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Editor's Note

This issue of *Reason Papers* features a symposium on Firmin DeBrabander's *Life After Privacy: Reclaiming Democracy in a Surveillance Society*. Irfan Khawaja and Paul Showler provide comments and the author replies.

In the occasional Discussion Notes section, we have a comment from Roger E. Bissell on Douglas B. Rasmussen and Douglas J. Den Uyl's "Three Forms of Neo-Aristotelian Ethical Naturalism: A Comparison," published as part of our Symposium on Neo-Aristotelian Ethical Naturalism in *Reason Papers* Vol 43.2. We also have a reply from Den Uyl and Rasmussen.

Next up are two review essays. First, Jason Walker reviews Aaron Harper's *Sport Realism: A Law-Inspired Theory of Sport*. Harper's book takes inspiration from legal realism to develop a theory of sport he calls Sport Realism. Walker is critical of the attempt, but still finds it worthwhile for those interested in philosophy of law or philosophy of sport. Then, Gary James Jason continues his exploration of twentieth-century propaganda of anti-Semitism and anti-black racism in previous issues of *Reason Papers*. Here Jason examines anti-Japanese racism in World War II propaganda films.

Rounding out this issue, Peter Saint-Andre reviews Roger E Bissell and Vinay Kolhatkar's *Modernizing Aristotle's Ethics: Toward a New Art and Science of Self-Actualization*.

Our next issue will celebrate 50 years of *Reason Papers*, so stayed tuned!

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Symposium: Firmin DeBrabander's *Life After Privacy: Reclaiming Democracy in a Surveillance Society*

Push Back Harder: Asymmetric Power and the Struggle for Privacy

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1. Prècis of *Life After Privacy*

It is no secret that we live, as Firmin DeBrabander aptly puts it, in a world "after privacy." "Democracy," we have long been taught, "is unthinkable without privacy," but the task of his book, *Life After Privacy*, is precisely "to think it."[2] He writes:

> My aim is to understand the prospects and future of democracy without privacy, or very little of it—and with a citizenry that

[1] I am a Provider Support Associate with CorroHealth, a health care revenue-cycle management company based in Plano, Texas, with an affiliate in Iselin, New Jersey, where I work. I am in no way a spokesperson, official or otherwise, for CorroHealth or any of its affiliates. The claims I make in this essay are made exclusively in my own name, at my own initiative and responsibility.

[2] Firmin DeBrabander, *Life After Privacy: Reclaiming Democracy in a Surveillance Society* (New York: Cambridge University Press, 2020), p. ix.

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> cares little about privacy, and does not know why to appreciate it, or protect it.[3]

DeBrabander begins with a well-documented fact that by now should be common knowledge: Big Data, meaning the data-mining and data-harvesting branches of the modern corporation and modern state, have within just a few decades subverted almost all of the norms of privacy that preceded the rise of the Internet, and have created a surveillance state of unprecedented scope and power.

I will not belabor the details of DeBrabander's story here, which relies on well-known work by Bruce Schneier, Michael Lynch, Cathy O'Neill, Zeynep Tufekci, and Shoshana Zuboff, among others.[4] The bottom line is that, through the (literal) devices of Big Data, your privacy is either a dead letter or on its way to getting there. Every move you make leaves a digital footprint that someone, somewhere, is harvesting and monetizing. It is tempting to regard yourself as benefited by the convenience you enjoy and opportunities for self-expression you get as a result, but it is also likely that you have no idea how many liberties Big Data has taken with your "private life" and how little privacy you now enjoy.

How did this happen? On DeBrabander's account, our predicament might be likened to that of the Biblical Esau: We sold our privacy for the digital equivalent of a mess of pottage. Big Data gave us an iterated series of trade-offs, over decades, of convenience or self-expression over privacy.[5] We cultivated societies of unbridled preference-satisfaction subject to the imperatives of immediate gratification. We thus chose convenience and self-expression over

[3] DeBrabander, *Life After Privacy*, p. ix.

[4] See, e.g., Bruce Schneier, *Data and Goliath* (New York: W.W. Norton, 2015); Michael Lynch, *The Internet of Us* (New York: W.W. Norton, 2016); Cathy O'Neill, *Weapons of Math Destruction* (New York: Broadway Books, 2016); Zeynep Tufekci, *Twitter and Tear Gas* (New Haven, CT: Yale University Press, 2017); and Shoshana Zuboff, *The Age of Surveillance Capitalism* (New York: Public Affairs, 2019).

[5] The story of Esau and Jacob is told at Genesis 25:25–34.

privacy, iterated across billions of mouse clicks, and divested ourselves by our own hands of our birthright.

It might in a sober moment occur to us that that we have given too much away to entities that may well threaten our well-being. What to do? There are, essentially, two options: either we explicitly fight for privacy under that description or we surrender our privacy and learn to live without it. DeBrabander makes an extended, albeit reluctant, case for the latter option, one part pragmatic, the other part theoretical.

The pragmatic part of the argument tells us that resistance to Big Data has at this point become futile. For one thing, there's *nothing left to fight about*: Big Data already has our data and already has the means by which to acquire whatever is left, so there is really nothing left to defend. For another, *there are no weapons left with which to fight*; there is no plausible or viable mechanism by which to hold the line against Big Data, much less to get back the privacy we have lost. Individual hacks will not work. Government regulation moves too slowly to catch up to Big Data's workarounds, and network-based activism, heavily reliant on the Internet, is easily neutralized by the owners of the networks on which it relies. To paraphrase Jesus, you might as well put down your digital sword.[6]

The theoretical part of the argument questions the nature and value of privacy itself. Consider three fundamental problems.

(1) First, it is not clear what harm is involved when privacy is "invaded." Much of the privacy we give away, after all, is relinquished voluntarily. Even apart from consent, it is unclear where the harm is supposed to be. Some authors (for example, Zuboff) seem to equate data harvesting with "invasion" and Big Data with totalitarianism or imperialism, but that seems overstated. Others (for example, Lynch) seem to insist that the Self is harmed in the sheer act of unwanted scrutiny by others, but surely that depends on the aims and context of the scrutiny. There is, it seems, no entirely general or generalizable account of the harm involved in "the invasion of privacy." The

[6] From the King James Version of the Gospel of St. Matthew (26:52): "Then said Jesus unto him, Put up again thy sword into his place: for all they that take the sword shall perish with the sword."

uncomfortable question thus arises: How can data privacy matter so much if we have no account of the wrongness of violating it?[7]

(2) Second, beyond the preceding theoretical lacunae, it might well be argued that privacy is a pernicious and self-subverting normative ideal, neither capable of inspiring a fight nor worth the candle. By its nature, the quest for privacy privatizes life. It atomizes us, separates us, and drives us into cocoon-like enclaves of comfort designed to filter out the unpleasant facts of life that constitute the subject-matter of politics. In doing so, it systematically unfits us for political life by an insidious logic of its own. Given our Esau-like proclivities, it is not as though we are inclined to resist either their blandishments or their takings. To paraphrase Karl Marx, the ethos of privacy becomes its own gravedigger.[8] It may well deserve it.[9]

(3) Third, at the deepest level, however, privacy is problematic because it presupposes an indefensible conception of the self—a private self that enjoys its privacy by retreating away from the social realm to commune with itself, by itself. DeBrabander traces this idea to a strand of peculiarly modern thought in the Western tradition, from Michel de Montaigne to Henry David Thoreau and through Anglo-American jurisprudence of the past century or so. Essential to this conception of privacy is the asocial atom of social contract theory: the utterly self-determining, self-forming, rigidly bordered Self that must be *left* alone, like some Leibnizian monad, the better to realize itself.[10]

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[7] For problem (1), see DeBrabander, *Life After Privacy*, chap. 2. Though not discussed in DeBrabander's book, it might have been worth engaging on issue (1) with the work of Adam Moore, *Privacy Rights: Moral and Legal Foundations* (University Park, PA: Penn State University Press, 2010).

[8] "What the bourgeoisie, therefore, produces, above all, is its own grave-diggers. Its fall and the victory of the proletariat are equally inevitable." See Karl Marx, *The Communist Manifesto*, in Karl Marx, *Selected Writings*, ed. Lawrence H. Simon (Indianapolis, IN: Hackett Publishing, 1994), p. 169.

[9] For problem (2), see DeBrabander, *Life After Privacy*, chaps. 5, 7, 8, and Conclusion.

[10] For problem (3), see DeBrabander, *Life After Privacy*, chap. 6.

However, there is (DeBrabander suggests) no good philosophical reason to believe in such a Self or the realization it needs. If there is not (an issue beyond my scope in this essay), there is no need for the extreme sort of privacy it demands. We ought perhaps to replace that atomistic conception of privacy with a more moderate one of the kind we find in Stoic, religious, and otherwise non-individualist conceptions of interiority, whose less romantic conceptions of privacy found expression in political regimes radically different from those that prevail in individualist Britain or America. The point is not to oscillate from, say, wild Thoreauvian freedom to theocratic repression, but to find the mean between them.

Given this, it is perhaps misleading of me to have described DeBrabander as counseling "surrender" to Big Data, full stop. What he wants is surrender on the *privacy* front, combined with an opening on a different front, the political. We should, on his view, replace our crusade for and valorization of privacy with a turn to a properly political conception of public life inspired by (a version of) Aristotle, John Dewey, and Hannah Arendt. The practical models here are the American civil rights and labor movements.[11] Neither movement aimed at or relied heavily for the effectuation of its aims on privacy. Freedom, equality, and justice are essentially public in character; they were won not by a retreat into the private sphere, much less by privatization, but by publicity, exposure, and the values of collective action in the service of a common good. Unlike digital activism, these movements were incontestable success stories (at least on their own terms, as far as achieving their own immediate and most pressing political aims), so we would do well to follow their lead. Doing so might win back some of our privacy without explicitly aiming at it, but more importantly, would

[11] On the civil rights movement, DeBrabander cites Taylor Branch's *Parting the Waters: America in the King Years 1954–63* (New York: Simon and Schuster, 1988); on the labor movement, he cites Philip Dray's *There Is Power in a Union* (New York: Anchor Books, 2010), and Erik Loomis, *A History of America in Ten Strikes* (New York: The New Press, 2018). See DeBrabander, *Life After Privacy*, pp. 99–104.

pay dividends in the restoration of our common public life, which is where the action is or ought to be.[12]

2. Blaming the Victims?

I should begin my remarks with a confession. Though I spent some twenty-six years as an academic philosopher, I now work in Big Data. That makes me a kind of Edward-Snowden-in-reverse vis-à-vis my former profession: Edward Snowden left his former profession to disclose the facts about Big Data; I have left mine to become a guardian of the asymmetric power and secrecy by which Big Data operates. Put another way, you've all met the enemy and it's me.[13] Given that, I want in my remarks here to focus on a narrowly pragmatic (rather than deeply philosophical) aspect of DeBrabander's overall argument: I am going to discuss at length the Esau-like diagnosis he gives of our predicament and then touch briefly on his proposal to surrender the privacy front while shifting focus to the political.

As I see it, DeBrabander overstates our culpability for our loss of privacy in a way that amounts to blaming the victims. In doing so, he understates Big Data's culpability for that loss. Given that, his proposal to direct our attention away from privacy as such ends up giving Big Data a pass and averting our eyes from its culpability. In fact, it seems to me that he gets much of the story backwards. We should be pinning the blame for the loss of our privacy squarely on Big Data, and only there, and, as a society, pushing back on Big Data much harder than we have. That is a precondition of any restoration of the political, not an expected consequence.

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[12] The suggestion is made throughout the book, but see in particular DeBrabander, *Life After Privacy*, chaps. 3, 4, 7, 8, and the Conclusion, e.g., pp. 72–74, and 157–63. I should emphasize that the paragraph as a whole is intended to capture DeBrabander's view, not my own.

[13] On my affiliation, see note 1. On Edward Snowden and related issues, see Edward Snowden, *Permanent Record* (New York: Metropolitan Books, 2019), and Barton Gellman, *Dark Mirror: Edward Snowden and the American Surveillance State* (New York: Penguin, 2021).

As a first approach, consider four explanatory models for understanding how Big Data managed to undermine privacy. The taxonomy is intended to be a rough, first approximation toward carving up logical space, neither mutually exclusive nor jointly exhaustive:

(1) *Unilateral seizure*: Big Data unilaterally acted to take our privacy; we played little or no voluntary role.

(2) *Voluntary relinquishment*: we voluntarily consented to give Big Data our privacy; it played little or no coercive role.

(3) *Symmetrical co-causation*: we acted in concert with Big Data, each party making co-equal contributions to the outcome.

(4) *Asymmetrical co-causation*: we acted in concert with Big Data, each party making unequal contributions to the outcome.

As I read him, DeBrabander oscillates throughout his book between (2), (3), and (4). Sometimes, he writes as though our loss of privacy is all our doing (2). Sometimes, he writes as though our loss of privacy is partially our doing (3). Sometimes, he acknowledges that while we voluntarily and culpably gave our own privacy away, Big Data, being the asymmetric player, played the larger causal role in producing the privacy-diminishing outcome (4).

My own view is a variant on (1). As I see it, Big Data acted unilaterally and coercively to take our privacy; the role it played was sufficient to produce the outcome. It is no doubt true that through apathy, indifference, and self-indulgence, we, its victims, made our own little contribution to the outcome, but I regard this as *explanatorily* irrelevant. The role we played was over-determined by the role Big Data played. Our role was epiphenomenal. Given the asymmetries of power involved, the informational constraints placed on us, and the sheer technical sophistication of the techniques deployed, there is almost nothing we could have done to forestall the outcome and save our privacy. Once the Big Data juggernaut began, it was fated to win, at least as far as it *has* won. Even if you factor in our culpability (where "our" excludes the power brokers within Big Data itself), it plays no important explanatory role.

To understand the actions involved, we have to understand the nature of the actors—the *modern corporation* and the *modern state*. The essential feature of both—to understate things—is asymmetric power vis-à-vis the rest of us. Both the corporation and the state are, in slightly different ways, mutually reinforcing *monopolies*. Whatever the moral tone of the rhetoric they use, both are fundamentally amoral, unscrupulous agents of power, unconstrained by the sorts of norms that constrain the average person acting in something other than an *ex officio* role.

The state has a monopoly on the initiation, use, distribution, and authorization of force; it decides when force is to be used, what force is to be used, against whom, to what degree, and with what consequences.[14] In part for this very reason, it enjoys immunity for abuses of its authority. Formally, the state enjoys *sovereign immunity*; informally, it enjoys a sense of practical impunity.[15] What this means is that states are authorized, both *de jure* and *de facto*, to lie, cheat, steal, trespass, assault, torture, and murder without having to answer for it in any way that compares to the accountability demanded of the governed. Their doing so is the exception, not the rule. Paradoxically, the state enjoys a presumption of moral authority on top of all of this: regardless of its actual moral status, states demand that the governed acknowledge their legitimacy and go to remarkable lengths to ensure that they do. Being a state actor not only means almost never having to say "sorry," but by the terms of conventional moral and legal logic, means almost never having anything to say "sorry" for.

One implication of the state's monopoly on force is its exclusive prerogative to define, through the rule of law, how force is to be used. A further, nearly trivial implication is that it gets to define the nature of property and contract rights and their enforcement, including how, where, and when resources are legitimately to be extracted from the sources of initial appropriation and how they are to be transferred from

[14] See, e.g., the entry for "State (polity)" on Wikipedia: https://en.wikipedia.org/wiki/State_(polity).

[15] On sovereign immunity, see the entry for "Sovereign immunity" on Wikipedia: https://en.wikipedia.org/wiki/Sovereign_immunity.

there on. Because it enjoys this monopoly, the state has the option either to regulate appropriation and transfer directly or to outsource the task to others.

The modern corporation is in essence the relevant outsourcing operation.[16] The state grants to the corporation a permission—once upon a time a charter, now a permit, license, or registration—to exercise a mini-monopoly on resource extraction, defined by the state, including limitations on liability for torts and guarantees of protection and favored treatment. Where the state concerns itself with the governance of territory, the corporation concerns itself with the extraction of resources from those territories, protected by state authority. In doing so, the state rigs the rules so as to facilitate corporate resource-extraction at the expense of nonstate and noncorporate actors: the tax code, property law, contract law, tort law, and criminal law are all structured to corporate advantage. The state has the incentive to do this because the revenue stream generated by the corporation is ultimately the revenue stream that pays for the state itself. The employment it generates serves to regulate the population, usually without the need for direct state intervention.

Given this setup, the two institutions both mirror each other and exist in a symbiotic relationship with each other. The state monopolizes force; the corporation monopolizes resource extraction, protected by the state's monopoly on force. The state enjoys immunity from prosecution for the way it deploys force; the corporation enjoys near-immunity from accountability for how it extracts resources from the commons. The state protects the corporation; the corporation feeds the state.

In short, the modern corporation governs us at precisely the point at which the state relinquishes control and precisely because it

[16] For a general account, see the entry for "Corporation" on Wikipedia: https://en.wikipedia.org/wiki/Corporation. For a more worked-out account, see Shoshana Zuboff, *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power* (New York: Public Affairs, 2019). For a more libertarian-friendly take on the same theme, see Brink Lindsey and Steven M. Teles, *The Captured Economy: How the Powerful Enrich Themselves, Slow Down Growth, and Increase Inequality* (New York: Oxford University Press, 2017).

does. Counterintuitive as this may seem to some, the modern corporation, like the state, wields the power of life and death over us. This should be obvious in the case of the health care corporation, the private prison, or the mercenary security outfit, but as many experts have persuasively argued, it is increasingly true of the rest of the world as well. Just as the state outsources its power to corporations, the corporation, in turn, outsources its power to the computer-driven algorithm. Everything nowadays either is, or is driven by, such algorithms, so computerization becomes an expression of corporate power. While the corporation's main concern is the monetization of the world, not its destruction, its risk calculus is its own, not ours. It does not wantonly have to kill us to possess the right to impose its risk calculus on us, however ultimately lethal.[17] Thanks to limited liability, it does not have to apologize when it is wrong, either.

That brings us more directly to Big Data. Personal data is a resource to be extracted from the circumstances of private life. To understand how it is extracted, we have to focus on the right or relevant circumstances. The relevant ones are not (*pace* DeBrabander) those of retail commerce or private self-expression, but of genuine human necessity, those junctures in our lives where we appear to face options,

[17] On lethal threats arising from computer algorithms, see Bruce Schneier, *Click Here to Kill Everybody: Security and Survival in a Hyper-Connected World* (New York: W.W. Norton, 2018). It's worth remembering that foreign threats and underworld actors—partly governmental, partly corporate—are as much part of "Big Data" as anything else. For useful discussion, see John P. Carlin and Garrett Graf, *Dawn of the Code War: America's Battle Against Russia, China, and the Rising Global Cyber Threat* (New York: Public Affairs, 2018).

Since I first presented an earlier version of this essay, six of my company's hospital clients have been hit by major computer hacks, leading in at least two cases to extended suspensions on hospital admissions. See, e.g., Michael L. Diamond, "CentraState Healthcare Hack Stole Data from 617,000, Including Some Social Security Numbers," *Asbury Park Press* (New Jersey), February 11, 2023, accessed online at: https://www.app.com/story/money/business/consumer/2023/02/10/freehold-nj-centrastate-hacker-stole-625k-social-security-numbers/69892194007/.

but where one option bears down on our needs, crowding out the possibility or feasibility of choosing any of the others.[18]

Birth is the unchosen point of entry into data harvesting, followed in (very) roughly chronological order by health care, education, employment, finance, housing, insurance, and law. There is little or no way of avoiding these institutions in modern life and no way to avoid the relevant institutions' demands for personal data. Once engaged with them, and typically at the first encounter, an individual is deprived of any choice about whether to surrender her data, the purposes for which that data will be used, the methods that will be used in mining it, or the risks involved at any point in the process of harvesting, mining, sale, or exploitation of it.

The same mechanism is deployed in every case. An asymmetrically powerful actor, often a corporation but sometimes the state, exploits the necessity of a weaker actor, a person, demanding data as the price of meeting the weaker party's unavoidable human needs. Nominal consent is obtained for the transaction, but the consent in no plausible way qualifies as informed and is often given (for instance, in health care or law enforcement) under duress, even extreme, terrifying duress.

The transaction itself has no defined boundaries. The terms of service keep changing. The terms are often themselves incomprehensible and incoherent. Many uses of the data are not captured by the terms of the "contract" at all: they are simply *faits accompli*. Beyond this, the stronger parties to any interaction enjoy almost complete immunity in cases of breach. Indeed, most cases of breach go undetected. Contracts today are breached so often by the stronger party that the phenomenon becomes a kind of parody of Immanuel Kant's example of the lying promise in his *Grounding*: the world literally *becomes* the one in which the maxim of the lying promise

[18] I rely here partly on my personal experience of working in Big Data (see note 1 above) and partly on the work of O'Neill and Zuboff (cited in note 4 above).

has become universalized—and universalized by the most powerful agents in the world.[19]

Beyond *this*, the socio-political world is organized so as to reward innovation at getting around the terms of a contract, because the terms are themselves conceived as irritating side-constraints on the imperatives of unbounded optimization (think HIPAA in health care or FERPA in higher education).[20] In many contexts, "innovation" just *means* finding ways to maximize revenue by exploiting the ambiguities of contract or regulation. Innovation so conceived is rewarded with far greater enthusiasm than adherence to humdrum moral norms.

The surrender of personal data is part of the price of the ticket for just about anything we want in the modern world, be it a necessity, a luxury, or anything in between. Once surrendered, the data enters a cycle of mining, monetization, regulation, and punishment—in short, external control—far beyond the control of the individual consumer. Your personal sense of decorum, prudence, or reserve are utterly beside the point in this context. Even the dead are harvested, catalogued, investigated, and administered.

Given this, DeBrabander's focus on voluntary disclosure via the frivolities of online commerce and online acts of self-expression strikes me as misplaced. Even if we took those things entirely out of the equation, we would be left with a Data Leviathan staring down its subjects.

While your moral mileage may vary here, it is beside the *explanatory* point that we are all shopping online until we drop; posting our selfies, nudes, and private confessions on social media; or a little of both. Private self-indulgence does not really explain much about

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[19] See Immanuel Kant, *Grounding for the Metaphysics of Morals*, 3rd ed., trans. James W. Ellington (Indianapolis, IN: Hackett Publishing, 1993), pp. 14–15, Ak. 402–3.

[20] HIPAA is the law that governs protected health information in the United States: the Health Insurance Accountability and Portability Act of 1996. FERPA is the law that governs educational records in the United States: the Family Educational Rights and Privacy Act of 1974.

our collective loss of privacy, which is another way of saying that contrary to DeBrabander, the desire for individual privacy (or self-expression) is—and never was—the problem.

3. Pushing Back Harder

I have, admittedly, focused on the *least* philosophical part of DeBrabander's argument. It might justifiably be wondered what turns on my doing so. Haven't I ignored what's more central to the book? In some ways, I have. However, the relevance of these initial explanatory concerns becomes clear if we now fast-forward past the philosophical arguments to DeBrabander's practical proposals.

In making his argument, DeBrabander canvasses the philosophical and legal literature in search of a serviceable definition of privacy and a defensible account of its value. Finding neither, he reaches the conclusion that there is none to be had. That, in turn, becomes the rationale for his suggestion that we change the subject. Instead of focusing on privacy, we ought to focus elsewhere; instead of defending privacy, we ought to defend other things.

I do not think DeBrabander's survey of the literature is comprehensive or charitable enough to justify the dismissal he offers. I also happen to disagree with many, if not most, of the strictly philosophical criticisms he makes about the value of privacy,[21] but let me leave those issues for others to discuss.

Suppose that we have done the best we can as far as philosophical accounts of privacy and come up short. Regardless, if my account is right, we have ample reason to regard Big Data's infringements on our privacy as a threat to us and ample motivation to push back. All we need to know is *that* they are threatening infringements, not *why*. We do not need a deep philosophical account of privacy to come to this conclusion, valuable as that might be.

DeBrabander is doubtless right that we lack a fully worked-out account of privacy in all of its details and subtleties, but we have a

[21] See note 7 above.

commonsense notion of what privacy is and a thin, generic account of its value. Like private property (and in much the same way), privacy serves a need to preserve and safeguard the separateness of persons. The details are no doubt contestable, but the fact itself is clear enough. The threat to privacy posed by Big Data is equally clear. We now have ample documentation of the scale and depth of Big Data's intrusions into our lives, so it is difficult to say that we are safe enough to change the subject and move on. The threat we face is as big as any we are ever likely to face.

Unless we really *know* that Big Data has won the game, that we are entirely out of ammunition, that all attempts at resistance will certainly be futile, we have undeniable reason for pushing back on Big Data. We need only know that it has awesome powers, is constrained from abusing them only in a purely formal way, is run by morally flawed mortals with ordinary vices, puts us at substantial risk (which it then covers up), and adopts a God-like posture toward us without having God's omnibenevolence. None of the good it does us can entirely offset or explain away these harms. Yes, it would be nice to have a theory that conceptualizes all of this in a neat and tidy way, but more important is to have the right weapons that protect one's space or that drive intruders out of it. The question is how to fashion them, not whether we need to.

DeBrabander writes as though privacy was a lost cause and as though the construction of an Arendt-inspired collectivist political order was somehow more feasible than the defense of privacy against Big Data. I do not see why—and I say that as someone *inside* the Beast. No particular political goal that DeBrabander favors is any more or less utopian than the task of reining in Big Data. Indeed, I do not see how anyone could construct the Arendtian order DeBrabander favors until they had *first* secured a measure of privacy. Even collectivist groups have to exclude those hostile to their aspirations in order to have the space to deliberate and act in a productive way. No one can function in an atmosphere of indiscriminate inclusion and total exposure. Contrary to DeBrabander, unless we draw some lines against Big Data and defend them, all bets are off for any higher political aspirations, Arendtian or otherwise.[22]

[22] The details of an activist strategy are worth discussing, but beyond my scope here. DeBrabander and I had a fruitful initial exchange on the topic at the event

Let me double back a bit, however. I am still enough of a philosopher to appreciate the strictly theoretical challenges DeBrabander has laid out. The concept of privacy is, as he rightly suggests, protean, equivocal, elusive, and sometimes over-hyped. Some of its applications are, as he rightly suggests, problematic and even pernicious. I share many of his concerns about the privatization of public life, particularly in the United States, as well as his aspirations toward an Aristotle-influenced, Arendt-inspired civic order. Though I disagree with much of it, I find *Life After Privacy* a bracing, stimulating read, one that helped re-focus my attention in salutary ways on the role and value of privacy in my own personal and professional life. It is not obvious how to reclaim democracy in a surveillance society, but reflection on DeBrabander's arguments has forced me to think hard about how it should be done.[23]

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that gave rise to this symposium. One disagreement arises from the very different lessons we take from Zeynep Tufekci's *Twitter and Teargas* (note 4 above), which DeBrabander reads more pessimistically than I do.

[23] This symposium began life as an Author-Meets-Critics session at the Central Division Meeting of the American Philosophical Association in Denver, Colorado (February 24, 2023). Many thanks to Celeste Harvey (College of St Mary) for initiating, organizing, and chairing the session, and to the North American Society for Social Philosophy for sponsoring it. Thanks also to Shawn Klein and *Reason Papers* for agreeing to publish the conference proceedings. And thanks, of course, to Firmin DeBrabander, Paul Showler, and Ethan Hallerman for a fruitful exchange at the session itself.

Reconstructing Privacy: Remarks on *Life After Privacy*

Paul Showler

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1. Privacy and Confession Culture

We contemporary North Americans inhabit what Firmin DeBrabander dubs a "confessional culture." Our willingness to share on social media details of our private lives is practically limitless. In fact, many people cheerfully reveal things about themselves—from incessant relationship updates to unsolicited "brelfies"—that could have caused their recent forebearers to die of shame or embarrassment.

For DeBrabander, our increasing embeddedness within a confessional culture is a primary reason why the fight for privacy is impractical. As he explains, attempts to preserve privacy in the digital age are "ultimately doomed so long as the majority no longer understands or appreciates privacy—clearly, convincingly, and self-consciously."[1] As our confessional culture continues to take hold, we are only more likely to lose sight of such an understanding or appreciation.

Although I agree that ours is a confessional culture, I would like to raise two critical questions about this insight. The first concerns the nature and exercise of power within a confessional culture. The second involves a more substantive objection to the normative implications that DeBrabander draws from this observation.

First, DeBrabander draws parallels between confessional culture and two related ideas: "panopticism" and "disciplinary power."

[1] Firmin DeBrabander, *Life After Privacy: Reclaiming Democracy in A Surveillance Society* (Cambridge: Cambridge University Press, 2020), p. 20.

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The former term refers to the "surveillance scheme" introduced by Jeremy Bentham (originally in his designs for a modern prison)[2] and famously analyzed by Michel Foucault. As Foucault puts it, the central function of the Panopticon is "to induce in the inmate a state of conscious and permanent visibility that assures the automatic functioning of power."[3] The latter phrase picks out a distinctive operation of power that "produces subjected and practiced bodies, 'docile bodies'."[4]

As DeBrabander points out, aspects of our confessional culture "fly in the face of dire predictions about panopticism."[5] Critics warn that mass surveillance will stifle individual expression as our digital panopticon induces us to monitor and regulate our own behavior. Yet, despite the well-known fact that social media companies are busy gathering, storing, and analyzing swaths of user data, these platforms do not seem to be producing disciplined, self-regulating subjects.

Although DeBrabander doesn't quite put it this way, his observations about our confessional culture point to a striking revelation: the mechanisms of disciplinary power appear to be in play, yet its effects do not appear to be working in their usual ways. For example, the constant internalization of digital surveillance seems to be producing not normalized "docile bodies" but eager exhibitionists. We appear to be surrounded by digital panopticism, yet our online behavior could not be further from Foucault's predictions.

Hence, my first set of questions are: If our digital confessional culture involves a detachment of panopticism from the effects of disciplinary power, what accounts for this shift? How does DeBrabander understand the operation of power within a confessional culture? Is

[2] Jeremy Bentham, *Panopticon: The Inspection House* (1791; repr. Whithorn, UK: Anodos Books, 2017).

[3] Michel Foucault, *Discipline and Punish*, trans. Alan Sheridan (New York: Vintage Books, 1995), p. 201.

[4] Foucault, *Discipline and Punish*, p. 138.

[5] DeBrabander, *Life After Privacy*, p. 11.

disciplinary power still a useful model for understanding our online world or do we need to look elsewhere?

My second question concerns the role of confessional culture in DeBrabander's overall strategy for showing that privacy is not, ultimately, worth defending. As I understand him, the idea is that we are so thoroughly ensnared in a world in which privacy norms have been disrupted that it is pointless to hope for popular support in resuscitating those norms. One might agree that the dominance of a confessional culture poses formidable practical problems for defending privacy rights, but it is not clear what is supposed to follow from this.

Consider an analogous situation in which a society that once broadly supported a right to religious expression undergoes a cultural shift toward secularism. As a result, many people in that society lose their motivation to defend the rights of their religious neighbors and friends from increasing infringements on the part of governments and corporations. These people need not exhibit animosity toward members of the religious community. They may even pay lip service to the importance of a right to religion. Nonetheless, they ultimately fail to offer any serious resistance to the erosion of those rights. Intuitively, it seems that the thing to do in such a situation would not be to abandon religious rights, but to come up with strategies for spurring people's motivations to defend them.

If there is something to these intuitions, then what makes the erosion of privacy rights any different? I agree that there are presently practical challenges to defending privacy. However, why should we accept that—taken on their own—they support the normative conclusion that we ought to abandon its defense?

2. Historical Continuity

My second set of critical remarks targets the historical component of DeBrabander's argument. I should note that I commend the historicism that DeBrabander offers in response to essentialist conceptions of privacy, so my thoughts are best taken as an invitation for him to elaborate on this important part of his book.

On the one hand, *Life After Privacy* argues that privacy—at least in its current form—is a recent invention. In fact, its recency undermines

the claim that privacy is a necessary condition for democracy to function (as many defenders would claim). On the other hand, there is a meaningful sense in which privacy (or something akin to it) forms a part of institutions going back centuries, if not millennia. For example, we are told that it is expressed in the writings of the Stoics and early Christians. Thus, whatever benefits or virtues one associates with privacy may be attainable without the comparatively recent (legal, architectural) edifices that our society has constructed in pursuit of it.[6]

On the face of it, there is a straightforward tension here: How can privacy be both a recent invention and an age-old relic? The answer is that it undergoes some sort of evolution or transformation, but this requires some general account of what exactly is being transformed, what the continuity consists in, etc.

My first question, then, is: What exactly does DeBrabander take privacy to be, such that it has undergone a series of historical transformations? At one point, he refers to privacy as a value,[7] but at other times it seems the term refers to rights or practices.

Without a more robust account of what exactly is undergoing a change, I worry that little prevents DeBrabander's view from devolving into a much more radically historicist position that threatens his claim that privacy has, in some sense, been around for a long time. To put this point in the form of a skeptical question: Why should we think that there is any meaningful continuity between ancient practices and our current conception of privacy?

In response, DeBrabander might appeal to the contextual view of privacy developed by Daniel Solove.[8] On this account, privacy is not a concept that can be captured by a set of necessary and sufficient conditions, but is best construed as a family resemblance concept.

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[6] DeBrabander, *Life After Privacy*, p. 75.

[7] DeBrabander, *Life After Privacy*, p. 75.

[8] Daniel J. Solove, *Understanding Privacy* (Cambridge, MA: Harvard University Press, 2008), p. 9.

That is, far from being a unified, unchanging phenomenon, privacy involves a set of contextually defined norms that evolve over time. Given, however, that DeBrabander explicitly distances himself from Solove's account, it is unclear how his own view can capture privacy's historical continuity without lapsing into a form of essentialism.[9]

3. The Public-Private Distinction

The final chapters of *Life After Privacy* assail the philosophical underpinnings of privacy theory. DeBrabander advances two main arguments against standard conceptions of privacy.

The first is that these views presuppose an implausible liberal notion of the subject, according to which we are autonomous, self-determining agents, whose essence can only be discerned by stripping away the distortions of social influence. In particular, this presupposes the "Romantic lie," the idea that a person can be "independent and utterly self-determining," owing their essence to no external force.[10] Call this the "atomism objection."

The second argument targets the idea that privacy is required for democratic flourishing. Proponents of this view maintain that citizens cannot properly participate in the public sphere until they have been left alone to work out their views and get their values in order. In other words, "Privacy is that purifying element that allows citizens to exercise consent, and be free in the state."[11] DeBrabander goes to considerable lengths to cast doubt on these assumptions. For example, there is no good reason to think that leaving citizens alone will produce politically virtuous citizens (as opposed to, say, reclusive sadists). Moreover, one can imagine authoritarian governments relishing the prospect of political subjects who prefer their own private spaces to the thrill of public demonstrations. Thus, we should stop assuming that privacy is a

[9] DeBrabander, *Life After Privacy*, pp. 34–35.

[10] DeBrabander, *Life After Privacy*, p. 110.

[11] DeBrabander, *Life After Privacy*, p. 117.

necessary condition for democracy. Call this the "indispensability objection."

I am sympathetic to the spirit of both objections. That is, I am just as suspicious of atomistic individualism as DeBrabander is and I share his skepticism that leaving people to their own devices will somehow make them better citizens. Nonetheless, I wonder whether there is still some viable version of the public-private distinction to be worked out. In particular, I want to insist that there is something valuable about the Romantic ideal of private projects of imaginative self-creation and that such projects need not presuppose an objectionable atomism. In other words, I am holding out hope for a more honest Romanticism.

On my view, there is an available conception of the public-private distinction that avoids both DeBrabander's atomism and indispensability objections. This conception has been defended (albeit not always very carefully) by Richard Rorty.[12] The basic idea is that in liberal democracies the public and the private are important for different reasons, but they are best understood as mutually independent of one another. In Rorty's terms, public pursuits of *solidarity* with others ultimately have no intrinsic connection to private pursuits of imaginative *self-creation*.

The first thing to notice about Rorty's pragmatic reconstruction of the public-private distinction is that it automatically concedes DeBrabander's indispensability argument. That is, *pace* privacy theorists, there is no necessary public benefit to be gleaned from allowing citizens to pursue their wildly different private projects. On the Rortyan view I am considering, the kinds of public practices and democratic habits for which DeBrabander is calling are of the utmost importance for liberal democratic societies. However, they are not predicated on promoting privacy, at least not in any straightforward sense.

If there is a substantive difference between DeBrabander's view and Rorty's, I suspect it comes down to the question of whether one can endorse the Romantic ideal of private projects without buying into the

[12] Richard Rorty, *Contingency, Irony, and Solidarity* (Cambridge: Cambridge University Press, 1989).

Romantic lie. In other words, can there be a viable conception of privacy that does not lapse into atomistic individualism?

Here, I would like to propose a distinction between self-discovery and self-creation as the goal of private projects. The former, I take it, *does* presuppose something like a fixed individual essence that needs to be recovered from the distortions of social influence. In his criticisms of the Romantic lie, DeBrabander seems to have something like this model in mind.[13] However, an alternative conception of the private that emphasizes self-creation need not endorse this atomistic view of selfhood. Self-creation is a decidedly social undertaking, in which a person takes as their starting point the various influences on their beliefs and values and reweaves them into a new and interesting sense of who they are. Rather than spurn societal influence, the self-creator is someone who actively seeks out alternative perspectives and ideas in order to enrich their sense of what is possible and important. To say that such endeavors are private, on this view, is just to say that they need not have any connection to one's broader responsibilities to others.

[13] DeBrabander, *Life After Privacy*, p. 110.

Life After Privacy: A Response to Two Critics

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1. Introduction

The idea for my book *Life After Privacy* started in 2014, with Edward Snowden's disclosure that the National Security Agency (NSA) was engaged in broad data collection—which meant the U.S. government was spying on its own population. Convinced by Michel Foucault and other philosophers that privacy invasion posed nothing less than a threat to freedom and democracy, I stormed into my political theory class and delivered a scathing lecture to my students. I was shocked by their reply: they did not think privacy was so essential after all, and were happy to share information if it meant they could reap digital conveniences elsewhere. The overall sentiment could be summed up as this: "I have nothing to fear or to hide, so why not share it?" From a political standpoint, this is chilling—Foucault might argue that it indicates we are willing to censor ourselves so that we may continue to have nothing to fear. However, this response alerted me to a larger issue: this digital generation—as well as a broader population enamored by and reliant upon technology—would not likely be galvanized to protect their privacy. We thus must make other plans. We must decide how our democracy can survive, or thrive, with little individual privacy for its citizens—or none at all.

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2. Response to Khawaja

With regard to Irfan Khawaja's comments, I should start by saying that there is actually much I agree with, especially his diagnosis of Big Data. All that I have learned about privacy and its various threats tells me that Big Data is indeed a Leviathan, as he puts it. I wholeheartedly agree with his assessment that "given the asymmetries of power involved . . . and the sheer technical sophistication of the techniques deployed [by Big Data], there is almost nothing we could have done to forestall the outcome and save our privacy."

I also agree with his view that this "asymmetrically powerful actor . . . exploits the necessity of a weaker actor, a person, demanding data as the price"—the price of convenience, in short. He is correct that "[n]ominal consent is obtained for the transaction, but the consent in no plausible way qualifies as informed and is often given . . . under duress."

In sum, we are up against a formidable (invincible?) foe, in the form of Big Data. I do think that Big Data has done much to suck us in, disarm us, and reshape the playing field in its favor so that analysts can invade our privacy and collect our data at will. I am reminded of Mark Zuckerberg's comments: "people have really gotten comfortable not only sharing more information and different kinds, but more openly and with more people . . . . [That] social norm is just something that has evolved over time. We view it as our role [at Facebook] in the system to constantly be innovating and be updating what our system is to reflect what the current social norms are."[1] In other words, Facebook merely happened upon the scene and discovered that our norms regarding privacy had changed, luckily, and the company is merely taking

[1] Bobbie Johnson, "Privacy No Longer a Social Norm, Says Facebook Founder," *The Guardian*, January 10, 2010.

advantage of this new landscape to help us get what we want—and what they want.

This is disingenuous, to say the least. Facebook has pioneered techniques to seduce us to open up and share: such is the famous history of the "like" button. Social media companies have played a seminal role in changing said privacy norms.

Khawaja opens his critique by saying that I blame the victims—that is, us—and that I give Big Data a pass. I do not intend to do the latter. Big Data is up to some chilling things, as I describe in the book, to the extent that I or any laymen can know or detect their plans. I worry that its intentions and its tools and operations are far beyond us, beyond our capacity for understanding, and response. I also do not trust Big Data. It is not looking out for my own interest or good.

I certainly do not mean to blame us victims for the loss of privacy—at least, not wholly or even largely. I just do not see or sense widespread concern over privacy This book started as an attempt to understand our capacity to care about privacy and our capacity to then mobilize to defend it. I grew increasingly pessimistic about it as I wrote the book.

I maintain that we are, or seem, notably content or acquiescent, for the most part, when it comes to sharing our information. We are more content or acquiescent than we should be or than I would expect. Given that we know we are being watched, I would expect us to be more careful or modest in this exchange. I do not think this has been tricked out of us, unwittingly, at least not completely. We know what we are doing, for the most part, when we share; we know that we are watched; we know there may be risks, though we may not be able to specify or articulate them. When not behind the computer screen or mobile phone, we are less inclined to expose ourselves shamelessly—though perhaps less than in the past—but this indicates we are not clueless about standards of modesty. Many of us are willing to

share because we are actually happy for the benefits and conveniences we receive in turn. Yes, many share because we are fatalistic and believe that there is little we can do. Sharing is the price of entry to the digital economy; if you want to take part, you have no choice but to expose yourself.

I came to suspect our ability or interest in defending privacy in large part because I realized how powerful Big Data is and how deep is our subjection to it in the digital economy. I wanted to push back against what I saw as the general focus and approach of privacy advocacy, which is to mobilize *individuals* to push back, as if that could be done. That is why I wanted to describe how little people care about their privacy, how little they can do—how willing they are to share, grudgingly or not. Privacy advocates insist that individuals have to be empowered to protect their data, but that seems like a fool's errand in the face of Big Data. We just have no idea how it operates, how Big Data learns about us, etc.

In that light, it is ridiculous to suppose, as privacy advocates do, that we can reclaim some agency for individuals, who may consent to have their information collected, or not. I wholly agree with Khawaja's critique of this notion. There is a lot of talk of consent in privacy regulations. However, I think that is a distraction; it suggests that there can be parity between me and my spies and analysts, but there cannot be such parity. I have little choice but to consent to data capture, which means it is no consent at all. If I want to be part of the digital economy—if I want to be part of society itself—I must offer and expose data, increasingly a lot. There is little choice involved on my part. It is required of me and I cannot really wield any choice to withhold information from Big Data.

Khawaja says, "We should be pinning the blame for the loss of privacy squarely on Big Data, and only here, and as a society, pushing back on Big Data much harder than we have." I aim to argue that isolated, unaffiliated individual responses to Big

Data—"pushing back"—are, like the bulk of privacy regulations, pretty toothless. They are diversions that might make us feel good, but achieve little as far as I can see, and allow Big Data to proceed apace. The pushing back in question cannot be by lone unaffiliated individuals, who are themselves tasked with defending their privacy (as the European Union's General Data Protection Regulation [GDPR] would do), but it must be by collectives, organized political bodies; they alone can hope to stand up to Big Data, Leviathan that it is, and they operate in the public realm. That is where political organization is traditionally most effective and powerful. Political organizing online has not proven quite so effective, as Zeynep Tufekci points out, though I am open to the possibility that that might change.[2]

Individual citizens whose privacy is intact, discrete, and protected, are not the most important locus of power, politically. I am dubious that they are much of a political force at all. They become politically powerful when they link up with others. This is what leads me to doubt the value of privacy in democracy and why I am critical of political arguments for defending privacy, identified primarily (if exclusively) as a virtue of individuals.

Khawaja says:

> Suppose that we have done the best we can as far as philosophical accounts of privacy and come up short. Regardless . . . we have ample reason to regard Big Data's infringements on our privacy as a threat to us and ample motivation to push back. All we need to know is *that* they are threatening infringements, not *why*. We do not need a

[2] Cf. Zeynep Tufekci, *Twitter and Tear Gas* (New Haven, CT: Yale University Press, 2018).

> deep philosophical account of privacy to come to this conclusion.

Again, I agree with this. I recognize the threat that Big Data poses, insofar as it aims to manipulate if not control us. I do not think we need to be able to define privacy in order to push back or recognize the need to push back. In my book, I am trying to explain how we can mobilize politically in the absence of a firm and articulated or widely understood notion of privacy. We cannot wait around for said definition, because I am dubious that privacy lends itself to much definition at all.

Khawaja holds that we have a "commonsense notion of what privacy is." I am not so sure of this. Our lack of appreciation for privacy suggests that this commonsense notion of privacy is not prominent, or at least, not so common. Many cultures around the world do not have a commonsense notion of privacy, indeed, have no notion of it at all. I am fine with Khawaja's view that privacy is valuable because it "serves a need to preserve and safeguard the separateness of persons." However, I think that is less than what privacy's most ardent supporters would hope for. Like Glenn Greenwald, they favor something that preserves and grounds the autonomy and independence of individuals.[3] Separateness of persons sounds good, simple, and convincing enough. As a philosopher, though, I cannot help but ask: Why must we preserve the separateness of persons? And how? And what is the "separateness of persons"? When are we separate and what makes us separate? I go back to the point, put otherwise, that I am responsible for this separateness, in no small part—I am responsible for feeling sufficiently separate and apart and independent—and thus, this will limit what can be done from the outside (read socially, politically, legislatively) to ensure or

[3] See Glenn Greenwald, *No Place to Hide* (New York: Picador, 2014), p. 174.

enforce this. It is not so self-evident what should or can be done to ensure my separateness.

I would like to make two final points about Big Data. Khawaja says that "it would be nice to have a theory that conceptualizes" privacy and its threats "in a neat and tidy way, but more important is to have the right weapons that protect one's space or drive intruders out of it." Again, I am also eager to move on and move past our conceptual weaknesses, which is why I turn to public organizing and argue that the public realm is more important politically than the private realm. Its value does not need to be proven; history bears countless examples of the power of political organizing in public. However, I would also like to hear more about the "right weapons that protect one's space and drive intruders out of it." I am open to said weapons. It's just that, among the regulatory or technical fixes I researched, I did not see anything that measured up. I admit that I like my privacy, even if I cannot define it, and would appreciate such weapons. Could people be counted on to use these weapons effectively? Who would wield them and how? Would it involve government or would it involve individual citizens? (I doubt it would involve corporations.) I am curious to hear more about all this. It is a bit surprising to hear Khawaja say that such weapons exist, or might show promise, if Big Data is indeed such a formidable force.

My last point says something else about Big Data and I wonder how Khawaja feels about this. From my perch outside the industry, from my perch as a citizen, consumer, and philosopher, I cannot help but be skeptical of Big Data's claims to omniscience and omnipotence. More importantly, I am worried about the pretenses, ambitions, and power of this industry, if it falls short of accuracy. Zuboff invokes these ambitions repeatedly, speaking of the "high priests" of data, that is, the analysts. Are they really so all knowing as they think? Will they know us so thoroughly, utterly, and completely that they can turn us into their unwitting

pawns? This strikes me as a utopian project, but history is littered with the rusted carcasses of such projects.

I published an article on this issue, applying Isaiah Berlin's critique of mid-twentieth century utopianism to Big Data's bold aspirations and pretenses.[4] Humans are crooked timber, Berlin maintains, by which he means we cannot be forced into neat little boxes and squares as positivistic minds would like.[5] Human nature is never so transparent or scrutable as some think. Humans often rebel against attempts to know and control us in extreme fashion, sooner or later. What will Big Data get wrong about us? Where will it err? How might it backfire? Will people ultimately rebel against being shaped, formed, and prodded—treated like straight timber, in other words, to fit into neat boxes?

3. Response to Showler

Paul Showler asks about the phenomenon I describe, where digital panopticism does not have the effect anticipated by Foucault and Jeremy Bentham—namely, that we do not seem to be coerced online. "[W]hat accounts for this shift? How does DeBrabander understand the operation of power within a confessional culture?" I have already said something to the latter: Our supposed freedom online is not worth much, politically. Self-indulgent self-expression online may not actually be such a useful exercise in free speech. It does not necessarily make us willful, courageous, and committed citizens. I suspect it does more of the opposite.

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[4] Firmin DeBrabander, "The Hubris of Big Data," *Los Angeles Review of Books,* May 24, 2021.

[5] See Isaiah Berlin, "The Pursuit of the Ideal," in *The Crooked Timber of Humanity*, ed. Henry Hardy (New York: Alfred A. Knopf, 1991) pp.1-19 .

In response to the former question, I ask: Why aren't we more careful or protective of our privacy online? Why are we more apt to share? Why do so many exult in sharing, often embarrassing, intimate facts? I suspect that we feel removed online and somehow protected from others. This may also be behind the stunning animosity online, why people feel emboldened to say heinous things and issue offense. They feel they are safely at a distance: they do not have to see your face when they issue insults. They are also removed from the damage they wreak. Their empathy is also disengaged.

For these reasons, the digital sphere was never going to be the new public realm, as internet evangelizers once proclaimed. We behave very differently online and not in particularly productive fashion or ways helpful for collaboration. Digital communication is misleadingly simple, too simple. It lacks nuance; in it, things are all black and white, people are mean or kind, and our anger is justified and righteous, as are our attacks. As Michel de Montaigne notes, communication is not simply verbal.[6] We communicate with our heads, eyes, hands, etc., all of which is absent online. Zoom is also still limited in this regard.

There is a provocative piece by Megan Garber in *The Atlantic*, arguing that we already inhabit the metaverse.[7] American media and entertainment culture have long disposed us to this metaverse. We are constantly encouraged to see our lives as

[6] Michel de Montaigne, *Apology for Raymond Sebond*, trans. Roger Ariew and Marjorie Grene (Indianapolis, IN: Hackett Publishing Company, Inc., 2003), p. 17.

[7] Megan Garber, "We've Lost the Plot," *The Atlantic,* January 30, 2023, accessed online at: https://www.theatlantic.com/magazine/archive/2023/03/tv-politics-entertainment-metaverse/672773/.

narratives; reality there becomes untidy and uninteresting because it is open-ended and lacks recognizable narrative structure. We gravitate to places and media where we can indulge the need for narrative. That is something we can do on Facebook, of course, and display an utterly unreal and overly cheerful demeanor and life story—or we can don different personae and experiment with this. This is all liberating, allowing us to be less inhibited in what I say, how, and to whom.

Showler also wonders whether, if confessional culture is ascendant, privacy is not worth defending. Well, it may not be worth defending, even if it is not as essential to democracy and freedom as I argue in the book.

However, Showler is also asking about my suggestion that our relationship to privacy is so fraught that it may not be possible to rehabilitate the institution of privacy, and thus that we should move on. Frankly, I am not sure how we can get people to appreciate privacy, even if it were worth protecting. Showler is right in that I feel privacy is doomed. I do not see any appetite or interest in protecting it. To the contrary, people are falling over themselves to give it away. I also arrived at this conclusion, however, after researching Big Data, reading what analysts learn about us and how they do so. Their techniques are so sophisticated, their algorithms so esoteric, we are fatally outmatched, if we want to protect our privacy—which we don't.

This points to my critique of the European Union's GDPR and most proposed privacy regulations: they want to empower us as individuals to protect our data. These regulations are faulty on two fronts. They presuppose that we want to do this when we don't and they presuppose that we can do this, when we can't. To illustrate the latter, it is helpful to consider how analysts learn about us, define us, and identify us. Let us start with a relatively old example from the early 2000s. Data analysts at the retailer Canadian Tire identified one particular purchase when it comes to determining whether customers were creditworthy: felt pads that

prevented furniture from scratching the floor.[8] This makes sense upon reflection. You could imagine that people who are careful with their floors and furniture are also careful to save money, or at least, not spend profligately. Another famous example, also relatively old now, is that of Target, whose analysts studied consumer purchase history to determine when women were in the second trimester of pregnancy.[9] The purchases in question included a combination of vitamins, lotion, and cotton balls. How are ordinary consumers supposed to protect our privacy against data analysis like this? Analysts might be grasping at straws here; their bold "predictions" may be a matter of correlation or happenstance, but that is perhaps more problematic than if they are accurate. Then we are dealing with a false human science that has broad impact, pinned to overweening ambition, which will expand and entrench the impact of analysts' predictions, false or not.

The pretenses of analysts extend beyond data, but involve our metadata, the data of our data. They think they can learn plenty about us from the mere form, if not the substance, of our communications and digital behavior. For example, Shoshana Zuboff tells us that an insurance company will soon determine your premium not on the basis of "*what* you write but *how* you write it. It is not what is in your sentences, but in their length and complexity, not *what* you list, but *that* you list, not the picture but the choice of filter and degree of saturation, not *what* you disclose

[8] Gordon Hull, "Successful Failure: What Foucault Can Teach Us about Privacy Self-Management in a World of Facebook and Big Data," *Ethics and Information Technology* 17, no. 2 (2015), p. 91.

[9] Charles Duhigg, "How Companies Learn Your Secrets," *New York Times*, February 16, 2012, accessed online at: https://www.nytimes.com/2012/02/19/magazine/shopping-habits.html.

but how you share or fail to."[10] Analysts claim they can also identify us by the way we hold our cell phone—at what angle—as well as how we swipe the screen and by the way we move the mouse on our computer screen.[11]

If anyone has ideas about (a) how we can encourage people to care about privacy and (b) actually empower them to do so, in the face of analysts who are supremely confident in their ability to know and predict us, I would very much like to hear it. I am open to the possibility, but have not yet seen it.

I next take up Showler's question about what I take privacy to be—a value, a right, or a practice—as well as whether there is "any meaningful continuity between ancient practices and our current conception." I think there is some partial continuity. I do sense that privacy has evolved over time. This will perhaps be controversial to say, but privacy seems largely or exclusively Western in nature, perhaps even just Anglo Saxon. As many have noted, it is difficult to translate the word "privacy" into languages other than English. Once when speaking with my father-in-law, who is from Syria, and a group of his Arab friends, I asked how to translate "privacy" into Arabic. This caused a major debate to which there was no simple answer. I noticed that my own father's family in Flanders simply uses the word "privacy" when speaking Dutch; they do not even bother translating it.

It was, of course, eye-opening to me to read Hannah Arendt's analysis of the etymology of politically significant terms. She says that the Greek equivalent for the private realm is *idion*, from which we get the word "idiot," which translates literally as

[10] Shoshana Zuboff, *The Age of Surveillance Capitalism* (New York: Public Affairs, 2019), p. 275.

[11] Stacy Cowley, "Banks and Retailers Are Tracking How You Type, Swipe and Tap," *New York Times*, August 13, 2018.

someone who is cut off from society, a kind of outcast.[12] Following that point, she says that privacy is "privative": it deprives us of something. What is that? Well, she argues, for the Greeks, privacy deprives us of what it means to be uniquely human, which is politics, the public realm.[13]

For the Greeks, Arendt claims, privacy has a negative connotation. It pertains to the house, the realm of necessity, where we are engaged in the business of survival, like the nonhuman animals; power structures are hierarchical in the home. In the public realm, by contrast, we are free and equal. That is where we go when we seek to transcend necessity and achieve a kind of immortality in making ourselves known for posterity. We make a name for ourselves in the public realm.

Christianity somewhat rehabilitates the notion of privacy. In the Gospels, Jesus speaks favorably of praying in private, where only God can hear you, rather than making a show of your prayer or general holiness.[14] Augustine deems interiority a virtue, which thereafter becomes an enduring Christian virtue, practiced and elevated in various forms by different Catholic and Reformed traditions.

It is difficult to see, however, anything like privacy such as we know it until the twentieth century, when it is bolstered by abundant private space, which people had previously never had. Throughout this project, I kept thinking about my mother, who was born in the 1950s in Ireland and shared a three-room house with ten people. That is nowadays an uncommon arrangement in

[12] Hannah Arendt, *The Human Condition* (Chicago, IL: University of Chicago Press, 1958), p. 24.

[13] Arendt, *The Human Condition,* p. 38.

[14] The Gospel of St. Matthew, 6:6.

the West, but it is hardly uncommon in the rest of the world. For that reason, I have been tempted to say that privacy is a luxury. Zuboff speaks glowingly of Gaston Bachelard's *The Poetics of Space*:

> Home is our school of intimacy, where we first learn to be human. Its corners and nooks conceal the sweetness of solitude; its rooms frame our experience of relationship. Its shelter, stability, and security work to concentrate our unique inner sense of self, an identity that imbues our day dreams and night dreams forever. Its hiding places—closets, chests, drawers, locks, and keys—satisfy our need for mystery and independence.[15]

I find this quotation problematic. Who outside the developed world has home space like that? Outside the United States, even? We Americans are the masters of suburban sprawl. Our McMansions host abundant closets and doors behind which you can hide and satisfy your need for independence. What is the rest of the world supposed to do? Shall we conclude they are denied the opportunity to "learn being human"? Is my mother less human in that regard, growing up in a packed cottage with eight siblings? Who has homes full of nooks and crannies where we can "concentrate our inner sense of self"?

We cannot help thinking of privacy in spatial terms. We need space in order to be private. We need no eyes on us, but that is a limiting condition and hardly valid for most of humanity, now and historically. I doubt the suggestion that generations before us who lacked such space were less than free and fulfilled.

As the exhaustive five-volume series *A History of Private Life* points out, notions of privacy greatly expanded as home space

[15] Zuboff, *Age of Surveillance Capitalism*, p. 476. See Gaston Bachelard, *The Poetics of Space* (New York: Beacon Press, 1994).

expanded.[16] That is to say, it was emphasized as a necessity as more people had more home space, more rooms, a yard, a hedge, and then a private car to travel in. Then it became even more expected that people require privacy, but what is this privacy? We are never so private as we seem or as we think. As I argue in the book, I myself may be the biggest threat to my own sense of privacy. Consider that Louis Brandeis defines privacy as the "right to be let alone."[17] Am I not principally responsible for that? As Jean-Jacques Rousseau notes in his *Second Discourse on Inequality*, I might carry the judging eyes of others with me, all the time, no matter where I am. They do not need to be present and visible to coerce or oppress me. I allow that to happen; conversely, when the eyes of others bear down on me, I am principally responsible for ignoring them and resisting their judgment.[18]

What is the continuity here? Isolation, solitude—even if only brief and momentary—those are the essential features of privacy through history, I think. Thus, I actually favor Daniel Solove's family resemblance concept when it comes to accounts of privacy,[19] but by no means is it a universal value, now or ever.

To Showler's last point, I agree that there could be a viable conception of privacy that dispenses with atomistic individualism. Perhaps I should have given that idea more thought and explored it in the book. In retrospect, I am not sure I am fair to privacy and its political importance. While I stick to my main claim that it is

[16] *A History of Private Life*, ed. Philippe Aries and Georges Duby, five vols. (Cambridge, MA: Harvard University Press, 1992–1998).

[17] Louis Brandeis and Samuel Warren, "The Right to Privacy," *Harvard Law Review* 4, no. 5 (1890), pp. 193–220.

[18] Jean-Jacques Rousseau, *Second Discourse on Inequality*, trans. Donald Cress (Indianapolis, IN: Hackett University Press, 1992), pg. 49.

[19] Daniel J. Solove, "Conceptualizing Privacy*," California Law Review* 90, no. 1087 (2002).

not all-important, privacy still plays an important role. However, it must be more nuanced than what privacy theory tends to see, which is privacy in materialist terms, that is, abundant physical space and the absence of other people. We need to understand what privacy means when I am in the company of others, which is the case for most of humanity. We need to understand the role I play in attaining or securing privacy, for I think I play an important role, an active role, mind you, not merely a passive role, where others simply "let me be." That is rarely the case. I allow people to influence, impress, or bother me long after they have fled the scene.

What is the political importance of a softer, more nuanced account of privacy? Political powers need to step back and let me be, in some basic sense; they need to give me room to act and operate as I wish, to some degree. Government ought not seek to suffocate and control me and tell me what I may think or say. I may allow a good deal of coercion to sink in, inadvertently, but government ought not actively seek to coerce. There is only so much that can be done in this regard. We cannot hope to utterly purify political powers of coercive elements or appearances. They may always seem that way to some, and by no fault of their own, but of my own.

Again, when it comes to corporate manipulation through surveillance, our demands may seem simple and pragmatic, but are muddled in the end. We would like corporations not to spy on us and then use that information in concert with behavioral science to prod us in certain directions. Again, though, I am the most important agent in this equation, not the corporation that would manipulate me. Manipulation is insanely difficult to pin down. When am I manipulated or not? It is impossible to say. What's more, there are degrees of manipulation: some people are more likely than others to succumb to manipulation. Some may seem to be manipulated or influenced, even when spying agents are aiming at no such thing. My own moral education and training is the

essential feature here; it will help me resist would-be manipulation. One study I quote in the book holds that a reliable foil to manipulation is when people take time to reflect upon the choices or directives before them.[20] That suggests, again, that I, my moral character, am the most significant protection against manipulation. That is what we must cultivate and, in that regard, privacy becomes less important. For, if I have moral fortitude and I can reflect and rebuff my corporate spies, privacy will not be so relevant. I will give myself needed space from them.

4. Conclusion

I would like to thank the scholars who critiqued my book. I am pleased that they appreciated the nature of my project and the scope of my critique. I am grateful to their insights. It is always valuable to understand my blind spots when it comes to privacy and digital technology, which is a sprawling and ever evolving field, to say the least.

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[20] Zuboff, *Age of Surveillance Capitalism*, p. 308.

Discussion Notes

Individualistic Perfectionism versus Objectivism: A Distinction Without Much Difference?

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1. Introduction

I have argued previously[1] that Ayn Rand's ethical theory is much closer in essence to the individualistic, self-perfectionist perspective of neo-Aristotelian Thomists Douglas Rasmussen and Douglas Den Uyl than to the "selfish," egoistic ethics many assume to be her basic position. In this discussion note, I will continue to develop my case by addressing some of the points they have made in a recent essay.[2]

2. Metaethics

In discussing "value" and "the good," Rasmussen and Den Uyl quote Rand's definition of the former: "that which one acts to gain and/or keep." They paraphrase her definition of the latter, which in the original reads: "that which furthers [a living organism's] life is the *good*, that which threatens it is the *evil*."[3]

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[1] Roger E. Bissell, "*Eudaimon* in the Rough: Perfecting Rand's Egoism," *The Journal of Ayn Rand Studies* 20, no. 2 (December 2020): pp. 452–78.

[2] Douglas B. Rasmussen and Douglas J. Den Uyl, "Three Forms of Neo-Aristotelian Ethical Naturalism: A Comparison," *Reason Papers* 43, no. 2 (Fall 2023): pp. 14–43. All subsequent citations to this will be parenthetically in the text.

[3] Ayn Rand, "The Objectivist Ethics," in Ayn Rand, *The Virtue of Selfishness: A New Concept of Egoism* (New York: New American Library, 1964), p. 17.

Reason Papers 44, no. 1 (Spring 2024): 44-52.

The first and most important thing to note about these definitions is what Rand did *not* say. She did not say that value is "that which one *may* act to gain and/or keep" or "*should* act" or "*hopes someday* to act." She also did not say the good is "that which *can* further" or that the evil is "that which *can* threaten." This indicates that Rand, in her conceptualization of value, is strongly oriented toward the *actual*, not the *potential*.[4]

Not surprisingly, Rand has no truck with people who claim to "value" something but who take no actions toward that thing. Her attitude toward value and action is vividly documented in Barbara Branden's 1962 biographical essay, "Who Is Ayn Rand?" where Branden cites Rand's novelette and play *Ideal,* in which, she says, Rand expresses "profound scorn for those who are only 'idealists,' who renounce the responsibility of translating their ideals into action and reality."[5] Even earlier, in a 1960 lecture, after quoting Rand's definition of "value," Branden makes its implications even more explicit. Speaking of "the people who, in literal fact, have *no* values," she states: "Don't believe the man who claims to value something, but who refuses to take the actions necessary to gain or keep it."[6]

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[4] Anyone familiar with Rand's views on abortion is vividly, if not painfully, aware of this tenet of hers. In her 1968 Ford Hall Forum address, Rand stated: "An embryo *has no rights*. Rights do not pertain to a *potential*, only to an *actual* being." See Ayn Rand, "Of Living Death," in Ayn Rand, *The Voice of Reason: Essays in Objectivist Thought*, ed. Leonard Peikoff (New York: New American Library, 1988), p. 58.

[5] See Nathaniel Branden and Barbara Branden, *Who Is Ayn Rand? An Analysis of Ayn Rand's Works* (New York: Random House), 1962, p. 149.

[6] See Barbara Branden, *Think as If Your Life Depends on It: Principles of Efficient Thinking and Other Lectures*, published by the Barbara Branden Legacy Trust, produced and distributed via the Amazon CreateSpace Independent Publishing Platform, 2017, p. 145.

Such potentials or aspirations or unacted-upon imperatives are thus *not* values in Rand's primary sense of the term. What connection they do have to actual value is only derivative and secondary. Furthermore, the wishes, hopes, etc., that are inside one's head have an incomplete, unactualized, *potential* kind of "value" *only* because living organisms *actually* act on some of them by pursuing things in the world.

After laying out Rand's key definitions of "value" and "good," Rasmussen and Den Uyl then offer their own broad description of the latter: "What is good or bad refers to the relationship between some aspect of reality and the life of a living entity" (p. 15). Admittedly, in identifying the good as *relational*—that without some relationship of a living entity to an aspect of reality, that aspect of reality is not actually the good of that entity—it is correct, as far as it goes. Unfortunately, it only goes halfway—namely, to the *potential* good (or bad).

In truth, however, there are *two* relationships between an aspect of reality and the life of a living entity that are essential to that aspect of reality being *actually* the good for that organism. One relationship is that aspect of reality's *being able to satisfy* (that is, *potentially* satisfying) some survival need of that organism. The other relationship is that aspect of reality's *actually* satisfying that living entity's survival need. This latter relationship requires an actual encounter between the living being and the relevant aspect of reality as well as an evaluation by the living being by means of physical and/or conscious processes that assess the ability of the aspect of reality to satisfy some need it has.

The same is true in the moral sphere, once the additional complexities of Rand's more specific definition are fully understood. As quoted by Rasmussen and Den Uyl, Rand's view of the good as a moral (not simply biological) concept can be seen to include *two* essential elements: (1) The good is "*an evaluation* of the facts of reality *by man's consciousness* according to a rational standard of value." (2) The good is "*an aspect of reality in relation to man*—and…it must be discovered, not invented by man."[7]

[7] Ayn Rand, "What Is Capitalism?" in Ayn Rand, *Capitalism: The Unknown Ideal* (New York: Signet, 1967), p. 14.

Rand calls this the "objective" view of the good; this label is apt for two reasons. Considered as an aspect of reality, the good is *that aspect being held as the object* of evaluation by a conscious, living entity. Considered as a product of awareness, the good is the form in which a conscious living entity *holds* an aspect of reality *as the object* of its evaluation.[8]

Rasmussen and Den Uyl make much of the fact that while the *evaluation* "does not exist apart from a cognitive act" (p. 16), the *aspect of reality* being evaluated *does* exist even when one is not actively engaged in evaluating it. However, the telling point, which they quickly underscore, is that "What is good for a human being can *only* be *achieved* if it is discovered" (p. 16, emphasis added). "Achieved," in this context, means: *actualized*. The good for a human being can only be *actual* good (actualized good) if it is discovered—that is, *known and evaluated*. Accordingly, the potential good is that which has not yet been achieved and is thus not yet actually good.

Also (though Rand does not say this), the human good can only be *actual* good *in a certain range of conditions*.[9] Rasmussen and Den Uyl allude to this in discussing the role of practical wisdom, which helps us "in particular and contingent circumstances" (p. 33) to weight our

[8] I call this two-pronged nature of relationships between consciousness and reality "the dual-aspect of the objective," and I have discussed it in several previous writings, beginning with my essay "Ayn Rand and 'The Objective': A Closer Look at the Intrinsic-Objective-Subjective Trichotomy," *The Journal of Ayn Rand Studies* 9, no. 1 (Fall 2007), pp. 53–92.

[9] In offering the following example, Leonard Peikoff sketches this much-needed amendment to Rand's definition of the good: "the sun is a good thing (an essential of life as we know it); i.e., within the appropriate limits, its light and heat are good, good for us; other things being equal, therefore, we ought to plant our crops in certain locations, build our homes in a certain way (with windows), and so forth; beyond the appropriate limits, however, sunlight is not good (it causes burns or skin cancer); etc." See Leonard Peikoff, "Fact and Value," *The Intellectual Activist* 5, no. 1 (1989), accessed online at: https://peikoff.com/essays_and_articles/fact-and-value/.

various goods and virtues, to determine what is actually the good in that situation, and thus to determine what action to take. However, prior to such discovery and apart from such determination, what *can be* the human good is only *potential* good. Therefore, it is up to our practical wisdom to help us in *actualizing* that potential.

This point is implicit in, but follows directly from, Rasmussen and Den Uyl's comment that "one has the capacity to know one's good and attain it (first grade of actuality), but one needs to engage in knowing and attaining it in order to be fully actualized (second grade of actuality)" (p. 22). From the other side of the equation, *which must be included,* we can equally see that an aspect of reality has the *capacity to be one's good and to help one attain it* ("first grade of actuality"—that is, *potentiality)*, but it needs to be known and attained in order *to be fully actualized as one's good* ("second grade of actuality").

Thus, the apparent difference that Rasmussen and Den Uyl see between themselves and Rand boils down to *a conflation of potential and actual*, a failure by Rasmussen and Den Uyl to fully incorporate the distinction between the actual and the potential (or "grades of actuality") into their discussion of Rand's view of the nature of the good. Accordingly, the ultimate difference they infer between themselves and Rand—"Obligation ultimately rests in OE [Objectivist Ethics] on one's choice, while in IP [Individualistic Perfectionism] . . . it rests on what is one's good" (p. 24)—does not follow. The full, *actual* good in fact *does* ultimately rest on one's choice, which flows from an evaluation, utilizing the logic of practical reason and the insight of practical wisdom, of the aspect of reality that otherwise is only one's *potential* good. The good prior to cognition *is* "a reality to be discovered," but at that point, it is a reality, an actuality, that is still just a *potential* good. For Rand, cognition actualizes an actual reality that is a potential good into an actual reality that is an actual good. Hence, goodness *is not* fundamentally about independently existing, uncognized realities, but about them *as actualities*. They are still independently existing realities, but now they are also c*ognized.*

Just to be fully clear on this point, I am *not* arguing here that since one cannot have *the concept* of "the good" apart from one's

cognitive efforts, then *that which that concept is about* cannot exist apart from those efforts either. That would be an error, as Rasmussen and Den Uyl correctly point out: a conflation of thought and reality. What Rand is arguing here is that the *actual* good (which is what she is defining) *cannot* exist apart from one's cognitive efforts (and the concrete context or "nexus" one is in), even though the *potential* good *can* exist apart from cognition. As said above, Rand is unwaveringly focused on *the actual*.

3. Normative Ethics

I will next focus on two further issues within normative ethics: conflicts of values and the proper beneficiary of actions. Rasmussen and Den Uyl maintain that Rand somehow "opens the door to the possibility of conflict" (p. 34). Although Rand denies that this is possible,[10] Rasmussen and Den Uyl take issue with her, holding that "the possibility of righteous conflicts between individuals regarding their respective good cannot be ruled out as a matter of principle" (p. 35).

This seems, however, to involve a confusion between conflict and competition. As we ordinarily understand conflict between individuals, it involves some form of violation of one person's rights by another, either in the form of physical force or some kind of deception (fraud) that breaches an agreement to interact and pursue values in an informed and voluntary manner. Competition is more general in that it simply involves two (or more) parties pursuing the same goal that only one of them can attain.

For instance, two football teams both want to win the game, so they compete to see who can rack up the most points. We would not call this a "conflict of values," since the attainable value for each player on each team is in competitive play, which itself means having a team to play with and a team to play against. So long as everyone abides by the agreed-upon rules, there will be no conflict between individuals.

Do the two teams have a "conflict of *interest*" (to use Rand's term)? No. Their "righteous [i.e., rational] interest" is to do the best they

[10] See Ayn Rand, "The 'Conflicts' of Men's Interests," in Rand, *The Virtue of Selfishness*, pp. 57–65.

can, *within the scope of the agreed-upon rules*—and to win, *if and only if they do better than the other team*. Competition and even a vigorous struggle are not equivalent to conflict. Wanting to play against a challenging opponent is a higher value than winning per se; otherwise, any ragtag bunch could play against their elderly grandparents and win!

In general, your "righteous interest" is not for you to have something you want rather than for someone else to have it, which *would* be a conflict of interest with anyone else desiring the same thing,[11] but to be able to *pursue* what you want from what is available and to *attain* whatever you can get without violating anyone else's free choice. This does not guarantee that other people's choices and actions will always be correct or rational, but Rand carefully qualifies her view that there are "no conflict of interests" among "rational" men.

Finally, Rasmussen and Den Uyl claim that the Objectivist Ethics "treats the relationship between an individual and his self as the central consideration of normative ethics" (p. 34). This is a common misreading of the Objectivist Ethics. Rasmussen and Den Uyl are correct in saying, in *The Perfectionist Turn*, that relationship issues, while important, are simply not fundamental in ethics[12]—but Rand also says this. In the introduction to *The Virtue of Selfishness*, she states that "the choice of beneficiary of moral values" is neither "a criterion of moral value" nor "a moral primary."[13] Furthermore, however, she also states that man's relation to himself, that is, his "concern with his own interests," while not ethically fundamental, nonetheless is real and

[11] From the standpoint of Individualistic Perfectionism and the Template of Responsibility, this would be ruled out because it makes relationships with others, rather than the seeking of one's well-being and the creating of one's best self, of primary concern.

[12] Douglas J. Den Uyl and Douglas B. Rasmussen, *The Perfectionist Turn: From Metanorms to Metaethics* (Edinburgh: Edinburgh University Press, 2016), p. 35.

[13] Ayn Rand, "Introduction," in Rand, *The Virtue of Selfishness* (1964), p. x.

important and derives from "the reasons why man needs a moral code."[14] Without such a code, Rand says, man cannot live his best life and make it what it can and ought to be. He cannot "choose his actions, values and goals by the standard of that which is proper to man," and thus he cannot "achieve, maintain, fulfill and enjoy that ultimate value, that end in himself, which is his own life."[15] In other words, individualist self-perfection is not possible without paying proper attention to one's own rational interests.

However, once making one's own life better and better is firmly set as one's primary moral focus, *then* the question becomes: How are you, *given the value of certain special others to you*, to carry out your responsibility to live well this one and only life of your own? This crucial practical concern logically requires not that one *disregard* the benefit to and well-being of others—that is a gross caricature of Rand's ethics—but that one's own self-interest, *one's own values as a whole*, *one's morally perfected self,* must always be primary in calculating whether to engage in an action that also benefits others.

Thus, being your own core beneficiary—though emphatically *not* the basic doctrine in Rand's ethics—is nonetheless a legitimate *derivative* concern, a necessary *implication and condition* of living the life proper to a human being. One cannot enjoy *one's own* one and only life, if one does not include oneself as at least one of the beneficiaries of any given action.

In this context, we can see how a related claim also falls short of the target. Rasmussen and Den Uyl attach great significance to Rand's statement that "the actor must *always* be the beneficiary of his action and that man must act for his own *rational* self-interest."[16] True enough, she says this; furthermore, it is absolutely correct, even on Individualist Perfectionist terms, as I will explain below. What is not correct is

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[14] Ibid.
[15] Rand, "The Objectivist Ethics," p. 27.

[16] Rand, "Introduction," in Rand, *Virtue of Selfishness*, p. x (first emphasis added by Rasmussen and Den Uyl).

Rasmussen and Den Uyl's claim that "for Rand to require that *only* oneself ought to be beneficiary is to adopt the same logic as that of altruism" (p. 35 n. 35, emphasis added). Rand did not say or "require" this nor that man must act only for *his own* rational self-interest. Indeed, she would have protested vehemently that she had given more than ample illustration that she did not advocate living one's life as a self-sufficient island, viewing others as nothing more than a multitude of utilitarian means to one's own ends or a vast resource to be treated impersonally and callously exploited.[17]

If one betrays either oneself or others one values, one undercuts the self/soul one is fashioning, *which will not do*; so Rand clearly holds that the latter, not the beneficiary issue, is more basic. As she argues, in making the myriad choices that serve that primary ethical task, one *must* always include oneself (though *not only* oneself). To do otherwise would be self-destructive, both of one's life (the source of one's values and capacity to value) and of one's self-esteem (one's regarding oneself as noble and as worthy of living and being happy). Thus, we see that Rand has indeed arrived at "A New Concept of Egoism" (the subtitle of *The Virtue of Selfishness*), one which sees self-benefit not as the *core* of ethics, but as a *necessary condition for supporting that core*: one's self-perfection as a rational individual.[18]

In summary, I find that the differences between Individualistic Perfectionism and Objectivist Ethics are considerably less extensive than Rasmussen and Den Uyl have made them out to be.

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[17] For that matter, as noted more briefly above, beneficiary is not a non-issue for Rasmussen and Den Uyl either. Although, as they state, "IP does not make relationships *primary*" (p. 35, emphasis added), their ethics does make relationships *subordinate to* the living of one's own life and the making of one's own self/soul, which is one's primary ethical responsibility.

[18] I am grateful to Becky Bissell, Vinay Kolhatkar, and the editors of this journal for their assistance on earlier versions of this discussion note.

More Different Than You Think: Rejoinder to Bissell

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1. Introduction

Roger Bissell contends that the differences between Individualistic Perfectionism (IP) and Objectivist Ethics (OE) are considerably less extensive than we have previously argued.[1] We find this claim interesting, so we will consider Bissell's reasons in a point-by-point manner. We will conclude by noting what we regard as the most fundamental difference between IP and OE.

2. Metaethics

(1) Bissell states: "Rand…is strongly oriented toward the *actual*, not the *potential*. …[She] has no truck with people who claim to 'value' something but who take no actions toward that thing" (p. 45). He then seems to claim that the activity of X-ing has potential value for a living being *only* because that being *actually* engages in X-ing. Accordingly, if a living being never so engages in X-ing, X-ing cannot be said to have potential value for it. There is then only what is actual or actualizing.

We find this claim curious. Can one not say there are actions that are good for a living thing to do, even if that living thing does not

[1] Roger E. Bissell, "Individualistic Perfectionism versus Objectivism: A Distinction Without Much Difference?" *Reason Papers* 44, no. 1 (Spring 2024): pp. 44–52. All subsequent citations to this will be parenthetically in the text.

Reason Papers 44, no. 1 (Spring 2024): 53-64.

actually do them? Imagine someone who firmly detests and is committed to not exercising regularly. Is it wrong to say that exercising regularly is nonetheless something one ought to do? If one cannot correctly speak of what one could and should value, then ethics seems impossible. Ethics is about the normative, which means it is inherently about what one *should* do. Hence, it would seem that one speaks correctly when noting that there could be something worthwhile to pursue even though one does not and possibly might not ever pursue it. What are we to call that which we could and possibly should pursue? A natural candidate is "potential values." Bissell does say that the connection of potential values to actual values "is only derivative and secondary" (p. 45), but this does not help his claim, because this seems to foreclose the possibility of potential values ever providing guidance for what one should actually value.

(2) According to Bissell's critique of our view, the difference between IP and OE "boils down to *a conflation of potential and actual*, a failure . . . to fully incorporate the distinction between the actual and the potential (or 'grades of actuality') into their discussion of Rand's view of the nature of the good" (p. 48). There seems to be some confusion regarding what is meant by "grades of actuality"; hence, our account of this notion bears noting:

> IP holds with Aristotle that there is a distinction between grades of actuality when it comes to living things. The first grade of actuality is the possession of a set of capacities that are also potentialities for a living thing's second grade of actuality—that is, their actual use or deployment by a living thing. Included among the set of potentialities of a human being that comprise its first grade of actuality is the potential to exercise one's conceptual capacity. This first grade of actuality is a cognitive-independent reality. However, when one's conceptual capacity is exercised and used in a manner that actualizes the other potentialities that require it, then a second grade of actuality is attained. For example, one has the capacity to know one's good and attain it (first grade of actuality), but one needs to

> engage in knowing and attaining it in order to be fully actualized (second grade of actuality).[2]

We know of nowhere in Rand's writings where she invokes the Aristotelian concept of grades of actuality when it comes to living things. More importantly, though, the point of this doctrine is that the distinction between what is actual and what is potential does not always require a dichotomy. There can be *cognitive-independent actualities* that also are potentialities. Thus, to attain a second grade of actuality does *not* mean or imply that what is being actualized is only a potentiality. An actuality can be further actualized. The second grade of actuality is in a way "built into" the first.[3] Aristotle is subtle.[4]

The relevance of this doctrine has a direct bearing on Bissell's interpretation of Rand's claim that human good is an aspect of reality in relation to a human being that is not invented but discovered. He contends, in effect, that two relationships are involved: (1) a relationship between the aspect of reality and a human being in which that aspect is a potential good for a human being and (2) a relationship between a human being and an aspect of reality in which that aspect is an actual good for a human being (p. 46). He further contends that "[t]his latter relationship requires an actual encounter between the living being and the relevant aspect of reality as well as an evaluation by the living being by means of physical and/or conscious processes that assess the ability of the aspect of reality to satisfy some need of his" (p. 46). Fair enough (at least for the moment), but this does not mean or imply that

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[2] Douglas B. Rasmussen and Douglas J. Den Uyl, "Three Forms of Neo-Aristotelian Ethical Naturalism: A Comparison," *Reason Papers* 43, no. 2 (Fall 2023): pp. 14-43, quotation at p. 22.

[3] Physical growth might be a paradigm example of moving from the first to the second grade of actuality. What one is like at age eight contains within it what one will be like at age eighteen (ignoring any outside factors such as disease). With deliberation and judgment, the matter is more complex, but even here the core element is a movement from one grade of actuality to the next. What is "built in" is the capacity to deliberate and judge based on recognition of the nature of things.

[4] See Aristotle, *On the Soul* II.1–3. For a more detailed account of this doctrine, see Fred. D. Miller, Jr.'s introduction to Aristotle, *On the Soul and Other Psychological Works*, trans. Fred D. Miller, Jr. (Oxford: Oxford University Press, 2018), pp. xxvi–xxxi.

relationship (1) is only an unrealized potentiality or that what that potentiality for a human being involves, and thus requires for actualization, is not a cognitive-independent reality. Most assuredly, a cognitive act is required to discover what this potentiality involves and what its achievement requires, but it is not a requirement for its existence as a first grade of actuality or what it involves as a second grade of actuality. This was the reason for our emphasizing that metaphysical realism[5] is the context in which IP is to be understood and our noting that human good is not a concept. As such, human good "is neither abstract nor universal, but individualized. It comprises a complex reality that expresses a relationship of potentiality for actuality, which is understood not only in terms of efficient causality but final and formal causality as well."[6]

Moreover, although attaining one's second grade of actuality requires both cognition and practical actions to exist, this does not make human good an evaluation.[7] To hold a so-called objective view of human good not only means that the two relationships Bissell notes are objects of cognition, but also that the evaluation that is employed is in accord with the facts that constitute the standard for evaluation. What makes an individual human being good does not consist in our evaluation of him as good but in how well he has actualized himself. Even as a second grade of actuality, what it is for an individual human being to be good is not an evaluation or concept in any sense. That is simply a form of

[5] "There are beings that exist and are what they are independent and apart from our cognition of them, but these beings can nonetheless come to be known." Rasmussen and Den Uyl, "Three Forms of Neo-Aristotelian Ethical Naturalism," p. 21.

[6] Ibid., p. 22. We are speaking here of an active as opposed to a passive potentiality, but another way to express this point is that first and second grades of actuality are not equivalent to potentiality and actuality as Bissell appears to understand them. One's pen, for example, has the potential to fall off my desk. That is not a first grade of actuality. First and second grades of actuality have to do with inherent properties. OE seems to exhibit no conceptual mechanism for distinguishing pushing the pencil off the desk and one's becoming a philosopher. The seed is in the first grade of actuality toward becoming a flower. You have dispositional dimensions to becoming a philosopher. This is not at all like the potentiality you have to go to Harvard.

[7] See Ayn Rand, "What Is Capitalism?" in Ayn Rand, *Capitalism: The Unknown Ideal* (New York: New American Library, 1966), p. 14.

rationalism. To make human good an evaluation suggests a conflation of concepts with realities.

(3) Bissell also states: "the ultimate difference they [Rasmussen and Den Uyl] infer between themselves and Rand—'Obligation ultimately rests in OE [Objectivist Ethics] on one's choice, while in IP [Individualistic Perfectionism] . . . it rests on what is one's good' . . . —does not follow. The full, *actual* good in fact *does* ultimately rest on one's choice" (p. 48). Here is what we say:

> Human good understood in terms of what the first grade of human actuality entails needs to be discovered in order for a human being to attain his form of life—his manner of living—and what that involves—the second grade of human actuality. This means that engaging in the act of discovering human good is good for a human being. It is choice-worthy and ought to be done. Not knowing one's human good does not relieve one of the obligation to discover and attain it, since human beings can in principle make such a discovery. This discovery is of course self-directed, but self-direction can still be for human good without its being compelled to that end. Teleology is not compulsion.[8]

Even though human cognition and choice are necessary for the actualization of human good, this does not mean that what is being actualized is only a disconnected potentiality. As already noted, it is "built into" our nature. It certainly does not mean that human cognition and choice determine what human good is. Additionally, since we understand human good as our *telos*,[9] then we also know that we should act to discover and achieve it. We ought to choose it because it is our

[8] Rasmussen and Den Uyl, "Three Forms of Neo-Aristotelian Ethical Naturalism," p. 22.

[9] You cannot have teleology without first and second grades of actuality, and this is why OE has no way to speak of human good as an actuality apart from choice. It is, however, incorrect to say it is only a potential good for me until I choose it, and then it becomes an actual good. If it is good, it was so for you before you chose it. Indeed, a third party can identify it as such—for example, "Given your desire to be familiar with the Aristotelian tradition, you must read Aquinas." The fact that you have not read him yet does not mean he is not a good for you. It only means you have not yet benefited from that good.

good and our end. Human good, not choice, is the basis for moral obligation; as we have noted in many places,[10] this illustrates a marked difference between IP and OE.

3. Normative Ethics

(4) With regard to normative ethics, Bissell claims that "Rasmussen and Den Uyl maintain that Rand somehow 'opens the door to the possibility of conflict'" (p. 49). This is not true; rather we hold that it is *our* account of human good that opens the door to the possibility of conflict:

> Since the character of human flourishing as a cognitive independent reality is neither abstract nor universal but always expressed in individualized form, one person's concrete form of flourishing is not the same as someone else's. Abstractly considered, the goods and virtues found in the lives and characters of human beings may be regarded as the same, but in reality they are and must be individuated, which opens the door to the possibility of conflict.[11]

It is Rand who shuts the door on the possibility of conflict between concrete forms of human flourishing or self-perfection.[12]

(5) Bissell goes on to claim that "conflict" is normally understood to involve the use of physical force or fraud between parties, whereas competition "simply involves two (or more) parties pursuing the same goal that only one of them can attain" (p. 49), and so "conflict" and "competition" should not be confused. Moreover, he insists that competition between football teams would not be called a conflict of values, "since the attainable value for each player on each team is in competitive play, which itself means having a team to play with and a

[10] See Rasmussen and Den Uyl, "Three Forms of Neo-Aristotelian Ethical Naturalism," p. 23 n. 15.

[11] Ibid., p. 34.

[12] We use the terms "human flourishing" and "self-perfection" interchangeably. See Douglas J. Den Uyl and Douglas B. Rasmussen, *The Perfectionist Turn: From Metanorms to Metaethics* (Edinburgh: Edinburgh University Press, 2016), pp. 171–200.

team to play against. So long as everyone abides by the agreed-upon rules, there will be no conflict between individuals" (p. 49).

Although "conflict" can refer to the use of physical force or fraud between parties, it certainly does not necessarily mean this. The most common way of understanding conflict between parties is to note that their respective goals are incompatible. The verb "conflict" means to be incompatible or at variance, to clash. Furthermore, while it is certainly true that members of a football team choose to engage in competitive play—according to the rules and hopefully against the best opponents—this alone does not suffice to explain all that they do. They also play to win, which generally means that one team wins and another loses. Their goals, their values, conflict.

However, Bissell is claiming that if you and I are in competition for some end and agree about the rules of the game, we also agree that the one with most merit should win. You win. Assuming superior merit on your part, I now have to say that my interest is in you winning because my interest is in having the best man win, so there is no conflict even though I lost. I am okay with losing, though, because my interest was in the best man winning. Therefore, there is no conflict between *rational* men because our end (a rational one) is the same, namely, having the best man win.

Nonetheless, this does not follow. First, there is conflict in acting for the end, else we could not find out who was better. Second, this line of reasoning ignores the individual. We can attach ourselves to abstract universalized ends, but it does not follow from that that we have the same concrete ends. To us, the rational person would say, "Yep, good job, Roger, but I plan to do better next time we meet." That shows individuality and graciousness to the winner. This brings us to our next point.

(6) Bissell holds that "[i]n general, your 'righteous interest' is not for you to have something you want rather than for someone else to have it, which *would* be a conflict of interest with anyone else desiring the same thing, but to be able to *pursue* what you want from what is available and to *attain* whatever you can get without violating anyone else's free choice" (p. 50). He is correct to suggest that one's "righteous interest" is more than simply having what one wants, whether it conflicts with what another person wants or not. IP indeed holds that human good is the satisfaction of *right* desire. Additionally, doing so in a context that

does not violate the basic, negative, natural rights of individuals is also good and appropriate. Having the liberty to pursue a flourishing life is vital. Nonetheless, it remains the case that X pursuing his righteous interest and attaining whatever he can get without violating the rights of Y does not preclude the possibility that there might be a situation where X's attainment of X's interest prevents Y's attainment of Y's interest—or vice versa. Joint acceptance of a framework for action does not avoid the possibility of conflict between the actions themselves.

Perhaps an example would be helpful here, so consider some characters from Rand's 1957 novel *Atlas Shrugged*. There are two men, John Galt and Francisco d' Anconia, who love the same woman, Dagny Taggart. Each man wants her to choose her ultimate love, each only wants her love if she chooses the man she believes to be her ultimate love, and each would be reconciled with her choice. They each want the best for her. Let us say that all this is entirely true. However, this does not show that it would not be better for Galt if Dagny truly regarded him as her ultimate love instead of d' Anconia or that it would not be better for d' Anconia if Dagny truly regarded him as her ultimate love instead of Galt. This is true *ex ante*, regardless of what is said or done *ex post*.

Accordingly, IP, in contrast to OE, holds that there can be conflict within a context of righteous interest. This is for two reasons. First, what is X's righteous interest is not only numerically different but also qualitatively different from Y's—and vice versa. Second, to describe one's interests as rational neither means nor implies that they exist (or should exist) in the same way and to the same degree in person X and person Y. This is not to say that wherever there are different righteous interests there must be a conflict, but it is to say that conflicts are possible. This is one of the reasons individual rights are crucial in how IP approaches political philosophy.

(7) Bissell also argues:

> Rasmussen and Den Uyl attach great significance to Rand's statement that "the actor must *always* be the beneficiary of his action and that man must act for his own *rational* self-interest." True enough, . . . What is not correct is Rasmussen and Den Uyl's claim that "for Rand to require that *only* oneself ought to be beneficiary is to adopt the same logic as that of altruism" . . .

> . Rand did not say or "require" this nor that man must act only for *his own* rational self-interest. (p. 51)

It is true that *always* acting for one's benefit does not mean *only* acting for one's benefit. Bissell is correct to say the OE does not prohibit acting for the benefit of others. However, the crucial issue here has to do with what Rand means when she says that "the actor must *always* be the beneficiary of his action and that man must act for his own *rational* self-interest" and how that squares with her claim that the choice of a beneficiary for moral action is not a moral primary or a criterion for determining moral value, but has to be validated by "the fundamental premises of a moral system."[13] Bissell makes his view of this matter clear when he states that "one's own self-interest, *one's own values as a whole*, *one's morally perfected self,* must always be primary in calculating whether to engage in an action that also benefits others" (p. 51). Yet here is the rub. Does the account of human good in terms of one's own self-interest and the account of human good as a perfected, self-actualized human being amount to the same thing? We think not. This can be made clear by a quick review of what IP holds regarding self-perfection.

Ontologically, self-perfection is an activity, an actuality, and our ultimate end. It comprises many activities or practices (termed "final ends"), among which are the pursuit of knowledge, friendship, health, pleasure, and wealth and the exercise of integrity, temperance, courage, and justice. Self-perfection is never sought for the sake of anything else; it includes all final ends and these final ends are both constitutive and immanent activities in that their actualization make up and are manifested within the self-perfecting life. They are not merely means to self-perfection; hence, their worthwhile character is not determined by whether they produce some external result that proves to be beneficial. Rather, one engages in these activities for their own sake because they express one's self-perfection.[14]

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[13] Ayn Rand, "Introduction," in Ayn Rand, *The Virtue of Selfishness: A New Concept of Egoism* (New York: Signet, 1964), p. x.

[14] IP is not fundamentally a consequentialistic theory when it comes to determining what ought to be done. See Den Uyl and Rasmussen, *The Perfectionist Turn,* pp. 39–41.

This understanding of self-perfection is especially important when it comes to personal relationships based on mutual appreciation of good qualities of character—what Aristotle calls "friendships of virtue."[15] In the case of this sort of friendship, one acts for the good of one's friend *for the friend's sake*. One does not calculate whether it is beneficial to act for the sake of such a friend, because acting for the sake of one's friend is definitive of this very relationship. In fact, to calculate whether to do so would be indicative of it not being a friendship of virtue and it would amount to treating what is a final, constitutive end—in this case, your friend—as simply a means.[16] Accordingly, for IP, it is not only possible to act for the good of one's friend for the friend's sake and at the same time be engaging in self-perfection, but it is also possible for such a self-perfecting act to not provide any beneficial consequences for the actor. If one were to retort, "Are not self-perfecting actions of benefit to the actor?" one would have the order reversed. Benefits depend upon and would be understood in terms of self-perfection and not self-perfection being enhanced by benefit.[17] Consciousness can be deployed to secure benefits or benefits can flow from the *proper* use of consciousness. These are different, with self-perfection being more a function of the latter. As we see it, IP is not a form of ethical egoism, while making sure to pick actions leading to the right benefits would seem to make it one—at least as normally understood.

OE is supposed to be a new concept of egoism. It would allow acting for the benefit of another. However, it would do so only if the consequences prove beneficial. To the extent OE would treat acting for the benefit of another as a constituent activity of one's self-perfection, it would be only because it was productive of beneficial results, not because it was an expression (in part) of the very character of human self-perfection. A friendship, on this understanding, can only be a means

[15] Aristotle, *Nicomachean Ethics*, VIII–IX.

[16] Self-perfection can also involve other types of friendships that are understood as simply a means—that is, relationships with others because they are beneficial in terms of knowledge, trade, pleasure, and civil order. Aristotle calls these "friendships of advantage" and "friendships of pleasure."

[17] At the metaethical level of analysis, being beneficial is understood in terms of the actualization of an entity's life-form, which is an immanent process. See Den Uyl and Rasmussen, *The Perfectionist Turn*, pp. 220–24.

to secure what is beneficial for oneself; it is not valuable for its own sake. [18]

Thus, even though always acting for one's benefit does not prohibit acting for the benefit of another, OE does require always regarding another as secondary to what benefits oneself. This makes the choice of a beneficiary a moral primary, despite what Rand claims.[19]

4. Conclusion

We noted in "Three Forms of Neo-Aristotelian Ethical Naturalism" that Rand holds that final causation "applies only to a conscious being."[20] We further noted that she holds that

> when applied to physical phenomena, such as the automatic functions of an organism, the term 'goal-directed' is not to be taken to mean 'purposive' (a concept applicable only to the actions of a consciousness) and is not to imply the existence of any teleological principle operating in insentient nature. *I use the term 'goal-directed' in this context, to designate the fact that the automatic functions of living organisms are actions whose nature is such that they result in the preservation of an organism's life.*[21]

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[18] Rasmussen and Den Uyl, "Three Forms of Neo-Aristotelian Ethical Naturalism," pp. 31–33.

[19] We think that one of the reasons OE has been subject to harsh criticism is that it requires *always* regarding another as secondary to what benefits oneself. There is a debate within Objectivism about this issue. For those interested, see Neera K. Badhwar, *Is Virtue Only a Means to Happiness?* (Washington, DC: The Atlas Society, 2015), accessed online at: https://praxeology.net/Virtue_and_Happiness.pdf. See also Neera K. Badhwar and Roderick T. Long, "Ayn Rand," *The Stanford Encyclopedia of Philosophy* (Winter 2023), ed. Edward N. Zalta & Uri Nodelman, accessed online at: https://plato.stanford.edu/archives/win2023/entries/ayn-rand/.

[20] Ayn Rand, "Causality Versus Duty," *The Objectivist* 9, no. 7 (July 1970): 4.

[21] Ayn Rand, "The Objectivist Ethics," in Rand, *The Virtue of Selfishness*, p. 17n. (emphasis added).

Consequently, given this understanding of natural teleology, it seems that OE does *not* appeal to final causality in explaining what the relationship of potentiality for actuality involves when it comes to living things. Yet, if this is so, how does one determine what is the result of the functions of a living organism? Without an understanding of what a function is for, how does one select what is the relevant result? What does "result" involve? Why would not death be the result? Death happens to every living thing and is the final result.

If one does not understand a living thing's basic potentialities as being *for* their mature state but only as what results, then there is no basis for saying what is the end of a living thing's functions. Furthermore, it is not even clear whether it is correct to use the term "function" in this regard or to say that a living thing needs to take certain actions in order to live thereby makes fulfilling these needs its end. This possibly explains why Rand speaks of human good as an evaluation: because we must choose the result that is the standard. However, while life is something most would choose, this does not work as an argument. Indeed, it seems to beg the question. Alternatively, IP holds that all living things need to be understood teleologically and as different in kind from other physical phenomena. The biocentric nature of natural teleology needs to be recognized and defended.[22] As a matter of fact, we suggested long ago that such a view of natural teleology is the best way to interpret Rand.[23] However, that is a different matter from what she actually says; besides, we have never been in the business of trying to develop her ethical system, but rather, to pursue the truth about ethics.

[22] See Den Uyl and Rasmussen, *The Perfectionist Turn*, pp. 45–47, 193–98; and 219–24.

[23] See our "Life, Teleology, and Eudaimonia in the Ethics of Ayn Rand," in *The Philosophic Thought of Ayn* Rand, ed. Douglas J. Den Uyl and Douglas B. Rasmussen (Urbana, IL: University of Illinois Press, 1984), pp. 63–80.

Review Essays

Review Essay: Aaron Harper's *Sports Realism: A Law-Inspired Theory of Sport*[1]

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1. Introduction

As terms go, "realism" has an impressive pedigree. It has been used to describe, at various points, theories of international relations, metaphysics, perception, consciousness, aesthetics, politics, and law, among many others. The tricky thing here is that realism in one domain often conflicts with the premises of realism in other domains. One would be hard-pressed to find anyone who subscribed to realism in every domain where there exists a theory by that name. Still, as names go, it is difficult to outdo realism. "I'm a realist," one says to one's opponent, implying that one's detractors subscribe to the unreal, naive, sentimental, or delusional. "Naive realism" might seem like a counterexample, but this only proves the point. "*Naive* realism" is a pejorative, not a term anyone uses to describe their own theory, with the emphasis on "naive" as a modifier, often posited as a foil to the speaker's pretense of a more nuanced and sophisticated realism. After all, what use are theories that rely on departures from the real? Is it not "the real" that we are all here to understand?

[1] Disclaimer: Shawn Klein is the editor of the Lexington Book series, Studies in Philosophy of Sport, which published *Sport Realism*. For that reason, Klein had no role in the substantive editing of this review.

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Whether any realisms deliver the goods is a different question. There is successful branding and then there is the substance. Aaron Harper, in his new monograph, *Sports Realism*,[2] attempts to provide yet another variation on this theme, relying on legal realism as his model.

Harper's creativity, ambition, and hard work can only be admired here. The book opens with a strange incident at the 2019 Baseball World Series. During the sixth game, an umpire called out the Washington Nationals' Trea Turner for running inside the baseline, and thus interfering with the pitcher's throw to first base, as Turner ran into the glove of the first baseman. The ruling puzzled even some on the opposing team, the Astros, even though the ruling was to their benefit. Considering the ambiguity of how the official rules can be applied to this situation, Harper observes:

> There is no straightforward rule application. Rule changes might be appropriate to address these problems and other complications. Nonetheless, while such changes may be beneficial, they do not contribute to understanding the call made on the field at the time, or what the call ought to have been, given the rules in place. (p. 2)

Hinting at the thesis he wishes to defend in this book, Harper quotes Michael Baumann of *The Ringer*, who writes of the affair, "More important than the way the rules are written is how the rules are enforced by umpires, and how their implementation is understood by players."[3] Harper expands upon this point,

[2] Aaron Harper, *Sports Realism: A Law-Inspired Theory of Sport* (Lanham, MD: Lexington Books, 2022).

[3] Michael Baumann, "The Trea Turner Interference Call Didn't Sway Game 6—But It Will Go Down as the Defining, Bewildering Image of the 2019 World Series," *The Ringer*, October 30, 2019, as quoted by Harper, *Sports Realism*, p. 2.

averring that those invested in sports are "especially interested in what call will be made next" (p. 2), a perspective he claims has been underappreciated but is actually central, or at least should be seen as so.

It is here that a rough analogy may be drawn to the evolution of a theory of law known as legal realism. Sport and law, Harper notes, feature a similar central question: To what extent are the rules of either institution constitutive of those institutions, or capable of explaining or predicting outcomes within either? (p. 5) Judges, umpires, referees, and other analogous figures are not merely applying these rules in dispassionate, objective, and impersonal ways; they must also use interpretation, imagination, or even what legal realists call "hunches." Thus, "both law and sport are rule-governed activities that are, in practice, much more complicated than they appear . . . [S]tudying these cases involves exploring the processes by which they are decided" (p. 5).

In its early twentieth-century context, legal realism can be understood as a reaction to another theory, legal formalism.[4] Formalism holds to the view that "the law" is merely the sum of the rules enshrined and formalized as law in constitutions,

[4] It should be noted here, in passing, that Brian Z. Tamanaha's *Beyond the Formalist-Realist Divide: The Role of Politics in Judging* (Princeton, NJ: Princeton University Press, 2010) contends that there was never exactly a school of thought called "legal formalism" as such, as in individuals who would have identified with or written formal articulations of formalism as a theory of jurisprudence during the decades of the late nineteenth and early twentieth centuries leading up to the advent of legal realism. There were certainly elements of what would retroactively be called "formalism" argued by many legal scholars at the time. However, it may be more properly seen more as a strawman or foil constructed by the legal realists with which they could contrast their own theory. See Henry Cohen, "Book Review: *Beyond the Formalist-Realist Divide: The Role of Politics in Judging*," *The Federal Lawyer*, February 2010, pp. 78–79, accessed online at: https://www.fedbar.org/wp-content/uploads/2010/02/Book-Reviews-Feb2010-pdf-1.pdf.

legislation, statutes, and precedent. In contrast, while not denying that these things play some role in the law, legal realists contend that the law is ultimately a matter of what judges say it is. After all, what interests us most in law is not necessarily what might literally be written in statute, but rather what judges could safely be predicted to enforce through their rulings. Noting this, Harper intends to apply a similar framework to sport. While the rules of a given sport, as written in official guides, have some degree of importance, it is more edifying and useful to understand the rules of a sport as they are interpreted and applied by the relevant sports officials, from umpires and referees to the heads of sports organizations like the National Football League (NFL) or National Basketball Association (NBA).

Sports realism, for Harper, not only provides a more accurate, realistic framework for analyzing sport, it may also serve as an important corrective. Harper acknowledges that other theories of sport have served valuable purposes, but their drawbacks have led to understandings of sport which are, at best, incomplete. For example, the focus on rules gives theories of sport too much of a normative, even moralistic edge: "I worry that theories of sport tend to be overly moralized, turning all sports disputes into ethical issues when this may not be the best framework" (p. 7). In particular, when it comes to making sense of cheating, Harper claims that it has been unduly simplified and reduced to a mere form of ethical infraction. Likewise, previous theories presume "overly romantic" or "selfless or idealistic motivations to situations that may not call for these" (pp. 7–8). Much like how we can and sometimes must distinguish between a legal and moral diagnosis of a situation, Harper hopes that with sports realism, we can likewise gain a clearer, more pragmatic understanding in our analyses if we see the ethical dimension as somewhat separate from the domain of sport. From the perspective of players, "how decisions will be made might be more important than how they ought to be made" (p. 8). The goal, ultimately, is to

"explain sport as it is actually played in order to provide a more accurate account of sport as an activity" (p. 8).

While there is much to recommend about *Sports Realism*, such as Harper's clear prose; easily followed lines of argument; and compelling, bizarre-yet-true real-world examples, ultimately, the argument is unpersuasive. I will unpack and explain below three difficulties I find with his view.

First, in Section 2, I examine Harper's analogy between sports and the law. The analogy between sports and law, and thus between philosophy of law and philosophy of sport, is *prima facie* plausible. However, the salient differences between them undercut any attempt to import explanatory theories from one to the other. Sports and law are too different as areas of human endeavor, so that the questions that philosophers of law and sport are interested in, do not have sufficient overlap.

Second, in Section 3, I consider the weaknesses of legal realism itself that make it a questionable choice of what to import into sports from law in the first place. Harper, interestingly, concedes that there are reasons why legal realism fell from favor within legal scholarship, but nevertheless insists that realism of this kind offers more promise within sports.[5] I will disagree.

Third, in Section 4, I wonder about Harper's stated purpose for turning to legal realism. What kind of work is sports realism, as a theory of sport, intended to do? On his own account, the theory of legal realism allows one to put moral judgment about law aside, or at least reduce its role, and thereby better understand law in a more anthropological mode. Likewise, Harper seems to

[5] Harper notes (p. 84) that legal realism is often found objectionable, given that legal systems are often premised on constitutions or other foundational documents and frameworks, which by their nature suggest distinctions between legal and nonlegal reasons. Sports, in contrast, lack any similar foundational frameworks, eliminating a major objection that legal realists face.

want "sports realism" to reject or at least limit this moralizing tendency, and thereby better contextualize and explain an activity like cheating. Legal realism does not, as Harper stresses, eliminate moral judgment; it merely establishes a framework for understanding decisions in more pragmatic framing. Has Harper sufficiently motivated this move, though? I take no issue with how cheating ought be conceptualized by philosophers of sport, either as a concept fully reducible to moral wrong or not. I argue here only that sports realism, whatever its merits or deficiencies, does not seem to offer any particular help in answering this question.

2. Law versus Sports

The analogy between judges and disinterested umpires, which holds that both are there "merely to call balls and strikes," is surprisingly old and well-worn enough to approach the status of cliché. Like a politician who pledges to balance government budgets by eliminating "waste, fraud, and abuse," nominees for the U.S. Supreme Court regularly make the "only calling balls and strikes" promise in U.S. Senate confirmation hearings to assure critics that they will not engage in partisan judicial activism. If one is drawn to theories of law that are skeptical of objectivity and insist that the law amounts to what the judge had for breakfast, one may scoff at the balls-and-strikes line.

Another reaction, though, could be to draw one's attention away from these metaphorical umpires and reconsider the analogy. If judges are at least claiming to be like umpires, is there a sense in which the comparison could work the other way around? Might umpires and referees also lack the objectivity judges often pretend to have? Just as judges, these theorists contend, "cloak their biases behind judge's robes," so too might umpires and referees be cloaking their biases behind umpire and referee uniforms?

As Harper observes, as early as 1930 Karl Llewellyn, one of the most influential legal realists, made this very comparison, but in nearly the opposite way in which it would come into use for U.S. Senate confirmation hearings. For Llewellyn, judges are like umpires: hard working, perhaps well intended, but ultimately vulnerable to human-all-too-human biases, guided more by hunches than objectivity. It is with some irony, then, that this comparison between judges and umpires was not originally intended to be flattering to judges. Umpires were presumed to be biased, highly fallible at best, and judges, Llewellyn insists, are no different in this regard.[6] Harper explains that, as a legal realist, Llewellyn claims that while we like to think that "the law" consists of a discrete body of written statutes, constitutions, regulations, and precedents, in reality, the law is merely whatever judges say it is, as applied to particular cases (p. 75). To extend this comparison, if law is whatever biases draw judges to rule as they do, understanding what sport is and the rules that undergird sport is merely a question about umpires and referees. Sport is thus whatever they say it is through their rulings.[7]

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[6] Harper quotes Llewellyn (p. 75): "Like an umpire in that he [the judge] does not always see the breach of the rules. Like an umpire in that at times he is severely partial to one side, or stubborn, or ignorant, or ill tempered . . . . Like an umpire finally in that his decision is made only after the event, and that play is held up while he is making it, and that he is cursed roundly by the losing party and gets little enough thanks from the winner." Karl Llewellyn, *The Bramble Bush* (1930; repr., Oxford: Oxford University Press, 2008), p. 15.

[7] There is a not unrelated sentiment expressed even in philosophy itself. A favorite slogan that Richard Rorty is alleged to have said, according to Crispin Sartwell: "Truth is what your contemporaries let you get away with saying." Crispin Sartwell, "The Provocateur's Philosopher," *Los Angeles Times*, June 12, 2007.

The legal realists beat him to this point by a few decades. This review is likely not the best place for an exegesis on the origins of legal realism itself, but I will note in passing that it was well-timed, as a theory of law. Legal realism finds some of its earliest expressions in the more cynical opinions of Oliver Wendell Holmes, who was outraged when the U.S. Supreme Court overturned progressive legislation on constitutional grounds. Holmes did not, by and large, take their arguments about the U.S. Constitution's limits on power seriously

It is worth pausing here to consider whether there is something to this analogy. Of course, no one would expect law and sport to be identical in every respect; were that the case, they would literally be the same thing. Yet their differences ought be relatively trivial, for purposes of whatever elements are being compared. Are law and sport, as human activities and social institutions, too different to sustain importing a theory of one to the other? At a 30,000-foot level of comparison, there are obvious similarities: both involve sets of rules, methods of adjudication, and officially recognized authority figures who judge when infractions happen and what penalties are appropriate. But the differences, as I'll argue, are significant enough to frustrate any attempt to look to one as a guide for the other.

a. Domain

Law is universal in scope, at least with respect to a given jurisdiction. It need not circumscribe all we do, but it would be difficult to live a full human life without encountering law at some level.[8] We are born and are immediately given birth certificates

enough to engage with them. Rather, for Holmes, rulings such as *Lochner v. New York* (1905) amounted to what politicians in future decades would call "judicial activism," the exercise of unelected judges substituting their own policy preferences for that of the people's elected representatives. Constitutional arguments were post hoc rationalizations, a way for judges to subvert democracy. As Holmes once put it, "If the voters want to go to hell, it's my job to help them get there as quickly as possible." By the 1930s, with the Court actively opposing much of the New Deal, there was at least demand for a legal theory that delegitimized—or at least severely undercut—the prestige of the U.S. Supreme Court and perceived objectivity of judges. Legal realism, drawing from Holmes and the tradition of American pragmatism, fit the bill, providing ample justification for Franklin Delano Roosevelt's campaign against the U.S. Supreme Court and the demolition of *Lochner*-era judicial restraints on the legislative and executive branches.

[8] One might be tempted to cite, as a counterexample, social groups such as the Amish that maintain societies outside of the twenty-first century world that most of us know. Yet it would be a mistake to believe that the Amish are in some sense outside of the law. Amish children attend public school through middle school and, when born, receive birth certificates. The Amish are

and receive legally compulsory education through at least age fifteen. We sign extensive contracts for our employment and obtain marriage licenses from the state when we marry. Certainly, in our economic lives, there's a considerable body of rules dictating all the rules we must follow, if we want to start a business, hire an employee, build a factory or a store front, and so forth. The point is, law is non-voluntary and universal as a domain and institution of human activity. Law provides a backstop of sorts, a framework to adjudicate disputes or violations of rights that social norms are not strong enough to prevent on their own, requiring compulsory enforcement at some level

Sport, in contrast, only becomes relevant if we voluntarily decide to partake in it. Even if the conception of "sports" was wide enough to include casual pick-up games, as Harper posits, we would still be only considering a voluntary, opt-in social institution, a structured, rule-governed form of play that we are free to partake in as participants or spectators, but also free to ignore. (As I will discuss below, one difficulty here is precisely that Harper's sports realism leaves "sport" undefined and undefinable, so take the definition I offer here advisedly.)

By itself, this may not seem like a huge difference, but it leads to a problem for this comparison, namely, to study law is to study *rules*, as they are articulated and applied. The rules themselves are the focus, along with the institutional frameworks that create, interpret, apply, and enforce them. Even the legal realist is, of course, interested in how judges reach decisions *about rules*. However, to study sports might be to study or appreciate athletic excellence or the nature of competition. While all sports,

required to file income taxes and with Social Security, among other legal requirements. Even if one sought to escape the reach of law by venturing into places where there is no governing sovereign, like international waters, the Law of the Sea will still govern one's activities there. One may only escape the reach of law by escaping social interactions with one's fellow human beings entirely.

with the possible exception of Calvinball, require rules of some kind, the rules are ancillary to other ends, the kind of ends that draw people to sport in the first place. The rules of sport, how they should be understood or applied, are no doubt of profound interest to the philosopher of sport. However, the rules are not the *subject* of sport itself, whereas legal rules are the subject of law.

If I, as a legal theorist, want to study law as an activity, I might read up on foundational case law, attend a local criminal or civil trial, study how contracts are drafted, or even study historically famous U.S. Supreme Court cases.[9] Fans, participants,

[9] One tricky problem for those who study law and craft entire theories of law is that they tend to focus inordinately on the types of famous cases that reach appellate courts or the U.S. Supreme Court. Such cases are often politically charged; judges there frequently break along predictable political lines. Citing such examples, many legal theorists emphasize indeterminacy in law, casting doubt on the possibility of the rule of law itself. But this is misleading for the same reason why studying the career of the Beatles would give a highly misleading understanding of what a career as a musician would typically entail. These cases receive so much attention precisely because they are so unusual. As Lawrence Solum observes: "Of those potential cases that do arguably permit legal redress, a great number will be settled either by an apology, a monetary settlement, an agreement to dismiss the action for lack of proof, a stern warning from the police, or a guilty plea. Of the few cases that go to trial, a vast majority will not be appealed. Most of those that are appealed will be dismissed without a published decision. And only a tiny percentage of the published decisions are of sufficient interest to warrant inclusion in a casebook for the teaching of law students. And a significant number of these cases are Supreme Court cases. This is important because a large share of decisions at trial or intermediate level will be strongly determined by past law. Lower courts handle a steady diet of 'easy' cases; and they are not free to change or evade existing doctrine. It is only the Supreme Court that has this freedom; a focus on Supreme Court decisions thus can easily skew one's perspective." Lawrence Solum, "On the Indeterminacy Crisis: Critiquing Critical Dogma," *University of Chicago Law Review* vol. 54 (1987): p. 497.

This is in large part because, for understandable reasons, legal scholars and media coverage of legal controversies focus inordinately on highly atypical, unrepresentative legal disputes. If there is an analogy to sports, it may be precisely in that the novel cases in recent sports history that Harper cites are atypical in much the same way that U.S. Supreme Court cases are for the regular operation of law.

and even theorists of sports generally focus on game play itself, with the adjudication of potential rules violations being more of a distraction. Watching umpires, coaches, and players argue over potential rules violations and resolutions is not exactly what sports writers or fans cite as a significant draw for them.

To illustrate the point further, as I write this, it is early 2024. The biggest event in sports over the past month was the Super Bowl, played between the Kansas City Chiefs and the San Francisco 49ers American football teams. Although some attention was paid, by the sports media, to the romance between a Chiefs player and a pop singer, generally the focus was on the athletic achievements on the field and competitive strategies of the teams, not so much on potential rules infractions or their adjudication. During that same time, the biggest event in law was likely the U.S. Supreme Court case of *Trump v. Anderson*, a dispute over whether the Fourteenth Amendment's clause 3, barring insurrectionists from federal office, absent a pardon given by a supermajority of the U.S. Congress, empowers state elections officials or state supreme courts from disqualifying Donald Trump from the Presidential ballot, on the grounds that his actions prior to and on January 6, 2021, qualified as insurrection as the term was understood in 1868.[10] Having listened to the more than two hours of oral arguments heard at the U.S. Supreme Court, I can report that attention was almost entirely on the meaning of legal concepts, the history of the relevant clause, and the scope of application for this constitutional provision. In other words, as an activity, the *focus of law was on the meaning of rules*, their application, and avenues of enforcement. Try to imagine a Super Bowl that functioned that way, in which litigants argued for two hours over whether a player's shoving of an opposing player constituted "unnecessary roughness," as the concept is meant

[10] *Trump v. Anderson*, No. 23-719, 601 U.S. (2024).

within official NFL bylaws. Some sports fans might live for such a discussion, but I take it that such fans are highly atypical among sports fandom.

A closer analogy *might* be drawn not to the content of law, but to the procedural rules and norms that govern the enterprise of law. For these rules inform how "players" (litigants, attorneys, judges, etc.) are intended to carry out their legal affairs, submit evidence and other paperwork, and comport themselves toward other legal professionals. This would not be law, *per se*, but these procedural rules could be seen as playing a similar role, within law, to the rules of sports. This is to say that they are incredibly important and make the enterprise of law possible, but these rules are usually not all that controversial or interesting. It might be worth considering what degree a theory of law pertaining merely to procedural rules might look like, but I suspect that most scholars interested in law are more drawn to controversies over constitutional law, adjudication, criminal procedure, and so forth, of the kind that more directly affect the lives of those who are not legal professionals.

b. Rules of law, rules of sports

Arguably, the most striking difference between sport and law would be the former's status as of artificial design. This requires a bit of unpacking, because at first glance, it may seem that as types of order, sports and law both represent examples of human design, and indeed, of rule-governed orders at that. However, a closer examination reveals a fundamental difference.

We may start with the broader Anglo-American common law tradition. This is sometimes referred to as a "judge-made" or—by scholars such as Friedrich Hayek and Bruno Leoni—as an "emergent order" of law.[11] The historical tradition of common law

[11] See, e.g., Friedrich Hayek, *Law, Legislation, and Liberty*, ed. Jeremy Shearmur (Chicago, IL: University of Chicago Press, 2021); Bruno Leoni, *Freedom and the Law*, expanded 3rd ed. (Indianapolis, IN: Liberty Fund, 1991).

stretches back into medieval English history, prior even to Magna Carta, but its most striking feature is that it is unwritten. That is, there is no one definitive written codification of common law. It is embedded in commonly understood and accepted legal traditions; particular applications can be found in the written decisions of particular cases, which require judges to articulate the reasons for their findings with consistency and coherence to the existing set of precedents. Each decision, to varying degrees, will itself have authority as precedent for other cases and courts. Thus, the common law emerges as an organically realized order, oriented toward problem-solving to the satisfaction of litigants, who naturally will demand outcomes consistent with settled expectations.[12]

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[12] It should be noted that my description of the common law applies to what is foundational in American, British, Canadian, Australian, etc. law, at least as a model and a type. These legal systems also involve other sources of legal authority, such as constitutions, statutes and legislation, and regulations. Hayek was mindful of this, which led to his careful distinction between law and legislation. See, e.g., Friedrich Hayek, *Law Legislation, and Liberty, Volume I: Rules and Order* (Chicago, IL: University of Chicago Press, 1973), pp. 72–74 and 83–97.

For Hayek, law is the set of shared, settled expectations expressed as rules that emerged organically within a given community and served as a component of a bottom-up social order, whereas legislation was explicitly articulated by a legislature, written down, and imposed from the top-down. Hayek does not believe that a society could be governed by law alone and takes it for granted that legislation would also be necessary, but he insists that the role of legislation ought be fairly minor, limited to harmonizing and correcting law. More importantly, Hayek insists on the distinction itself, as the notion that Congress, Parliament, or any other authority could "make" law was dangerous and misleading. We often say, for example, that "ignorance of the law is no excuse," which makes sense when we speak of law in Hayek's sense. It would be ludicrous for a bank robber to plea that he had no idea that robbing a bank was illegal. However, the depth and complexity of legislation and regulation are such that even trained experts struggle to stay abreast of annual changes, so the claim that one was ignorant of obscure regulatory tweaks may have more justification.

It may be helpful to consider that some scholars have rejected the description of this type of legal order as "judge-made," for this description may give the false impression that judges may invent any legal principle they desire according to their own arbitrary personal preferences. In reality, judges do not like seeing their precedents overturned by other courts, so they are incentivized—and not merely by oath—to rule within the confines of existing, widely held principles of common law and reason itself. Thus, common law jurisprudence may be more accurately thought of as "judge-found" or "judge-discovered" law. To the extent that judges may be said to "make" law, it would be within this very specific context. For while the rules articulated by judges may not derive from explicit legislation, they derive from investigation of existing rules and usually represent extensions or applications of existing legal rules to a new phenomenon.

I mention this because, as rule-governed orders go, *sports seem to be nearly the opposite of this*. Basketball, for example, was invented, and its basic rules were laid out by one individual all at once. Its rules evolved over time, but at the guidance of official rule makers, such as the NBA or the National Collegiate Athletic Association (NCAA). To simplify a bit, we could consider the types of order represented here as bottom-up, in the case of the Anglo-American common law tradition, and top-down, in the case of sports. There might be instances of sport that evolved their rules in an organic fashion similar to the common law, such as pickleball, but this does not appear to be the case with most if not all professional and organized sports. Law lacks a particular author or moment of creation: there is an organic character to much of the body of rules that make up the law, with a somewhat evolutionary flexibility. Whereas the rules of sports are more artificial. Sports as we know them today may derive from older, now obscure forms, but rules establishing discrete time limits, giving batters three strikes, allowing American football players to

carry the ball with their hands while forbidding soccer players from doing the same, are all artificial, rules that were decided by particular individuals. In short, sports are created, artificial orders, whereas law is more of an organic, evolved order.

The common law system is only seen in the English-speaking world, so one might object that the civil code legal systems common to Europe and most of the rest of the world do, in fact, more match the nature of an artificial, rule-based order. For example, under the influential Justinian's Code and Code Napoleon, legal authorities attempt to anticipate any and all potential grounds for criminal or interpersonal dispute and have rules written to cover them all. In an American law school library, one might marvel at the size of the archives, with books of highly detailed case law stretching back at least to the state's founding and likely well before. However, in a civil code system, law school libraries are typically a lot smaller, because judges and attorneys in these systems do not particularly pay much attention to precedent. What matters is the code itself, not what prior judges have ruled even in very similar cases. Such systems may well more closely resemble organized and institutionalized sports, inasmuch as the rules are crafted in advance, at a single instance, with occasional modification from legislative and regulatory authorities.

However, even here, the analogy is fraught. It would be one thing if, for example, Justinian's Code and Code Napoleon were created from scratch, in similar fashion to sports. However, this is not the case. Justinian's and Napoleon's codes were based mostly on already existing laws, rules, and norms and represented attempts to harmonize and codify conflicting laws across different regions within their own empires. The Eastern Roman Empire and France prior to Napoleon certainly had law and courts to enforce it, but these codes attempted to standardize and harmonize practices that may have diverged between different jurisdictions.

Even under the Civil Codes of the continent, then, one finds that the lion's share of law has its origin in organically emerging laws. The Civil Codes were only possible to the extent that what they codified was consistent more or less with existing practice.

3. Legal Realism as a Questionable, Circular Import

Even setting aside the differences between law and sports as types of order, we still might consider the extent to which *philosophy* of law might generate useful theoretical frameworks that could be applied within *philosophy* of sport. Even here, though, we can see how the differences between these two types of order or human activity make that unlikely.

Let us consider Harper's general thesis about what he sees in legal realism as a useful framework to import from law into sport:

> I draw upon elements of American legal realism as I develop a theory I call sport realism. Legal realists hold that the law is found most clearly in the decisions made by legal officials, including judges, because these decisions comprise what the law really means to those individuals it applies to. By comparison, participants of sport look to decisions made by sport officials, broadly construed. Umpires and referees are obviously officials, but in practice a sport official is anyone who resolves disputes and metes out punishments or sanctions. League commissioners, managers, and even other players serve these roles. An adequate theory of sport must acknowledge that decisions made by these various figures define the sporting landscape. (p. 8)

I briefly note here an obvious objection. The adjudication of rules, resolving claims over whether any have been broken, what the appropriate penalties should be, certainly does seem central to what law is, whereas this does not seem central to what sport is. While rules and adjudication do indeed seem necessary, we typically see this as a distraction: well-played games usually have little to no breaching of rules. Setting aside this area of disanalogy, a more fundamental question remains. Consider that if there is a foundational question to philosophy of law, it is the existential question, *what is law*?

All theories exist, at least in principle, to solve a problem or provide an explanatory framework for solving a problem. Legal realism attempts to do just this, just as other theories of law do. In this case, the legal realist emphasizes the role of the judge and concludes that law is, fundamentally, merely a matter of what judges say it is. In contrast, formalism, as a theory, would point to the collective body of written (and perhaps unwritten) laws. Natural law theory would ground the answer to what law is in the moral nature of humanity and political legitimacy, denying that any law commanding injustice could be genuine law. Legal positivism would emphasize the role of a sovereign in explicitly creating rules recognized as law by a community and, as Harper discusses, the interpretivism of Ronald Dworkin identifies law with the interpretation of judges, but unlike realists, requires that they are guided by the consensus of moral norms of a community.[13] If the realist contends that laws are merely whatever

[13] Harper discusses (pp. 22–23) Dworkin's example of *Riggs v. Palmer* (115 N.Y. 506, 22 N.E. 188, 511 [1889]), a notorious case in New York probate law. In that case, a man sought to enforce his grandfather's will, naming him as the heir to his estate, which was what the will specified. The only trouble was that the man had murdered his grandfather. Unfortunately, in New York probate law at that time, there was no explicit provision revoking one's status as a beneficiary in a will on that basis. One might go to prison for life, but as a potentially very wealthy man. In that case, however, the judge ruled that the deeper common law principle that "crime should not pay" or, to be more precise, "no one shall be permitted to profit by his own fraud, or to take

judges say they are, the Dworkinian interpretivist substitutes a hypothetical Judge Hercules, as an idealized defender of the moral norms of a community, in that role.

We are left, then, with the question of what philosophy of sport aims to deliver. If theories of law attempt to characterize what law is and is not, could any of these theories, imported into sports, characterize what sport is and is not? This is a fundamental disconnection in Harper's analysis: they do not. Harper's conception of sport is broad, including any kind of rule-based athletic competition, whether as formalized as one would find in professional sports or as informal as pick-up games between friends.[14] Harper does not, however, attempt to use sports realism

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advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime" ought govern the outcome of this case. Thus, even without any explicit provision in New York statutes at that time, the murderer was denied the status of beneficiary of his grandfather's estate. Dworkin takes this case as illustrative of his theory of interpretivism, as explained in Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1977).

[14] Harper's wide conception of "sport" is suggested most explicitly here: "I contend that my theory of sport realism has applicability to sport of all types, including amateur and informal sporting events that lack a traditional official such as a referee or umpire" (p. 8). This falls short of a formal definition, and doesn't seem intended as such, speaking more to the applicability of the "sports realism" ethos rather than an articulation of "sport" as a concept explained by sports realism as a theory Other statements are more puzzling. For example, he writes, "According to sport realism, a sport is not defined by rules, conventions, or principles but as a system in which the rules and their corresponding punishments and penalties will be applied in predictable ways to resolve disputes" (p. 79). The first claim here seems to be a straw man: I am not aware that anyone has argued that a sport is *solely* or even primarily defined by rules, conventions, or principles, other than perhaps as ways to distinguish a given sport from another. However, the second claim, which appears to be an attempted definition, is more bizarre. A "system in which the rules and their corresponding punishments and penalties will be applied in predictable ways to resolve disputes" could describe many things having nothing to do with sport, such as, ironically, a legal system, but also any order involving rules and enforcement, such as non-athletic games.

to answer the question of what sport is. If he did, the answer would be that sports are merely whatever umpires and referees say they are. Rather, for Harper, realism is applied only to the question of what the *rules* governing a given sport are, not over what counts as sport in the first place.

This is unfortunate, but also possibly a necessity of the disconnection between law and sport as areas of philosophical inquiry. Law pertains to the nature and application of rules, first and foremost, whereas—to stipulate a potential definition myself—sport is *organized athletic competition*. The rules within a given sport are a fundamental element of that sport but are not the sport itself. Thus, a realist theory of sport could not answer the question of what sport is. A referee does not rule over what counts as American football; this question is already decided before the referee even dons his uniform. In contrast, judges, particularly on the appellate level, do settle disputes over what counts as good law and what its limits are.

Failing to define sport might seem like a trivial problem of the kind that philosophers bicker over. However, at least a working definition for sport is essential if one intends to craft a functionalist account, as Harper does. Without being able to clearly distinguish real-world cases of sport from things that are not sport, one cannot have an account of what the essential function of sport is or be able to identify how sport succeeds or fails as a social endeavor. Harper eventually looks (in Chapter 5) to Aristotelian moral theory for his account of ethics within sport, albeit within a heavily pragmatic framing. Failing to define sport—apart from the circularity that sports realism inherits from legal realism—would undermine that aspiration, for without some account of what sport is, there can be no way to establish a *telos* (end) for sport, establish what is sport at its most excellent, or distinguish it from counterfeits.

Likewise, the question of how to understand the rules—and mechanisms and standards of enforcement thereof—of a given sport would, by necessity, turn on the question of what sport is and is not. Harper only considers sport on a spectrum from levels of formality to informality, from professional and organized to amateur and informal, but this presumes given types without considering what might be included or excluded.

There is a famous exchange in the 1988 Tom Hanks film, *Big*,[15] In which Josh Baskin, a twelve-year-old transformed into an adult, suggests to a work colleague that video games ought to be considered a type of sport worthy of inclusion at the Olympics. The colleague insists that video games cannot be a sport, because a machine is doing the work rather than the player, to which Josh points out that we regard horse and car racing as sports. The colleague, fatigued by the exchange, drops the inquiry, but it is a useful example of how the boundaries of what counts as sport can be somewhat fuzzy. At the very least, we ought not be so quick to presume "sport" to be a term with obvious conceptual boundaries.

Consider these examples: professional wrestling, particularly World Wrestling Entertainment (WWE), Harlem Globetrotters basketball, and the somewhat more controversial example of figure skating. The first two here *resemble*, superficially, widely recognized sports, namely, wrestling and basketball. However, both are highly choreographed athletic performances, lacking the competition I identify in my stipulated definition. Notoriously, professional wrestling relies on a practice of "kayfabe," a kind of wink-and-nod understanding between performer and audience that they are witnessing a scripted performance between athlete-actors who inhabit characters.[16]

[15] *Big*, directed by Penny Marshall (20th Century Film Studios, 1988).

[16] The change of the name from the World Wrestling Federation (WWF) to World Wrestling Entertainment (WWE) is only one of many tells here. A common explanation has to do with state regulations, in which athletic competitions are held to a regime of legal regulations prohibiting game fixing.

Likewise, the Globetrotters resemble a conventional basketball team, who oddly only ever seem to play against the Washington Generals and who boast a win-loss ratio against the Generals of something on the order of many thousands to one.[17] Like the WWE, however, the Globetrotters are a scripted, highly choreographed performance, not an actual competitive endeavor. Nevertheless, one could imagine accounts of sport that only emphasize the audience *experience* of competition, and many in the audience of either, such as children, experience those events as if they were actual competitions.

Figure skating is more controversial, in that it is a recognized Olympic event. However, the standards of what constitutes a sport seem inconsistent here, for it is unclear how, if figure skating is a sport, why ballet and other types of dance would not also be sports. It is competitive, but points are determined by seemingly subjective artistic criteria rather than objective metrics like goal points or knockouts. Currently, the 2024 Olympic Games in Paris are slated to include *break dance* as an event. One would hope that a theory of sport could analyze questions such as: Were the organizers of the Olympics right to consider break dance? Are

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"Kayfabe" would have posed a problem for the WWF, as a professional organization of athletic competition. But as the WWE, marketed explicitly as "Entertainment," such regulatory issues would not apply, inasmuch as WWE is more or less openly conceding its nature as scripted entertainment rather than sport. With recent relaxations on sports betting, it may be noteworthy that one does not see WWE among the type of sport one may place bets on.

[17] Rodger Sherman, writing in 2015, cites a figure of more than 16,000 to 1 as of that date. Although there are reports of others, the best-documented instance in which the Generals defeated the Globetrotters appears to be January 5, 1971, in Martin, Tennessee. Rodger Sherman, "A Requiem for the Washington Generals, the Worst Sports Team of All Time," *SBNation.com*, August 14, 2015, accessed online at: https://www.sbnation.com/2015/8/14/9152971/washington-generals-harlem-globetrotters-losing-all-the-time.

they wrong to exclude ballet? Ought figure skating continue to be included in the Winter Olympics?

I bring up these examples to illustrate that a theory of sport, much like a theory of law, would need to address *what counts as sport*. Are there principled ways in which the WWE and Harlem Globetrotters games could be excluded as legitimate types of sport? It seems so, but we would want a definition and theory of sport to make this case. Such a theory could, it seems, be able to identify whether figure skating counts or is rather a kind of competitive ballet performed on ice. We need not necessarily be troubled if there turned out to be some fuzziness on the margins, where certain activities exist in some overlap between sports and other activities, such as the arts or scripted entertainment. Certainly, one would want to understand what features make sport most distinct from other forms of human activity and achievement, in order to have a clear conception of the functionality of sports or the unique *telos* of sports that would inform our understanding of excellence in sport.

However, sports realism *cannot* fulfill this role or tackle this type of question. The referees of a WWE match or a Globetrotters game can be expected to give their rubber stamp to those activities, so a claim that sports is merely whatever the umpires or referees claim it to be does not answer any question here. Sports realism could perhaps say something about the rules *within* a given sport, but not whether it was a legitimate instance of sport to begin with.

This is a deficiency it shares with legal realism. Legal realism proposes to define law merely as whatever judges deem it to be, but "judge" and "court" are themselves *legal* concepts, meaningless without some concept of what "law" is. Why are the rulings of the U.S. Supreme Court in some sense binding and definitive, while the rulings of a high school mock trial are not?

The answer is that the U.S. Supreme Court has standing within the framework of American constitutional law to perform this task, but a high school mock trial team does not. One can only say this to the extent that *law* is already an existing concept, though, which can make these distinctions meaningful. If there is a cardinal sin to legal realism, it is that its attempted definition of law as that which judges deem to create or enforce is hopelessly circular, as it relies, parasitically, on legal concepts to define law itself. In fact, the conceptual hierarchy is such that no "legal" concepts can have meaning without "law" as a prior understood concept. One need only consider the position of the legal realist judge. If she takes legal realism totally to heart, she will run into some difficulty whenever she needs to rule, for she believes that law is whatever she says it is. Apart from whatever gratification she might get from this god-like power, as a practical matter, she will immediately realize that this conception of law gives her no guidance, within her own judgment, as to what counts as a good legal argument or what counts as law in the first place independent of her own arbitrary preferences.

Likewise, sports realism, in attempting to abandon the notion that "sport" has meaning outside of what referees or other sports authorities subjectively prefer it to be, faces a similar conceptual circularity. Consider, for example, one instance in which Harper almost provides a definition of sport: "Sport realism is broadly functionalist in nature, *defining sport through consideration of what decision-makers in sport will actually do*. This entails examination of how disputes will be resolved and what sorts of punishment will be meted out by sports officials" (p. 107, emphasis mine).

We must have a coherent concept of "sport" to be able to make sense of concepts like "umpire" or "referee," much less what or who counts as a "decision-maker in sport" or "sports official." Only in that way can we tell the difference between the kind of

authority that the sport realist insists that, say, the referees in an NFL game have as opposed to the kind exercised by people who wear similar uniforms at a Globetrotters game or a WWE match. To do that, though, we would need some other theory of sport, for sports realism cannot, by its own terms, articulate a concept of sport that is not circular in the same way that legal realism's concept of law is circular.

I will also add that a concept of law as well as a concept of sport would be fundamental both to determining how either is functioning well on an institutional level and for drawing sound moral judgments about how they are done well or not. Realism does not seem to be capable of providing that.

4. What Do Legal Realism and Sports Realism Get Us?

Harper cites three "insights" from legal realism that he identifies as core to his project of sports realism. First, legal realism "defines law in terms of how it functions rather than its constitutive rules or principles" (p. 67), hence legal realism's emphasis on the role of judges, especially appellate court judges, rather than constitutions, statutes, legislation, or regulations. Second, Harper cites legal realists' rejection of the "distinction between legal and non-legal reasons, acknowledging that judges may be motivated by any number of factors" (p. 67). Third, Harper cites legal realists' embrace of law "as a profession, with its members most interested in predicting future decisions or rulings. Sports realism aims to predict future outcomes and resolutions, since people involved in sport are most interested in what will happen in upcoming disputes" (p. 68).

The first of these points has already been addressed. Legal realism fails conceptually because it puts the cart before the horse by attempting to define law in terms of the functions of institutional roles like judges. As such roles can only be identified on the basis of an established definition of "law," legal realism is by necessity circular. Second, a distinction between "legal" and

"nonlegal" reasons for judicial outcomes would likewise presume some existing definition of law, even if the legal realist only intends ultimately to reject the distinction as significant. (Paradoxically, realists must tacitly rely on the meaningfulness of the concept to claim that the distinction is not meaningful.) After all, the distinction can at least be made for purposes of distinguishing outcomes that nonrealists might anticipate as opposed to the kind realists believe they alone can predict. Finally, one could hardly gainsay the desire for predictability in any human endeavor, be it law or sports, but testable hypotheses and pattern-seeking are more the province of the sciences. Law has a necessarily normative element that cannot pretend to supply reliable predictions in a descriptive sense. This normative element, after all, is what makes it possible to distinguish between law functioning well and collapsing into dysfunction.

If legal realism inherently has these difficulties, how would sports realism be advantageous to the philosopher of sport? For Harper, the reason seems in part to do with difficulties philosophers of sport have had in understanding cheating in sports. Some philosophers have proposed understanding cheating in purely moral terms. On Harper's telling, some philosophers, such as John Russell, find "no distinctive conceptual core" to the concept, concluding that cheating is merely a broad-umbrella notion intended to "express moral disapprobation" (p. 99). As cheating, conceptually, is too broad to capture a distinct moral wrongness applicable to all cases, we would at least have a *prima facie* case for dropping the concept entirely. Harper suggests the difficulty here is that philosophers have been too quick to frame cheating as a moral concept. Rather, drawing from legal realism's distinction between an action being morally wrong as opposed to legally wrong, he posits that cheating could be seen as a distinctive kind of wrong unique to sports. While cheating may, in many instances, overlap with moral wrong, it ought not be seen as reducible to moral wrong (p. 100).

This is a puzzling warrant for sports realism. The distinction between legal and moral wrong is not controversial and hardly requires legal realism to justify it. For example, foundational to law in both an Anglo-American and Continental model is the basic distinction between criminal and civil law. Criminal law usually involves intentional injuries committed against third parties, either financial or physical, with prosecutors required to demonstrated *mens rea*, or a guilty conscience, where defendants are demonstrated to have acted willfully in the commission of their crimes. It would be difficult to think of an instance where a claimed criminal action was not also a specific moral wrong, assuming a liberal democratic legal order, though some possible divergences might be more readily found in authoritarian legal systems, or even under more religiously influenced criminal codes in the West. Homosexuality, for example, is generally not seen as morally objectionable in the West in 2024, but it was penalized in the criminal code in much of the United States as recently as the 1980s.[18] However, it would hardly have been a novel argument, even prior to 1986, to suggest that homosexuality was not in fact immoral, even while acknowledging its place in the criminal code and even if only as a novel exception to the general rule.

The distinction is more evident in civil law, though, where it is commonplace for litigants to be found liable for injuries to plaintiffs under standards of strict liability. Such liability, though, does not presume immorality on the part of the defendant. One is not necessarily seen as a "branded criminal" for having lost such a case. Many injuries are acknowledged to have been accidental by the plaintiff. In civil law, the question investigated by courts is

[18] The criminalization of homosexuality was affirmed as constitutional in *Bowers v. Hardwick*, 478 U.S. 186 (1986), a decision that was only definitively rejected by the U.S. Supreme Court in *Lawrence v. Texas*, 539 U.S. 558 (2003).

not moral fault, but a more basic question of who pays, who ought to be financially responsible. As a restaurateur, for example, I might take every reasonable precaution to keep my food as sanitary as possible, but there will always be some nontrivial, nonzero number of cases in which salmonella appears in a given egg dish. Civil law would find me liable, but not necessarily as having committed any obvious or distinct moral wrong.

It is not my place here to take up the question of how "cheating" ought to be understood, as a conceptual matter, by philosophers of sport. If Harper finds it advantageous to redefine cheating as a kind of wrong distinct from those of a moral nature, I offer no argument against that stance here. I observe only that if law and philosophy of law are being mined for useful examples for sport, the distinction between legally wrongful and morally wrongful hardly requires adaptation of either species of realism.

5. Conclusion

Despite the generally negative, critical stance I have taken here on Harper's book, I do not want the reader to get the wrong impression. The book is well-written, well-argued, and offers an edifying experience for those interested in philosophy of law and philosophy of sport. *Sports Realism* certainly serves the function of a book to invite the reader into questions of great importance and to help him or her to understand the broader landscape of theoretical questions that may not have been all that obvious at first. It is often more clarifying to see how a given analogy fails than where it succeeds, since in the failure of the analogy, one comes to understand the outer boundaries of the two things being investigated. Despite all the deficiencies I found with Harper's argument, I rather enjoyed reading this book. I hope that other readers find it as thought-provoking as I have.

Review Essay: Moderating Racism: The Attempt to Restrain Anti-Japanese Racism in World War II Propaganda Films

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> "In Europe we felt that our enemies, terrible and deadly as they were, were still people. But out here [in the Pacific theater] I soon gathered that the Japanese were looked upon as something subhuman or repulsive; the way some people feel about cockroaches or mice."
>
> —Ernie Pyle[1]

1. Introduction

In this essay, I will explore one of the most ironic episodes in the history of propaganda, namely, the attempt by various U.S. federal agencies to moderate racist elements in American World War II (WWII) anti-Japanese propaganda films. I examine four films: two produced by the military and two by Hollywood. They include *December 7th* (1943), *Air Force* (1943), *Know Your*

[1] Clayton Koppes and Gregory Black, *Hollywood Goes to War: How Politics, Profit, and Propaganda Shaped World War II* (New York: The Free Press, 1987), 253.

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Enemy: Japan (1945), and *Betrayal from the East* (1945).[2] After setting up some historical context and summarizing each film, I will analyze how they served to intensify racial hatred of Japanese people in general and Japanese-Americans in particular as well as how the federal government tried to control that propaganda, but was limited by its own policies regarding Japanese-Americans.

Let's start with the context surrounding American WWII film propaganda. During the WWII period, film was *not* covered by the U.S. Constitution's First Amendment. The U.S. Supreme Court ruled in 1915 that films were merely business products, and thus they were not protected expression.[3] Essentially, films could be censored or regulated by agencies at all levels of government. It was only in 1952 that the Supreme Court first ruled that film is covered by the First Amendment. Therefore, even though by 1930 the motion picture industry was large and powerful, during WWII it was still monitored by various organizations.

Among these monitoring agencies was the Production Code Administration (PCA), set up to enforce the Hays Code, which was a voluntary form of self-censorship adopted by Hollywood in 1934. The Hays Code restricted what American movies could portray, mainly on social issues such as sex, crime, drug usage, nudity, and so on. However, during the war years, the PCA was also involved in some political censorship, as when it stopped the production of a film about Nazi concentration camps in the late 1930s—ironically, because the film portrayed negatively another country's institutions and leaders.

Also involved in vetting war films was the United States Office of War Information (OWI). President Franklin Roosevelt created the OWI by executive order in 1942, six months after the

[2] *December 7th*, directed by Greg Toland and John Ford (Office of War Information, 1943); *Air Force*, directed by Howard Hawks (Warner Brothers, 1943); *Know Your Enemy: Japan*, directed by Frank Capra (Netflix, 1945); *Betrayal from the East*, directed by William Berke (RKO Radio Pictures, 1945).

[3] *Mutual Film Corp. v. Industrial Commission of Ohio*, 236 U.S. 230 (1915).

Japanese attacked Pearl Harbor. The OWI was created to provide news about and increase support for the war; in short, it was a kind of ministry of propaganda. It was in operation from June 1942 until September 1945.

The OWI had both dissemination and censorship functions. It disseminated information about the war domestically and abroad through a variety of media, including films, newspapers, radio broadcasts, and posters. It also produced a number of radio series and set up the Voice of America. More controversially, the OWI worked with the War Relocation Authority (WRA)—the agency tasked with incarcerating Japanese-Americans—to produce films that justified that internment.

The OWI's censorship function was directed at two main sources of war films: governmental war departments such as the Department of War (which during WWII contained the Department of the Army and the Department of the Army Air Force) and the Department of the Navy (which during the war was still a separate Cabinet-level department[4]) and the Hollywood studios. Eminent director John Ford was made a Naval officer and produced many of the U.S. Navy's war films and equally renowned director Frank Capra was made an Army officer and made many of the Army's war films, augmenting the already large number of war films produced by Hollywood studios during this period.

The OWI set up the Bureau of Motion Pictures (BMP) to try to ensure that studios produced films that presented what, in the eyes of the OWI, was the "right image" of the war and to increase the public's support for it. Despite the fact that President Roosevelt said there was to be no censorship of the movies, the

[4] In 1947, the Army Air Force became the separate United States Air Force and the Navy Department was subsumed into the War Department, becoming the Department of Defense.

OWI exercised considerable power in forcing the revision of scripts or even blocking the release of films.

2. The Japanese Fifth-Column Narrative and the Internment of the Japanese in the U.S.

The December 7th, 1941, Japanese attack upon Pearl Harbor swiftly resulted in persecution of the Japanese in America. Within hours of the attack, the U.S. Federal Bureau of Investigation (FBI) started rounding up leaders of the Japanese-American community, which was mainly located in Hawaii and states along the west coast. In a matter of days, more than 2,000 of these community leaders were jailed and their assets frozen. The press also immediately sprang into action, running stories spreading what I term the Japanese Fifth-Column Narrative, which is the myth that Japanese-Americans actively assisted or even fought with the Japanese military in its attack on Pearl Harbor.

This narrative was given an early boost by the Roberts Report, which is a report on the Pearl Harbor attack issued on January 23rd, 1942, by a committee headed by U.S. Supreme Court Justice Owen Roberts. This report held that the two highest officers in charge of Pearl Harbor's defense at the time of the attack—Admiral Husband Kimmel and General Walter Short—were "derelict" in their duties. The report also contained a vague statement that "[t]here were, prior to December 7, 1941, Japanese spies on the island of Oahu. Some were Japanese consular agents and others were persons having no open relations with the Japanese foreign service. These spies collected and, through various channels transmitted, information to the Japanese Empire respecting the military and naval establishments and dispositions on the island."[5]

[5] "Attack on Pearl Harbor: Report of the Commission," January 23, 1942, Digital History, accessed online at: https://www.digitalhistory.uh.edu/active_learning/explorations/japanese_internment/pearl_harbor_commission.cfm.

Even though the Roberts Report made no mention of Japanese-Americans collaborating with the enemy, various politicians and newspapers quickly moved to promulgate the Japanese Fifth-Column Narrative. On February 14th, Lt. Gen. John DeWitt, commander of the Western Defense Command—the Army's organization for coordinating the defense of America's Pacific Coast region—wrote the U.S. Secretary of War to recommend that the Japanese "and other subversive elements" be moved out of the region and away from all military installations. Five days later, President Roosevelt issued an executive order giving the U.S. military the power to identify "military areas" and exclude from them any people the military command saw fit. Less than two weeks later, DeWitt ordered that Japanese-Americans were to be excluded from the western halves of California, Oregon, and Washington along with the southern third of Arizona. This exclusion zone was later expanded to include all of California and Alaska as well.[6]

By mid-November of 1942, 100,000 Japanese-Americans were moved first to temporary centers in places such as stables at race-tracks and then to large concentration camps in inland Utah, Idaho, Wyoming, Colorado, and elsewhere. Japanese-Americans had to sell their property rapidly, often at artificially low prices. During 1942 to 1946, over 127,000 Japanese-American citizens spent time in the camps and they were released only after the war. In 1944 the U.S. Supreme Court ruled that the WRA had no right to subject loyal citizens to its concentration camp system.[7] The Court's ruling only allied to Mitsuye Endo as an individual, but she refused to leave the camps unless all her people were let go. The Supreme Court took another year to decide that the whole

[6] Besides the Western Defense Command, the Homeland Defense included the Eastern Defense Command, the Central Defense Command, the Southern Defense Command, the Alaska Defense Command, and the Caribbean Defense Command, each with its own commander with the power to relocate civilians. Only DeWitt exercised this power and he did so only against Japanese-Americans.

[7] *Ex parte Mitsuye Endo*, 323 U.S. 283 (1944).

prison camp system was illegal and allowed President Harry Truman to start closing the camp before it announced its final decision. By March of 1946 the last camp was closed.

Neither German-Americans nor Italian-Americans were interned during this time, despite the fact that both Germany and Italy also declared war on the U.S. Only Japanese-Americans were singled out for internment.[8]

3. *December 7th* and *Air Force*

The portrait of Japanese people in American WWII movies was invariably demonizing, but two films produced in 1943 were especially egregious. The first—*December 7th*—was initiated by eminent director John Ford. The Navy assigned him the project of making a short documentary about the attack on Pearl Harbor and the heroic efforts the Navy made to restore the base and repair the ships. Ford was busy making his documentary *Midway*, so he assigned the film to outstanding cinematographer Gregg Toland. However, instead of a short piece on the attack and the recovery from it, Toland produced a feature-length film about the failures of intelligence leading up to the attack. Toland's film has a prologue in the form of a staged argument between a naïve Uncle Sam and a realistic character "Mr. C" (Uncle Sam's conscience). It conveys the message that the Japanese—including Japanese-Americans—are different and dangerous. We are told that Japanese-Americans are only hyphenated Americans: they send their children to Japanese schools, worship a "so-called religion, Shintoism," and apply for dual-citizenship for their children. We see in the background Japanese children singing in Japanese,

[8] No Italian-Americans were interned, despite the fact that the Fascist League of North America (FLNA) was founded in 1924, combining forty fascist Italian-American organizations, and the FLNA lasted until 1929. Again, no Germen-Americans were interned, despite the fact that in 1936, the German-American Federation was founded with the direct involvement of Deputy Fuhrer Rudolf Hess. It had a peak membership of 25,000 followers and engaged in spreading Nazi propaganda as well as openly seditious actions.

Japanese signs in shops, Japanese listening to long-range radio broadcasts from Tokyo, and so on. The film advances the Fifth-Column Narrative by showing Japanese-Americans engaging in espionage and the Japanese Consul receiving that information.

When the OWI saw an early cut of the film in October 1942, it members were angered by its portrayal of Japanese-Americans.[9] When the Joint Chiefs saw the film in early 1943, they were aghast. They seem to have had two basic objections to it. First, the film implicitly but strongly condemned the U.S. military for lack of preparedness. Second, it explicitly accused Japanese-Americans in Hawaii with actively aiding the Japanese military. That is, it pushed the Fifth Column Narrative with a vengeance.[10]

Ford took Toland's version of the film and gutted it, cutting it down from 120 to 32 minutes and removing the objectional material—especially the prologue—while keeping much of the footage of the attack. He thus restored the film's original purpose of showing how the attack occurred and how quickly the War Department and Navy acted to recover, so that it was approved for limited release.

Hollywood's first major film to deal with the Pearl Harbor attack was *Air Force* (1943). This was an A-level picture, with a top director, writer, producer, and actors. In the film, a B-17 Flying Fortress (part of a group of nine bombers) nick-named "Mary Ann" is sent on a routing flight from San Francisco to Pearl Harbor. The crew lands in the middle of the attack on Pearl Harbor. The crew's voyage is a voyage of discovery about the perfidious nature of the Japanese.

The message that Japanese (both native and American) are different and dangerous is conveyed through various scenes. For

[9] Mark Harris, *Five Came Back: A Story of Hollywood and the Second World War* (Edinburgh: Canongate Books Ltd., 2014), 206.

[10] Alan Chalk, "Teaching Pearl Harbor Films, American and Japanese," *Education about Asia* 7, no. 1 (2002), 23.

example, a crewman calls the Japanese "monkeys" (a common anti-Japanese slur of the time). There are numerous scenes of Pearl Harbor, Hickam Field, Wake Island, and Clark Air Force Base (in the Philippines) in flames. An American airman is shot by a Japanese fighter plane as he parachutes to the ground and then is strafed as he lies wounded. Also, there are two scenes in which American servicemen discuss how sneaky it was for the Japanese to attack America while pretending to conduct good-faith peace negotiations in Washington.

The Japanese Fifth-Column Narrative is advanced in several scenes. Upon landing at Maui, "locals" (Hawaiian Japanese-Americans) shoot at them, forcing them to fly to another field. An officer then reports that a Japanese-American vegetable truck drove down Hickam Field, chopping the tails off the aircraft shortly before the attack. An airman reports that a "Jap" in a truck blocked the road leading to Hickam Field (and shot at him with a shotgun), so the pilot could not join in the defense. One soldier tells another that at Hickam Field there was a lot of "fifth-column" activity. At Clark Air Force base, an officer reports that the local Japanese set fires to guide in the bombers and cut the telegraph lines just before the attack, which was intended to show that Japanese Philippinos also constituted a fifth column.

The OWI reviewed the script for *Air Force* in October 1942 and heavily criticized it for its portrayal of Japanese-Americans as being a major cause of the defeats the U.S. suffered early on in the Pacific Theater. While the OWI objected to the film, the Army Air Force approved its domestic and foreign distribution. The PCA only objected to language such as "damn," "hell," and "lousy"—but not to phrases such as "fried Jap" and "stinkin' Nips."[11] The OWI was up against Hollywood's economic interests: *Air Force* had cost a lot to make; hence, it played widely. While the Toland-made anti-Japanese jeremiad was quashed by the OWI and the military (and Ford's version saw

[11] Koppes and Black, *Hollywood Goes to War*, 78.

only limited release), the Hollywood-produced screed was shown widely to the public.

4. *Know Your Enemy: Japan* and *Betrayal from the East*

Of the eminent directors who volunteered to join the American Armed Forces and make propaganda films to support the war effort, doubtless the most prolific and effective was Frank Capra. Enlisting in the Army just days after Pearl Harbor, he started making propaganda films in 1942. After the Allied victory in Europe, Capra wanted to leave the service and return to Hollywood, but the Army wanted him to finish one last film, as the U.S. was still at war with Japan. That film was *Know Your Enemy: Japan.*

John Huston wrote script for the film in late 1944, making it frankly racist by adding lines about the Japanese having buck teeth and wearing glasses. The script was reviewed by the War Department and, even though it was blatantly racist, the Army approved its production. In fact, the Army was worried that it was "too sympathetic to the Jap people."[12] Despite the approval of Huston's script, Capra took him off the project, wrote the final version of the script, and finished making the movie in August 1945. The film is arguably the most venomous piece of anti-Japanese film propaganda produced during WWII.

The bulk of *Know Your Enemy: Japan* depicts Japan's history and culture in a way that demonstrates how different and dangerous the Japanese are. In order to portray difference, numerous scenes show allegedly "strange" customs, such as worshiping a sun-god emperor and ancestral ghosts (Shintoism); regimentation of their children; and a stereotypical physical appearance of being short, skinny, and with their soldiers looking like "prints off the same negative." Advancing the idea that the Japanese are dangerous include claims about them following a

[12] Harris, *Five Came Back*, 336-37.

doctrine of world domination ("Hakko ichiu") laid out in a written plan (the apocryphal "Tanaka Memorial"); learning from foreigners and then turning on them; using sneaky and treacherous tactics; finding meaningless the concepts of liberty and freedom; being prone to rape, brutality, and torture; and being especially bloodthirsty in their blind obedience to authority. All of this is accompanied by scenes of atrocities that Japanese troops committed, the death march of American prisoners in the Philippines, and the mass killing of innocent Philippinos. The film ends with the chilling warning that defeating Japan "is as necessary as shooting a mad dog in your neighborhood."

Capra's film was shipped off to be screened to U.S. troops in the Pacific, but it arrived three days after the atomic bombing of Hiroshima. When Gen. Douglas MacArthur—the most powerful military commander in the war at that time—viewed the film, he was utterly opposed to its screening. He told the War Department that he refused to show it to the soldiers and urged that it not be shown or publicized in the U.S. The film was locked away for over thirty years.

Turning now to *Betrayal from the East*, this film opens with journalist Drew Pearson saying that the film was based on a real story and cautioning the viewer that this must never happen again. The story opens in an American newspaper field office in Tokyo, where we learn that two journalists—the office editor and a reporter—have obtained a list of Japanese spies operating on the U.S. West Coast. The journalists are subsequently killed. We move to the Japanese consulate in San Francisco, where two Japanese agents (Kato and Yamato) discuss a Japanese plot to paralyze the Pacific region. Kato reports that West Coast operations are set to go, but the Japanese spy in Panama failed to get the defense plans for the Canal Zone. However, he knows an ex-GI (Eddie Carter) who likes "easy Money," so he could be bribed to get the plans. The film revolves around the actions of Eddie Carter and Peggy Harrison, who is an American undercover agent who winds up working with Eddie to foil the Japanese spies and saboteurs. Eddie and Peggy wind up dying for their country at the hands of Japanese agents.

Various scenes advance the view that the Japanese are different and dangerous. For example, the opening title shows a caricatured Japanese face with glasses, fangs, and a scowling look and Eddie later calls the Japanese "monkeys." The Japanese secretary and the clerk at the American newspaper office are portrayed as spies and Eddie calls the Japanese agents who intend to kill him "dirty double-crossing back-stabbers." The editor at the newspaper office is defenestrated by the Japanese secret service and the American reporter who had memorized the list of Japanese spies and saboteurs on the West Coast is cruelly thrown overboard from a Japanese ship while returning to the U.S. We see Kato showing agents how to derail a train and he boasts that America will be saturated by "peace" propaganda while "our diplomats" delude American leaders until the day of the attack. A "traitor" (a Japanese-American U.S. intelligence agent) is tortured with a red-hot iron and Japanese and Nazi agents in Panama kill Peggy by steaming her in a sauna.

The whole film is an extended elaboration of the Japanese Fifth-Column Narrative. Many scenes convey this message. The American reporter tells the editor (when they are in the field office in Tokyo) that Japan has an espionage and sabotage organization from Seattle to San Diego for when war comes. The reporter tells the editor that this embedded fifth column are "all Japs living in America," with the editor adding that many of them have lived in America for a long time. For example, a key Japanese operative poses as a student of English at Stanford and is on the football cheering squad, while Kato owns a club in Los Angeles. While in Los Angeles to meet Kato and "make easy money," Eddie finds that he is being followed by Japanese agents and that his hotel room is bugged. Indeed, Peggy says that "the whole Pacific Coast is sitting on a powder keg." At the Panama hotel Eddie is sent to, the bellboy and the travel concierge are both Japanese spies, while at a Japanese-owned beauty parlor in Panama, we see the wives of American servicemen blabbing military secrets as Japanese beauticians listen intently. Finally, while on a Japanese freighter that is supposed to take him back to California, Eddie discovers a box with the plans to numerous West Coast installations.

The OWI objected to *Betrayal from the East*. While it felt it couldn't stop the film's domestic distribution, it was able to block the film's foreign distribution. This marked a capitulation by the OWI. Since earlier Hollywood movies focused on the Japanese, the agency had urged Hollywood studios to present the Japanese fascist military regime—rather than the Japanese people as such—as the real enemy. Starting in 1942, though, a string of major Hollywood films pushed the racist narrative.[13] By 1944, the OWI gave up trying to constrain the studios from conveying that narrative and settled for keeping the movies from being distributed outside the U.S.[14]

5. The OWI Contradiction

In retrospect, the OWI's own actions made incoherent its efforts to rein in virulent anti-Japanese propaganda produced by Hollywood. One manifestation of this incoherence is that the OWI *itself* produced two short "documentaries" (really, just blatant propaganda films)—*Japanese Relocation* (1942) and *A Challenge to Democracy* (1944)—sugarcoating the decision to put Japanese-Americans in concentration camps. Both put forward the Japanese Fifth-Column Narrative.

Consider first *Japanese Relocation.* This short film is narrated by Milton Eisenhower, Gen. Dwight Eisenhower's younger brother. Milton Eisenhower directed the WRA, but after three months he resigned and became deputy director of the OWI. This film opens by telling us that the attack on Pearl Harbor made the West Coast "a potential combat zone." With 100,000 people of Japanese descent in the region, two-thirds of them U.S. citizens and one-third "aliens," Eisenhower tells us that "we knew that some were potentially dangerous" and we couldn't tell what that

[13] See, for example, *Little Tokyo, USA* (1942); *Wake Island* (1942); *Bataan* (1943); *Guadalcanal Diary* (1943); *Gung Ho* (1943); *Objective Burma* (1945); and *Blood on the Sun* (1945).

[14] Koppes and Black, *Hollywood Goes to War*, 276.

population would do if the Japanese invaded America. He warns that the country faced "sabotage and espionage." For example, in Los Angeles (which had more Japanese residents than any other U.S. city) hotels used primarily by Japanese were close to an air base, shipyard, and oil facilities; Japanese fishermen could monitor the movements of our ships; and Japanese farmers lived near aircraft plants. Such people were relocated first, but the problem still remained of how the remainder would behave should the Japanese army invade.

U.S. military authorities thus decided that all Japanese-Americans had to move inland. We are told that the Japanese "cheerfully" handled the registration paperwork and the government helped them handle the disposal of their property. The Army provided vans to move belongings and buses to move people. "The evacuees cooperated wholeheartedly," we're told. "The many loyal among them accepted" the sacrifice for the "war effort." In the centers and the camps, normal services such as churches and schools were quickly restored. Inmates are seen governing themselves, with the Army only guarding the perimeters. Eisenhower adds that special care was given to the children and adults were allowed to work outside the compounds during the day. The film winds to an end by looking forward to a time when the loyal can be free again and the disloyal "leave this land for good." It closes with self-congratulation: the U.S. is protecting itself without violating norms of "Christian decency."

Another manifestation of the OWI's incoherence in controlling anti-Japanese propaganda was in the OWI's justification for doing so. It did want to portray Japan's fascists rather than Japanese-Americans as the real enemies of the U.S. However, its goal was not to exonerate Japanese-Americans from the charge of forming a fifth-column; instead, the OWI wanted to make it easier to *permanently* relocate them to small towns in the interior of the company. The OWI's concern was that if Japanese-Americans were demonized, no interior small town would allow them to resettle there.

This agenda was made even more clear in the second of the OWI films about the camps. While *A Challenge to Democracy* still mentions the "military hazard" that Japanese-Americans posed, it emphasizes how well those interned have adjusted to life in the camps by running schools, successfully farming, engaging in recreation, doing productive work, and worshipping freely (except that Shintoism was not permitted). The inmates generally are shown smiling. There is also a tone of defensiveness—after all, this movie was made in 1944, with Allied forces clearly turning the tide of war, yet these American citizens are still held in concentration camps. Here, the film just lies: the Japanese-Americans "are not prisoners, they are not internees. They are merely dislocated people—the unwounded casualties of war." "Casualties"—really? Held in camps guarded by soldiers?

In the end, we see Japanese internees being freed, but only after they "prove" their loyalty to U.S. security services. Most importantly, all the freed internees we see are ones who agree to join the Army or else to live in the U.S. Midwest. The message is clear: the camps will only be closed when the internees move to America's hinterlands.

The OWI's goal of permanently pushing Japanese-Americans into the hinterlands clearly assumed that they would have to be kept away from militarily important areas. This, in turn, assumed that Japanese-Americans would always present a danger of engaging in espionage and sabotage on behalf of America's future enemies—in short, that Japanese-Americans were *by nature* always a danger of being a fifth column. The OWI was, therefore, not credible when it tried to dissuade Hollywood studios from making propaganda portraying the Japanese as a race as different and dangerous and pushing the Fifth-Column Narrative, *for it did precisely the same thing*.

6. Conclusion

By the end of WWII, antipathy toward the Japanese was at full tide. One poll conducted for the OWI showed that 73 percent

of respondents viewed the Japanese as treacherous, 62 percent as sly, and 55 percent as cruel. A 1944 poll reported that 13 percent of Americans wanted to see Japanese people exterminated.[15] A 1945 poll showed that 22.7 percent of Americans wanted *more* atomic bombs dropped on Japan.[16]

Japanese-Americans were considered to be apt by nature to be disloyal—so much so that they remained in concentration camps for the better part of a year *after* the Japanese government surrendered to the U.S. The camps weren't closed because the military or WRA viewed then as no longer needed or because the American public—even after having learned about Nazi concentration camps—demanded that they be closed. They were closed by U.S. Supreme Court rulings.

No doubt, many factors worked together to cause this fever pitch of hatred, such as pre-war racism toward the Japanese, the Pearl Harbor attack, reports of savage fighting in the Pacific (where the fighting took place in jungles rather than fields and cities), reports of Japanese brutality in China, and reports of Japanese mistreatment of American prisoners. However, adding to these factors were numerous, intensely hostile, and racist propaganda films.

Here, we can draw an analogy with anti-Semitic film propaganda produced by the Nazi propaganda ministry. In both cases, targeted groups were systematically portrayed as different and dangerous and they were demonized by a mythical historical narrative. In the case of Germany, it was the Nazi Historical Narrative, which held that Germany had been stabbed in the back by Jewish financiers in World War I. In the U.S., it was the Fifth-Column Narrative, which held that the Japanese Imperial Navy was actively aided by Japanese-Americans.

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[15] Office of Opinion Research, "The Quarter's Polls," *Public Opinion Quarterly* 8, no. 4 (1944): 588.

[16] Hazel Gaudet Erskine, "The Polls: Atomic Weapons and Nuclear Energy," *Public Opinion Quarterly* 27, no. 2 (1963): 180.

Book Review

Roger E. Bissell and Vinay Kolhatkar. *Modernizing Aristotle's Ethics: Toward a New Art and Science of Self-Actualization*. Cambridge, UK: Ethics International Press, 2023.

1. Introduction

Roger E. Bissell and Vinay Kolhatkar are nothing if not ambitious. With *Modernizing Aristotle's Ethics: Toward a New Art and Science of Self-Actualization*[1] they have set out to establish not only "a universalizable ethic that promotes the best within us," but also "a universalizable politics for a free society that can make everyone's personal best easier to achieve" (p. 256). They propose to accomplish this goal by "bringing about a merger between science and philosophy and crafting a fact-based teleologic ethic" undergirded by "a testable model for why it works—a comprehensive theory of human nature" (preface).

This is a tall order, indeed. Although the authors do not claim to have provided the final word, at the same time they seem fairly confident that their "new integration" (preface) is on the right track. Because they cover so many topics, a brief review cannot do justice to the full range of their insights. Here, I will focus primarily on two areas of interest. First, I will address some core issues in Aristotelian ethics and the propriety of building, or at least adding onto, what the authors call an "Aristotelian skyscraper" (p. 6) fit for life in the modern world. Second, I will assess their contributions to a more scientific and more humane ethics in the Objectivist tradition.

2. Aristotelian Foundations

The authors state up front that their "goal is not merely to *modernize* Aristotle's ethics, but to reformulate Aristotle's *eudaimonism* and transform it into an ethics of self-actualization that is relevant and powerful for people living today" (p.

[1] Roger E. Bissell and Vinay Kolhatkar, *Modernizing Aristotle's Ethics: Toward a New Art and Science of Self-Actualization* (Cambridge, UK: Ethics International Press, 2023). All subsequent references to this book will be in-text citation.

22).[2] Although it is true that Aristotle provides a deep and comprehensive analysis of eudaimonia, this does not necessarily mean that he advocates what today we think of as eudaimonism. Because the risk of anachronism looms large here, it is important to proceed with scrupulous care.

In contemporary philosophy, the primary source for an ethics of eudaimonism is David Norton's book *Personal Destinies*.[3] For several reasons, it behooves us to take a closer look at Norton's account in the context of Bissell and Kolhatkar's project. First, Norton treats eudaimonism and self-actualization as equivalent.[4] Second, psychological theorists of self-actualization and personal expressiveness (also treated in the psychological literature as equivalent), including Alan Waterman, Carol Ryff, Richard Ryan, and Edward Deci, have considered Norton's book to be the canonical account not only of philosophical eudaimonism but of eudaimonia itself, and thus by extension Aristotle's conception of human flourishing. Third, Bissell and Kolhatkar frequently cite Norton for support, such as when they state that if "living well becomes second nature . . . [y]ou have actualized

[2] Although Bissell and Kolhatkar mention that their goal is not to produce a complete exposition of Aristotle's ethics or broader philosophy, one might wish that they had more carefully represented some of his positions. Their erroneous or questionable claims include: that dialectics was "Aristotle's signature philosophical method" (p. 15), that the goal of the *Historia Animalium* was to build a "biological taxonomy" (p. 18), that the highest good for human beings is defined in terms of desire-satisfaction (p. 21), that all living things can be *eudaimon* (p. 22), that the "highest good for living beings [including even human beings] is . . . to get and have what one needs" (p. 22), that under Aristotle's doctrine of the mean the virtue of courage is "a middle ground or 'mean' between rashness (too much courage) and cowardice (too little courage)" (p. 39), that Aristotle identified "four primary ethical virtues: courage, temperance, justice, and prudence" (p. 43) when in fact he did not subscribe to a theory of cardinal virtues and he considered prudence (one rendering of *phronesis*) to be an intellectual virtue, that "Aristotle postulated eudaimonia as an 'ought'" (p. 183) in the modern meaning of the term, and that Aristotle held happiness as a subjective emotional state to be the goal of ethics (pp. 183, 213).

[3] David L. Norton, *Personal Destinies: A Philosophy of Ethical Individualism* (Princeton, NJ: Princeton University Press, 1976).

[4] Ibid., p. 15.

the fully adult, humane, productive self that was potentially there as you were learning and growing as a child and as a young person" (p. 24).

Given that Aristotle is the ultimate source for our concepts of potentiality and actualization, we might assume that the notion of a "self that was potentially there" is straightforward Aristotelianism. But not so fast. On closer inspection, one sees that Norton derives his eudaimonism from Jean-Paul Sartre's existentialism, Friedrich Nietzsche's will to power, Soren Kierkegaard's Christian theology, Gottfried Leibniz's monadology, a bizarre interpretation of Plato's metaphysics in which each individual's daimon is a Platonic Form, and an unjustifiably universalized reading of Socrates's intellectual midwifery in which every person possesses the same kind of daimon and personal truth that Socrates attained only through decades of philosophical labor. Conspicuously missing from this list is Aristotle. Indeed, after praising "those respects in which Plato's metaphysics justified Greek moral individualism," Norton laments that "it is these very respects that are immediately undermined by the metaphysics of Aristotle."[5]

What is going on here? Could it be that contemporary eudaimonism is not quite as Aristotelian as everyone has thought?

Aristotle defines eudaimonia as living well.[6] Building on that foundation, Bissell and Kolhatkar make the bold statement that "in common sense terms, there is not much of a conceptual gap between living well or human flourishing (eudaimonia) and self-actualization" (p. 25). Yet the nature of this gap is precisely the issue—and one of paramount importance, for which common sense is insufficient evidence. Highly relevant is the fact that, for Aristotle, the self is an achievement.[7] By contrast, for recent theorists of eudaimonism and self-actualization, the self somehow exists *in potentia* from birth or perhaps even before, if Norton's quasi-Platonic metaphysics is to be believed. More specifically, following in the footsteps of Socrates and Plato, Aristotle seems to have held that a stable self is achieved only by those who pursue a philosophical way of life, who commit to deeply

[5] Ibid., p. 150.

[6] Aristotle, *Nicomachean Ethics*, I.4, 1095a19.

[7] Suzanne Stern-Gillet, *Aristotle's Philosophy of Friendship* (Albany, NY: SUNY Press, 1995), p. 25.

understanding the human good, and who put in the long-term work of self-examination. This all can be seen in the surviving fragments of Aristotle's dialogue *Protrepticus* as well as Pierre Hadot's groundbreaking revival of philosophy as a way of life, especially his book *What Is Ancient Philosophy?*.[8]

Where does this leave Bissell and Kolhatkar's Aristotelian skyscraper? At the least, further work is needed to understand whether its foundations are quite as Aristotelian as they imagine. Yet we can go further and wonder whether a time-travelling Aristotle would really strive to build a philosophical "skyscraper" in the first place.

Less metaphorically, there are tensions at the heart of any project that aims to modernize Aristotle. Three of the highly relevant ones are, briefly, as follows: (1) Aristotle and the ancients considered understanding the world to be an end in itself, whereas we moderns value knowledge primarily as an instrument of power over nature and, increasingly, over human nature and society. (2) They saw the maxim "know thyself" as leading ideally to self-mastery, whereas we care primarily about personal expressiveness. (3) They prized the activities of leisure (festivals, music, dramatic performances, great conversation, intellectual inquiry, philosophical speculation, and the like), whereas we are driven primarily by productive work in the service of material progress.[9] We could even say that, on these matters, modernity has rejected Aristotle, so perhaps an Aristotelian would be justified in rejecting these aspects of modernity in favor of a more contemplative life. (What that might look like, though, is far beyond the scope of this review.)

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[8] Pierre Hadot, *What Is Ancient Philosophy?*, trans. Michael Chase (Cambridge, MA: Harvard University Press, 2004).

[9] With regard to material wealth, Bissell and Kolhatkar quote Ayn Rand's disciple Leonard Peikoff as saying that "there is no limit to man's need of wealth. . . . [E]very material achievement contributes to human life by making it increasingly secure, prolonged, and/or pleasurable" (p. 121). This is a decidedly un-Aristotelian perspective, for in *Politics* I.9 Aristotle explains that those who seek wealth without limit do so because they have set no limit to their desires and that this is a corrupted state caused by caring about merely living rather than living well.

These tensions come to a head in Bissell and Kolhatkar's continued use of Ayn Rand as the modern exponent par excellence of Aristotelian philosophy. It seems to me that, at least on the foregoing three issues—and likely more, for instance, Rand's criticism that Aristotle did not consider ethics to be a science—reports of Rand's Aristotelianism have been greatly exaggerated.

3. Objectivist Integrations

With all that having been said, Bissell and Kolhatkar also explore, within a neo-Objectivist or post-Objectivist framework (p. 47), many fascinating topics at the borderline between psychology and philosophy. Indeed, "Buttressing Ayn Rand's Ethics" might have been a more appropriate title for their book, because they engage much more directly with Rand than with Aristotle (except, interestingly, in their chapter on politics). It is here that they come into their own and make a number of truly original contributions, both theoretical and practical. Their initiative to mesh philosophical principles with recent scientific research will undoubtedly be debated for years and deserves to be folded into the kind of broad-minded Objectivism that is, to use one of their preferred adjectives, more humane than ever before. In what follows I can give only a flavor of what they have achieved in this sphere.

In their third chapter, Bissell and Kolhatkar describe twelve psychological needs that human beings "must satisfy . . . if they are to achieve a psychic state that's serene in equilibrium, and excited by choice or chance" (p. 60). A number of these needs go back to Marie Jahoda's 1958 integration[10] of prior thinking by social, psychodynamic, and humanistic psychologists such as Gordon Allport, Erik Erikson, Erich Fromm, Heinz Hartmann, Abraham Maslow, and Carl Rogers. In Jahoda's phrasing, the six fundamental needs are autonomy, accurate perception of reality, attitudes toward the self, personal growth and self-actualization, psychological integration, and environmental mastery. (This last is a broad category that includes competence in practical affairs and human relationships, with the latter often separated out into a distinct component by subsequent psychological theorists.) To these six, our authors add a belief in one's own goodness (perhaps part of "attitudes toward the self"), discovering or creating a "true self" (perhaps part of personal growth and self-actualization), recognition and

[10] Marie Jahoda, *Current Concepts of Positive Mental Health* (New York, NY: Basic Books, 1958).

reward for one's achievements, inspirational experience, and for many but not all people creating a genetic or nongenetic legacy (similar to what Erik Erikson called "generativity").

Bissell and Kolhatkar re-use Maslow's definition of a need as "something whose absence demonstrably worsens the organism's mental and/or physical health, and whose presence in optimal quantities becomes necessary (but not *by itself* sufficient) to reach a flourishing state" (p. 159). However, it is unclear to what extent the twelve psychological needs are meant to align with the psychological literature. For example, in their two-page overview of autonomy (pp. 81-82), they do not reference definitions of this construct proposed by theorists from Carl Jung's concept of individuation and Heinz Hartmann's ego psychology in the 1930s through Carol Ryff's construct of psychological well-being as well as Edward Deci and Richard Ryan's self-determination theory in the 1990s and beyond.

Moreover, it is an open question whether all of these good things are really *needs* and whether something must be a need in order for it to matter or be valued in life. Consider that Aristotle's psychological theory describes not one but three kinds of reaching out into the world: needs, wants, and (among humans) deliberate resolutions to act. Aristotle also explores aspirations such as wonder (the starting point of philosophy), yearning to understand the world (the foundation for learning and science), and love for what is beautifully right (the aim of character development). For Aristotle, these are not needs but noble ideals open only to people who have been properly brought up and, at the highest levels, who have been exposed to a philosophical way of life. Does modern psychology add something over and above Aristotle's insights by labeling everything valuable a need? The authors do not offer the kind of philosophical analysis that would make this clear.

In addition to the twelve psychological needs, the authors posit seven key faculties—or "abilities, natural or acquired, for a particular kind of action" (p. 97)—of the human person: rationality, introspection, tenacity, the capacity for joy, goodwill and empathy, wisdom, and resilience. Here again, it is unclear whether these faculties are intended to align with the scientific literature or with Aristotle's analysis of various human capacities. As an example of the latter, Aristotle considers practical wisdom (*phronesis*) to be a capstone virtue, for he argues that "it is not possible to be fully good without practical wisdom

nor practically wise without virtue of character."[11] Aristotle also describes various component skills of practical wisdom—such as comprehension, sensitivity, insight, and know-how—that come together to form a stable trait or intellectual virtue and help a person understand how to size up a given situation and to act appropriately given the circumstances. Yet nothing of this is reflected in the authors' single paragraph about wisdom (p. 98).

Because Aristotle conceives of virtue as the activation of a capacity, it is surprising that Bissell and Kolhatkar do not mention Christopher Peterson and Martin Seligman's massive volume *Character Strengths and Virtues: A Handbook and Classification*.[12] This tome, produced with the help of over fifty scholars, was intended to function as a "manual of the sanities" and an equivalent of the standard Diagnostic and Statistical Manual (DSM) but for positive psychology. Although the untimely death of Peterson in 2012 seems to have slowed further progress in this realm, another noteworthy theorist here is Blaine Fowers, who uses virtue ethics as the basis for his research at the intersection of psychology and the virtues.[13]

It might seem that my comments up to this point have been overly critical. However, I mention these gaps and omissions because they provide intriguing opportunities for the authors (and like-minded others) to further knit together the art and the science of self-actualization, as their subtitle has it. There is plenty of work still to be done, and Bissell and Kolhatkar have laid much of the groundwork for fruitful exploration. Here, I particularly point out their identification of four levels of humaneness, their conception of a "life mission" as broader than Rand's "productive work," the idea of individualized value equilibrium, and their proposal that meaning or mattering (not survival or even flourishing) is the end goal of human life.

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[11] Aristotle, *Nicomachean Ethics*, VI.13, 1144b31.

[12] Christopher Peterson and Martin E. P. Seligman, *Character Strengths and Virtues: A Handbook and Classification* (Oxford, UK: Oxford University Press, 2004).

[13] See esp. Blaine Fowers, *Virtue and Psychology* (Washington, DC: American Psychological Association, 2005).

As the authors emphasize, to live a good life we need not only theoretical insights but also practical guidance. Sprinkled liberally throughout *Modernizing Aristotle's Ethics* are numerous actionable suggestions for formulating a personal mission in life, building healthy relationships, strengthening one's character, finding greater joy, resolving value conflicts, and integrating the many domains of one's existence into a seamless whole. They have truly lived up to the promise that Rand made years ago of defining a philosophy for living on earth.

Unfortunately, I fear that not enough people, whether philosophers, psychologists, or intellectually inquisitive members of the general public, will benefit from Bissell and Kolhatkar's laudable efforts, for *Modernizing Aristotle's Ethics* is currently available only in hardcover at a price of over $100. This will greatly limit its audience, to the detriment of authors and readers alike. Perhaps eventually a paperback edition will be forthcoming; in any case, we can hope that their insights will have a long-term impact through continued scholarly engagement and practical application.

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