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RAWLS AND ENVY*

George V. Walsh
Salisbury State University

In sections 80-81 of *A Theory of Justice*,[1] John Rawls seeks to rebut in advance the charge that his principles of justice are "based in part on envy" (p. 538). I wish to examine the significance of this charge, summarize Rawls's reply, assess the latter's validity, and conclude with some remarks on the import of envy for Rawls's political philosophy.

1.

Why should Rawls be concerned with this objection before it has actually been raised against his theory? The reason, he tells us, is that "many conservative writers have contended that the tendency to equality in modern social movements is the expression of envy" (p. 538). This accusation Rawls sees as directed against egalitarianism in general, not merely against certain forms of that doctrine. It would, therefore, apply to his conception of justice ("democratic equality") which, by his own account, is a form of egalitarianism:

> While there are many forms of equality, and egalitarianism admits of degrees, there are conceptions of justice that are recognizably egalitarian, even though certain significant disparities are permitted. The two principles of justice fall, I assume, under this heading. (p. 538)

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Now, suppose the principles of justice *were* in this sense founded on envy. What would be the objection? The objection would be that *envy is a vice* (pp. 532, 534). We obviously cannot have principles of justice whose very derivation depends on giving expression to a vice. *This* is the reproach which Rawls believes that he has avoided.

Let us restate the charge more precisely in order to clear it of all suspicions of being an instance of the genetic fallacy or a form of *ad hominem* argument. Envy is no blind feeling, but an emotion and a vice. As such, it must have an inner structure. It must be based upon perceptions and involve appraisals. It must seek satisfaction by altering circumstances. Envy therefore has certain interests. How, then, could a conception of justice be "based on envy"? By being derived from a set of premises, one of which asserts as a moral imperative that the interests of envy must be satisfied. Such a conception of justice *would make the interests of envy its own* and in that sense would be "based on envy." This is not to say that the advocates of such a conception would themselves be envious. They might have any number of motives, such as the desire to placate envy. But, at any rate, such motives would be irrelevant to the argument.

We may, then, summarize the imagined objection to Rawls's argument in the following way: (1) the principles of justice are based on envy in the sense that they have been derived from an argument asserting the interests of envy; (2) but envy is a vice; (3) therefore the principles of justice must be rejected upon moral grounds.

Now, if this is the objection to his theory that Rawls has in mind, then he is right to take it seriously. And even if he does not have it in mind, he should consider it. Let us see if his attempted vindication of his principles successfully answers the objection or has any prospect of doing so.

The strategy of Rawls's defense is as follows. He starts by giving a definition of envy which he regards as appropriate. Then he divides the argument for the principles of justice into two parts. The first part consists of the chain of inferences leading up to the final choice of the principles by the parties in the original position. The second part consists of a reassessment of the principles so chosen in order to determine whether they are consistent with the stability of society. Applying his definition of envy to the first part of the argument, Rawls concludes, as I interpret him, that no premise asserting the interests of envy thus defined enters into the choice of the principles of justice. Indeed those principles turn out to be antithetical to the interests of envy. Therefore, democratic equality *considered qua justice* is not derived from envy. Proceeding to his examination of the second part of the argument for the principles - that is, their reassessment in terms of stability - Rawls concedes that this reassessment does give

> attention. We are downcast by their good fortune and no longer value as highly what we have; and this sense of hurt arouses our rancor and hostility. Thus one must be careful not to conflate envy and resentment. For resentment is a moral feeling. If we resent our having less than others, it must be because we think that their being better off is the result of unjust institutions or wrongful conduct on their part. Those who express resentment must be prepared to show why certain institutions are unjust or how others have injured them. What marks off envy from the moral feelings is the different way in which it is accounted for, the sort of perspective from which the situation is viewed. (p. 533)

If envy does not wax on grounds of the envied person's unjust possession, neither does it wane on grounds of his just possession. Its "perspective" is amoral, and it is ready to act in either case: "We are prepared to deprive them of their greater benefits." Envy both in perspective and in action is blind to right and justice.

Having defined envy and distinguished it from resentment, Rawls argues that envy is not to be found among the motives of the parties in the original position. The reason is that envy is absent from his own list of such motives, a list that he has fixed by stipulation. Envy is excluded from this list because it is a special psychological propensity which may or may not occur or which may occur with varying intensities in different persons. Such propensities have to be left behind the veil of ignorance by the very nature of Rawls's argument (pp. 530, 143-4).

Nor can it be argued, he continues, that envy is introduced into the original position because the other conditions of the position provide for it. He is here thinking of the circumstances of justice, the formal constraints of the concept of right, the list of alternative conceptions presented to the parties, and, no doubt, the veil of ignorance itself. Indeed, "each of the stipulations of the original position has a justification which makes no mention of envy. For example, one invokes the function of moral principles as being a suitable general and public way of ordering claims" (p. 538). Finally, Rawls points out, the very conception of justice - democratic equality - chosen by the parties is antithetical to the interests of envy. For that conception provides for inequalities on condition that the least well off representative man thereby achieves a betterment of his position. But this is precisely the exchange that the envious man of Rawls's definition would *refuse*. Thus "the content of the principles" is antithetical to "the characterization of envy" (p. 538). Rawls maintains that these considerations, taken together, show that the first part of the argument for the principles is

> I shall say that it is excusable. Since self-respect is the main primary good, the parties would not agree, I shall assume, to count this sort of subjective loss as irrelevant. Therefore the question is whether a basic structure which satisfies the principles of justice is likely to arouse so much excusable envy that the choice of these principles should be reconsidered. (p. 534)

This passage attributes the excusability of certain cases of envy to their supposed rationality. In these cases the satisfaction of envy would make their subjects better off instead of worse off. Those who are excusably envious are not, then, willing to take a loss in order to satisfy their envy. They would, presumably, accept the "deal" offered by the difference principle if they lived in a society whose basic structure were governed by Rawls's conception of justice. What they would - excusably from Rawls's point of view - do in less egalitarian societies is something that Rawls seems willing only to hint at.

Rawls next tells us that the main motivational basis of excusable (?) envy is a "lack of confidence in our own worth combined with a sense of impotence" (p. 535). (I have inserted the question mark because Rawls seems subtly to shift his ground at this point; I will have to leave the discussion of this matter to Section 3) Rawls's problem, then, is to discover what features of the basic structure of society lead some people to have a lack of self-confidence, and whether democratic equality tends to minimize such features. Rawls believes that the main features of a society detracting from its citizens' self-respect are (1) civic inequality, (2) the visibility of social and economic inequalities, and (3) the absence of some "constructive alternative to opposing the favored circumstances of the more advantaged" (p. 535). He then argues that the principles of democratic equality provide against the first by the political liberties they guarantee. The second is provided against by the lesser income spread allowed and by the fact that "the plurality of associations in a well ordered society, with their own secure internal life, tends to reduce the visibility, or at least the painful visibility, of the variations in men's prospects" (p. 536). As for the third, democratic equality would seem to offer as many constructive alternatives as any other conception of justice. Rawls adds an additional advantage: since claims on "social resources" are disconnected from both the concept of desert and the standard of perfection, "no one supposes that those who have a larger share are more deserving from a moral point of view" (p. 536) or are being rewarded for any excellence they display. The principles of democratic equality, therefore, "underwrite their self-assurance" (p. 536). On all these counts, democratic equality turns out to contribute to the stabi-

degree, I have extracted several examples. In each case the definition chosen (1) states a current meaning, (2) comes closest of all other definitions under that entry to the definition given by Rawls, and (3) implies, either explicitly or implicitly, that what is being defined is a vice. Implicit designation of a vice would consist in the absence of any other definition under that entry that is close to Rawls's and expresses greater opprobrium in its choice of words. I may add that I cannot find examples that disagree with the following.

Envy: 3. The feeling of mortification and ill-will occasioned by the contemplation of superior advantages possessed by another.)[3]

2a. A painful or resentful awareness of an advantage enjoyed by another, accompanied by a desire to possess the same advantage.[4]

To envy is to feel spite and resentment because someone else possesses or has achieved something that one wishes he had himself. (*The award has made him envy you and he is no longer your friend.*)[5]

Jealous - Envious: A person is jealous of intrusion upon that which is his own, or to which he maintains a right or claim; he is envious of that which is another's and to which he has no right or claim. One is envious who begrudges another his superior success, endowments, possessions, or the like. An envious spirit is usually bad.[6]

To vary our sources, I shall add a definition from a dictionary which is both older and in another language:

Envy (Neid): 3. Today as in earlier language envy means that state of mind, characterized both by odium and by self-torment, which is distressed at the perception of the prosperity and the superior merits of others, begrudges them these things and usually wishes at the same time to destroy them or to possess them oneself. Synonymous with grudgingness, the evil eye.[7]

Leaving the question of ordinary usage aside, let us look at a sample of definitions of envy given by moral philosophers in the past.

a loss to himself in order to reduce the disparity between himself and the envied person. Rawls regards this as a *necessary condition* of envy: he who is not prepared to accept such a loss is not envious. Kant's definition, which Rawls tells us he has "pretty much followed," seems to fall short of this provision.

This clause in Rawls's definition is *essential* to his claim that the interests of envy are not provided for in the first part of the argument for the principles of justice. Indeed, if we examine one by one each of the conditions of the original position - the rationality of the parties, the circumstances of justice, the formal constraints of the concept of right, the list of alternative conceptions presented to the parties, and the veil of ignorance - we will find that not one of them provides for the interests of envy in the *Rawlsian* sense. Not one of them panders to that vice which refuses to accept the betterment of one's own position in return for permitting another to have more primary goods than oneself.

But what if we take the other definitions listed above? (1) We find the each of them either explicitly or implicitly identifies envy as a vice. (2) But we find at the same time that none of them specifies as a necessary condition of envy the willingness on the part of the envier to accept loss to himself in order to bring his rival down. On the contrary, they do not even mention such an extreme attitude. Of course the willingness to accept such a loss might be regarded by those offering the above definitions as a *sufficient* condition of envy, but there is no reason to suppose that they would require it as a *necessary* condition. And certainly usage reflects the truth here. For why should envy have to be implacable in order to be envy? This is not true of any other vice. We know that a person may be deflected from pursuing one of his vices by a cleverly considered appeal to another of his vices. Are we to assume that no one ever suffers from envy unless it is his *strongest* vice? Is there no way to bribe an envious man?

I submit that there is, granting that he has a slightly stronger urge, namely the desire to get a state-guaranteed free ride. This is to offer him a deal, a deal like Rawls's difference principle. Indeed, the difference principle is exquisitely tailored to a person of this type. Rawls, of course, would not admit that this stronger urge, even when a habit, is a vice, but that is not essential to our point. What is essential is that Rawls's difference principle makes the satisfaction of envy in the ordinary sense the criterion of justice, and even the substitute for economic progress, unless the other urge which we have just named is satisfied in its place.

The great difference between Rawls's view of envy and that expressed in the definitions quoted above now begins to emerge. The

can be brought against Rawls's egalitarianism.

Rawls seems to be vaguely aware that he is departing from the ordinary meaning of envy, and this awareness appears like the return of the repressed to haunt his very definition. Observe how in that definition he says "the individual *who* envies another is prepared to do things that make them both worse off if only the discrepancy between them is sufficiently reduced" thus making willingness to accept injury *essential* to envy. But observe also that a few lines before that, also within the same definition, he says that "we *envy* persons whose situation is superior to ours *and* we are willing to deprive them of their greater benefits even if it is necessary to give up something ourselves" (p. 532, emphasis mine). Here Rawls falls back into the ordinary meaning of envy, to which willingness to accept a loss is *accidental.* But these two meanings contradict each other, and Rawls must choose between them. If he chooses the ordinary and wider meaning, then under that concept will be included the case of the man in whom envy is a very strong urge and who will therefore hold out for absolute equality until he receives a bribe satisfying a yet stronger urge: to get something for nothing from the state. Surely it could not be denied that such a man's modified egalitarianism would in part be "based on envy." But if Rawls chooses the narrower meaning - as, of course, he does - then he can be accused of being arbitrary and tendentious. I believe that I have shown how arbitrary it is. In what sense can it be said to be tendentious?

Rawls's definition of envy is tendentious because it is perfectly tailored to his difference principle. If it is urged that the difference principle is "based" on envy, he answers by defining envy in such a way that it could not serve as a motive for choosing that principle. But this is a circular argument. The objection was based on the common understanding of envy, and cannot therefore be circumvented by redefinition. Of course there can be no objection to moral philosophers giving their own definitions of virtues and vices. But this will not automatically dispose of objections to their theories that are based on common understandings of these traits. The conflict between common understanding and philosophical redefinition must be discussed and settled in the light of the realities being dealt with. Redefinition by itself will settle nothing.

The same studied and tendentious process of redefinition to which Rawls resorts in the case of envy is carried over into his treatment of jealousy, grudgingness, and spite. Rawls needs to redefine these traits because of the inner needs of his defense against the envy objection. Unsure that his defense has been decisive, Rawls proposes a kind of truce. After all, he points out, objections of this nature can cut both ways. If those who advocate the difference principle can be

ling, reluctant or stinting.[20]

The quality or state of being grudging.[21]

Grudging: That grudges: . . . unwilling, reluctant, resentful, envying.[22]

1: that grudges: UNWILLING, RELUCTANT, ILLIBERAL, UNGENEROUS.[23]

Begrudge: To grumble at, show dissatisfaction with; esp. to envy one the possession of; to give reluctantly, to be reluctant.[24]

Jealousy: 3. Solicitude or anxiety for the preservation or well-being of something; vigilance in guarding a possession.[25]

4b. in respect of success of advantage: Fear of losing some good through the rivalry of another; resentment or ill-will towards another on account of advantage or superiority, possible or actual on his part; envy, grudge.[26]

1a. a jealous disposition.[27]

2. a zealous vigilance.[28]

Jealous: 1c. hostile toward a rival or to one believed to enjoy (as a possession or attainment): ENVIOUS, RESENTFUL.[29]

Spite: 2. A strong feeling of contempt, hatred, or ill- will; intense grudge or desire to injure; rancorous or envious malice.[30]

2a: often petty ill-will or hatred toward another accompanied with the disposition to irritate, annoy or thwart; envious or rancorous malice.[31]

Looking over these definitions, one cannot help being struck by the fact that they answer so little to Rawls's requirements. For what Rawls needs is (1) a vice, which is (2) attributable essentially to those who are "better circumstanced," and (3) in virtue of which they seek to preserve their superior position by rejecting "the claims of the less advantaged to greater equality." Finally, to complete this structure, he needs (4) another vice, perhaps the intensification of the first, whose essential mark is the willingness to accept a loss in order to preserve the inequality in question. These requirements are not met at all. For

interests of envy are covertly assumed to exist in the motives of the parties and covertly provided for in the other conditions of the original position. This I shall now proceed to do.

The basic motivations of those in the original position are set forth in Rawls's "thin theory of the good." This theory both describes the primary goods and specifies the method ("rationality") by which the parties order such goods and seek means to their acquisition. All this involves an implicit theory of human nature which sees the latter as a set of pre-given goals and which sees reason as merely an instrument of those goals. Reason operates by pruning these goals to meet the more implacable demands of nature, arbitrating among those which remain, and, finally, seeking the most effective means of implementing the resulting life-plan. There is no discussion of the obvious alternative procedure. Such a procedure would be to define man as a rational animal, specify his precise relation to a natural environment open to rational control but not to arbitrary demands, and then positively formulate his good in terms of that total picture. For Rawls, on the contrary, "an individual's good is the hypothetical composition of impulsive forces that results from deliberative reflection meeting certain conditions" (p. 417). Among these conditions may be the immediate and absolute veto of nature, and in this case, of course, a given goal must be omitted from the life-plan (e.g., an armless man must abandon the goal of being a violinist). But there are situations where nature's veto may be hidden and nature's penalty even shifted to other people, as in the case of the goal of occupying a position for which one is not the most qualified candidate. Normally nature's veto would be expressed through the free market, i.e., the refusal of employers to hire, and of consumers to patronize, those who are unqualified for a position. Not so in Rawls's society. For him "the realization of the self which comes from a skillful and devoted exercise of social duties" (p. 84) is a fixed goal. If nature vetoes that goal in certain cases, then we must find "a conception of justice which nullifies the accidents of natural endowment" (p. 15) lest those holding to such goals in the face of whatever failures or test results not "be deprived of one of the main forms of human good" (p. 84). To assist such people to attain such aims, the state must sometimes force employers to abandon their hope to "attract superior talent and encourage better performance" (p. 84). In this way we avoid "a callous meritocratic society" (p. 100).

Such a conception of the human good, not being objectively founded in the relation of man to nature, can only lead to a conception of self-respect which is subjective and arbitrary. That is to say, a person's self-respect will not be founded on a hard objective look at one's own performance but upon how one appears to other people,

conception of justice governing the basic structure of society be chosen under conditions that are "fair." But what is fairness? In Rawls's original explanation it was simply "one of the forms of conduct in which the recognition of others as persons is manifested,"[32] the form of which is concerned with equal treatment and the prevention of anyone's being "taken advantage of."[33] Without receding from this position, he explains fairness in *A Theory of Justice* as representing "certain ends that cannot be given up" (p. 111), ends that have been identified as such by "our considered judgments in reflective equilibrium" (p. 111). Rawls explicates these demands as similar to the claims of children upon their parents for equal "attention and affection" (p. 540). The claim to be treated in this equal way is based on being a "moral person" (p. 12), which means a moral agent. This quality is, of course, a very abstract one, entirely separable from the notion of being anyone in particular, or of having any particular rights. Now, whatever one may think about this claim, it is important to see that Rawls makes it the basis of all other rights and claims. And it is equally important to see that it functions in conjunction with Rawls's concept of self-respect.

The application to society of the notion of fairness results in the "concept of justice," which is "defined . . . by the role of its principles in assigning rights and duties and defining the appropriate division of social advantages" (p. 10). Accepting this *concept* as setting the parameters of their choice, the parties in the original position are to choose a *conception* of justice which is one of its interpretations (p. 10). But although Rawls claims that his *concept* of justice is neutral between *conceptions* of justice (p. 6), the parameters of the concept rule out all antecedent rights based on who the parties are and how they have acquired what is theirs. For Rawls, justice is not the recognition of rights; rights are, rather, created by the principles of justice and then distributed in the "appropriate" way. The only discussion allowed is over which way in the most appropriate. But the answer is predetermined anyway by the one natural right which Rawls recognizes as antecedent to the contract. This is the right to be treated "equally." The search for the appropriate distribution of rights is therefore a search for the answer to the "problem" of inequality. This is for Rawls the central question of justice (p. 7). The real "end that cannot be given up" turns out to be *equality*, at least as an ideal. This is because inequality is seen as an affront to self-respect. The central interest of Rawls's *theory* of justice, as well as his chosen *conception*, is thus identical with the interest of envy.

Rawls's *concept* of justice, therefore, rules out every *conception* of justice that does not take the demands of envy as at least the premises of all negotiation. Above all, the Lockean theory of natural

But Rawls regards "excusable envy": as something which is not only excusable to *have*, but also excusable to *nurse* and to *seek outlets for.* Therefore he avoids classifying it as a vice. Indeed it is likely that he would deny that it is a vice, for he introduces the section discussing "excusable envy" with the words, "So far I have considered envy and grudgingness as vices" (p. 534).

But if "excusable envy" is not a vice, on Rawls's assumptions, what is it? To answer this question we shall first have to ask what makes it excusable. One answer that Rawls gives is that it is a reaction to a disparity considerable enough to cause a "wound" to the "self-respect" of the envious man. It is needless to point out that the only way in which this could excuse envy would be if Rawls's theory of self-respect and the consequent moral imperatives which it would impose were true. What I want to emphasize now is that if all that were established, envy would then become indistinguishable from justified resentment, and, all things equal, to pursue the satisfaction of such resentment is to pursue justice, and to pursue justice is a virtue. But if Rawls takes this line, there is no need for separate treatment of excusable envy under the heading of stability. All this could have been taken care of in the first part of the argument.

But Rawls obviously does not do this. This is because he wants to treat envy as a vice whose incidence can be reduced by the adoption of his principles. Now, he cannot claim that a basic structure based on his principles would reduce envy as he has previously defined it, that is, envy in the sense I have called "inexcusable." Hence he must claim that it reduces "excusable envy." To make this alleged reduction even relevant to his case, he must treat "excusable" and "inexcusable" envy as if they were different manifestations of one social phenomenon which is in fact a vice. Rawls is thus trying to have it both ways: he must avoid calling "excusable envy" a vice while treating it as a vice when he needs to do so.

How does Rawls treat "excusable envy" as a vice? He does so in two ways. The first way is to stress that it is nasty, unpleasant, and a form of rancor. As such it seems to be quite different from resentment. It seems to be an unpleasant characteristic in a person and a canker on society. But the second way in which he treats excusable envy as a vice is by dropping the distinction between the two kinds of envy right after he has introduced it! He does this in the *same* paragraph in which he tells us he is going to discuss *only* "excusable envy":

> We are now ready to examine the likelihood of excusable general envy is a well-ordered society. I shall only discuss this case, since our problems is whether the principles of

may without moral censure be retained, nursed, and even acted upon. Whereas "we are normally expected to forbear from actions" to which we are prompted by envy and "to take steps necessary to rid ourselves" of that vice, the case is different with excusable envy. What actions is Rawls thinking of, one wonders? In the case of excusable envy "no one can reasonably be expected to overcome his rancorous feelings." Now the superficial plausibility of the analogy to the innocently contracted drug habit vanishes. There is no obligation to overcome the propensity. As for the injustice in the case of "excusable envy" which might parallel the incompetence of the physician, the only demonstrable injustice which Rawls alleges is the "disparity" of primary goods. I cannot help thinking that, all in all, this is one of the most extraordinary passages in the history of ethics. Whatever the arguments expressed in it do, they do not tend to relieve the impression that Rawls is once again assigning to envy a major role while going through the motions of exorcising it. I think we can safely conclude that the concept of "excusable envy does not serve the purpose for which it was intended.

There remains the question of Rawls's stratagem in separating the two parts of the argument. Would the resulting logical relation between the parts serve Rawls's purpose if the rest of his argument stood up? I do not believe that it would.

For the second part of the argument for the principles of justice is by Rawls's own definition *a part* of that argument (p. 530). If the principles of justice did not pass muster at this second stage, they would necessarily, he tells us, be "reconsidered" (p. 531). Choice of the principles is, therefore, to some extent based on their compatibility with the stability of society. Rawls might answer that the second stage of his argument is in no sense a deduction of principles of justice *as such*, that it is an argument from *stability*, and that the criteria of stability are different from those of justice. He might even point in his defense to his position that democratic equality is not necessarily the *most* stable conception of justice (p. 504). The fact is, however, that the certification of a conception of justice as reasonably stable is a necessary condition of its final certification as the most favored conception of justice. And the most favored conception of justice is the one that comes to determine the basic institutions which in turn determine what actions and persons are to be regarded as just and unjust throughout the society. What is just and unjust is, therefore, strictly determined by the argument from stability. But the argument from stability itself is an argument that a society based on democratic equality would *just happen* to be able to bank the fires of envy. Therefore, even if the argument from stability is external and accidental to the derivation of the principles of justice, it is internal and

same observations would apply to a greater of lesser degree to intuitionistic arguments for the welfare state: the value of equality is presented on grounds that are at least overtly different from those of envy, and equality is weighed against any number of other values. Now what is the result when we compare these forms of egalitarianism with Rawls's theory?

The result is, I think, that Rawls's theory is by far the most difficult to exonerate of involvement with the demands of envy. For, first, Rawls's argument for equality on grounds of self-respect, indeed his very concept of self-respect as tied to relative status and being "looked down on" by significant others, coincides exactly with the complaint of the envious man. And, secondly, when, in Rawls's theory, equality gives way before *another* value, the absolute improvement of the least advantaged representative man, this *second* value is not so far removed from envy as to be incapable of assuaging it with ease (pp. 536-7). It seems, indeed, to be covetousness. The answer to our two questions, then, indicates that when it comes to answering the charge of being based on envy, Rawls's theory compares unfavorably with both utilitarian and intuitionistic defenses of the welfare state. And the very arguments which Rawls uses against other interpretations of his second principle show that his differences from them depend upon his concept of self-respect and upon the fact that equality in his theory gives way to other values with far less readiness.

Of course it is important to realize that one who asserts the interests of envy or becomes their partisan is not necessarily motivated by envy. There may be any number of grounds for such advocacy, among them the belief that envy should be placated. I believe that all such grounds are wrong, but that is another matter.

I conclude, then, by stating that, apart from strict egalitarianism, there is no theory of justice that is, in the sense defined, more truly based on envy than that of Rawls, and that, consequently, of all moral defenses of the welfare state on grounds of equality there is none more deeply sympathetic to the interests of envy or more radically committed to promoting its claims.

* The writing of this article was supported by research grants from the Earhart Foudation and the Foundation for the New Intellectual.

1. John Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971). All citations from *A Theory of Justice* are inserted parenthetically in the text.
2. Helmut Schoeck, *Envy: A Theory of Social Behavior*, trans. Michael Glenny and Betty Ross (New York: Harcourt, Brace and World, Inc., 1966).
3. *Oxford English Dictionary* (Oxford: Oxford University Press,1961), vol. III, p. 231.
4. *Webster's Third International Dictionary* (Springfield, Mass.: G. and C. Merriam Co., 1968).

RICHARD EPSTEIN AND THE THEORY OF STRICT LIABILITY IN TORT LAW

Thomas A. Fay
St. John's University

Professor Richard Epstein's theory of strict liability offers a distinctly different, and in my view, a much superior approach to tort law than negligence theory. While negligence theory employs such notions as "reasonableness," "due care," "foreseeability," etc., in its attempts to determine responsibility and compensation, Epstein's is a theory of corrective justice which attempts to determine responsibility on purely causal grounds. In this paper my procedure will be as follows. In the first section I will look at some of the salient features of Professor Epstein's theory of strict liability, such as the well known and much discussed causal paradigms, and then contrast his theory of strict liability with the established alternative, negligence theory. In the second part I will look briefly at some of the criticisms which Epstein's theory has received, particularly from Professors Borgo and Posner, as well as Epstein's response to these criticisms. In the third part I will consider what I take to be the advantages of Epstein's theory of strict liability over negligence theory, as well as some problems connected with it.

1. Differences between Epstein's Theory of Strict Liability and Negligence Theory

As we noted, Epstein's is a theory of corrective justice which attempts

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individual liberty and property rights.[7] Thus he remarks in his article, "Causation and Corrective Justice: A Reply to Two Critics":

> In most cases I think these rights are deserving of absolute protection and vindication. In those cases in which such total protection is not feasible (usually for reasons of efficiency) I want to see compensation, be it in cash or kind, for the individual liberites or property rights that have been taken or destroyed. Individual rights remain a barrier to forced redistributions of wealth, even though they are not always barriers against forced changes in the form in which that wealth is held.[8]

Thus for Epstein ownership and property rights are closely related to tort concepts and a proper grasp of these notions logically entails a theory of strict liability in tort. As he notes again in his article "Causation and Corrective Justice: A Reply to Two Critics":

> " . . . in my view the proper conception of ownership compels the adoption of strict liability."[9]

For Epstein, then, property rights, ownership, and tort are closely tied together. Further, property rights and ownership are the ground of individual autonomy and liberty. As Epstein remarks in his article "Nuisance Law: Corrective Justice and its Utilitarian Constraints": "Private property is an external manifestation of the principle of personal autonomy."[10] From the basis of individual autonomy and inviolability, ownership rules organize rights prior to any violation and furnish the foundation for tort which is concerned with dealing with members of society who refuse to respect the rights of others. Thus Epstein notes in *Strict Liability:*

> . . . the principles of strict liability say that the liberty of one person ends when he causes harm to another. Until that point he is free to act as he chooses, and need not take into account the welfare of others . . ."[11]

Thus the defendant's invasion of the plaintiff's person or property establishes a *prima facie* tort.[12] The purpose of tort law then is the protection of individual liberty and private property.[13] Thus Epstein's starting point for tort law in property rights and individual liberty is distinctly non-utilitarian.[14]

Generally, negligence theory, on the other hand, takes a utilitarian cost/benefit analysis as its starting point, e.g. nuisance cases,

digms for the analysis of a tortious action and by the analysis of causation fix responsibility. He wants to keep responsibility closely tied to causation. Borgo argues that Epstein has gotten it backwards. Epstein argues that responsibility is ascribed on the basis of cause. Borgo, on the other hand, that cause is ascribed on the basis of legal responsibility. Thus, according to Borgo, Epstein's criterion *for prima facie* liability is circular. Through our common experience of responsibility, the way the word is used in ordinary language, we come to a notion of cause, e.g., because B is missing an eye we want to find out, of the many circumstances surrounding this loss, where the *responsibility* for this harm lies, and when we determine this we will think this agent *caused* the harm.

I think Borgo's analysis is simply incorrect. When first A suffers the loss of the eye we do not immediately move to responsibility and only afterwards get to cause. No, first we determine cause, and only afterward does responsibility become a consideration, because even after we have determined the cause there may *be no responsibility.* They are distinct notions, and distinct notions that are *separable.* To illustrate this point, consider the biblical case of the elder Tobias. After he had buried a murdered kinsman against the royal edict he lay by the wall of the house to rest, and while he was asleep the birds released their droppings into his eyes blinding him. When Tobias is found blinded what question is asked? "Who is *responsible?"* Or, rather "What *caused* this blindness?" because in this case even though there was indeed a *cause* there is no responsibility for responsibility can arise only where in addition to the tortious act, there is also *volition.* Without this we have no responsibility, only an act of nature, or God. Clearly we first seek the *cause,* and only then determine how to affix responsibility. Thus also in the famous case of *Talmage v. Smith*[20] when the owner of a property threw a stick to chase some boys off of his property, striking one of them in the eye causing him to be blinded, we do not start with the question of *responsibility,* but rather with the *cause* -- who threw the stick? We first determine the cause. It is only after this determination has been made that we can begin to talk about the question of *responsibility,* for unless we determine that it was a human agent who caused not only the harmful act but did so with volition we do not have a tort. Thus it seems Borgo is mistaken and Epstein correct, and his analysis is not impugned by Borgo's criticism.

Let us turn our attention now to the key elements of Richard A. Posner's criticism of Epstein.[21] Briefly, Posner thinks that Epstein is wrong on the following five points:

1) Epstein treats tort and contract law inconsistently.
2) He doesn't explain why causal principles should provide

approach cannot encompass all of our moral perceptions. He criticizes Epstein's position on good Samaritan cases because, Posner thinks, according to Epstein's causal arguments there is no liability in the good Samaritan case where I can, with little risk or inconvenience to myself, assist someone but do not, for example by throwing a rope lying at my feet to a drowning person. For Epstein there is no liability here because A, the potential rope thrower, has not harmed B, the drowning person, according to any of the four causal paradigms. After all, he does not have a legal duty to throw the rope. For Posner this failure to fasten a liability on A demonstrates the inadequacy of Epstein's causal approach. Clearly Epstein's strict liability approach with its causal analysis which cannot find a liability in such an inhuman action, or better inaction, as not even to throw a rope to a drowning man must be wrong. But Posner misses the point, a point which even Borgo had grasped, namely that the moral order of responsibility and the legal order of responsibility are not always isomorphic.[27] Clearly anyone, even someone whose moral sensitivities might in other respects be rather blunted, would see a moral obligation to throw the drowning man the rope. But because we might have a *moral obligation* to do something does not *ipso facto* create a legal duty to do it, the failure of which results in a tortious liability. Posner has confused an imperative of the moral order with one of the legal order.

3. Advantages of Epstein's Theory of Strict Liability.

Let us now turn our attention to some of the advantages that Epstein's theory might have to commend it. The first of these I would call a certain intuitive moral persuasiveness, that is, that he who causes the harm should, at least *prima facie*, compensate the victim, provided, of course, that the plaintiff had a duty toward the defendant. Individual autonomy cannot be used as a justification for using someone else as a mere resource without compensation. Second, Epstein's theory, exploiting as it does the four causal paradigms in afixing responsibility, and eliminating such loose, ill-defined, and perhaps undefinable, notions as "reasonable man," "due care," etc., which play such an important role in negligence theory, has the merit of *elegance.* It has efficiency that is based on *principle.* This in its turn leads to much greater predictability of legal outcome,[28] a notion so important that Oliver Wendell Holmes placed it in the essence of law. The strict liability approach, it seems to me, also has the merit of eliminating a lot of the fuzziness and vagueness which presently surround negligence language. There is no need to try to determine *ex*

marketing of new products, with the subsequent loss to the general public that these new products would bring? And doesn't holding corporations to standards of strict liability produce results which are exactly the opposite to the ones desired by Epstein - that is, judges acting on their vision of "fairness," and a "deep pockets" theory of justice, attempting to redistribute the wealth of wealthy corporations? And isn't this in its turn an attack on the property rights of the shareholders? This result of holding corporations to a standard of strict liability can hardly be one which would please Professor Epstein. And yet isn't it true that when we put these elements together we must inevitably get this result: strict liability + "deep pockets" = redistribution of wealth?

Epstein, to be sure, in his later writing, for example, "Products Liability as an Insurance Market," 1985, has attempted to address this problem and notes:

> A return to more limited rules of product liability seems clearly required. The demand that the legal system take into account the ability to insure does not translate into automatic justification for continued expansion of liability.[31]

But is this position entirely consistent with the theory of strict liability as he had presented it in his earlier writings?

In conclusion we might say that there are considerable advantages to Epstein's theory of strict liability, as I have attempted to point out. But as it stands there are some very serious problems with it and these need to be addressed.

1. Richard A. Epstein, *A Theory of Strict Liability: Toward a Reformulation of Tort Law* (San Francisco: Cato Institute, 1980), p. 75. Cited hereafter as SL This book reprints two of Epstein's articles which appeared in the *Journal of Legal Studies* Part One of the book appeared as "A Theory of Strict Liability," vol. 2 (1973). Part Two appeared as "Defenses and Subsequent Pleas in a System of Strict Liability, " vol. 3 (1974).
2. Richard Epstein, "Pleadings and Presumptions," *University of Chicago Law Review,* 40 (1972-73), 574. Hereafter cited as PP.
3. PP., p. 57
4. "Judges in some jurisdictions do not like the doctrine of contributory negligence because they believe that it is harsh to excuse a negligent defendant merely because the plaintiff has been negligent as well." PP, p. 578.
5. Epstein, SL, p. 51.
6. Epstein, SL, p. 135.
7. Richard A. Epstein, "Causation and Corrective Justice: A Reply to two Critics," *Journal of Legal Studies* 8 (1979), p. 488. Hereafter cited as CC.

LIBERTARIAN THEORY, CUSTOMARY COMMUNAL OWNERSHIP AND ENVIRONMENTAL PROTECTION

David R. Lea
University of Papua New Guinea

1. Introduction.

In this paper I intend to offer a comparison of two attitudes towards property rights. The first is the liberal/Western individualistic attitude which in its strongest form, I believe, is represented by the libertarianism of Robert Nozick as it is set forth in *Anarchy, State and Utopia.* [1] The other perspective is the collective rights tradition which I find to be exemplified in the traditional Melanesian societies of Papua New Guinea, though, of course, the central features of this position can be located in other traditional societies.

I defend my choice of Nozick as exemplar of the liberal philosophy on property rights on the grounds that his strong position on individual rights presents this individualistic tradition in its purest form which contrasts interestingly with the orientation of non-Western communal societies. I could have chosen John Rawls whose work *A Theory of Justice* is an equally seminal and important contribution to the liberal tradition.[2] However, Rawls, as Nozick himself has pointed out, is less thoroughgoing in his commitment to individual liberties especially those relating to private ownership in that he construes these liberties as conditioned by the social end product of an egalitarian based distribution.[3]

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is said to encompass "The legitimate means of moving from one distribution to another . . ." and makes reference to the means by which an individual may acquire a holding through transfer and divest himself of a holding.[6]

Nozick recognizes that this is not a wholly just world and thus he adds a further principle, that of "rectification." In this instance one may legitimately acquire holdings through the attempted rectification of past injustices.[7] In such a case authorities try to estimate what might have occurred if the past injustice had not happened. The principle of rectification, however, plays a very minor role in Nozick's text and is not really germane to the significant conclusions which are reached. For this reason it can be safely disregarded.

In this paper I intend to concentrate upon the second principle," justice in transfer", as a way of underlining the most significant differences between the liberal/libertarian and the customary Melanesian philosophy of ownership. This route, of course, avoids discussion of the separate issue of original entitlement including the original sources of entitlement of the transferor. This is intended for two reasons: first, matters of economy which dictate that in effective discussion one must focus on a distinct issue; second, the real difficulty in saying anything relevant and appropriate concerning the historical events surrounding original acquisition where in most cases the evidence is entirely and irretrievably unavailable.

Justice in transfer refers to the "legitimate means of moving from one distribution to another." As we have mentioned, this must encompass the legitimate means of acquiring through transfer and divesting oneself of a holding. As in many cases, Nozick is often content merely to indicate the significant issues involved, but he does state categorically that one essential component of just distribution is the quality of voluntariness. This can be interpreted to mean that one cannot legitimately or justly acquire a holding - regardless of other necessary conditions - unless there has been a voluntary transfer or conveyance; conversely, it is generally the case that one cannot successfully divest oneself of a holding unless one has acted voluntarily.[8]

This philosophical account of legal entitlement entails broader implications by casting a moral blueprint which excludes certain social and political arrangements and sanctions others. For example, welfarism and Keynesian policies could not even be contemplated if one were already convinced that the funds (taxation payments) to be used for such purposes, had been illegitimately acquired by the government and thereby contrary to justice in transfer. On the issue of laissez faire economics and the asserted independence of business activities with respect to government regulation, the entitlement theory offers an analogical defence of the autonomous choices and non-interference with

the notion of "private ownership" and result in something called an illegitimate entitlement which is synonymous with the violation of a natural moral right. Nozick labels such actions or policies as being contrary to morality or immoral.

One may conclude from this adumbration that institutional arrangements are both assessed and justified in terms of individual liberty. Property rights are held to exist independently of institutional structures as with other natural rights like the right to personal security. The emphasis upon individual rights as forming the moral background to the entitlement theory means, of course, that much rests upon the attribution of absolute value to the individual. But this leads to an apparent paradox as property rights are necessarily embedded within organizational structures in civil society and so become associated with constraints on individual liberty as organizational structures will ineluctably restrict one's natural individual freedom. However, Nozick justifies these minimal societal restrictions on individual liberty on the grounds that a certain minimal organizational regulation is necessary to safeguard a non-organizational right to the liberty of personal ownership. Ultimately the freedoms associated with property rights and personal security entail the implementation of the minimal state or "territory wide protection agency."

3. Communal Land Ownership.

By way of effecting comparison with this articulated ideology of a modern liberal individualistic utopia let us now consider a different ideology associated with what have been labelled holistic societies - societies in which the ultimate value is the society itself.[12] To illustrate certain important differences we will turn our attention to the traditional Melanesian societies of Papua New Guinea. Within this context, we encounter a dominant ideology of communal rather than individual values. Associated with these ideas we encounter conventions of ownership whose basis is communal rather than individual. In this instance an entirely different perspective on ownership rights unfolds. A.P. Power asserts that as land through generations was held by force of arms through social groupings, the fundamental ownership of land is by groups of some sort or other. Though customary administration of land within these groups is varied and group specific, the important constant, he remarked, was that the group owned, and individuals used, the land. "Individual land usage rights did not remove the reality that the group was the basis for ownership and the basis for the defense of these rights."[13] Similarly Heider in his study of another group of Melanesians, the Dani of Irian Jaya, also observes that individual hold-

the bus to other individuals or organizations, and neither does the individual clan member gain a right to sell or convey community holdings. However, as a member of the clan, the individual does gain certain rights and interests greater than those of a usufruct; the Melanesian clan member can, for example, participate in important decisions involving the development, disposition, devolution, and even sale of holdings. But unlike the liberal system which Nozick advances, communal consent is always necessary for individual dealing in land and the individual is never at liberty to alienate, sell or unilaterally transfer his interest.

Another Western concept which is useful in understanding the individual's right within the Melanesian system of communal land holding is that of trusteeship. We have already seen that liberal thinking (represented by Nozick), sees the rights of the group derivative from individual rights and thus confines the task of the organization (most often viewed as a minimal state) to providing protection and security for the rights and property of individuals. In contrast, the Melanesian position embraces a view which can be associated with Hegel's interpretation of the classical Greek political life, this is to say one which regards the organization or community as having its own proper interests and even rights, which condition the freedoms and interests of the individual. In this scheme the roles are reversed and it is the individuals who must promote the interests of the community rather than the community promote the interests of the individual.[17] In Melanesia these ideas necessarily apply to individual rights to land and land usage. This entails that the individual land usage is not exclusively personal but must also conform to communal purposes. Thus, in part, his right is that of trustee, one who holds property conditional upon the performance of certain positive duties towards another, i.e., the holder of the greater interest. This means that the individual right holder is not at liberty to impair the holding and indeed must strive to use the holding for the benefit of the superior interest of the full title holder, in this case the community.

However, the idea that a community or society might possess its own proper ends distinct from the purposes of distinct individuals - which at times take preference over individual purposes - has been strongly criticized by the liberal tradition. Nozick himself seems to view such a notion as an abstraction without content. On the subject of an overall social good he states:

> Why not . . . hold that some persons have to bear the costs that benefit other persons more, for the sake of the overall social good. But there is no social entity with a good that undergoes some sacrifice for its own good. There

the embrace of the opposing modern ideology of individualism. Hegel has not been alone in discerning this trend as certain modern anthropologists have come to similar conclusions. For example, Daniel de Coppet finds our modern way of understanding society exceptional in disregarding society as an ultimate value to the benefit of a quite opposite and non-social value, the individual. Like Hegel, De Coppet sees this trend as a historical process involving the progressive negation of the community as a whole. De Coppet locates the initial expansion of individualism in Medieval ideology. During this period, he alleges, there was a growing difficulty to assign a place to society in the context of (in and beside) God, Christ and the King. He believes that with the inability to effect an appropriate definition of society there began a very slow and gradual drift of ultimate value from society to the indivisible individual.[22]

Both Hegel and De Coppet argue that this modern individualistic ideology impedes an appropriate understanding and assessment of the community and its structures. Hegel discerned that assessments of behaviour and organizational norms based solely on liberal theory would offer no more than a deracinated analysis which abstracts individual choice from the inherited structures and their communal function.[23] Hegel's goal was a synthetic resolution which reintegrated the modern liberal attitudes and ancient view which attributed pre-eminent value to the community. Hegel sought to resolve the conflict through a movement of *aufgehoben* in which both perspectives were renewed and preserved in new synthesis, *System der Sittlichkeit.* [24]

Similarly, De Coppet, writing from a contemporary anthropological perspective, notes that as the liberal ideology values nothing beyond the individual, the continuous move towards its expanding freedom discredits society as a value and makes understanding society even more difficult.[25] De Coppet argues that understanding and proper assessment will be achieved, not through the isolation of individuals and their actions, but rather, in considering these phenomena in the context of a much greater whole, that is the society itself.

My argument in this paper is that this overemphasis on the value of the individual and his freedom (especially in the area of property rights) and the concomitant devaluation of society and the community's general interests have contributed to the environmental problems which we now face. This has been generated by an attitude which considers societal structures primarily in terms of individual freedom and interests, denying, of course, that society itself can be regarded as an entity with interests, a future, and a destiny. This devaluation of society, when coupled with a failure to acknowledge that interests of communities are intimately joined with particular localities and defined areas of land, may militate against appropriate social action in

effects on future communities and generations.

The right of the individual to transfer a holding, unilaterally, may be identified, in part, with what A.M. Honore describes as the right to capital - the power to alienate a holding or to consume, waste, modify or destroy it.[28] Part of the problem with Nozick's promotion of the individualist attitude to personal ownership and transfer is the failure to recognize that what an individual does with his holding cannot be entirely his own concern given that the holding forms part of the natural environment in which others and the community must exist. When I transfer a holding I transfer it to an individual or organization which usually has a particular use in mind. It may be true to say that I myself have not used the holding in a destructive, wasteful manner with harmful consequences for others, however, what mechanisms will protect us from the subsequent inimical environmental consequences derivative from ill-considered transfers? I argue that given the exigencies of our environmental concerns, it may no longer be feasible to give individuals a *carte blanche* to proceed as they wish when they intend to transfer a holding.

Let us look at a specific issue involving the transfer of individually held property, the phenomenon of development by sub-division. The latter is a familiar device of land developers in Western societies. Unless a specific municipality has passed regulations either to proscribe or control this practice, an owner or developer will always have this option at common law. Nozick's libertarian principles offer strong support for maintaining this general common law right and rendering it immune to supervening legislation. The entitlement theory states that one has the inviolable right to transfer one's property. This means, as we have seen, that any interference with this right to transfer, which necessarily includes the right to convey land by subdivision, involves violation of the natural right to property and *ipso facto* the individual moral side constraints. In effect, the application of Nozickian principles prohibit the municipality or any other community organization controlling the development of land by subdivision.

The seriousness of this issue should not be underestimated. Studies have shown that many of the ecological problems in Australia and in the rest of the world are generated by the overcrowding of human beings on areas of land which cannot accommodate the intense resource usage or the sewage and human waste resulting from population density. This problem has arisen in Perth Australia where the underground water supply lies close to the surface and is thereby at continual risk from leakage from septic tanks. In other parts of the world, for example, the Aral Sea and *environs* in Central Asia, population density has created a demographic disaster such that over use of water resources may irrevocably undermine an entire water system.

Furthermore, in the liberal system the only constraints on use are those associated with direct injury to other individuals. Tibor Machan, as we mentioned earlier, has described a program for environmental protection based on liberatarian principles in which he argues that any pollution which would most likely lead to harm being done to other persons who have not consented to being put at risk would have to be legally prohibited.[30] From my perspective this manner of procedure is still inferior to a communally based orientation on several grounds. First, because of the nature of libertarian theory there is always a presumption in favor of the property holder in the use of his property such that the individual right to do what one wishes with one's holding remains inviolate until it is shown that his action will bring about a result which is, or is likely to be, injurious to others. Thus the burden of proof seems to devolve upon those who are at risk to prove that they are at risk (by which stage matters may have already gone too far). For example, a community may wish to say no to the construction of a nuclear power plant in its vicinity. In this instance the community's intentions are to prempt the possibility of a monumental disaster even though, at law, they may be unable to adduce conclusive evidence proving that injury will be likely to occur. Clearly, the communitarian approach gives the community greater control and autonomy in its efforts to address environmental issues and plan appropriate safeguards. In addition, there are further advantages to the communal approach which might be loosely based on Melanesian structures. In Melanesia there are aspects of trusteeship associated with individual usufructuary rights, such that even the degree of control which the individual exercises must, in part, be directed towards communal benefit - the principle being the long term survival of the community. The implementation of these principles would necessarily abrogate any course of action, for example ill-considered transfers, which might harm future generations of the community even if the present membership is left virtually unaffected. In addition, this notion of ownership operates to promote the future of the community, as the community, the ultimate owner of the land, is thought to consist not only of present membership but also past and future members.

A further problem within libertarian theory, which militates against an axiology in support of environmental and general communal protection, is the tendency of libertarians to supplement principles based on individual liberty and autonomy with cruder utilitarian notions associated with people like Jeremy Bentham. These instances are most conspicuous where libertarians seem to confuse their allegiance to individual autonomy and embrace utilitarian calculations in support of those freedoms of private ownership intrinsic to the free market system. Initially in *Anarchy, State and Utopia* Nozick inveighs against utili-

cerns by considering communities and their problems as reducible, without remainder, to individuals and individual benefit or disadvantage. It thereby misses the point that aboriginal hunting and fishing rights are not simply individual rights but also communal rights intrinsic to a communal form of life (i.e., rights whose control and enforcement invests in the community rather than the individual). Thus, in effect, by dividing land into individual freehold estates, one removes the traditional communal land base from communal control placing the control in individual hands. Furthermore, one undermines the future of a traditional holistic community by sabotaging customs and practices associated with traditional land use. The latter point is intimately connected with the fact that individual control and conveyance of land facilitates industrial development and industrial uses inconsistent with traditional forms of land use. Thus, the overall effect of the implementation of individual forms of land tenure has been disruption to certain traditional activities and the vitiation of the community's control of its own destiny. In some cases there has been violent resistance to these developments gaining prominence in recent years as environmental groups have begun to draw attention to the struggles of various indigenous peoples to maintain a traditional form of life in the face of encroaching development.[33]

Finally, buttressing libertarian arguments for certain preferred "liberties" with references to utilitarian advantages will not strengthen the case in non-Western eyes, as holistic thinking does not view the interests of the whole as equal to the interests of the parts. The fact that individual members of the community are enjoying a standard of living previously unachievable will not be entertained as an argument, if this is achieved through social relationships and land use which threaten the cohesion and continuity of the community.

These observations may be dismissed as a mere academic points about the differences between holistic and liberal thinking and, necessarily, the ideological differences between the developed and the developing world. Indeed it will, no doubt, be argued that liberal/libertarian principles are merely the agents of change which help modify outdated forms of community life so that these communities can adapt to modern development. But the uncritical acceptance of this thinking may be mistaken on two counts: first, traditional forms of land use have tended to be aligned with natural cycles and surrounding ecosystems thus tending to preserve and renew the environmental habitat; second, as our understanding of ecological processes deepen, Western societies may come to realize that we must also balance the preoccupation with the immediate material products of development with a concern for the manner in which we are using the environment. This may well mean devaluation of utilitarian advantages and certain liberties associa-

producing rubber, oil palm, sugar, cocoa, tea, coffee etc. Furthermore, this desire for cash has also led to the foreign backed and controlled developments in the areas of gold and copper mining. Power, who has observed this phenomenon in the East Sepik alleges, that this has led to winners and losers and the breakdown of the communal nature of social organization.[35] Those who are not sufficiently enterprising have been alienated from the social organization and the results are now encountered in terms of urban drift, crime and urban unemployment. However, the point is that the alienation of communal land to individual holdings is seen to be part of a process which effects environmental damage (and social disruption) without necessarily involving implementation of industrial methods of production.

In a paper of this length there is certainly insufficient space to provide an exhaustive survey of the environmental and social damage effected by the transfer and alienation of land from communal holdings. Among other things, these events have resulted in the release of toxins into the alluvial systems. Add to all this the emergence of the logging industry and one encounters the host of familiar environmental problems which are beginning to plague all third world countries and the world in general.

Aside from issues of cultural continuity and environmental protection, there are other strong economic reasons for preserving the communal land tenure within Papua New Guinea. This traditional institution functions as a source of economic and social security for most Papua New Guineans. Collective ownership, which has been an integral part of the Melanesian subsistence culture, ensures against demographic displacement and nutritional deprivation which have occurred elsewhere in the third world. As 97% of the land in P.N.G. is communally owned, clan holdings continue to offer alternatives to those alienated by the cash economy and urban life. This has served as a mitigating factor which has obviated some of the worst aspects of third world development which occur when landless displaced peasants are forced into overcrowded urban centres. Studies also indicate that subsistence farming through the communal land system is demonstratably efficient.[36] Accordingly, hunger and nutritional deprivation have not been significant problems in Papua New Guinea. Development, therefore, has not been retarded by the necessity for additional investment in agriculture thus allowing the economy to mobilize domestic resources for public capital formation.

However this does not mean that abandoning certain liberal principles associated with the notion of private ownership necessitates the embrace of socialism. In other words, the traditional collectivist perspective, as it is found in Melanesia and certain parts of Africa, does not imply a socialist system. Western individualism and Western forms

ship as found in Melanesia and elsewhere.

According to this thinking, the values embodied in communal ownership entail individual rights which are derivative from communal ownership rights. This departure from the liberal formula, which regards the community's rights as derivative from the individual's pre-eminent right, implies limitations on the individual's right to transfer and the right of capital. In the former case, in which the communal right is pre-eminent, this means that the individual will have to obtain communal approval or consent before exercising the right to capital, which, *inter alia*, includes the exclusive power to transfer the holding and control development. In Melanesia ownership of the means of production - land - has been communal rather than individual. The advantage of regarding ownership as communal based rather than individual based can be measured in the degree to which this will operate to retard the continuing damage to the natural environment. (One admits, of course, that the fact of communal ownership is no absolute guarantee that environmental damage will not occur, however, communal ownership implies that it will be less easy for the individual title holder(s) to avoid liability for the effects of mismanagement.) This will be especially the case if one regards the community as consisting not only of the present membership but also future membership (which is the case in Melanesia).[40]

1. Nozick, Robert, *Anarchy, State and Utopia*, (New York: Basic Books, 1974).
2. Rawls, John, *A Theory of Justice* (Cambridge: Harvard University Press, 1971).
3. Nozick, 1974 p. 198.
4. *Ibid.*, p. 151.
5. *Ibid.*, p. 150.
6. *Ibid.*, p. 151.
7. *Ibid.*, pp. 152-153.
8. *Ibid.*, pp. 153-154.
9. *Ibid.*, p. 50.
10. *Ibid.*, pp. 30-33, 171-173.
11. *Ibid.*
12. For a provocative discussion of this concept see Daniel De Coppet, "The Society as the Ultimate Value and the Socio-Cosmic Configuration," *Ethnos* 55 (1990): pp. 140-151.
13. A.P. Power, "Resources Development in East Sepic Province", in *Ethics of Development: Choices in Development Planning* (C. Thirwell and P Hughes, eds. Port Moresby: U.P.N.G. Press, 1988), pp. 269-281, p. 269.

issue in the latter terms. They did not ask whether, as individuals, they were materially better off, they asked whether their society or community was better off and they came to the conclusion that it was not. Ultimately, Bourgainville island plunged into a state of revolt as the Bourgainville revolutionary army closed the Panguna mine and subsequently drove the P.N.G. Defence Force and all foreigners from its shores. Bourgainville declared itself independent of P.N.G., and the P.N.G. government embargoed the island effecting ever deteriorating levels of health and general welfare. These conditions continue at the time of writing.

Stepping back from these historical events we again underline a conflict of underlying principles, the liberal and the holistic. The Bourgainvilleans judged according to the latter and looked at social change as it was seen to affect their society as a whole. In doing so, they attended to the traditional Melanesian consideration which regards the identity and interests of the community as intimately connected with the communal land base. It was obvious that the presence of the mine had disrupted the traditional relationship between community and its communal form of land use which was not consonant with the customary form of community life.

34. A.P. Power, "The Future of Clans in Papua New Guinea in the 21st Century", in *Ethics of Development: Choices in Development Planning,* C. Thirwall and P. Hughes, eds. (Port Moresby: U.P.N.G. Press, 1988) pp. 156-175.

35. *Ibid.*

36. See Ghillean Prance, "Fruits of the Rainforest", *New Scientist* 13 (1990), pp. 35-45.

37. R.W. James, *Land Law and Policy in Papua New Guinea,* Monograph 85. (Port Moresby: Papua New Guinea Law Reform Commission, 1985), p. 38.

38. *Ibid.*

39. For an interesting discussion of this concept and its relevance to the capitalist development of the environment see P. Catton, "Marxist Critical Theory, Contradictions, and Ecological Succession," *Dialogue* 28 (1989): pp. 637-655.

40. See: Mantovani, "Traditional Values".

ESTOPPEL: A NEW JUSTIFICATION FOR INDIVIDUAL RIGHTS

N. Stephan Kinsella
Houston, Texas

1. Introduction.

Add an "e" to the word "stop," and dress it up a little, and you get "estoppel," an interesting common-law concept. Estoppel is a principle of equity or justice which is invoked by a judge to prevent, or *estop,* a party from making a certain claim, if the party's prior actions are in some sense inconsistent with making such a claim, and if another relied on such prior actions to his detriment. For example, suppose your neighbor hires a painter to paint his house, but the painter mistakenly comes to your house and starts painting it. You see him doing this, and realize the mistake the painter has made. But instead of stopping him and telling him of his mistake, you wave at the painter and allow him to finish, hoping to get a free paint job. Later the painter asks you to pay him. You refuse; he sues you for the price of the paint job. As a defense, you claim that you did not have a contract with the painter, which is true. At this point, however, the judge might say that you are estopped from making such a claim (that you did not have a contract), because it is inconsistent with your prior action (of letting the painter continue painting your house), and because the painter in good faith relied on your actions, to his detriment. You "will not be heard" to claim there was no contract. Since you are prevented, estopped, from urging that defense, you will lose

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claims urged are clearly inconsistent and contradictory. To say a person is estopped from making certain claims means that the claims cannot even possibly be right, because they are contradictory, and thus they should be disregarded; they should not be heard.

The core of the estoppel principle is consistency. Consistency is insisted upon in any argumentative claim, because an argument is an attempt to find the truth; if an arguer need not be consistent, the very activity of argumentation - of truth-finding - cannot even occur. For example, if Mark states that A is true and that not-A is also, *simultaneously,* true, we know immediately that Mark is wrong - that A and not-A cannot both be true. In short, it is impossible for a person to coherently, intelligibly assert, in a discussion or argument, that two contradictory statements are true; it is impossible for his claims to be true. Thus he is estopped from asserting them, he is not heard to utter them, because they cannot tend to establish the truth, which is the goal of all argumentation.

(Rarely will an arguer state that both A and not-A are true. However, whenever an arguer states that A is true, and also *necessarily holds* that not-A is true, the inconsistency is still there, and he is still estopped from [explicitly] claiming that A is true and [implicitly] claiming that not-A is true. He might be able to remove the inconsistency by dropping one of the claims; but this is not always possible. For example, Andrew might argue that argumentation is impossible; but since he is currently arguing, he must, necessarily, implicitly hold that he is arguing, and that therefore argumentation is possible. He would be estopped from urging these two contradictory claims, one explicit and one implicit, and he could not drop the second claim - that argumentation is possible - for he cannot help but hold this view while engaged in argumentation itself.)

By engaging in argument, one is necessarily trying to arrive at the truth. Since consistency is a necessary condition of discovering truth, any arguer is implicitly accepting the consistency requirement, i.e., the estoppel principle, and would contradict himself if he denied its validity. If my opponent says that inconsistency in claims is not fatal to truth, then he could never claim that my opposing view (that consistency is necessary) is incorrect, because it is "merely" inconsistent with his; thus, he could not deny the truth of my view. But such a position is nonsensical, for my opponent would be claiming that his view (that consistency is unnecessary) and my view (that consistency is necessary) are both true, a blatant contradiction.[5]

Thus any arguer must also accept the validity of the estoppel principle, for it, as explained above, is merely a convenient way to apply the requirement of consistency, which any arguer does and must accept. In effect, any arguer is estopped from denying the validity of

ped from claiming that aggression is wrong. (And if he cannot even claim that aggression - the *initiation* of force - is wrong, then he cannot make the subsidiary claim that retaliatory force is wrong.) He cannot assert contradictory claims; he is estopped from doing so. The only way to maintain consistency is to drop one of his claims. If he retains (only) the claim "aggression is proper," then he is failing to object to his imprisonment. If he drops his claim that "aggression is proper" and retains (only) the claim "aggression is wrong," he indeed could object to his imprisonment; but, as we shall see (in section 3B.1, below), it is *impossible* for him to drop his claim that "aggression is proper."

To restate: If John does not claim that murder is wrong (he *cannot* claim this, for it contradicts his view that murder is *not* wrong, evidenced by his previous murder; he is estopped from asserting such inconsistent claims), then if the state attempts to kill him, he cannot complain about it, because he cannot now (be heard to) say that such a killing by the state is "wrong," "immoral" or "improper." And if he cannot complain if the state proposes to kill him, *a fortiori* he cannot complain if the state merely imprisons him.[10]

B. Necessary Claims and Their Proper Form.

1. Changes of Mind and Denunciation of Prior Action.

John could attempt to rebut this application of estoppel, however, by claiming that he, in fact, *does* currently maintain that aggression is improper; that he has changed his mind since the time when he murdered Ralph. He is attempting to use the simultaneity requirement, whereby an arguer is estopped from asserting that A is simultaneously true and not true. John is urging that he does not hold both contradictory ideas - aggression is proper; aggression is improper - now, that he is only asserting the latter, and thus is not estopped from objecting to his imprisonment.

But John traps himself by this argument. If John now maintains that the initiation of force is improper, then, by his own current view, his earlier murder was improper, and John necessarily denounces his earlier actions, and is admitting the propriety of punishing him for these actions, which is enough to justify punishing him. (And of course it would also be inconsistent of him to deny what he admits, and he is thus estopped from doing so.) Furthermore, if John denounces his murder of Ralph, he is estopped from objecting to the punishment of that murderer, for to maintain that a murderer *should* not, must not, be punished is inconsistent with a claim that murder should not, must not, occur.[11]

Thus the proper way to select the norm which the arguer is asserting is to ensure that it is universalizable. The views that "aggression *by me* is proper" and "aggression by the state, against me, is improper" clearly do not pass this test. The view that "aggression is (or is not) proper" is, by contrast, universalizable, and is thus the proper form for a norm.

When applying estoppel, then, the arguer's claims to be examined must be in a universalizable form. He cannot escape the application of estoppel by arbitrarily specializing his otherwise-inconsistent views with liberally-sprinkled "for me only's."[14] Since he is engaged in arguing about norms, the norms asserted must be universalizable.

Thus we can see that applying the principle of estoppel would not hinder the prevention of violent crimes. For the above murder analysis can be applied to any sort of coercive, violent crime. All the classical violent crimes would still be as preventable under the new scheme as they are today. All forms of aggression - rape, theft, murder, assault, trespass and even fraud - would still be proper crimes. A rapist, e.g., could only complain about being imprisoned by saying that his rights are being violated by the aggressive imprisonment of him; but he would be estopped from saying that aggression is wrong. In general, any aggressive act - one involving the initiation of violence - would cause an inconsistency with the actor later claiming that he should not be imprisoned or punished in some manner. But should the punishment in some sense be proportional to the crime? This question is addressed in section 3D, after first considering limits on state action against nonaggressors.

C. Laws Restricting Nonaggressive Behavior.

Beside laws that restrict aggressive, coercive behavior, there are laws aimed at ostensibly peaceful behavior: minimum wage laws, anti-pornography laws, anti-drug laws, etc. How would estoppel affect (the validity of) these laws? It can be shown that the government is estopped from enforcing certain laws (more precisely, it is estopped from claiming that it has the right to use force against a given person). But note that, even if we can say that the government is estopped from imprisoning a certain person, say Susan, this of course does not mean that the state is prevented from doing so. The principle of estoppel could, at most, be used to show that the government's justification for imprisoning Susan is inadequate.

Let us take an example. Suppose Susan publishes a patently pornographic magazine in a jurisdiction with anti-pornography laws; the state convicts and imprisons her. Unless Susan wants to go to prison,

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Thus it can be seen that any law restricting non-coercive behavior is invalid, null and void, and every person, and the state, is estopped from arguing for its legitimacy.[15]

D. Proportional Punishment.

The above analysis in section 3A, justifying the punishment of aggressors, does not mean that all concerns about proportionality may be dropped. Someone who commits a relatively minor coercive act is estopped from complaining about - what? Suppose the state attempts to execute a person whose only crime was the theft of a candy bar. He will complain that his right to life is about to be violated; is he estopped from making such a claim? No, because he has done nothing inconsistent with such a claim to justify so estopping him; he does not necessarily claim that aggressive killing is proper. The universalization requirement does not prevent him from reasonably narrowing his implicit claim to "minor aggression, namely candy bar theft, is not wrong" rather than the more severe "aggression is not wrong."

In general, while the universalization principle prevents arbitrary particularization of claims - e.g., adding "for me only's" - it does not rule out an objective, reasonable statement of the implicit claims of the aggressor, tailored to the actual nature of the aggression and its necessary consequences and implications. E.g., while it is true that the thief has stolen a bar of chocolate, he has not attempted to take a person's life; thus he has never necessarily claimed that "murder is not wrong," so that he is not estopped from asserting that murder is wrong. Since a candy bar thief is not estopped from complaining about his imminent execution, he can also assert his right to retaliate against the government (which is estopped from denying it), which implies that the government has no right to execute him.

If the nature of the punishment exceeds the nature of the aggression, the aggressor is no longer estopped from complaining (about the excess punishment), and is able to argue that he has a right to attack the state. The state is estopped from denying this because, to the extent of the excess punishment, it is itself an aggressor, which implies that the criminal has a right to not be disproportionately punished (following the analysis used in section 3C, above).[16]

4. Conclusion.

Principled application of the estoppel principle would result in a free society. For all coercive crimes could be punished (if not by the state,

examined is the legitimacy of the argument itself, especially since the division used is morally neutral.

Other divisions could of course be proposed as well, but they do not result in interesting or useful results. For example, one could divide human conduct into jogging and not jogging, and attempt to apply estoppel to it, but to what end? In an attempt to justify some type of utilitarian-oriented welfare state, rather than the libertarian state justified by the nonaggression principle, one could instead divide human conduct into, say, "socially beneficial" and "not socially beneficial" behavior. And such a division in, admittedly, perfectly legitimate, in abstract. However, it is pointless, for estoppel cannot be aplied to it, as it can to an agression/nonagression division, to result in any sort of useful rule.

For, in the estoppel theory argued below, an action is categorized, purely descriptively, as being either aggressive or not. Claims *about* action are then subjected to the universalization requirement (because claims occur during argumentation where universalization must be applied, as discussed in section 3.B.2, below), which forces such claims to be in a form such that the nonagression principle results. However, categorizing action as "socially beneficial" or not is merely descriptive, as is the agressive/nonaggressive division. Action is aggressive if it is the initiation of force against another, e.g., murder, rape, and battery. But what is "socially beneficial"? A lengthy analysis must occur just to show that the conduct in question has been appropriately classified as "socially beneficial" or not. Indeed, such an analysis would amount to a full blown theory justifying a welfare state, obviating the need for use of the estoppel principle in the first place. But since the nonaggression principle, which rules out a welfare state, is justified by application of estoppel, it is impossible to justify such a welfare state theory. For if the nonaggression principle is justified, its contradiction cannot be true.

7. If John does not hold this view, then he is failing to deny the propriety of his imprisonment; he is effectively consenting to his incarceration, and we do not then need to justify the state's action of imprisoning him. I assume in this paper that an individual's consent justifies action against him.

8. On this subject, Alan Gewirth has noted, "Now these strict 'oughts' involve normative necessity; they state what, as of right, other persons *must* do. Such necessity is also involved in the frequently noted use of 'due' and 'entitlement' as synonyms or at least as components of the substantive use of 'right.' A person's rights are what belong to him as his due, what he is entitled to, hence what he can rightly demand of others." Gewirth, "The Basis and Content of Human Rights", 13 Ga.L.Rev. 1143, 1150 (1979).

9. The fact that John here necessarily claims a right, in that the aggression against him is wrong and ought not occur, is a key difference between the estoppel-based justification of rights and Alan Gewirth's action-based attempt, set out most fully in his book *Reason and Morality* (Chicago: University of Chicago Press, 1978). Gewirth argues that all action is purposive and free, and that an agent (i.e., actor) thus necessarily values freedom and well-being, the prerequisites of successful action. The next step - upon which his entire theory depends - does not follow, however: that because an agent must hold that freedom and well-being are necessary goods to him, he "logically must also hold that he has rights to these . . . features and he implicitly makes a corresponding rights-claim." (*Reason and Morality,* p. 63.)

An agent does not necessarily claim a right to have goods just because he values them; and, furthermore, the requirement of universalizability does not apply to goods valued by an agent. However, when an agent is engaged in the special activity of argumentation, in making norms-claims, he is claiming rights, and the requirement of universalizability does apply. (See section 3B.2) (For criticism of this crucial step in Gewirth's argument, see A. MacIntyre, *After Virtue: A Study in Moral Theory* (Notre Dame: University of Notre Dame Press, 1981), pp.64-5; H. Veatch, *Human Rights: Fact or Fancy?* (Baton Rouge and London: Louisiana State University Press, 1985), pp.159-60;

the right to use illegally seized evidence in a conviction of a defendant.

Whether such arguments of third parties could be fully developed is a separate question, beyond the scope of this article; I merely wish to point out that other complaints about certain government actions are not automatically barred just because the specific criminal cannot complain. Just because the government's imprisonment of John does not aggress against him does not show that such action does not aggress against others.

11. In an argument where norms - rules of conduct - are being searched for, an arguer cannot hope to convince others of a norm (something that must not occur) which carries absolutely no consequences for its violation. The search for norms would be purposeless otherwise. Visiting sanctions upon those who break such rules is what it means to say that the rule "must" not be broken. Such strict norms by their nature also contemplate sanctions for their violation. Thus if John admits that "murder must not occur" he implicitly admits that it is proper to apply appropriate sanctions to someone - even himself - who breaks that rule. See also the comments of Professor Gewirth in n8, above.

12. See n9, esp. paragraph. 4.

13. Hoppe, p. 131

14. "The rule cannot specify different rights or obligations for different categories of people . . . as such a 'particularistic' rule, naturally, could never, not even in principle, be accepted as a fair rule by everyone" (Hoppe, p. 5). Checked against the universalization principle, "all proposals for valid norms which would specify different rules for different classes of people could be shown to have no legitimate claim of being universally acceptable as fair norms, unless the distinction between different classes of people were such that it implied no discrimination, but could instead be accepted as founded in the nature of things again by everyone" (*Ibid,* 131-132). Particularistic rules, "which specify different rights or obligations for different classes of people, have no chance of being accepted as fair by every potential participant in argumentation for simply formal reasons. Unless the distinction made between different classes of people happens to be such that it is acceptable to both sides as grounded in the nature of things, such rules would not be acceptable because they would imply that one group is awarded legal privileges at the expense of complementary discriminations against another group. Some people, either those who are allowed to do somethng or those who are not, therefore could not agree that these were fair rules." (*Ibid,* 138)

15. I would like to mention here Hans-Hermann Hoppe's "argumentation ethics," which is similar in some respects to the estoppel theory, as developed most fully in his *A Theory of Socialism and Capitalism: Economics, Politics, and Ethics*, ch. 7 and *passim.* (For further elaboration on Hoppe's thesis, see also his, "The Ultimate Justification of the Private Property Ethic," *Liberty,* September 1988, p. 20; symposium, "Hans-Hermann Hoppe's Argumentation Ethics: Breakthrough or Buncombe?" *Liberty,* November 1988, 44, especially Murray Rothbard's contribution, "Beyond Is And Ought," and Hoppe's response, "Utilitarians and Randians vs. Reason"; D. Osterfeld, "Comment on Hoppe," and Hoppe's response, "Demonstrated Preference and Private Property: A Reply to Professor Osterfeld," *Austrian Economics Newsletter,* no.3 (1988); D. Conway's book review of *A Theory of Socialism and Capitalism,* and Hoppe's response, "On the Indefensability of Welfare Rights: A Comment on Conway," *Austrian Economics Newsletter*, no. 1 (1990).

Hoppe's main argument is that any person who argues must accept certain principles which must be implicitly acknowledged by any person engaged in the activity of arguing. Hoppe shows that any arguer presupposes that both the arguer and the listeners, indeed all people, have a right to self-ownership, and the right to homestead property. He goes on to show that the necessary implication of the principle of homesteading is *laissez faire.*

I am arguing that the application of the estoppel principle results in the nonaggression

Discussions:

MACHAN'S MORAL FOUNDATIONS

Paul Gaffney
St. John's University

Individuals and Their Rights, by Tibor Machan, attempts to provide a moral justification for the libertarian outlook. By 'libertarianism', Machan refers to that "distinctive American political tradition" - the tradition which embraces "a conception of political and legal justice that upholds each individual's basic right to life, liberty, and property."[1] These basic rights are conceived in *negative* terms; the right to life, in other words, demands not that anyone (including the government) provide the goods necessary for life (that would be a *positive* conception of the right), but rather that no one interfere with the moral sphere appropriate to it (in other words, no one threatens my life). My rights demand nothing from you; they demand of you their proper respect.

We can summarize the basic structure of Machan's argument: political justice is explained in terms of these negative rights (it is not justice which explains rights, but rather rights which explains justice). These rights, Machan claims, are grounded in the ethics of classical egoism. Because of what I am, and what I ought to do, there are certain spheres of moral authority that deserve full respect, both from other individuals, and even from the government.

This book evidences a sincere desire to defend its position on all fronts. It is Machan's contention that, although others have argued for libertarianism's political desirability or economic superiority, few, if any, have done justice to the moral foundation of the outlook. This is the specific intention of the book.[2] I will attempt to articulate a couple of

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> The point of morality is to provide human beings with a guide to doing well in life, to living properly, to conducting themselves rightly. (*IR*, p. 37)

This is a brief outline of classical egoism, as I understand it. My first concern, before we get to the political implications, is about the structure and claim of this ethical position. (Machan indicates that this position is defended on its own merits.[5]) What is it precisely that I ought to do, according to the classical egoist? And, most importantly, having decided what the egoist program is, what is the character of the egoistic 'ought'?

It is clear that one ought to live his/her life well, i.e., one should be happy. Since human happiness, or well-being, consists in living according to our fullest perfection, which is the rational capacity, one ought to live rationally, which is to say morally. The classical egoist argues that one ought to do that which is consistent with the patterns and the demands of eudaimonistic realization, patterns and demands which at times require non-calculating loyalty, compassion, and generosity (*IR*, p. 35). The relationship between moral activity and happiness, therefore, is not that between a means and an end: happiness is not a feeling; it is a certain kind of activity. As Machan puts it:

> The relationship between the value each person has chosen by choosing to live his or her human life and the principles adherence to which will result in the realization of that value, is not to be conceived as a mechanistic means/ends model, whereby the means can be separated form the ends . . . This is the truth in the ancient idea that virtue is its own reward, at least for the individual with moral integrity, who sustains his rational plan of living in all his conduct. (*IR*, p. 43)

Since moral activity *constitutes* my fulfillment, in other words, it would not be fair to characterize the egoistic ought as a hypothetical imperative, if by 'hypothetical' we mean to suggest that moral activity has only an instrumental value.

A new question can now be asked of the egoist: Why *should* I be happy? Why should I be concerned with self-perfection, especially if I am satisfied with less? Here my concern is not so much with excellence in other-regarding virtues (such as those mentioned above - generosity, compassion, loyalty) because these commit us to some *interpersonal* obligations. While it is undoubted that Machan envisions his excellent moral agent in a full array of social relationships, it is a

tively human achievement, cannot be established simply by identifying a structure of value.

> There are factors that can contribute to, while others detract from, good human life. But because people are self-determining beings, they constitute an essential element for purposes of establishing whether they will promote a good or a bad life. Here is where the ontological shift from goodness to moral goodness or virtues occurs. A claim that factors suitable or good for life exist applies to nonhuman living beings . . ." (*IR*, p. 40)

The morally good is an appropriate good that is chosen by a free agent; it is not simply what is suitable for a human. This much is clear, but what exactly does choice accomplish? I would suggest that a good which is chosen constitutes a morally significant choice in this sense: it is a choice for which the agent is now *responsible.* Choice is not able, however, to *establish* what our moral responsibilities are. So when we speak of a moral choice in this sense we are referring to the fact that the agent has freely chosen, but we don't know whether or not the agent is *morally obligated or responsible* to make that choice in the first place. We still have not made the connection between what is good and what one ought to do.

In looking to see what strength we can give to the egoistic ought, we discovered that it cannot be considered a hypothetical imperative; now we must conclude that it is not similar to a categorical imperative. It would be very difficult for the egoist to claim that one absolutely ought to achieve his/her perfection when the initial agreement to the endeavor is a morally neutral choice. Now, of course, we probably should not make too much of the suicide example, since Machan is offering his position here simply to lay out the structure of his moral position. One can say, hopefully, that suicide is not, for most, an urgent moral dilemma; nor is the choice to live that Machan has in mind here nearly as dramatic and explicit as a detailed study might suggest.[8] But if it is theoretically possible to opt out of the endeavor through a morally insignificant choice,[9] it would seem to raise real questions about the status of one's choices within the endeavor. Machan hints that we could also speak of wasting one's life away as a kind of suicide, and this is definitely of ethical concern (*IR*, p. 56). Let me phrase my question according to our earlier metaphor: if I don't have to go to New York City in the first place, why am I blameworthy if I take the long way, or if I stop short and stay put?

It would not appear that this attempt to think of the egoistic ought as either a hypothetical or a categorical imperative is promising;

necessary to posit some other term to give moral significance to those possibilities that practical activity involves. If my understanding is correct, it is a tenet of classical egoism to deny this requirement: there is no second term for the agent that creates moral significance. There is, in other words, no reference to God to whom, as the author of my nature, I owe full realization of my being; there is, of course, no reference to the state or the community; finally, there is no *necessary* reference to others (even loved ones).[10] If the classical egoist were willing to try to explain his meaning in these terms (which is doubtful), he/she might suggest that the other term is the perfected self, with whom one is dialectically related in one's practical life. But this line has its own difficulties. It would seem to be rather difficult to identify this term, especially since Machan prefers to speak of human nature (with its better recognition of individual circumstances and temperaments) as opposed to human essence. We feel somehow that it is justified, but how can the classical egoist *morally* challenge the person whose individuality is lazy and cowardly?

What is most plausible is that this whole line of thinking is somewhat misdirected because it tries to make sense of a teleological notion of the good in deontological terms. In other words, classical egoism presents an aspirational morality, not an morality of duty.[11] The former, which is characteristic of Greek ethics, is concerned with one's maximal possibilities, not with the minimum that one must do. As L. Fuller has put it:

> Those thinkers [Plato and Aristotle] recognized, of course, that a man might fail to realize his fullest possibilities. As a citizen or an official he might be found wanting. But in such cases he was condemned for failure, not for being recreant to duty; for shortcoming, not wrongdoing. Generally with the Greeks instead of ideas of right and wrong, of moral claim and moral duty, we have rather the conception of proper and fitting conduct, conduct such as beseems a human being functioning at his best.[12]

What my line of questioning represents, therefore, is something akin to a category mistake: I am trying to force a morality that articulates an aspirational ideal into a series a deontological propositions. So to the question "*Must* I be happy?" both Aristotle and Machan might well be flabbergasted.

But Fuller's discussion hints at a point that I would like to develop. The Greeks' aspirational morality was articulated in a political context; there were certain requirements of citizenry that were well understood. For this reason, Fuller's remark that the Greeks would

libertarian, doing my duty in respecting your negative rights is the entirety of what justice requires.[14] How are we to understand the connection between Machan's moral foundation and his political conclusions? Is this the construction: "I ought to respect your negative rights because it is an aspect or an instance of my eudaimonistic pursuit, which is my primary moral responsibility"? Or is this the construction: "I ought to respect your negative rights because their exercise is necessary for your eudaimonistic pursuit, which is your primary moral obligation"? In either construction, it appears that classical egoism is not the true moral foundation for the libertarian stance (i.e., the respect of negative natural rights). For these duties, corresponding to the rights they respect, are fundamental: I have a moral obligation to respect them regardless of whether or not they contribute to my happiness or yours (since my duty to you exists even if you waste the opportunity it safeguards [15]). It seems that, as a moral foundation for libertarianism, classical egoism has argued for either too much or too little. It has argued for too little if it does not insist that the negative natural rights are basic, absolute, and universal - and therefore constitute a *primary,* even a categorical, moral obligation. It has argued for too much if the moral foundation for negative natural rights is the *moral obligation* of self-perfection. Libertarianism, it would seem, is primarily concerned to outline the bare minimum that must be respected so that complex social relationships can flourish. It must acknowledge that it has no argument with the lazy coward who, in his complacency, never expects anything from others, nor ever threatens the moral spheres of others.

This is not to say that there is no moral foundation for libertarianism, nor that the foundation that does exist is unrelated to Machan's moral theory. He claims that my ethical responsibility is primarily egoistic (natural end flourishing); this responsibility, since it refers to a determinate nature, is universalizable to all members of the classification; therefore, my primary moral responsibility implies a further responsibility: to give you room to fulfill your moral responsibility. My argument is that the notion of self-perfection is involved in the recognition of moral responsibility, but in a different way. I would contend that I have a direct moral responsibility to respect your moral space simply because I recognize you as the type of being who holds negative natural rights. In other words, my duties presuppose a notion of the flourishing individual or of human potential; to recognize you as a being possessing these rights is implicitly to assign you this ontological possibility. And, therefore, *I ought to respect this, I owe it to you.* I cannot make sense of my moral oughts, which extend universally to all members of the classification, without the doctrine of human flourishing.

preferences."

4. *IR*, pp. 26, 46-47. Machan makes it clear that his moral position draws from Aristotle, but is not an attempt to recover the precise intentions of Aristotle. There is, therefore, no attempt by Machan to show that his development is in full accord with every line of Aritotle's text. A specific example: "The distinction between this view ans Aristotle's may be noted here: we are resting human goodness on human nature, not merely human essence. Aristotle's Platonic intellectualism came from his essentialist rather than naturalist conception of the human good. Human nature is richer, less specialized that human essence. When we consider human nature, then, a person's individuality is of as much significance as his or her common humanity."

5. *IR*, p. 29: "It is my view that classical egoism is a sound system of morality, regardless of whether or not it supports negative natural rights . . . Ethics, in short, is prior to politics because the question 'How should I conduct myself?' is prior to the question 'How should *we* conduct ourselves in one another's company?'"

6. *IR*, p. 33. Machan is criticizing those contemporary moralists who "hold that the dominant concern or morality lies in determining how one should treat other persons." Egoistic obligations are not exhaustive of Machan's morality, but that they are primary would seem clear from this passage from the same page: "[T]he idea that *every one ought to strive to benefit himself or herself first and foremost in life* will not imply that a person's egoistic conduct will result in substantial anti-social, avaricious, allous, or deceptive behavior . . ." (my emphasis).

7. See passage cited above, pp. 4-5.

8. *IR*, p. 56: "Let us grant that to live is a matter of (implicit) first choice . . . This choice gives reason, therefore, for the rest of one's actions and requires no reason for itself. It is the primary reason, the *first* one, which then creates the need for morality. My point here is conceptual rather than chronological. First one tacitly, implicitly, chooses to live . . . Later [the choice] becomes more explcit . . ."

9. *IR*, p. 57: "[I]f initially the choice is to bow out of life, then, to the best of our knowledge, one needs no moral guidelines."

10. Because my primary responsibility is to myself, even if many of the virtues involve others. The one exception that Machan has allowed is the fact that I may have made some commitments to others, and therefore my life has social significance.

11. I first encountered this distinction in L. Fuller, *The Morality of Law* (New Haven: Yale University Press, 1964). Fuller claims no originality for the distinction itself, although he does say that his nomenclature is new.

12. Fuller, p. 5.

13. *IR*, p. 2: "A right binds us to refrain from preventing others from others acting in certain ways (they have a right to act) - using the pool, speaking their minds, voting for their political candidates, even wasting their lives. In this sense a right is always relational - it pertains to the moral responsibilities that arise among humans (and perhaps other moral agents)." On the same page, Machan cites Raz' definition of a right: "'X has a right' if and only if X can have rights, and other things being equal, an aspect of X's well-being (his interest) is a sufficient reason to holding some other person(s) to a be under a duty." See Joseph Raz, "On the Nature of Rights", *Mind*, XCIII (1984), p. 195.

14. *IR*, p. 101: "One cannot then explain rights in terms of justice but one must explain justice in terms of rights."

15. See the citation from *IR* (p. 2) in the preceeding footnote.

16. There is nothing here, as far as I can tell, which is incompatible with a religious morality either.

DERIVING RIGHTS FROM EGOISM: MACHAN vs. RAND

Eyal Mozes

In his book *Individuals and Their Rights,* Tibor Machan presents an argument deriving individual rights from an ethics of rational egoism (or, to use his term, classical egoism). Machan cites Ayn Rand throughout his book, and regards his own arguments as a more detailed and systematic presentation of the argument sketched by Rand. However, I submit that Machan's argument is significantly different from Rand's.

Rand's arguments are often misinterpreted in a form similar to Machan's. To a large extent, this is the result of the lack of a systematic presentation of Rand's philosophy, and of the brief, sketchy form in which she presented her views. However, a close reading of her statements on this subject, and a look at other, less easily available sources (such as taped lectures by Leonard Peikoff, who has had the advantage of long personal discussions with Rand), reveal a line of argument very different from - and, I submit, much sounder than - Machan's.

There are two aspects in which Machan's argument differs from Rand's:

> (1) Machan justifies his interpersonal ethics through a "substitution principle", the idea that rationality requires you to grant to other human beings the same rights that your

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