

**Symposium: William Irwin's *The Free Market Existentialist***

Mere Prudence? Existentialist Ethics, Moral Anti-Realism, and Freedom

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**1. Introduction**

Libertarianism and existentialism share much in common in the early twenty-first century American intellectual landscape. They both represent counter-cultural rebel streaks, punctuated by themes of individualism and personal responsibility. Though these are perennial concerns within American culture, the chief intellectual influences on both traditions share European roots: France and Germany for most of the existentialists, and expatriates like Friedrich Hayek, Ludwig von Mises, and Ayn Rand for libertarians.<sup>1</sup> In this respect, William Irwin's *The Free Market Existentialist*<sup>2</sup> is notable less for what many may see as an unlikely pairing, but more in that this line of argumentation wasn't explored sooner. Irwin's success with this book comes, in no small part, from providing a long overdue service. Although I find fault in some aspects of Irwin's approach, I broadly sympathize with the book's essential arguments, and highly recommend it to others. As it is

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<sup>1</sup> As a point of interest here, it is worth observing that Rand originally considered "existentialism" as the name of her system of thought. She opted for "Objectivism" because "existentialism" was already in use. See Leonard Peikoff, *Objectivism: The Philosophy of Ayn Rand* (New York: Meridian, 1991), p. 36.

<sup>2</sup> William Irwin, *The Free Market Existentialist* (Malden, MA: Wiley Blackwell, 2015). All parenthetical citations in the text are to *The Free Market Existentialist* unless otherwise specified.

in exploring the limitations of any work that we may better come to appreciate its strengths and how progress can be made with further work, it is my hope that this review will be taken as a friendly, constructive criticism.

In particular, although I endorse Irwin's notion that striking thematic commonalities and compatibility exist between existentialism and libertarianism, I take issue with Irwin's proposed synthesis, as it takes up unnecessary positions that are counter-productive toward that end. In particular, the embrace of moral anti-realism here is made all the stranger. Existentialism itself hardly requires anti-realism, and arguably counsels against it. Indeed, it is not even clear that Irwin has abandoned ethics at all, so much as rebranded the enterprise, as he attempts to reconstruct most of the work of morality in terms of prudence and enlightened self-interest. Does this make Irwin's a case of "Moral Anti-Realism in Name Only"? If so, we have existentialism itself to credit for keeping Irwin from the brink, which is a good thing, because it will also turn out that the libertarianism he endorses, if truly divorced from any basis in ethics, would be unobtainable.

In the space available here, a complete argument against moral anti-realism, merely as such, is not possible. In any case, it would take us into the weeds, inasmuch as Irwin is largely basing his anti-realism on Richard Joyce's *The Myth of Morality*,<sup>3</sup> which would require a separate discussion about Joyce, moral fictionalism, and metaethics generally, rather than about Irwin, existentialism, and libertarianism. Instead, let me state in general terms where I disagree with him as it applies to existentialism and libertarianism. There is a failure of imagination on Irwin's part to see that many of the concepts and ideas he defends contain a normative, and thus, moral, valence. At points, Irwin seems to be aware of this, but he tries to avoid that problem by speaking instead of *non*-moral virtues, like prudence. In so doing, he protests too much, for the concessions Irwin himself supplies to normativity happen to provide the rudiments for meaningful ethical claims. Moreover, existentialism itself embodies robust ethical claims, such as freedom and authenticity as normative values, that would be difficult if not impossible to capture from an anti-realist perspective.<sup>4</sup>

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<sup>3</sup> Richard Joyce, *The Myth of Morality* (Cambridge, UK: Cambridge University Press, 2007).

<sup>4</sup> Two book-length treatments of the ethics of Sartrean existentialism worth consulting on this point include Thomas C. Anderon's *Sartre's Two Ethics: From Authenticity to Integral Humanity* (Chicago, IL: Open Court, 1993), as

The strange conclusion here is that embracing anti-realism is not only unnecessary and counterproductive, but given Irwin's own commitments, it also suggests a departure from existentialism. To the degree that Irwin retains both the existentialist framework and libertarian politics, he will require robust moral commitments.

In what follows, I first discuss Irwin's general case for anti-realism in the context of a libertarian existentialism, finding that his case rests primarily on a false alternative between his preferred anti-realism and a rigid moral realism. This excludes the possibility of the kinds of normative frameworks that the virtue theorists, as well as the existentialists themselves favored, making the appeal to a "non-moral normativity" unnecessary. Next, I discuss Irwin's proposed "non-moral virtue" of prudence, considering its place in Aristotelian virtue theory, and concluding, with Aristotle, that prudence gains its status as a virtue only within the context of a broader moral theory. This suggests that prudence is not viable as a proper "non-moral" virtue, as it is not autonomous from specifically moral virtues. Finally, I consider the relationship between morality and the political and legal foundations of liberalism, with particular attention to classical liberalism. I conclude that both as a theoretical and practical matter, moral anti-realism frustrates and undermines liberal theory, rather than supports it.

## 2. Non-Moral Normativity?

Part of the difficulty here is that Irwin, like Joyce, demands too much of morality. Finding that belief in moral claims can be explained as evolutionary adaptations, he concludes that they cannot therefore be meaningfully true. This is especially pressing for existentialists, as they are committed to the notion of an absurd universe, or at least, as Albert Camus suggests, an absurd relationship between people and the universe (p. 12). Nevertheless, it is Simone de Beauvoir who, after identifying the "spirit of seriousness" as the state of mistaking values for ready-made things in the world, suggesting a rejection of moral realism, who also diagnoses nihilism as a "disappointed [spirit of] seriousness which has turned back upon itself," seeing a rejection of ethics as the other side of the moral realist coin.<sup>5</sup> One question here

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well as David Detmer's *Freedom as a Value: A Critique of the Ethical Theory of Jean-Paul Sartre* (Chicago, IL: Open Court, 1988).

<sup>5</sup> Simone de Beauvoir, *The Ethics of Ambiguity*, trans. Bernard Frechtman (New York: Citadel Press, 1996 [1948]), p. 52.

ought to be: Are moral realism and anti-realism false alternatives, as Beauvoir suggests? Does the rejection of one necessarily entail the truth of the other?

Helpfully enough, Irwin unwittingly leaves an escape clause or two here. First, he insists that existentialists should be more willing to accept the basic findings of evolutionary biology, thus weakening Jean-Paul Sartre's attempt to rule out any essence or nature for human beings. As products of evolution, there are ways in which humans do in fact have a "nature," but we do, nevertheless, retain autonomy over ourselves as individuals.<sup>6</sup> Second, he accepts, as he must, that there are at least some meaningful forms of normativity, albeit of what he insists is a "non-moral" character.<sup>7</sup> I'll analyze these two ideas in turn.

First, the premise that humanity has any kind of nature, whether from evolution or some divine source, can provide a ground for an ethics, but perhaps one more empirical than we typically get from many versions of moral realism. That is, we can meaningfully describe certain behaviors or habits as either "good" (well-suited) or "bad" (ill-suited) to the overall functionality and flourishing of any creature with a particular nature. This would give rise to moral facts, in the form of empirically grounded claims about behavior.

Consider, as one possible framing of the issue, the way that Phillipa Foot describes her understanding of the relationship between fact and value:

The thesis of this chapter is that the grounding of a moral argument is ultimately in facts about human life—facts of the kind that [Elizabeth] Anscombe mentioned in talking about the good that hangs on the institution of promising, and of the kind

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<sup>6</sup> A helpful distinction to keep in mind here is the difference between what can be said of populations and individuals. Evolutionary biologists emphasize the usefulness of evolutionary explanations for the former, but not the latter. Heritability is ultimately a measure of variation among individuals within a population. See Daniel J. Fairbanks, *Everyone Is African: How Science Explodes the Myth of Race* (Amherst, NY: Prometheus Books, 2015), p. 115.

<sup>7</sup> Irwin concedes that the "ought" of morality and of prudential self-interest often coincide, but he insists that they do not always do so, and that the latter should be favored in cases of conflict (p. 126). However, ethicists who adhere to variations of ethical egoism and eudaimonistic ethics would challenge that claim, on the basis that the two oughts are indeed one and the same, by definition.

that I spoke of in saying why it was a part of rationality for human beings to take special care each for his or her own future. In my view, therefore, a moral evaluation does not stand over against the statement of a matter of fact, but rather has to do with facts about a particular subject matter, as do evaluations of such things as sight and hearing in animals, and other aspects of their behaviour. Nobody would, I think, take it as other than a plain matter of fact that there is something wrong with the hearing of a gull that cannot distinguish the cry of its own chick, as with the sight of an owl that cannot see in the dark. Similarly, it is obvious that there are objective, factual evaluations of such things as human sight, hearing, memory, and concentration, based on the life form of our own species. Why, then, does it seem so monstrous a suggestion that the evaluation of the human will should be determined by facts about the nature of human beings and the life of our own species? Undoubtedly the resistance has something to do with the thought that the goodness of good action has a special relation to choice. But as I have tried to show, this special relation is not what non-cognitivists think it is, but rather lies in the fact that moral action is rational action, and in the fact that human beings are creatures with the power to recognize reasons for action and to act on them. This in no way precludes recognition of the part played by 'sentiments' such as (negatively) shame and revulsion or (positively) sympathy, self-respect, and pride in motivating human virtue.<sup>8</sup>

Oddly enough, the Darwinian factors and hypotheticals raised by Irwin illustrate this point. There are reasons why animals engage in behaviors that we humans find disgusting and there are reasons why they would seem disgusting to us. Reasons for both have to do with our respective natures and the evolutionary paths that brought us to where we are today.

But if this nature is taken too rigidly as a hard determinism constraint, ethics would still be a dubious undertaking as a project. The other ingredient needed would be some theory of free will: the ability to deliberate and choose and to be held responsible. For that, we needn't be as extreme as the early Sartre, who embraced a (metaphysical) libertarianism so radical so as to exclude the very

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<sup>8</sup> Phillipa Foot, *Natural Goodness* (New York: Oxford University Press, 2001), p. 24.

possibility of a human nature. We can instead endorse a compatibilist perspective, consistent with causal determinism, to respect more fully the facticity of our capacities. If the compatibilist is correct, the facticity of that kind of determinism poses no essential contradiction with the full freedom of the subject.

The idea that there is at least some human essence or nature creates fascinating possibilities as a basis for ethics—but note that this will foreclose others. For example, the orthodox Kantian will want to base ethics on fidelity to the moral law for its own sake and will take precious little of an empirical nature into account when identifying what the moral law is. That won't work here. If there is some fact of the matter about what it is to be human and fulfill that functionality, and normativity is based on that, then it will be a uniquely *human* ethics. For example, if there were such creatures as vampires, where part of their nature includes sucking blood to sustain themselves and to live well, then it couldn't exactly be immoral for them to do so. For vampires, like mosquitoes, would merely be fulfilling their nature. Similarly, if some alien creatures had dominating lesser species like humans as part of their evolutionary make-up, we wouldn't be able to call it unethical for them to choose to do so, even as humans would be within their moral rights to resist.

If what I describe sounds familiar, that's for a reason. In a roundabout way, I have described a virtue-ethicist perspective. All it really requires at this point is to specify (a) some account of *eudaimonia* (happiness or flourishing), which existentialists would no doubt link with authenticity and freedom, and (b) a fleshing out of the kinds of habits of character that generally constitute or give rise to it in human beings. Rather than categorical imperatives, hypothetical imperatives would ground ethics as moral facts. *If* you want to live well, *then* incorporate these habits into your character. Moral facts would merely be potentially testable empirical claims about general traits and habits as they relate to *eudaimonia*. This, I think, captures well what I think Irwin is trying to get at with an enlightened prudentialism. Rather than being a “fiction,” though, morality could be conceived of as a usefully simplified conceptualization, or decision heuristic, guiding us for our own difficult decisions and in terms of evaluating others' character.

It may be that I make too much of Irwin's concession that if evolution supplies an account of a human nature, then this implies a potential basis for normativity. After all, Irwin emphasizes that this is a “non-moral” form of normativity, so let us consider this idea at length.

Irwin uses prudence as an example, but of course, it seems that we're not limited to that. There are, of course, instrumental values and rules that inform much human activity. Speaking as an Uber driver, I can observe that to drive well, there are certain rules one should follow, independent of traffic laws. A "good" Uber driver is courteous to his or her passengers, doesn't take personal calls while driving, and doesn't blare Nine Inch Nails at loud decibels (unless, of course, requested to do so by a passenger). We can recall Sartre's waiter here to qualify these observations, though. It would be inauthentic, or to engage in bad faith, for a person to carry this too far, to do this with an attitude that depersonalizes oneself. I take it that *authenticity*, in this context, would suggest a state of harmony between these kinds of norm-based habits and one's expression of self.

I bring this up to observe that even if we live in an absurd universe, there are nevertheless examples of meaningful sets of operating norms such as this one in great abundance. It is hardly written into the cosmos that Uber drivers ought to behave in a certain way. However, we do nevertheless observe that certain habits and behaviors work well for this activity and others do not. Indeed, with most human activities, there are attitudes, habits, behaviors, and rules, which if followed, make these activities more successful for all involved. Irwin, following Joyce, might insist that there's nothing uniquely *ethical* about all of this, but I suppose that's where this may get a bit semantic. If we consider what traits are fairly consistent across human activity in terms of enhancing their quality, satisfaction, and role in *eudaimonia*, that list would probably include traits like honesty, courage, and generosity. We would consider further that as ingrained habits of character, one is less likely to mistake them for imperatives from on high or follow them as a matter of bad faith. Would these be *non-moral* virtues? It seems not. Although they could be redescribed in terms of how they contribute to norms of prudential self-interest, simple parsimony alone would suggest that it's a lot simpler here to speak of things being good, right, bad, or wrong. This is why Irwin's appeal to the parsimoniousness of concepts, as a reason for moral anti-realism, is strange. It would seem simpler to describe behavior as good and bad, virtuous and vicious, than to invoke the comparatively baroque conceptual framework of *non-moral* virtues and vices.

Irwin concludes his chapter on "Existentialism in a World Without Morality" with a revealing discussion about what kind of moral language it would make sense to keep (p. 128). "Evil" is out, but "good" and "bad" are in, which would have pleased Friedrich

Nietzsche, though not Beauvoir. Interestingly enough, Beauvoir saw no difficulty with retaining “evil” as a concept, explicitly identifying at least one form of it with enslavement.<sup>9</sup> Existentialism certainly suggests a great deal more nuance to normativity. Authenticity is nothing if not a normative concept, perhaps a morally “thick” concept (as Bernard Williams might have called it<sup>10</sup>), and courage and honesty seem constantly emphasized in existentialist literature. I am unsure whether I agree with this characterization, though it is worth recalling that Camus refers to his character Meursault, the eponymous protagonist of *The Stranger*, as a “hero for the truth.”<sup>11</sup> The implication here is that truth and honesty are good things in a fully normative, even heroic sense. And of course, there is freedom, as a primary, if not the primary, value. It is worth considering here the reason Sartre rejects the possibility that a sincerely committed Nazi could claim authenticity: understanding and valuing one’s own freedom requires recognizing it for others. Indeed, he invokes the role of moral judgment and insists that freedom can be one’s goal only to the degree that one wants it for others.<sup>12</sup> Normativity is everywhere in existentialism.

There is normativity—and then there are formal systematic accounts of ethics which would presumably fully account for moral facts. Existentialism certainly has the former, but it lacks the latter. At least two stumbling blocks may account for this. First, to put it mildly, Sartre is reluctant to concede any ground on the question of whether there is a human nature. Second, for existentialists, there remains the possibility that ethics might be doomed from the start as an endeavor conceived in, and practiced as, bad faith. Irwin already takes care of the first here, by suggesting that the empirical facts of evolution be brought into the equation.

As for the second of Irwin’s possible escape clauses, the project of ethics could be in bad faith *if* one reasons, as Immanuel Kant

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<sup>9</sup> Beauvoir, *The Ethics of Ambiguity*, p. 136.

<sup>10</sup> Bernard Williams, *Ethics and the Limits of Philosophy* (Cambridge, MA: Harvard University Press, 1985).

<sup>11</sup> Robert C. Solomon, “*L’Etranger* and the Truth,” *Philosophy and Literature* 2, no. 2 (1978), p. 143.

<sup>12</sup> Jean-Paul Sartre, “The Humanism of Existentialism,” in *Essays in Existentialism*, ed. Wade Baskin (New York: Citadel Press Books, 1995), pp. 57-58.



does,<sup>13</sup> that one must act a certain way *simply* because the moral law, however autonomously derived, compels us. If it is *only* to the degree that one chooses in such a way that one's acts have moral import, this would suggest that one can only be moral to the degree that one is also acting in bad faith. For if I claim that the moral law compels me to act in a certain way, this renounces my responsibility in choosing to act. However, if morality consists not in duties and moral laws, but rather in virtues, we can accept both the internal transcendence of freedom and facticity that gives rise to normativity. Irwin, after all, argues for a kind of enlightened self-interest informing prudential decision-making. The virtue perspective, especially in its eudaimonistic formulations, offers a similar, if more long-term, motivation. To put it crudely, because virtues represent internalized habits and dispositions, the agent's moral actions can be consistent with authenticity. Yet at the same time, this would not imply that agents are unfree, slaves to their own habits and dispositions. Consider Daniel C. Dennett's example of Martin Luther's stand against Catholicism. Luther is reputed to have said, "Here I stand. I can do no other." We understand by this not that he was denying his own freedom to choose, as an act of bad faith. To the contrary, we understand by this that he was affirming his own freely chosen and internalized values, and taking responsibility for them, making a stand in the name of his own integrity.<sup>14</sup>

### 3. *Phronēsis* as a Virtue, Moral and Otherwise

That brings me to prudence, which Irwin characterizes as a *non-moral* virtue. For Irwin, prudence does a lot of work which looks for all the world like morality, insofar as it provides a unitary basis for action, even if Irwin believes that prudence and morality can depart from each other.

As it happens, Aristotle identifies prudence as one of his virtues, which he calls *phronēsis*, usually translated either as practical wisdom or prudence. Compare the translations from Sarah Broadie and Christopher Rowe (wisdom) with Robert Bartlett and Susan Collins (prudence). *Phronēsis* is characterized as an intellectual, as opposed to

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<sup>13</sup> Immanuel Kant, *Grounding for the Metaphysics of Morals*, 3<sup>rd</sup> ed., trans. James Ellington (Indianapolis, IN: Hackett Publishing Company, Inc., 1993).

<sup>14</sup> This example is taken from Dennett's discussion of compatibilist free will. See Daniel C. Dennett, *Elbow Room: The Varieties of Free Will Worth Wanting* (Cambridge, MA: MIT Press, 1984), p. 133.

moral, virtue in Aristotle's *Nicomachean Ethics* (I.13, 1103a4-10). However, as Broadie observes in her commentary, this virtue is not autonomous from the moral virtues. Aristotle distinguishes *phronēsis* from *technē* (technical skill) and *sophia* (intellectual accomplishment), and he concludes that *phronēsis* depends on overall character-excellence, or virtue, insofar as virtue helps to ensure that the values one relies on *phronēsis* to obtain are the correct ones.<sup>15</sup>

Would this make prudence a “moral” virtue or a “non-moral,” intellectual virtue? As Broadie sees it, Aristotle indeed saw it as an intellectual virtue, as opposed to a moral one, but he was quick to emphasize that it was not separable from the moral virtues that comprise *eudaimonia*. For Aristotle, prudence itself requires the character-excellence supplied by the other moral virtues, just as they rely on prudence in their successful exercise. This suggests a sense of directionality: For what ends or whose interests is one acting?

We wouldn't want to say that one acts merely for one's interests, whatever they happened to be. After all, Irwin would not endorse interests or ends that cut against libertarianism or which were enmeshed with consumerism, since he endorses the former and condemns the latter. We want those interests to be in some sense “enlightened” by an awareness of long-term consequences. Irwin initially suggests that something like desire-satisfaction is sufficient as an end or interest, but he later suggests something more like long-term, enlightened self-interest instead (p. 125). Missing from this, however, is an account of what would play the role of Aristotle's character-excellence, to offer an account of what makes interests enlightened, and in virtue of what consequences are understood to be good or bad.

The idea that prudence, whether we want to call it a moral virtue or not, can exclusively ground normativity could be challenged by David Hume's “sensible knave” thought experiment.<sup>16</sup> As the

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<sup>15</sup> See Sarah Broadie and Christopher Rowe, *Aristotle: Nicomachean Ethics* (Oxford: Oxford University Press, 2001), pp. 46-48. Also see Robert Bartlett and Susan Collins, *Aristotle's Nicomachean Ethics* (Chicago, IL: University of Chicago Press, Chicago, 2011).

<sup>16</sup> David Hume's discussion of the sensible knave can be found in his *Enquiry Concerning the Principles of Morals*, sec. 9, pt. 2. It should be noted that Hume ultimately concludes that this knave is simply odious and not necessarily a major problem for his own ethical view. Although sympathetic to much of Hume's approach here, I would only suggest that the act of identifying this individual as a “knave” suggests that, regardless of whether the knave is in a position to understand and accept the error of his ways, an

experiment postulates, there could be people who are extremely clever and ultimately prudent enough to know how to appear kind, decent, honorable, and trustworthy, but who also know how to victimize them without detection. One can picture here anything on the spectrum from pickpockets and shoplifters, kleptomaniacs, and Bernie Madoff-type fraudsters to sexual predators and murderers. If a person had those kinds of talents, why wouldn't he engage in that kind of behavior, if it would gain him values over and above what he could have by maintaining his integrity? One might recognize money, sex, and other values as one's interest or desire, and if one was prudent about how one went about obtaining them, that could in principle include unscrupulous tactics as normatively recommended, at least for that agent.

Is there a way to argue that, no matter how talented and prudent, knavery and predatory behavior can never be justified on the basis of prudence alone? One tack could be to deny the possibility of a (successful) sensible knave. For example, agents are almost never in a position to know for sure what they could get away with; epistemic limitations all but guarantee that. The Ring of Gyges does not and could never exist. Even if it were true that, in principle, one could become a prudent predator, no human agent is smart enough or well-informed enough to know, with certainty, how to pull it off. Prisons are full of people who thought they were intelligent enough to victimize successfully their fellow human beings without being caught, only to learn otherwise. Habitual and even occasional liars find that they frequently fall into Seinfeldian predicaments: tracking the multiple alternative stories one tells others and keeping them all consistent is a cognitively taxing endeavor. There are simpler, more satisfying ways to go about obtaining our values. In this sense, there is nothing sensible about the tactics of the sensible knave.

But there is another potential diagnosis that suggests itself here of special relevance for the existentialist: bad faith. I suspect that Irwin's temptation here would be to say that the existentialist, whether free market or not, would reject predation, even if it could be justified on purely instrumental, prudential grounds, because this would make one guilty of bad faith. After all, what is bad faith but a lie to oneself and to others, a fundamental misrepresentation of what and who one is? Note, though, that it does mean that a conflict here exists between the agent's interest in authenticity and prudentialism as a guide for

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account of what makes the behavior "knavery" to begin with is necessary.

action. It seems that if the existentialist wishes to settle that conflict in favor of the former, it would be difficult not to see this as a moral claim or priority. Recall Sartre's view that one may not claim freedom for oneself while denying it for others. The existentialist, in essence, would want to be able to say that achieving authenticity is praiseworthy and that bad faith is . . . bad. If this is what responsibility entails, what would this be called if not morality? If Irwin accepts existentialism to this extent, then he may not be offering us a true moral anti-realism.

#### **4. Law and Politics Without Morality?**

Irwin cites Hans-Georg Moeller for the claim that we don't need morality; Moeller believes that law and love are sufficient. Love, in the Confucian sense, as opposed to the Christian sense, establishes the norms for relationships between family and friends. Law works by stabilizing expectations toward everyone else (pp. 118-19). Of course, Irwin would hardly be alone in that view, since legal positivists like H. L. A. Hart, as well as the legal realist school, all share that law should not be conflated with morality. However, this poses more than a few problems, particularly for libertarians.

Consider that Hart, in distinguishing law and morality as entirely separate domains, also goes on to emphasize that the question of whether to follow an unjust or immoral law is one for ethics to settle.<sup>17</sup> However, moral anti-realism denies the ability to undertake that question in a meaningful way. We would just have law. A stock example used in the literature on the positivism versus natural law debate is the Fugitive Slave Act. Was it the case that pre-Civil War Americans should have obeyed this law? Traditionally, the natural law theorist responds that as the Fugitive Slave Act is unjust, it cannot have the status of binding law; an unjust law is no law at all. Positivists like Hart respond that the Fugitive Slave Act was indeed law, as it was passed according to the rules of recognition, following all proper procedures for legislation. However, they contend that the Fugitive Slave Act's status as legitimate law does not settle the question of whether it ought to have been obeyed; this, they say, is a question for

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<sup>17</sup> "Wicked men will enact wicked rules which others will enforce. . . . [H]owever great the aura of majesty or authority which the official system may have, its demands must in the end be submitted to a moral scrutiny." See H. L. A. Hart, *The Concept of Law*, 2<sup>nd</sup> ed. (New York: Oxford University Press, 1994 [1961]), p. 210.

morality. But what of the moral anti-realist? It seems that the moral anti-realist can only answer that it depends on what one's interests and desires are. We do, after all, have an interest in being or at least appearing to be law-abiding. As no one wants to entertain the possibility that one would not have been wrong to obey this kind of law, legal positivism can only survive to the extent that one has the ability to make those kinds of judgments about justice and morality generally.

Critics of legal positivism, both in and outside of the natural law school, argue that positivism has a problem in providing for or explaining the morality of fidelity to the law. Fortunately, regardless of which school of law one favors, there is one simple way to resolve the question of how one can regard fidelity to the law. The catch, however, is that it requires that we have some notion of morality in play. In considering whether to obey a law, we would need to identify a law as just, unjust, or merely amoral. (An amoral law would be a rule without any particular moral valence, like the question of what side of the road to drive on or what day to pay our taxes on.) If a law is just, we follow it, because it's already entailed by justice itself; hence, appealing to the law is superfluous. If the law is amoral, we generally follow it, out of prudence. The threats of punishment, or traffic accidents, factor into prudence. As for unjust laws, there would be no particular obligation to follow unjust laws and good reason actively to disobey them.

But note that this works only if we have some notion of morality, and justice in particular, to which we can appeal. If we're moral anti-realists, we have only prudence and our interests to guide us. The only possible solution left to the question of why the law should be followed would be something a bit more Hobbesian than libertarians would typically entertain.

Indeed, the question of whether law, merely as such, is sufficient to guide behavior exists not merely for individual citizens, but also for states themselves. The People's Republic of China, for example, has a constitution guaranteeing for its citizens the same basic set of liberties commonly found in liberal democracies, such as the freedom of speech, religion, press, due process, and so forth. The problem is that the Chinese Communist Party rarely actually follows its own constitution on these points, as courts in China do not entertain appeals to constitutionally guaranteed freedoms as valid defenses. As a general problem in Irwin's appeal to love and law, even if it were conceded that citizens need only law to guide their behavior toward strangers, states themselves, which face few practical barriers in the

exercise of their powers, stand in some sense beyond the accountability of law. Beyond love and law, there would have to be some other avenue of appeal for the interests of state actors, if nothing else, to follow their own law.

Beyond law itself, a version of the sensible-knave problem also presents itself for politics. Suppose that an individual is talented at manipulating others without any sense of remorse. We can call this individual Frank Underwood. We could imagine Underwood's politics hardly to be libertarian. Underwood would likely favor a politics rich in demagoguery, relying on cronyism, corruption, and rent-seeking, something closer to a highly interventionist statism than to libertarianism. If he were in a developing country, he might be ambitious enough to pursue dictatorship.

It might be that Underwood is a poor example here, because he's likely a narcissist, if not a sociopath. It would be a fool's errand to attempt to reason morally with such an individual, whether there were moral facts or not. Rather, my concern here is with providing an account as to why this would be a "bad" thing. Regardless of whether Underwood is persuadable or not, on what basis would a classical liberal or libertarian anti-moralist describe this kind of behavior as wrong?

We could say that it's bad in the sense that Underwood's antics would deprive us of freedom and our property: his "good" is our "bad." With moral anti-realism, libertarians would have an impoverished vocabulary at the level of interest-group politics, limited to saying that they didn't like what Underwood was doing, perhaps on an aesthetic level. But why would libertarians' interests matter at least as much as Underwood's or his faction's? If classical liberalism means anything, it would have to mean at a minimum that individuals and their rights matter, which is a normative claim. In this context, we'd at least want the claim that it's *wrong* to deprive people of their rights, independent of the hurly-burly world of interest-group politics. Sartre, a perhaps unwilling conscript to the classical liberal cause, demands that one's own freedom may only come with the recognition of the equal freedom of other individuals.

Irwin emphasizes the role of contracts in protecting freedom. Even without a Hobbesian Sovereign to enforce contracts, we have prudential reasons to live up to our agreements, insofar as others will be unlikely to form agreements with us if it becomes known that we're unreliable trading partners. Any cursory study of the merchants' law of the Middle Ages will show how well professional reputation

incentivized law-following without formal state-enforcement measures, even across borders of language and nationality.

But consider the political process: contracts can be subverted there. Indeed, the U.S. Constitution's Article I, Section 10's "Contracts Clause" owes its existence to the tendency of state governments, under the Articles of Confederation, to nullify contracts between debtors and borrowers, since the latter are numerous enough to be politically useful as a voting block. As another example, consider eminent domain abuse, in which deeds and contractual relationships can be uprooted to benefit more powerful interests. Contracts alone would be insufficient to protect children and the mentally handicapped, as they are ineligible to sign them. For people in that kind of condition, a moral notion of rights might be useful.

This all suggests that politics is best seen as an outgrowth of ethics, shifting the perspective from the individual (the good person) to the social (the good society). Classical liberalism, as a political ideology, gains much of its intuitive appeal from the idea that the way we interact as individuals with each other ought largely to inform and be consistent with how we interact with the State. If it's true that threatening one's neighbor, stealing from her, violating her privacy, or compelling her to do your bidding is wrong, we can see why it would be wrong for the State to do it and wrong for one to enlist the State to perform these functions on one's behalf.

The existentialist is in a unique position to understand this and to provide a moral language for it. The existentialist, after all, can invoke the primacy of freedom as a value, emphasizing its relationship with responsibility. Just as important, though, is the moral psychology of bad faith, which fits nicely as a description of one who rejects these activities for individuals but supports them when done by the State. In this respect, the existentialist ethos is, if nothing else, congruent with the libertarian ethos of "keep your hands to yourself and mind your own business." Such a rich morality could only be in Irwin's prudential best interest to adopt.

