets Hayek's criteria of a coerced agent.

Even on Hayek's own instrumental grounds, such consequences would be clearly unacceptable, since they would have the effect of discouraging people from inventing new, life-saving procedures because they would know that their very success would deprive them of their liberty to pursue their own ends and would make them the helpless tools of anyone who needed their services. In no event could this be counted as a benefit to society. As we see, then, Hayek's criteria for coercive actions can be consistently applied in ways that

would be unacceptable to him. Furthermore, the oasis example, which was supposed to be a clear case of coercion, has been shown to be, at the very least, far from clear.

There is, in addition, a more fundamental difficulty, which lies in the third condition of coercion; that is, that which the coercer denies to me must be crucial to my existence or what I most value. But if, for whatever reason, it becomes crucial to my life or what I most value that I be painted by one particular painter (say I am on my deathbed, and only the sight of my portrait painted by this artist will give me the courage to fight on), then that painter is coercing me by withholding his talent. And as a consequence, presumably, the government should step in to prevent this act of coercion by forcing the painter to meet my terms. Hayek, apparently recognizing such an objection, introduces the notion of the "average, normal person" as a test of how much discomfort constitutes coercion. But this doesn't provide an objective standard upon which cases can be discriminated, because it is itself dependent upon some one authority defining who is an "average, normal person" and how much discomfort this person should be able to take. Because A does not value most highly what B values, or what the average person values (supposing that could ever be determined), there is no way that we could ever claim that condition (3) was not satisfied if the offended person claimed that it was. Since all four criteria must be met in order for an act to qualify as coercive, there will always be an equivocation built into any determination because of the subjectivism of this third criterion.

What follows from these objections is that under Hayek's definition of coercion a free market could not exist, since he leaves to every individual the discretion to claim coercion when some good that he considers crucial to his existence is offered only at a price that he cannot or is unwilling to pay. He is, then, perfectly within his rights to call in the government to stop the coercer and force him to offer the good at a price that he considers reasonable. This is an odd consequence, indeed, for a conception that was supposed to lay the groundwork for a free-market economy and a free society.

Hayek's attempt to relate his theory of coercion to the critical case of state action leads him on to even greater difficulties than were encountered with his initial formulation of the definition of coercion. He begins by asserting that coercion must be the exclusive instrument of the government to be exercised for the sole purpose of

preventing instances of far more harmful coercion of one individual or group by another.

> Coercion, however, cannot be altogether avoided because the only way to prevent it is by the threat of coercion. Free society has met this problem by conferring the monopoly of coercion on the state and by attempting to limit this power of the state to instances where it is required to prevent coercion by private persons. This is possible only by the state's protecting known private spheres of the individual against interference by others and delimiting these private spheres, not by specific assignation, but by creating conditions under which the individual can determine his own sphere by relying on the rules which tell him what the government will do in different types of situations. [P. 21]

In order to establish these private protected spheres in which individuals are, then, free to act, it is necessary that the government have within its power the ability to coerce individuals. The recognition of property is the first step in delimiting the private sphere, and the established network of rights created by contract is the framework of exchange. By ensuring that the individual spheres are not drawn up by government with reference to particular things or particular persons, the expectation is that this necessary exercise of governmental coercion will largely lose its potentially menacing nature.

Governmental coercion can be reduced to a minimum by observing the following conditions: (1) it must be limited by known, general, abstract rules; (2) the effect of these laws on specific individuals must not be foreseen by the lawgivers; (3) the law must only prescribe limited and foreseeable duties; and (4) the law must leave the individual free of the arbitrary will of another:

> The coercion which a government must still use for this end is reduced to a minimum and made as innocuous as possible by restraining it through known general rules, so that in most instances the individual need never be coerced unless he has placed himself in a position where he knows he will be coerced. Even when coercion is not avoidable, it is deprived of its most harmful effects by being confined to limited and foreseeable duties, or at least made independent of the arbitrary will of another person. Being made impersonal and dependent upon general, abstract rules, whose effect on particular individuals cannot be foreseen at the time they are laid down, even the coercive acts of government become data on which the individual

> can base his own plans. Coercion according to known rules, which is generally the result of circumstances in which the person to be coerced has placed himself, then becomes an instrument assisting the individuals in the pursuit of their own ends and not a means to be used for the ends of others. [P. 21]

Particular laws, then, must be abstract, general, and of the nature of a "once-and-for-all" command that is "directed to unknown people and that is abstracted from all particular circumstances of time and place and refers only to such conditions as may occur anywhere and at any time" (p. 150). Furthermore, these laws must be known and certain and be applied equally to all persons without respect to individual differences. To be governed always by the rule of law and not of men means that administrative or judicial discretion must be limited as far as that is possible.

Laws of this nature are largely deprived of their coercive nature; they become fixed givens of our environment, similar to the laws of nature:

> Provided that I know beforehand that if I place myself in a particular position, I shall be coerced and provided that I can avoid putting myself in such a position, I need never be coerced. At least insofar as the rules providing for coercion are not aimed at me personally but are so framed as to apply equally to all people in similar circumstances, they are no different from any of the natural obstacles that affect my plans. In that they tell me what will happen if I do this or that, the laws of the state have the same significance for me as the laws of nature; and I can use my knowledge of the laws of the state to achieve my own aims as I use my knowledge of the laws of nature. [P. 142]

Conscription and taxation being avoidable or at least predictable, Hayek is willing to categorize them as practically noncoercive governmental acts:

> Of course, in some respects the state uses coercion to make us perform particular actions. The most important of these are taxation and the various compulsory services, especially in the armed forces. Though these are not supposed to be avoidable, they are at least predictable and are enforced irrespective of how the individual would otherwise employ his energies; this deprives them largely of the evil nature of coercion. If the known necessity of paying a certain amount in taxes becomes the basis of all my plans, if a period of military service is a fore-

> seeable part of my career, then I can follow a general plan of life of my own making and am as independent of the will of another person as men have learned to be in society. [P. 143]

Hayek's conception of general, abstract rules of law does not, however, exclude the government from legislating with reference to specific classes of people, providing only that both those within and those outside of the particular group concur as to the advisability of the law. But the final "justification of any particular rule of law must be its usefulness" (p. 159). His position is articulated most succinctly in the following passage:

> The conception of freedom under the law that is the chief concern of this book rests on the contention that when we obey laws, in the sense of general abstract rules laid down irrespective of their application to us, we are not subject to another man's will and are, therefore, free. It is because the lawgiver does not know the particular cases to which his rules will apply, and it is because the judge who applies them has no choice in drawing the conclusions that follow from the existing body of rules and the particular facts of the case, that it can be said that laws and not men rule. Because the rule is laid down in ignorance of the particular case and no man's will decides the coercion used to enforce it, the law is not arbitrary. This, however, is true only if by "law" we mean the general rules that apply equally to everybody. This generality is probably the most important aspect of that attribute of law which we have called its "abstractness." As a true law should not name any particulars, so it should especially not single out any specific persons or group of persons. [P. 153]

Now, the crucial question to be posed concerning Hayek's view of the rule of law is, Does this concept provide an adequate and unambiguous standard for differentiating between those governmental actions that are coercive and those that are not? Upon examination, the rule of law as expounded by Hayek will be shown to offer no principle by which laws dangerous to a free society, yet satisfying the conditions of a legitimate law, can be condemned. The rule of law is a framework, a necessary condition, for a free society that coerces only those citizens who are themselves coercers; but it is not a sufficient condition, precisely because it gives us no principle for determining what the contents of "rules of law" should be or what areas are by their very nature outside the purview of governmental action.[4]

For Hayek to maintain (a) that the government should coerce individuals only to protect individuals from coercion by others and (b) that individuals should be coerced, in most cases, only when they have engaged in a deliberate act that they knew would place them in such a situation, and then for him to claim that taxation and conscription are largely deprived of their coercive nature by being predictable, is to argue for a contradiction. For a man who contends that the goal of achieving equalization of income is not a proper justification for governmental use of coercion because no individual or group of individuals can determine the potentialities of others, it seems rather inconsistent for him to contend in the case of conscription, which is a far more serious case, that some people do know better than others what ends those others' lives should serve and what the real dangers to their lives are. To A, an unwilling conscript, the distant danger that barbarian hordes from country *X* may sweep down on his own country and destroy him, seems a far more remote possibility of coercion than the order of his own government that conscripts him and sends him to fight country *X* on its own remote shores. The claim that conscription is justified is tantamount to positing the existence of some group of individuals (some elite) who know best what ends the lives of individuals should serve. While this might be a satisfactory conclusion for an advocate of totalitarianism, it could hardly be consistent with Hayek's stated objective of establishing the conditions for a free society.

In point of fact, there are an unlimited number of possible legislative actions that would satisfy Hayek's condition of consistency with the rule of law and yet be extremely threatening to the lives and property of putatively free citizens. A law, for example, proscribing abortion might satisfy all the conditions including that of being agreed to by majorities both inside and outside the affected group, yet A, who desires an abortion and cannot receive one because of this law, is clearly coerced while neither having engaged in nor threatened any person with a coercive act of her own. And a far more difficult question is, How can the legislator determine when majorities inside and outside the affected group would concur; this is especially difficult when we recall that these laws were supposed to be once-and-for-all enactments that refer to as-yet unknown persons.

The fact that person B knows that from his $10,000 income 25 percent will be forcibly taken from him by taxation to pay for (*a*) the sustenance of indigent people whom he would otherwise not wish to aid, (*b*) the education of other peoples' children in doctrines that he

abhors, (*c*) the erection of municipal buildings, swimming pools, etc., that he neither desires nor will use, (*d*) the prosecution of a war of which he does not approve, and (*e*) whatever other projects the majority can dream up on which to spend his money in ways that he would not choose to have it spent if it had not been extorted from him, is hardly to contend that B is a free and noncoerced agent. If no matter how much he limits his income, he cannot help supporting causes that he heartily detests (except by reducing his earnings to zero), then B has been made to serve the ends of others. The knowledge that this particular tax was not directed specifically at B would hardly convince B that he was not being coerced, nor should it. And is he not, also, subject to the arbitrary will of another, that is, the will of a majority who determine how the products of his labor are to be utilized?[5]

Furthermore, Hayek's claim that civil laws promulgated in accordance with his standards of the rule of law would be similar to the natural laws of physics seems fallacious, indeed. Natural laws have as their essential feature a claim to necessity and immutability as regards this world, and they are not dependent for their validity upon the creation, discovery, or acceptance by human beings; they are contingent upon neither the will, choice, nor acknowledgment of some human beings. The same can, surely, not be said for civil laws, which are quite clearly the work of specific people—the result of their particular will, choice, and acknowledgment. The fact that if I jump from a ten-story building I will not fly gracefully through the air, but will instead plummet thunderously to the ground, is the result of my inability to abrogate the laws of nature; the fact that if I refuse to stop at a red light I may be apprehended by a policeman and made to pay some penalty is a case that bears only superficial resemblance to the first, although penalties are paid by me in both instances. In the first case, the fact that I cannot fly is dependent upon the will of no human agent; it holds true everywhere on earth; it is true of all persons; and it is not contingent upon the observation or apprehension of any agent—in short, the penalty I must pay is absolutely necessary. In the second case, the penalty I must pay is dependent upon the will of another human agent (the legislator); it obtains in some places on earth and not in others; and it is contingent upon the presence of some agent to apprehend my transgression—all of which renders the penalty purely contingent. So much for Hayek's attempt to sanctify civil laws by assimilating to them the properties of natural, physical laws.

If, under Hayek's system, the state can conscript citizens to serve

against their will and force them to pay taxes to serve ends that they have not approved, and yet still not be acting illegitimately, while the spring owner and the doctor who simply attempt to sell their services at prices that make such a sale worthwhile to them are considered coercive agents, then something has gone radically awry with Hayek's definition of coercion and its application to the state in the guise of the rule of law.

Apart from its function as a coercive agency, the government may, on Hayek's view, also, perform as a service agency. But to perform these services it must tax; that is, as he now concedes, to act coercively. Here, he does label taxation a coercive act; but he does so not to oppose it; rather, he says that most people will find it expedient to obey, so, in their own turn, they can coerce others to do their bidding.

> It is not to be expected that there will ever be complete unanimity on the desirability or the extent of such services, and it is at least not obvious that coercing people to contribute to the achievement of ends in which they are not interested can be morally justified. Up to a point, most of us find it expedient, however, to make such contributions on the understanding that we will in turn profit from similar contributions of others toward the realization of our own ends. [P. 144]

It is lamentable, indeed, that Hayek raises the question of the morality of coercing people through taxation to support causes of which they disapprove, only to have him deflect the issue with the claim that expediency should be the relevant criterion.

> But, though a few theorists have demanded that the activities of government should be limited to the maintenance of law and order, such a stand cannot be justified by the principle of liberty. Only the coercive measures of government need to be strictly limited. We have already seen that there is undeniably a wide field for non-coercive activities of government and that there is a clear need for financing them by taxation. [P. 257]

Once again, Hayek fails to recognize that the service activities of government cannot be noncoercive if they employ taxation. To argue, as he does, that because *he* (or a lot of other people) sees a clear need for these kinds of services they can be legitimately undertaken by the government, is to establish himself (or some other judge) as the arbiter of what individual ends should be. For

determining that "beyond this point the government cannot act," he has provided us with no principle except expediency (a standard that is no fixed guide because it implies either that every person should judge what is most expedient for him, which would exclude precisely those activities Hayek is arguing for, or that there be some final, all-knowing judge of what is expedient for "society"). For example, in his discussion of governmental expropriation of the property of individuals, he says that such an act should only be undertaken if the public good outweighs the private harm. And again we face these same, persistent problems—Who is to be the judge, by what standards, by what right, and expedient or for the good of which people? How can the judge quantify public good, and by what criteria is he entitled to say that the good of some members of society should be maximized at the expense of others?

It has been the contention of this critique of Hayek's conception of coercion and his treatment of the question of coercion and the state that his analysis does not provide us with a clear and nonobfuscatory criterion for delimiting those actions, be they individual or governmental, that fall under the category of coercive actions. Regarding the original question about the extent to which Hayek's conception of liberty leads to the minimization of coercion in the state, the answer must be that, rather than limiting coercion to the bare minimum, he has opened the floodgates to a whole host of governmental measures financed by compulsory taxation and judged primarily on a standard of expediency.[6] Perhaps it is not too harsh to say that Hayek himself has in his discussion of this subject done much to "blur the fundamental distinctions."

Thus, the bankruptcy of Hayek's instrumental justification of liberty has been demonstrated. Such a "utilitarian" approach, one that sanctions liberty as a means to maximize social well-being and judges all legislation on an expediency standard, cannot provide an inviolable foundation for personal liberty, private property, and the free market. On a natural-rights moral foundation, one that Hayek would reject, liberty would be an imprescriptible end in itself, not the means to a supposedly higher end of "social benefit." This alternative moral underpinning offers certain other advantages to a defense of a free-market system; that is, it eliminates the oasis owner as a coercer because he has absolute ownership of his property, and no one else can claim "need" or "the public good" to demand his product from him; it places boundaries on the concept of the "rule of law" by delimiting individual private claims (or rights) that cannot be proscribed by any majority decisions; and it eliminates the

taxation and conscription cases as clear violations of the rights to property and life.

It is apparent that Hayek, like the utilitarians, rejected rights arguments with the obvious strategic advantages that they bring. Presumably, he would condemn them for the traditional Benthamite reasons (that they are merely metaphysical and unproven),[7] but his transition to an efficiency or social-benefit standard does provide him with the flexibility that a natural-rights underpinning would have eliminated. Just as John Stuart Mill attacked the reification of the "noninterference" principle and proceeded to embrace social welfarism, if not socialism,[8] so Hayek, through the same strategy, has come to acquiesce to taxation, conscription, and state provision for the disadvantaged.

1. Chicago: University of Chicago Press, 1960. All parenthetical page references in the text are to this work.

2. The centrality of the argument from human ignorance to Hayek's defense of freedom is displayed with even more clarity in a later work, *Law, Legislation and Liberty*, vol. 1 (London: Routledge and Kegan Paul, 1973). Here, Hayek attacks what he terms "constructivist rationalism," the view that institutions exist by human design to fulfill designated purposes and that they can be redesigned to better fit these purposes. A spontaneous order—one in which individuals operating with fragmented pieces of knowledge pursue their own ends, is maintained by rules of law, and societal purposes are not planned—is the opposing vision that Hayek endorses. For example:

> Economics has long stressed the "division of labour" which such a situation involves. But it has laid much less stress on the fragmentation of *knowledge,* on the fact that each member of society can have only a small fraction of the knowledge possessed by all, and that each is therefore ignorant of most of the facts on which the working of society rests. Yet it is the utilization of much more knowledge than anyone can possess, and therefore the fact that each moves within a coherent structure most of whose determinants are unknown to him, that constitutes the distinctive feature of all advanced civilization. [P. 14]

3. Ronald Hammoway, in an article entitled "Hayek's Concept of Freedom" (*New Individualist Review* 1 (1961), offers a parallel analysis of Hayek's oasis case. He analyzes the concept "reasonable price," arguing that if *reasonable* means "competitive," no determination of "reasonable price" could be made where no competitive market exists (p. 29).

4. Similar objections have been lodged by other critics, e.g., R. Hammoway, "Hayek's Concept of Freedom"; J. C. Rees, *Philosophy* 38 (1963); Lord Robbins, *Economica,* Feb. 1961. Hayek's attempt to refute these objections appears in *Law, Legislation and Liberty,* 1: 101. Here, he embraces a Millian distinction between activities that affect (later he amends this to "affect and harm") others and those that only affect the individual actor. The claim is that only the former activities fall under the purview of the law and hence that his stipulations for generality in the law would be applied only to those actions that are other-regarding and affect others. Does this reformulation solve the problem? As generations of critics have argued, however, since the publication of J. S. Mill's *On Liberty,* the "harm" principle is ambiguous and subject to interpretation. (What activity, no matter how personal or insignificant

it might be, cannot be construed by someone as affecting the interest of another? For example, if I eat this piece of cake, you can't. You are, clearly, affected; and if it is the last piece, you are harmed.) It can provide no clear standard to curtail legitimate law-making fields from illegitimate. And Hayek's example of religious conformity, in which such stipulations would fall outside of the public domain, seems to dissolve in his hands.

> At least where it is not believed that the whole group may be punished by a supernatural power for the sins of individuals, there can arise no such rules from the limitation of conduct towards others. . . . [P. 101]

By implication, then, when the group believes that such supernatural power will be visited upon the collectivity, it would be justified in legally proscribing sacreligious conduct. Once again, the "affect or harm"-others criterion provides no delimiting principle. Hayek's problems multiply when he goes on to attempt a definition of actions that harms others. The harm criteria themselves, it seems, will be subject to continuous reinterpretation by judges and legislators.

5. This problem is not remedied in Hayek's more recent work (e.g., *Law, Legislation and Liberty*, 1: 142), in which he argues that social legislation that establishes provisions for certain minorities and would require additional taxation need not violate "general rules of conduct." "It would not make the private citizen in any way the object of administration; he would still be free to use his knowledge for his purposes and not have to serve the purposes of an organization." It is only "social" legislation that aims at particular purposes with respect to favored groups that Hayek finds offensive, because it cannot be framed as "general rules of conduct."

6. Hayek attempts in *Law, Legislation and Liberty*, 1: 57-61, to rescue freedom from expediency assessments; but, still abjuring the designation of liberty as a natural right, he fails in this attempt, too.

> A successful defense of freedom must therefore be dogmatic and make no concessions to expediency, even where it is not possible to show that, besides the known beneficial effects, some particular harmful result would also follow from its infringement. Freedom will prevail only if it is accepted as a general principle, whose application to particular instances requires no justification. [P. 61]

Hayek contends that an ideology (and presumably the principle of freedom that he endorses) cannot be "proved" or demonstrated (p. 58). From where, then, does this "general principle" derive its status? Freedom, he asserts, is a higher-order principle, one that ought to be held above the fray of pragmatic trade-offs with other values. On an evolutionist account of the formation of law and, indeed, of morality, such an inviolable principle cannot be postulated. It is contradictory to claim, as Hayek does repeatedly, that all societal rules must evolve, that individuals ignorant of the myriad events and plethora of knowledge that constitute society cannot create law volitionally, and then to declare that freedom is somehow an indubitable value. Clearly, the latter view of liberty is incompatible with an evolutionist conception of jurisprudence and morality. Regimes whose regnant principle is *un*freedom have proliferated and flourished throughout the evolutionary process. Indeed, coercive societies abound in our own age and have succeeded in perfecting the technology of repression. The evolutionary, or historical process, cannot grant ultimate moral sanction to the principles of freedom. To argue that it can would be to fall precisely into the historicist camp that Hayek has so eloquently condemned.

7. Jeremy Bentham, *Anarchial Fallacies,* in *The Works of Jeremy Bentham,* ed. John Bowring (Edinburgh: William Tait, 1839).

8. John Stuart Mill, *The Principles of Political Economy,* ed. Sir William Ashley, 1909 (New York: Augustus M. Kelley, 1969).

LIBERTY, AND POSSIBLY WEALTH

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Among economists, there are two widely held but quite different concepts of freedom. F. A. Hayek defines freedom as "the state in which a man is not subject to coercion by the arbitrary will of another or others."[1] This noninterference concept of freedom, also strongly supported by Milton Friedman and Fritz Machlup, holds that the essential component of individual freedom involves being free from external coercion and restraint by other people.[2] In the words of Friedman:

> Political freedom means the absence of coercion of a man by his fellow men. The fundamental threat to freedom is power to coerce, be it in the hands of a monarch, a dictator, an oligarchy, or a momentary majority.[3]

The noninterference, or lack of coercion, concept has been strongly challenged by an "effective power" concept of freedom. In the latter view, freedom is identified with the power to act, and freedom in the sense of noninterference is held to be of no practical value to those who lack buying power.

George Stigler, in a recent article, develops a version of the effective-power concept of freedom. He identifies freedom with the "domain of choice" and challenges the validity of the concept of freedom that distinguishes coercion by other men from other limitations on choice.[4] Freedom or liberty in this domain-of-choice sense expands with an enlargement of income and wealth, which increases the effective capacity to choose.

> A wider domain of choice is another way of saying that a person has more freedom or liberty. From this viewpoint one can properly say that even with the vast expansion of public controls over earning and spending in the United States since the Civil War, there has been an enormous expansion in the average individual's liberty.[5]

In this view, freedom increases with the amount of income and the consequent increase in size of the individual's opportunity set. It

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follows that an increase in income widens the domain of choice even in highly regimented societies. It is contended that the present-day Russian, for example, has more liberty than his nineteenth-century ancestors because his income is higher.[6]

In challenging the noninterference meaning of freedom, Stigler argues that it is (1) not possible and (2) pointless to distinguish between restrictions imposed upon an individual's range of choice by budget limitations (limitations of income or of wealth) and restrictions on choice due to coercion by others. The following analysis suggests that wealth and freedom are not synonymous and that there are important reasons for retaining a noninterference concept of freedom.

Can the Distinction Be Made?

In challenging the Hayekian view that freedom represents the absence of coercion by others, Stigler contends that many, and perhaps all, of the restrictions imposed upon our range of choice by wealth are, at least to some extent, the product of the behavior of other people. Consider two examples presented by Stigler where restrictions on our range of choice are alleged to be in some measure the product of the behavior of others:

> 1. If I cannot attend a symphony concert because there are not enough other demanders of a symphony orchestra in my community, my wealth has been reduced (in utility terms) by the behavior of others.
>
> 2. If other people have reduced their demand for symphony concerts because of taxation (not necessarily progressive) of income by the state, have I lost liberty or only wealth?[7]

The first example in which my wealth is alleged to be restricted by other people is not persuasive. If I cannot attend a symphony because not enough people wish to attend, in what sense is it appropriate to say that my wealth has been *reduced* by the behavior of others? First, the contention that it has been implies that my level of wealth has been or could be higher. It is correct that my wealth as a music lover would increase, *ceteris paribus*, were demand sufficiently great to justify a symphony orchestra. Nevertheless, it seems odd to contend that my wealth has been reduced in this case, since presumably demand has not been sufficiently great in the past to justify

a symphony orchestra. Stigler's case would appear to be an example of what Harold Demsetz has described as the nirvana approach.[8] My wealth is reduced only when compared with what it would be if people's tastes were more to my liking. The conclusion that my wealth is reduced in this case implies that somehow people's tastes should be different and that, if they were, my wealth would be higher.

Second, to blame this lack of wealth on my part on the behavior of other people (not enough people will support a symphony orchestra) implicitly assumes that I have a "right to music." Other people cannot have an obligation to support an orchestra unless I have a right to such music. The "right" to music is similar to the "right to food" and other "economic rights." Such positive rights demand as their counterpart that someone must provide what others have the purported right to. Yet nowhere does Stigler purport to establish such a right or such an (unchosen) obligation on the part of other people.[9]

This example illustrates the difference between the "I may" (noninterference) and "I can" (effective-power) concepts of freedom.[10] In the example cited, I am free to ("I may") attend a symphony concert although I cannot do so. I am free in the noninterference but not in the effective-power sense. The reason I do not have an opportunity to attend a symphony concert is not coercion by other people but rather wealth limitations.

The second case with which Stigler questions our ability to distinguish coercion by others from other limitations on choice is one where a symphony orchestra was presumably profitable and available until taxation reduced the demand, eliminating my option to attend a symphony concert. Which is affected—"liberty or only wealth"?

Political actions frequently affect liberty as well as wealth. Any tax involves coercion. The higher the tax, the more coercion involved and the more effort devoted to circumventing the tax. The fact that the benefits may exceed the costs of taxation for some people does not negate the fact that liberty or freedom is affected by taxation even though the tax is a general one and is not intentionally capricious in its effects. The effects of any tax can be quite different for different individuals depending upon the circumstances. Whether my welfare has suffered depends upon my subjective assessment of the situation. Freedom, like material wealth, is but one aspect of welfare.

In reality, there are conflicts of freedom, and it is not always easy to assess the impact of a policy on freedom. Stigler mentions the example of limitations on auto parking.[11] Freedom on my part to ignore traffic regulations, for example, interferes with the freedom of other people to drive. In traffic regulations, we accept restrictions on driving as a way of obtaining the maximum freedom to drive. There are also conflicts of freedom within the economic sphere.

> The freedom of coalition and of contract may be used to restrict the freedoms of work and enterprise, and thereby the freedoms of choice of consumption and occupation. We know of many instances where workers' or businessmen's combinations have created monopolistic positions restricting entry into occupations or industries.[12]

The fact that freedoms may conflict and that policies may affect liberty as well as wealth does not lessen the importance of retaining separate meanings for freedom and wealth. Both contribute to welfare, but neither should be equated with welfare. Furthermore, different people are likely to place different weights on the importance of freedom and material wealth.

Purpose of Distinction

The purpose of distinguishing the effective power from the noninterference concept of freedom is clearly seen in the case of limitations by nature. The concept of freedom becomes meaningless when it is expanded to include naturally occurring limitations of human capacities and opportunities. Freedom is logically identified with the threat of being restricted by other people. If constraints on my behavior are due to nature, in what sense is it meaningful to say that my freedom is infringed? An infringement of freedom has moral connotations. Consequently, only human conduct can appropriately be called just or unjust.[13] In the case of freedom of scientific inquiry, for example, "Would it not be preposterous if some ultra-pragmatists were to say that Professor X lacks freedom in inquiry since, although no one limits his research activities, his reasoning powers are limited?"[14]

The contention that it is pointless to distinguish between restrictions on wealth and liberty in the example cited by Stigler concerning gasoline rationing is also not convincing.

> Whether the state forbids me (by a rationing system) to use more than ten gallons of gasoline a week, or whether I am prevented from doing so by its high price (not including taxes) is of little direct significance to me; in either case my driving is limited by decisions (to ration or to buy gasoline) of my fellow citizens.[15]

While an individual's driving may be limited to the same extent by state-imposed rationing as by limitations of wealth in the immediate moment of time, rationing restricts the range of choice more as conditions change and the individual has an opportunity to make adjustments. Market rationing permits the individual to use more gasoline when his income increases or when other conditions change so that he prefers to substitute gasoline for other goods. In the absence of gasoline rationing, the individual can make choices now (e.g., moonlight to earn additional income) that will eventually enable him to exercise that freedom.[16]

The idea that legal restraints are important only insofar as they affect the domain of choice suggests that restraints that do not affect my current opportunity set are unimportant, or that as an individual I am oblivious to all political restraints that are not binding on me. In this view, a legal prohibition against long hair, men's hats, ice hockey, or Cadillacs would appear to be of "little direct significance to me." Yet, if people generally acted in accordance with narrowly defined self-interest and were oblivious to all political controls or restrictions on individual behavior that did not currently affect them, there could be little support for a free society. Mutual tolerance is important in establishing the formally defined rules as well as in numerous interactions that are conducted in an orderly manner without rules.[17]

There is evidence that people are, in fact, concerned about political controls that are not currently binding on them. George McGovern discovered in 1972, for example, that his proposal for a large increase in estate taxes was opposed even by many people for whom such increases were of "little direct significance."

Further Implications

It is also important to maintain the distinction between freedom and wealth in contrasting the market with a centrally directed economy. There is a growing consensus that central direction is

inefficient as judged by its ability to produce material goods and services (wealth).[18] Opposition to the market system, however, focuses on moral or ethical issues.[19] If restrictions on choice arising from coercion by other individuals are not differentiated from budget limitations, there is no basis for differentiating between economic and political systems on grounds of freedom.

In the effective-power concept of freedom, general increases in wealth imply general increases in liberty.[20] This pragmatic view is consistent with the utilitarian approach, which holds that the ultimate standard in judging an institution or policy is whether it is a useful means for helping the "immense majority" attain their chosen ends *whatever those ends may be*. The idea that the ends are taken as given and that goodness is measured by numbers of proponents is clear in the following passage:

> I share Hayek's opposition to a host of modern public policies. They certainly cannot be opposed effectively on moral grounds: the moral views of a large share of the population are highly congruent with these policies. If a policy is demonstrably inefficient in achieving its goals, the more efficient policy ought to be preferred by members of the society.[21]

If the ends are taken as given and the only consideration is the efficacy of alternative measures to achieve those ends, there is nothing to protect individual rights.[22] There is no reason to expect momentary majorities to be staunch guardians of minority rights. The power to coerce is a threat to freedom whether the threat is by a dictator or a democratic majority. Thus, freedom of the individual may conflict with majority rule. In summary, the utilitarian approach implies neither free markets nor the protection of other individual rights.[23]

There is another important reason for keeping the freedom and wealth concepts separate. Freedom as a component of total welfare is desirable in and of itself. Although there is a great deal of evidence that freedom and prosperity are positively correlated, freedom would be considered desirable by many people even if it were to involve a trade-off with material goods and services.[24] This point was clearly made by Wilhelm Röpke:

> It is for the same reasons that I champion an economic order ruled by free prices and markets. . . . this is the only economic order compatible with human freedom, with a state and society which safeguard freedom, and with the rule of law. . . . We

> would uphold this economic order even if it imposed upon nations some material sacrifice while socialism held out the certain promise of enhanced well-being.[25]

When freedom is identified with material wealth, the economic order is evaluated solely in terms of output of goods and services. There is a great deal of evidence, as suggested above, that the market economy is most productive in terms of material output. This fact alone, however, will not answer those who criticize the market on humane grounds. Furthermore, the identification of freedom with material wealth undermines the arguments of those (like Röpke) who defend the market on humane grounds. If freedom cannot be distinguished from material wealth, that political and economic system is most free which is most productive in terms of material output. This discounts the value of freedom as an end in itself as well as the significance of the often-cited relationship between economic and political freedom.[26] As Ropke, Friedman, Hayek, Ludwig von Mises, and many others have persuasively argued, there is no way to preserve political freedom in the absence of economic freedom. In Friedman's words:

> Historical evidence speaks with a single voice on the relation between political freedom and a free market. I know of no example in time or place of a society that has been marked by a large measure of political freedom, and that has not also used something comparable to a free market to organize the bulk of economic activity.[27]

When freedom is identified with or considered to be indistinguishable from material wealth, the concept of political freedom loses much of its meaning. What happens, for example, to the concept of civil liberties when no distinction is made between restrictions due to political regulations and those due to wealth? Are free institutions only valuable insofar as they lead to increases in material output?[28] Was the most important effect of the recent Khmer Rouge regime in Cambodia associated with the decrease in rice production? Is there really no important distinction "between the liberty of a man who is legally free to travel abroad but lacks the wherewithal to do so and a man who has the wherewithal but is forbidden by the state to travel"?[29] Or, between the man who has insufficient funds to print a newspaper and the man who is legally forbidden to do so? Is freedom of inquiry of no value to those who are not so engaged? More generally, are only those political constraints that are currently binding important to us?

Conclusions

Although both material wealth and liberty contribute to welfare and expand the domain of choice, they are different concepts. Freedom means noninterference, while wealth involves material goods. The distinction between wealth and freedom is not always clear-cut, since many policies affect both wealth and liberty. It is important, however, that the distinction between freedom and wealth be maintained, since people reveal by their actions that they perceive a trade-off when increases in individual freedom can only be secured by a reduction in wealth. Thus, the "freedom to be one's boss," for example, is often cited as a reason for accepting a lower-paying job. Further, many American settlers came to the United States for reasons of political and religious liberty.

The market is criticized on a number of grounds despite its demonstrated superiority in the production of goods and services. Some people dislike the market because the "wrong things" get produced, others because it is based on self-interest, and still others because it does not achieve "social justice." Many socialists are willing to forgo the productivity of the market for ideological reasons. Collectivist methods of agricultural production are maintained in Russia and China, for example, despite much greater productivity on private plots. Egalitarian measures are supported in the West despite their effects on material prosperity.[30]

It is important, then to maintain the distinction between freedom and wealth in assessing the effect of alternative political and economic systems upon freedom and material wealth. If freedom is defined as effective power to obtain what one wants, the important relationship between freedom and the market is obscured. Individual freedom is a necessary (though not sufficient) condition for achieving prosperity.[31] Thus, it is important to maintain the distinction between wealth and freedom both because of the demonstrated relationship of freedom to material wealth and because freedom is an end of itself. Both issues are important in any assessment of collectivism versus the market.

1. F. A. Hayek, *The Constitution of Liberty* (Chicago: University of Chicago Press, 1960), p. 11.

2. Fritz Machlup, "Liberalism and the Choice of Freedoms," in *Roads to Freedom: Essays in Honour of F. A. von Hayek,* ed. Erich Streissler, G. Haberler, F. A. Lutz, and F. Machlup (London: Routledge & Kegan Paul, 1969), p. 124.

3. Milton Friedman, *Capitalism and Friedman* (Chicago: University of Chicago Press, 1962), p. 15.