

REASON PAPERS

A Journal of Interdisciplinary Normative Studies

Vol. 34, No. 2

October 2012

Symposium: Sari Nusseibeh's *What Is a Palestinian State Worth?*

- Variations on a Lockean Theme: Sari Nusseibeh's Heretical Proposal for
Israel/Palestine —Irfan Khawaja
The Return of Abu Nasr al-Farabi —Paul A. Rahe
A Modest Proposal: Is It? —Said Zeedani
Nusseibeh on Secular Faith —Fahmi Abboushi
What Is a Palestinian State Worth to the Palestinians?
—Donna Robinson Divine
Reflections on What a Palestinian State Is Worth —Issam Nassar
A Response to Five Critics —Sari Nusseibeh

Articles

- Independence and the Virtuous Community —Daniel O. Dahlstrom
Is Life the Ultimate Value? A Reassessment of Ayn Rand's Ethics
—Ole Martin Moen
Self-Ownership and Justice in Acquisition —Lamont Rodgers

Discussion Notes

- Direct and Overall Liberty: Replies to Walter Block and Claudia Williamson
—Daniel B. Klein and Michael J. Clark
Property and Progress —Gordon Barnes
Rejoinder to David Prychitko on Austrian Dogmatism —Walter E. Block

Review Essays

The Space of Music: Review Essay of Dmitri Tymoczko's *A Geometry of Music* —Roger Scruton

Review Essay: Ralf M. Bader's *Robert Nozick* and Ralf M. Bader and John Meadowcroft's (ed.) *The Cambridge Companion to Nozick's Anarchy, State, and Utopia* —Dale Murray

Review Essay: Timothy Sandefur's *The Right to Earn a Living* —David M. Wagner

Book Reviews

Kwame Anthony Appiah's *The Honor Code* —Joseph Biehl

Donald Livingston's *Rethinking the American Union for the Twenty-First Century* —Gary Jason

Scott Douglas Gerber's *A Distinct Judicial Power* —Joyce Lee Malcolm

Jeffrey Friedman's (ed.) *What Caused the Financial Crisis* —Thomas L. Hogan

John A. Allison's *The Financial Crisis and the Free Market Cure* —Arnold Kling

Ibn Warraq's *Virgins? What Virgins? and Other Essays* —David Cook

Yoani Sanchez's *Havana Real* —Glenn Garvin

Afterwords

America the Philosophical: Carlin Romano on Ayn Rand —Stephen Hicks

Letters from Lahore: Osama bin Laden, "Internal Sovereignty," and the "Black Coat Movement" —Khalil Ahmad

Editors-in-Chief:

Carrie-Ann Biondi, Philosophy, *Marymount Manhattan College*
Irfan Khawaja, Philosophy, *Felician College*

Editors Emeriti:

Tibor R. Machan (1974-2000), Business Ethics, *Chapman University*
Aeon J. Skoble (2001-2010), Philosophy, *Bridgewater State University*

Editorial Board:

Neera K. Badhwar, Philosophy, *University of Oklahoma (Emeritus)*;
Economics, *George Mason University*
Jordon Barkalow, Political Science, *Bridgewater State University*
Walter E. Block, Economics, *Loyola University, New Orleans*
Peter Boettke, Economics, *George Mason University*
Donald Boudreaux, Economics, *George Mason University*
Nicholas Capaldi, Business Ethics, *Loyola University, New Orleans*
Andrew I. Cohen, Philosophy, *Georgia State University*
Douglas J. Den Uyl, VP for Educational Programs, *Liberty Fund, Inc.*
Randall Dipert, Philosophy, *State University of New York at Buffalo*
Susanna Fessler, East Asian Studies, *State University of New York at Albany*
John Hasnas, Law, *Georgetown University School of Law*
Stephen Hicks, Philosophy, *Rockford College*
William T. Irwin, Philosophy, *King's College (Wilkes-Barre, Pennsylvania)*
Kelly Dean Jolley, Philosophy, *Auburn University*
Stephen Kershnar, Philosophy, *State University of New York at Fredonia*
N. Stephan Kinsella, Director, *Center for the Study of Innovative Freedom*
Israel M. Kirzner, Economics, *New York University*
Shawn E. Klein, Philosophy, *Rockford College*
Leonard Liggio, VP of Academics, *Atlas Economic Research Foundation*
Eric Mack, Philosophy, *Tulane University*
Fred D. Miller, Jr., Philosophy, *Bowling Green State University*
Jennifer Mogg, Philosophy, *Bridgewater State University*
James Otteson, Philosophy, *Yeshiva University*
Ralph Raico, History, *State University of New York at Buffalo (Emeritus)*
Douglas Rasmussen, Philosophy, *St. John's University (Queens, NY)*
Lynn Scarlett, Senior Environmental Policy Analyst, *Resources for the Future*
David Schmidtz, Philosophy, *University of Arizona*
James Stacey Taylor, Philosophy, *The College of New Jersey*
Lawrence H. White, Economics, *George Mason University*
Edward Younkins, Business, *Wheeling Jesuit University*
Matthew Zwolinski, Philosophy, *University of San Diego*

REASON PAPERS

Vol. 34.2 – October 2012

Editorial —Irfan Khawaja and Carrie-Ann Biondi 6

Symposium: Sari Nusseibeh's *What Is a Palestinian State Worth?*

Variations on a Lockean Theme: Sari Nusseibeh's Heretical Proposal for Israel/Palestine	—Irfan Khawaja	15
The Return of Abu Nasr al-Farabi	—Paul A. Rahe	28
A Modest Proposal: Is It?	—Said Zeedani	38
Nusseibeh on Secular Faith	—Fahmi Abboushi	45
What Is a Palestinian State Worth to the Palestinians?	—Donna Robinson Divine	47
Reflections on What a Palestinian State Is Worth	—Issam Nassar	52
A Response to Five Critics	—Sari Nusseibeh	57

Articles

Independence and the Virtuous Community	—Daniel O. Dahlstrom	70
Is Life the Ultimate Value? A Reassessment of Ayn Rand's Ethics	—Ole Martin Moen	84
Self-Ownership and Justice in Acquisition	—Lamont Rodgers	117

Discussion Notes

Direct and Overall Liberty: Replies to Walter Block and Claudia Williamson	—Daniel B. Klein and Michael J. Clark	133
Property and Progress	—Gordon Barnes	144
Rejoinder to David Prychitko on Austrian Dogmatism	—Walter E. Block	151

Review Essays

The Space of Music: Review Essay of Dmitri Tymoczko's <i>A Geometry of Music</i>	—Roger Scruton	167
Review Essay: Ralf M. Bader's <i>Robert Nozick</i> and Ralf M. Bader and John Meadowcroft's (ed.) <i>The Cambridge Companion to Nozick's Anarchy, State, and Utopia</i>	—Dale Murray	184
Review Essay: Timothy Sandefur's <i>The Right to Earn a Living</i>	—David M. Wagner	196

Book Reviews

Kwame Anthony Appiah's <i>The Honor Code</i>	—Joseph Biehl	205
Donald Livingston's <i>Rethinking the American Union for the Twenty-First Century</i>	—Gary Jason	211
Scott Douglas Gerber's <i>A Distinct Judicial Power</i>	—Joyce Lee Malcolm	215
Jeffrey Friedman's (ed.) <i>What Caused the Financial Crisis</i>	—Thomas L. Hogan	222
John A. Allison's <i>The Financial Crisis and the Free Market Cure</i>	—Arnold Kling	229
Ibn Warraq's <i>Virgins? What Virgins? and Other Essays</i>	—David Cook	234
Yoani Sanchez's <i>Havana Real</i>	—Glenn Garvin	239

Afterwords

<i>America the Philosophical</i> : Carlin Romano on Ayn Rand	—Stephen Hicks	245
Letters from Lahore: Osama bin Laden, "Internal Sovereignty," and the "Black Coat Movement"	—Khalil Ahmad	248

Editorial

Readers familiar with Anglo-American analytic epistemology are doubtless familiar with the concepts of *regress* and *coherence*, but since *Reason Papers* is an interdisciplinary journal, and both concepts are of relevance to this issue, a short primer on the subject may be in order.

A “regress” is an ordered series of questions and answers intended to establish the justification of some claim. Suppose, for instance, that you announce your intention to vote for Barack Obama in the 2012 U.S. Presidential Election. I ask you *why* you think Obama is the person to vote for, and you respond: “Because he’s the best of the available candidates.” I then ask you *why* you think he’s the best of the available candidates, and you respond: “Well, unlike the others, he has a genuinely presidential demeanor, an agile mind, and supports policies that are more obviously conducive to the general welfare than the others.”

Suppose that I persist with “why” questions of the same type: Why (I ask) *are* a presidential demeanor, agile mind, and welfare-conducive policies good reasons for electing a President? You might find that a somewhat odd or ridiculous question, but being an obliging and tolerant sort of person, you give a somewhat essay-like answer in response, having something to do with the nature of the presidency and the nature of politics itself. “Well,” you say, “the Preamble of our Constitution gives government a crucial role in advancing the general welfare, and the president literally presides over those functions of government most responsible for setting the government’s direction. So if the general welfare is in fact to be advanced, the person in charge of the executive branch of government has to have the right conception of government and its relation to the general welfare, and morally and intellectually be up to the demands of the office.”

We could, in principle, take this regress several steps further, and in various different directions. Eventually, however, the regress must come to an end: the chain of “why” questions must terminate in an answer that is no longer intelligibly susceptible of any more why questions. The interesting thing about a regress of justification is how it transforms the topic under discussion as the regress proceeds from beginning to end. We begin with a question about an individual choice, involving a specific person, a specific time, a specific place, and a circumscribed aim. We proceed, by iterated “why” questions, to answers that are simultaneously related to and at a remove from those specificities. On the one hand, each answer in the regress is related to its predecessors because each answer explains and justifies them. It’s *because* of what you believe about the nature of the presidency, politics, and the general welfare—and because you regard your beliefs about them as rational—that you decide to vote for Obama in the first place. On the other hand, each answer stands at a remove from its predecessors because each “why” question demands an answer that broadens the scope of the inquiry, and increases its abstractness. Having begun the inquiry with a question about

the merits of Obama-as-president, we end up having a conversation about the presidency as such, government as such, and the general welfare.

A regress, however, is only one of several different kinds of inquiries we might conduct in this context. Another one concerns *coherence*. Go back to the discussion about voting for Obama for president in 2012. You announce your intention to vote for Obama, and I ask why. You respond: “Obama is the best of the available candidates.” I ask: how so? And you respond, as in the previous example: “Well, unlike the others, he has a genuinely presidential demeanor, an agile mind, and supports policies that are more obviously conducive to the general welfare than the others.”

Now suppose that while I accept your criteria for the best presidential candidate, I wonder whether our agreement is substantive or merely verbal. In this case, I ask what you *mean*, say, by “policies conducive to the general welfare.” In order to have that conversation, we need to lay our conceptions of the general welfare on the table and make the conceptual equivalent of a pairwise comparison between them. That, in turn, requires that each of us tell a “story”—probably a fairly long and detailed one—about what we take “the general welfare” to be and how it is that something of that sort is to be promoted by government. Call this a question of *conceptual clarification*. Or suppose I accept both your criteria *and* their meaning, but want to know why it is that you think that *Obama* is the candidate who best exemplifies them. In that case, we have to compare notes on what we know about Obama from his track record, and report on what we find, comparing his track record with that of his competitors. Our reports may either agree or differ. If they differ, we need to figure out which report tells the better story by better fitting the facts. Call this a question of *hypothesis confirmation*.

“Coherence” denotes a relation between beliefs that have successfully passed tests of conceptual clarification and hypothesis confirmation. At a minimum, coherence requires consistency: no two beliefs can cohere if they contradict each other. In a more demanding sense, coherence involves a sort of mutual support: beliefs are coherent when they fit together in a single consistent system of beliefs, where the system has unity of some sort, and each belief plays a harmonious role, however major or minor, in a cognitive division of labor. In a yet more demanding sense, coherent beliefs bear strong conceptual relations to one another based on the content of the beliefs themselves: they entail one another, or explain one another, or bear some other kind of relation to one another that informs us about important similarities between things in the world. When it comes to coherence, then, the operative question is not the “why” of justification but the “what” of integration: what does *this* belief have to do with *those* ones? What does *each* of my beliefs have to do with the *others*?

Consider once again the inquiry about voting for Obama. In order to *clarify* the concept of “the general welfare,” I need to tell a “story” about it that fixes the referent of the concept while conveying a sense of its complexity. To grasp that complexity, I need to ask non-obvious questions about it, and have the answers to them. Since “obviousness” is a highly

subjective concept, I need to correct for my sense of the obvious by anticipating and/or fielding questions from others about it. To *confirm* some account of Obama's track record (as against that of the other candidates), I not only need to know the relevant facts (and why those ones are relevant), but need to put the facts into chronological order (what happened when?) and explanatory order (why did what happened happen as it did, and when it did?). And then I need to identify the sources of those facts, and be prepared to defend their reliability. Eventually, I have to put the whole story together in a single account that reflects the fact that each sub-inquiry in it is ultimately about the same thing: my political views.

The preceding account allows us to paint the portrait of the ideal epistemic (and discursive) agent. She has two essential features. On the one hand, she has mastery of the regresses that justify her beliefs. If you demand a justification of any of her beliefs, she has an answer to any legitimate "why" question you might ask of her, all the way down to the terminus of the regress for that belief. She knows where the regress ends, can explain why it ends where it ends, and feels no temptation to end the inquiry prematurely. On the other hand, she has mastery over the coherence of her beliefs as well. If you ask her for an account of the relations between her various beliefs—what they mean, how they're confirmed, how they relate to other beliefs in other domains—she has a coherent and interesting story to tell you about them. In fact, her having that story is less a function of your challenge to the coherence of her beliefs than of her own desire to keep them coherent. She "coherentizes" on her own initiative, just for the love of doing so—to expand the total stock of her beliefs so that they match the complexities of the world. She will, of course, need the help of others in the process of inquiry—for instruction, for testimonial evidence, for conversation, whether cooperative or adversarial—but ultimately, her epistemic achievement is her own.¹

We rehearse this primer lesson in epistemology because in an unexpected way, this issue of *Reason Papers* offers a case study (for lack of better terms) in regress-following and coherentizing. We don't mean, of course, that the issue is explicitly arranged in the form of a regress argument, or that our authors have deliberately decided to write as a collective mind to maximize the coherence of the claims within its covers. Nor do we mean that there's very much explicit discussion of epistemology in the issue. What we mean is that the inquisitive reader who reads *Reason Papers* 34, no. 2 cover to cover will likely be confronted with issues that lead him to ask the "why" questions characteristic of a regress of justification. Having done so, he might well be surprised to find that a "why" question provoked by one item in one

¹ Our discussion here owes a debt to Ayn Rand's account of epistemic virtue in her "The Objectivist Ethics," in Ayn Rand, *The Virtue of Selfishness: A New Concept of Egoism* (New York: Signet, 1964), pp. 20-24. For further discussion, see Leonard Peikoff, *Objectivism: The Philosophy of Ayn Rand* (New York: Meridian, 1993), chap. 4. For a more conventional treatment, see Michael Williams, *Problems of Knowledge: A Critical Introduction to Epistemology* (Oxford: Oxford University Press, 2001).

part of the issue gets a candidate answer in an item in a part of the issue devoted to an ostensibly unrelated topic. Something similar might be said of coherence. A reader interested in maximizing the coherence of his views on a topic discussed in one part of the issue might be surprised to find unexpected light cast on that topic from a discussion on an apparently “irrelevant” topic from inquiries in a supposedly “unrelated” discipline. The result is, so to speak, a lesson in epistemology very different from what one finds in most textbook discussions of the subject: a case study in regresses and coherence as they arise in real-life inquiries and controversies—of epistemology *in medias res*.

The issue begins with a Symposium on a relatively narrow topic—the merits or demerits of a Palestinian state in the West Bank and Gaza. “What,” the Symposium asks, “is a Palestinian state worth?” Put another way: *Why have a Palestinian state?*

As Irfan Khawaja suggests in his Introduction to the Palestine Symposium, much of the answer to that question turns on local or specialized knowledge of interest to Israelis, Palestinians, and assorted policy wonks, but as Sari Nusseibeh suggests in *What Is a Palestinian State Worth?*—the book that inspired the Symposium—a full and satisfying answer to the question requires inquiries into more general topics. The value of a Palestinian state, after all, turns on the value of states generally. That prompts a more general question further down the regress: *Why have states?*

Three items in our issue address that question from divergent perspectives, none directly about Palestine, but each at least indirectly relevant to it. Daniel O. Dahlstrom’s critique of Alasdair MacIntyre’s quasi-anarchism suggests that states protect our security in ways that anarchies cannot (“Independence and the Virtuous Community”). Khalil Ahmad’s “Letters from Lahore” describes the frightening insecurity of life under a government unable or unwilling to defend the rights of its citizens against the onslaughts of an increasingly militant Islamist threat. And Gary Jason’s critique of contemporary American neo-secessionism highlights the weaknesses in the neo-secessionist case, with potentially interesting application to the example of Israel and Palestine (see Jason’s review of Donald Livingston, ed., *Rethinking the American Union for the Twenty-First Century*).

One plausible answer to our question about the need for states, then, is that we need them to protect the security of our *rights*, something that well-functioning states do better than any other institution. But that answer leads in turn to a deeper and more theoretical question. Rights are themselves a controversial concept, notoriously rejected by philosophers from Bentham to Marx to MacIntyre. And so, we’re led one step further down our regress: *Why have rights?*

Timothy Sandefur’s recent work on economic freedom offers at least part of an answer to that question. We need rights, he suggests, because life compels us to earn a living, and rights protect the living that we earn. It seems plausible enough to think that there is some close connection—whether in Nablus or Newark—between having to earn a living, needing the freedom to

earn it without coercive impediments, and needing protection against those who would unjustly seize the product of one's labors. David M. Wagner's review of Sandefur's *The Right to Earn a Living: Economic Freedom and the Law* examines the constitutional and legal issues involved in Sandefur's argument.

The "right to earn a living" presupposes the *need* to earn a living, and likewise presupposes the *obligation* to respect rights. But the concepts of "need" and "obligation" are at least as controversial as the claims of "rights" themselves, and Ayn Rand famously (or notoriously) claimed that all three norms share a common justification in the contribution they make to *life*. That brings us to what is arguably the most fundamental question in any normative regress: *What is the source of normativity?* Put somewhat differently, *what is the ultimate basis of practical judgments?* Or in Rand's terms, *what is "the ultimate value"?*

Ole Martin Moen's answer to these questions takes the form of an extended inquiry into Rand's "The Objectivist Ethics." Moen sketches Rand's argument for the claim that life is the ultimate value, attacks what he takes to be defective interpretations of her views, and offers a hedonistic interpretation of Rand according to which happiness plays a more prominent (or at least different) role than it has in previous interpretations (see Moen's "Is Life the Ultimate Value? A Reassessment of Ayn Rand's Ethics"). We hope to run responses to Moen's article in the near future by three authors whose work it discusses—David Kelley, Douglas Rasmussen, and Irfan Khawaja—followed by a response by Moen himself.

With *happiness*, then, we reach the terminus of the notional regress that runs like a thread through the issue. But considerations of coherence arise about the various subjects within each of the preceding regresses as well, and interestingly enough, our authors discuss these issues from diverse perspectives that enable the reader to "coherentize" on each of these topics in an interdisciplinary way.

Start with states. It's plausible enough to say that "we need the state to protect our rights," but "the state" is a misleadingly simple designation. For one thing, states differ: to speak of one is not to speak univocally of all. And the major differences between states concern the relative success with which they do what states are supposed to do—namely, protect our rights. When states fail at their appointed task, after all, they tend to fail more egregiously than just about any other institution on the planet. It's not enough, then, to say that states protect rights. We need a better sense of the mechanics of success and failure.

Scott Gerber's *A Distinct Judicial Power* discusses the historical development of what we now take to be a necessary constituent of a *successful* state—an independent judiciary. Joyce Lee Malcolm finds "much to praise" in the book, but in criticizing it, draws attention to the difficulties of addressing a complex topic from competing disciplinary perspectives. Several items in the issue discuss varieties of state *failure*. Book reviews by Thomas Hogan (of Jeffrey Friedman, ed., *What Caused the Financial Crisis*) and

Arnold Kling (of John Allison's *The Financial Crisis and the Free Market Cure*) each discuss the role of the state and/or market in generating the "Great Recession of 2008." Elsewhere, Glenn Garvin describes the abysmal dysfunctionality of the Cuban regime as recounted by blogger Yoani Sanchez (in *Havana Real: One Woman Fights to Tell the Truth about Cuba Today*),² and Khalil Ahmad, a blogger himself in a nation where people run the risk of death for that activity, describes the consequences of state failure in Pakistan.

Or consider rights. Many of our authors discuss rights, but none of them means quite the same thing by the term, and property rights constitute a major locus of disagreement. Sandefur's (and Wagner's) "right to earn a living" requires the protection of one sort of property right, but Dahlstrom's (and MacIntyre's) defense of the Americans with Disabilities Act involves a very different one. And as our Palestine Symposium makes clear, crucial issues in both historiography and practical politics turn on how we conceptualize and justify property rights in other contexts as well. Consider the case of land disputes in Israel and Palestine. What are we to make of the fact that Jewish settlers have regularly won title to Arab land—evicting its erstwhile owners—by invoking nineteenth-century versions of Islamic land law? Was Jewish settlement of Mandate Palestine during the Third Reich an invasion of Arab Palestine, or was it a benign influx of desperate souls with nowhere else to go? Is Jewish settlement of the West Bank an encroachment on Palestinian land, or is it merely a reclamation of vacant or underused land that would otherwise go to waste? Does the Palestinian Authority own all of the West Bank, or must it defer to Israel's claims of state ownership there? Are environmentally conscious Zionists more deserving of land than environmentally careless Arabs, or should Arab land claims, regarded as indigenous, always deserve a presumption of validity? Or is none of the above the correct answer in any of these cases?

There are no easy answers here, but three items in our issue begin to shed some light on related issues. In a discussion with obvious application to the history of Israel/Palestine, Lamont Rodgers insists (against Edward Feser) that the claims of justice apply to acts of initial appropriation ("Self-Ownership and Justice in Acquisition"). Meanwhile, Gordon Barnes disputes David Schmitz's claim that private property rights are a necessary condition of human progress, suggesting that alternative property arrangements might do just as well ("Property and Progress"). Finally, Dale Murray's review of recent work on Robert Nozick serves to remind us of Nozick's indispensable

² We note in passing that Sanchez was recently arrested—or in official Cuban parlance "deported" to her home—on the pre-emptive grounds that her presence at a public trial she wanted to cover as a journalist would have been an illegal provocation. She was released by the Cuban authorities after being detained for thirty hours. See Associated Press, "Cuban Blogger Yoani Sanchez Freed from Detention," *The New York Times*, October 6, 2012, accessed online at: <http://www.nytimes.com/aponline/2012/10/06/world/americas/ap-cb-cuba-dissidents.html?partner=rss&emc=rss&r=0>.

contributions to our understanding of property rights (see Murray's Review Essay on Ralf M. Bader's *Robert Nozick* and Ralf M. Bader and John Meadowcroft's [ed.], *The Cambridge Companion to Nozick's Anarchy, State, and Utopia*).

Normative theory tells us how things ideally ought to be, but normative concepts do not by themselves offer guidance on the complex question of how to get from the non-ideal conditions that we inhabit to the ideal conditions they recommend. That fact suggests that moral progress and political reform need careful and considered analyses of their own. Joseph Biehl's review of Kwame Anthony Appiah's *The Honor Code* discusses the nature and mechanics of moral progress in cross-cultural perspective. In a previous issue of *Reason Papers*, Daniel Klein and Michael Clark articulated a pragmatic conception of libertarian political reform inspired by insights in Adam Smith and Friedrich Hayek; in this issue, they defend that account against two critics ("Direct and Overall Liberty: Replies to Walter Block and Claudia Williamson"). By contrast, Walter Block's discussion of David Prychitko's work insists on a doctrinally uncompromising conception of Austrian economics, and an equally uncompromising approach to political reform ("Rejoinder to David Prychitko on Austrian Dogmatism").

One obvious threat to progress comes from dogmatism or fideism. The dogmatist is the negative counterpart of the ideal epistemic and discursive agent described above. Where the ideal agent has an answer to any legitimate "why" question you might ask of her, the dogmatist feels the need to delegitimize the task of asking or answering such questions, stopping every regress before it gets started. Where the ideal agent seeks to maximize the coherence of her beliefs by seeking confirmation for them from the world, the dogmatist seeks a form of pseudo-coherence by trying desperately to shut out the world. Religious fideism is a central theme not just in our Palestine Symposium, but in David Cook's review of Ibn Warraq's *Virgins? What Virgins?* and in Khalil Ahmad's letters on the Taliban. But dogmatism and group-think can take secular forms as well, as Stephen Hicks makes clear in his quick dissection of Carlin Romano's handwaving discussion of Ayn Rand's Objectivism (see Hicks's Afterwords article, "*America the Philosophical: Carlin Romano on Ayn Rand*").

Happiness, as remarked above, is a good candidate for the terminus of a regress of justifications, but as Aristotle aptly suggested, that fact, however true, seems vacuous until we get a clearer account of what *makes* us happy.³ It's a rare conception of human happiness that excludes the joys of music, so it's perhaps no accident that Aristotle not only uses so many musical examples to explicate the nature of happiness, but devotes so much attention to the role that music plays in producing human happiness.⁴ Nor, perhaps, is it

³ Aristotle, *Nicomachean Ethics*, trans. Terence Irwin, 2nd ed. (Indianapolis, IN: Hackett Publishing Company, 1999), I.7.1097b23-25.

⁴ Cf. the famous lyre example at Aristotle, *Nicomachean Ethics*, I.7.1098a7-15. On the

an accident that the metaphors we inherit from the Greeks for coherence and concord, in epistemology as in ethics and politics, are so often musical ones.

Dmitri Tymoczko's remarkable book, *A Geometry of Music*, pursues an apparently unrelated question: what is musical tonality and why we do we enjoy it so much when we hear it? "It would make me happy," he writes, "to think that [my] ideas will be helpful to some young musician, brimming with excitement over the world of musical possibilities...."⁵ Tymoczko is right to be optimistic about that on purely musical grounds, but his book brims with excitement for non-musicians as well. For one thing, we *all* would like to know what's going on when we respond so powerfully to Bach, Beethoven, Brahms, or Blackmore. And if Aristotle is right, perhaps Tymoczko's claims about musical structure have something deep to teach us about the ostensibly non-musical parts of life that we feel compelled to describe by musical metaphors—e.g., epistemic and psychological harmony, moral measure, discursive counterpoint, political concord. In any case, we're privileged to have Roger Scruton as a guide to the complexities of Tymoczko's book, and to the complexities of the topic itself.⁶

Achieving the ideal of epistemic virtue is an ambitious aspiration for any of us, but the intellectual challenges we faced in editing this issue of *Reason Papers* induced both of us to take a few steps in its direction. We hope the intellectual challenges you face in reading it do the same for you.

Errata

We regret to note four errors in recent issues of *Reason Papers*.

(1) A block quotation from an article by Murray Rothbard quoted in Irfan Khawaja's review of Brian Doherty's *Radicals for Capitalism* incorrectly capitalizes the word "libertarianism" (*Reason Papers* 31 [Fall 2009], p. 154). In fact, Rothbard uses the lower case "l" throughout his essay. The error seems to have arisen from the editors' imprudent reliance for proofreading purposes on the version of the Rothbard passage quoted in Peter Schwartz's "Libertarianism: The Perversion of Liberty." Schwartz systematically capitalizes the "l's" in every instance of the word "libertarianism" in his

role of music in well-being generally, see Aristotle, *The Politics*, trans. Carnes Lord (Chicago, IL: University of Chicago Press, 1984), VIII.5-7.

⁵ Dmitri Tymoczko, *A Geometry of Music: Harmony and Counterpoint in the Extended Common Practice* (Oxford: Oxford University Press, 2011), p. xviii.

⁶ For the companion site for Tymoczko's book (with audio files keyed to examples in the book), go to: <http://www.oup.com/us/companion.websites/9780195336672/examples/?view=usa>.

article, altering direct quotations where the “l” appears as lower-case in the original text.⁷

(2) The Editorial for *Reason Papers* 33 (Fall 2011) inaccurately makes reference to Daniel Klein and Michael Clark’s account of “direct and indirect liberty” (p. 10). The correct phrase is “direct and overall liberty.”

(3) Irfan Khawaja’s review of Tariq Ramadan’s *What I Believe* inaccurately states that “the Bush Administration cut funding to the anti-Soviet resistance (“*mujahidin*”) in 1989, and left office in 1992...” (*Reason Papers* 33 [Fall 2011], p. 184). In fact, though the bulk of funding was cut in 1989, some residual funding persisted until 1992. The substantive point made in the passage stands, however.

(4) In Carrie-Ann Biondi’s “Descending from King’s Cross: Platonic Structure, Aristotelian Content,” a parenthetical comment about the *Harry Potter* characters Ron and Hermione confusingly describes them as “now married to each other with families of their own” (*Reason Papers* 34, no. 1 [June 2012], p. 73). The phrase should, of course, read: “now married to each other with a family of their own.”

Irfan Khawaja
Felician College
Lodi, NJ

Carrie-Ann Biondi
Marymount Manhattan College
New York, NY

www.reasonpapers.com

⁷ Compare Murray Rothbard, “Frank S. Meyer, The Fusionist as Libertarian Manqué,” *Modern Age* 25, no. 4 (Fall 1981), p. 355, with Peter Schwartz, “Libertarianism: The Perversion of Liberty,” in *The Voice of Reason: Essays in Objectivist Thought*, ed. Leonard Peikoff (New York: Meridian, 1990), p. 315.

Symposium:
Sari Nusseibeh's *What Is a Palestinian State Worth?*

Variations on a Lockean Theme:
Sari Nusseibeh's Heretical Proposal for Israel/Palestine

Irfan Khawaja
Felician College

1. Introduction

This symposium on Sari Nusseibeh's *What Is a Palestinian State Worth?* (hereafter, *Palestinian State*)¹ is the result of an oddly serendipitous series of events in the fall of 2010 just prior to the book's release. Things began early that fall while I was working on a review for *Reason Papers* of a pair of books on John Locke, and was trying there to explain Locke's very radical, and to most minds counter-intuitive, conception of the "State of Nature" and of the means of escape from it. Given the counter-intuitive nature of Locke's account, and the age-old objection of its irrelevance to the modern world, I wanted an example that might convey, or at least approximate, what Locke has to say.

On Locke's view, the State of Nature is a condition under which individuals possess and exercise moral rights, but do so in the absence of any legitimate government, and thus, without law. Possessing rights but lacking government, each person in the State of Nature faces the question of how to safeguard his rights "on his own." Presumably, individuals in this situation would eventually agree to govern themselves in relatively small-scale voluntary communities, each of which exists to protect its members' rights, but none of which has recourse to genuine political power—that is, to an institution with a monopoly on authority and the legitimate use of force. So conceived, the State of Nature, as Locke sees it, is a suboptimal but not (necessarily) terrible place; some people live in it today, many people lived in it in Locke's day, and pre-historic humans managed to survive in it for almost 200,000 years.² Still, its "inconveniences" are such as to give every rational

¹ Sari Nusseibeh, *What Is a Palestinian State Worth?* (Cambridge, MA: Harvard University Press, 2011).

² John Locke, *The Second Treatise of Government*, in *Two Treatises of Government*, ed. Peter Laslett (Cambridge: Cambridge University Press, 1988), secs. 14-15 and 19.

person in it a strong motivation to get out.³ Inconvenient or not, however, no one, on Locke's view, can permissibly be *forced* out of the State of Nature. One leaves the State of Nature only by an act of consent.⁴ In other words, we either consent to be governed by a legitimate government, or not. If we do consent, we enjoy the benefits of government while incurring the responsibilities of citizenship.⁵ If we don't consent, we are left as we were in the State of Nature, ungoverned but with our rights intact.⁶ We are, in this latter case, left without political responsibilities, but also without political representation or protection. Presumably, the state leaves us in peace—it can neither tax us nor demand our time or labor—but it excludes us from participation in its activities and from its assistance, and forbids us from setting up a rival to it.⁷

Locke presumes that most people will consent to a legitimate government, but if we have the right to consent, we have the right to refuse to consent. The question therefore arises within a Lockean framework of how to deal with those who for whatever reason refuse to consent to a legitimate government.⁸ Clearly, while non-consenters have no political obligations, they are obliged to respect the basic moral rights of others, and can morally speaking expect their own rights to be respected in turn. There is textual evidence in Locke for thinking that a government could (and probably should) grant non-consenters some very basic form of protection as second-class citizens while expecting some very basic form of compliance with the law.⁹ Such second-class citizens would neither enjoy the benefits of full citizenship nor incur its burdens. Indeed, the former fact, for Locke, is what induces the majority of individuals in the State of Nature to consent to government: they face a bargain that is hard enough to induce enough of them to consent to government for government to get off the ground, but not hard enough to count as coercing them into citizenship.

³ Ibid., secs. 13, 21, and 123-31.

⁴ Ibid., secs. 14-15 and 95-96.

⁵ Ibid., secs. 95, 99, and 120.

⁶ Ibid., sec. 95.

⁷ Ibid., sects. 4 and 9. The point about non-rivalry is implicit in Locke, but is made explicit by Robert Nozick's claim that a Lockean regime "maintains a monopoly over all use of force except that necessary in immediate self-defense"; see Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), p. 26.

⁸ The issue seems first to have been made explicit by Nozick; see Nozick, *Anarchy, State, and Utopia*, pp. 24, 54-56, 88-90, 109-110, and 117.

⁹ Locke, *Second Treatise*, secs. 119-22.

The example I ended up using in my 2010 review was Nusseibeh's description, in an online interview, of what I call the "heretical proposal" that opens *Palestinian State*.¹⁰ To the question, "What prospect is there for the Palestinians?" Nusseibeh had answered: "My next proposal will be to ask Israel to annex us, accepting us as third class citizens. The Palestinians would enjoy basic rights, movement, work, health, education, but would have no political rights. We would not be citizens, only subjects."¹¹ The fit with Locke's views was very inexact, but the affinities, I thought, were definitely there. In effect, Nusseibeh was asking the Israelis to end the "State of War" created by its occupation of the West Bank, and leave the Palestinians in something like a Lockean State of Nature.¹² In fact, he was going somewhat beyond this, in echo of Locke's description of the second-class citizens who neither expressly consent to nor expressly dissent from the state:

But submitting to the laws of any country, living quietly, and enjoying privileges and protection under them, makes not a man a member of that society: this is only a local protection and homage due to, and from all those, who, not being in a state of war, come within the territories belonging to any government, to all parts whereof the force of its laws extends.¹³

Not an ideal circumstance to be sure, but hardly unfamiliar to anyone acquainted with immigrant life from Kuwait City to Jersey City.¹⁴

¹⁰ See Irfan Khawaja, "Review Essay: Edward Feser's *Locke* and Eric Mack's *John Locke*," *Reason Papers* 32 (Fall 2010), p. 169 n. 21. I take Nusseibeh's proposal to be "heretical" by analogy with the classical Islamic sense of the word *bida'a*: in Islamic law, *bida'a* means both "heresy" and "innovation."

¹¹ Interview with Israeli Occupation Archive, "Sari Nusseibeh: A Palestinian State Has Become Impossible," January 20, 2010, accessed online at: <http://www.israeli-occupation.org/2010-01-20/sari-nusseibeh-a-palestinian-state-has-become-impossible/>.

¹² Cf. Locke, *Second Treatise*, sec. 19.

¹³ *Ibid.*, sec. 122. Spelling modernized.

¹⁴ In a review of *Palestinian State* in *The New York Review of Books*, David Shulman somewhat derisively compares Nusseibeh's proposal to the so-called "Atlanta Compromise" offered by Booker T. Washington in his famous speech to the Atlanta Cotton States and International Exposition (September 18, 1895). Shulman's comparison is more inexact than he lets on—where Nusseibeh insists on a full set of positive rights from the state, Washington did not—but he is right to suggest that the affinities are there. See David Shulman, "Israel and Palestine: Breaking the Silence," *The New York Review of Books*, February 24, 2011, accessed online at: <http://www.nybooks.com/articles/archives/2011/feb/24/israel-palestine-breaking-silence/?page=1>. Washington's speech appears as chapter 14 of his 1901 book *Up from Slavery: An Autobiography*, accessed online at: <http://www.bartleby.com/1004/>.

I'd at first been more interested in Nusseibeh's suggestion as a heuristic device for explicating Lockean political theory than as a serious proposal for resolving the Arab-Israeli conflict. But as I followed the news on Israel/Palestine across the winter of 2010 and into 2011, his thesis began to grow on me as a proposal in its own right.

One set of developments concerned the settlement enterprise in the West Bank. September 2010 saw the expiration of Israel's ten-month "freeze" on new settlements in the West Bank, followed by the resumption in earnest of settlement activity there. February of the following year brought the United States' veto of a United Nations Security Council draft criticizing the settlements. By the summer of 2012, U.S. Republican presidential candidate Mitt Romney was able to blame Palestinian poverty in the West Bank on Palestinian "culture," ignoring entirely the systematic violations of Palestinian rights of movement, exchange, property, and security required to facilitate the Israeli settlement enterprise, as well as the decades of U.S. subsidies spent in support of Israel's economy.¹⁵ Much of the American debate about settlements seemed premised on the supposition that the settlements were not the problem that they in fact are—a systematic, decades-long experiment in state-sponsored expropriation, discrimination, and marginalization.

The other set of debates concerned Palestinian statehood.¹⁶ April of 2011 gave rise to the attempted "unity deal" between the secular Fatah and Islamist Hamas factions of the Palestinian movement. In September 2011, the (temporarily) unified Palestinian government brought its bid for Palestinian statehood to the U.N. Within a few months, after some nominal recognition of a Palestinian state by developing nations, the effort came to a halt under the implied threat of an American veto in the U.N. Security Council. As I write in early October 2012, the Palestinian Authority has returned to the U.N. General Assembly to seek "nonmember state" status at the U.N. Much of *this* debate, in turn, seemed premised on the supposition that a *state* was somehow an obvious solution to the Palestinians' problems—with correspondingly little discussion of why that should be so.

Following these debates, one couldn't help but wonder at the apparent mismatch between problem and envisaged solution. Why the insistence on a Palestinian *state*? Why for that matter a *Palestinian* state? Why think that a state put in the hands of one's supposed ethno-religious

¹⁵ Romney's comments are reported in Ashley Parker and Richard A. Opiel, Jr., "Romney Trip Raises Sparks at Second Stop," *The New York Times*, July 30, 2012, accessed online at: http://www.nytimes.com/2012/07/31/us/politics/romney-angers-palestinians-with-comments-in-israel.html?pagewanted=all&_r=0.

¹⁶ For useful background, see Robert McMahon, "Backgrounder: Palestinian Statehood at the UN," at the website of the Council on Foreign Relations, accessed online at: <http://www.cfr.org/palestinian-authority/palestinian-statehood-un/p25954>.

compatriots should bring liberty, equality, prosperity, or anything else worth having?

When in December 2010, Harvard University Press announced the publication of Nusseibeh's book, I jumped at the opportunity to run a symposium on it in *Reason Papers*. And here's where the serendipity comes in. By sheer coincidence, my Felician College colleague Fahmi Abboushi had just returned to the U.S. after a year of administrative work at the Arab-American University of Jenin in the West Bank, to become Associate Dean of the Graduate Program in Teacher Education at Felician. By yet another coincidence, Fahmi turned out to have been a student of Nusseibeh's at Birzeit University during the tumultuous years of the first *intifada* in the 1980s and 1990s, as had his friend (and our fellow symposiast) Issam Nassar, Associate Professor of History at Illinois State University and Co-Editor of *Jerusalem Quarterly*. With their help, but without even having seen the book, I wrote Nusseibeh a somewhat long-winded letter asking if he'd like to be part of a symposium on it. He suggested dryly in response that I might want to read the book before I made a decision, but added: "Whatever you decide, you will find me game." And so he was.

Having secured a mini-quorum of contributors essentially sympathetic to Nusseibeh's views, I thought it important to invite others whose approaches might not be as sympathetic. The first potential critic to whom I turned was Donna Robinson Divine, Morningstar Professor in Jewish Studies and Professor of Government at Smith College and Associate Faculty Member at the University of Haifa and Bar Ilan University. I'd met Donna in 2005 at a conference on post-colonial theory and the Arab-Israeli conflict at Case Western University in Cleveland, where she had done an exemplary job at co-editing the conference proceedings, contributing an insightful essay of her own of relevance to topics discussed in Nusseibeh's book.¹⁷ I also thought it worth having a commentator with recognizably conservative views in the American sense of that term. Though I had never personally met Paul Rahe—the Charles O. Lee and Louise K. Lee Chair in Western Heritage and Professor of History at Hillsdale College—his reputation as a historian and political theorist preceded him, and was bolstered by the mention made of him in the Acknowledgements of *Palestinian State*.¹⁸ Finally, I thought it worth having a Palestinian critic who would actually have to live under the regime Nusseibeh was proposing. There couldn't, in this respect, have been a better contributor than Said Zeedani, Associate Professor of Philosophy at al-Quds University, a resident of East Jerusalem, and colleague of Nusseibeh's.

¹⁷ Donna Robinson Divine, "The Middle East Conflict and Its Postcolonial Discontents," in *Postcolonial Theory and the Arab-Israeli Conflict*, ed. Philip Carl Salzman and Donna Robinson Divine (New York: Routledge, 2008), pp. 208-21.

¹⁸ Nusseibeh, *Palestinian State*, p. 233.

With the very kind help of Amelia Atlas at Harvard University Press, and of the Press itself, the symposium was off and running.

2. The Heretical Proposal

As just remarked, *Palestinian State* begins with Nusseibeh's now-notorious proposal to have Israel annex the West Bank and Gaza, granting the Palestinians there the status of second-class citizens of Israel in exchange for protection of their civil rights by Israel, and recognition of some version of a Palestinian right of return to those parts of Israel currently inaccessible to them. After a few chapters devoted to related philosophical themes—the burdens of history, the value of human life, the function of the state—Nusseibeh returns to and refines the “heretical proposal” at some length in Chapter 5 of *Palestinian State*. Having revisited and redescribed it, the book turns to topics in moral epistemology and psychology (faith, reason, the nature of freedom and human motivation) before it closes, fittingly, with an Epilogue on the redemptive powers of education.

Despite the philosophical richness of the book, much of the English-language commentary on it outside of this symposium has focused, perhaps understandably, on the heretical proposal with which it begins. Most of this commentary has been negative. While left-leaning critics have accused Nusseibeh of acquiescence in a form of colonial subjection for the Palestinians,¹⁹ right-leaning critics have accused Nusseibeh of covert designs against the integrity and security of the Israeli state.²⁰ Though some of Nusseibeh's critics have made legitimate criticisms of his arguments and proposal,²¹ most, to my mind, have misrepresented or misunderstood them,

¹⁹ For criticism from the left, see David Shulman, “Israel and Palestine: Breaking the Silence”; Tom H., “What Is a Sari Nusseibeh For?” *Jadaliyya Magazine*, March 2011, accessed online at: <http://www.jadaliyya.com/pages/index/899/what-is-a-sari-nusseibeh-for>; and Avner Inbar and Assaf Sharon, “A Too Modest Proposal? A Palestinian Peacemaker Gives Up on Politics,” *Boston Review*, July-August 2011, accessed online at: http://www.bostonreview.net/BR36.4/avner_inbar_assaf_sharon_sari_nusseibeh_palestinian_israeli_politics.php.

²⁰ For criticism from the right, see Peter Berkowitz, “One State?” *Jewish Review of Books*, January 2011, accessed online at: http://sari.alquds.edu/state_worth/peter.htm; Elliott Abrams, “A Peaceful Palestinian's Perplexing Plan,” *Commentary*, January 2011, pp. 41-44; Adam Kirsch, “Cost Analysis,” *Tablet Magazine*, February 8, 2011, accessed online at: <http://www.tabletmag.com/jewish-arts-and-culture/books/58311/cost-analysis>; and Gil Troy, “The Palestinian Gandhi?” *Jerusalem Post Magazine*, February 11, 2011, accessed online at: http://sari.alquds.edu/state_worth/troy.htm.

²¹ Haim Watzman raises some legitimate questions about the vagueness of Nusseibeh's discussion of civil rights in “Mideast Maverick,” *Chronicle of Higher Education*, January 30, 2011, accessed online at: <http://chronicle.com/article/The-Mideast-Maverick/126057/>, as does Mori Ram in an untitled review for the online journal

and none has tried very hard to put them in their most defensible form. So some background and clarification are in order.

Solutions to the Arab/Israeli conflict basically divide two ways: two-state solutions and one-state solutions. Obviously, two-state solutions create two distinct, exclusive, sovereign states in the relevant area—a Jewish state for citizens of Israel, a Palestinian state for citizens of Palestine. On a two-state solution, Israelis and Palestinians negotiate so that the Israelis get political recognition from the Palestinians, and with it, peace, while Palestinians at last get a state of their own, and by implication, both recognition and peace. Each state has an ethno-nationalist basis, so that each state is essentially a state of ethno-national compatriots, linked by a deep sense of *belonging*.

Though a powerful consensus of opinion holds that the two-state solution is the only game in town, Nusseibeh belongs to the small minority of informed observers who rejects it.²² Consider four interlocking reasons for that rejection.

For one thing, a Palestinian state would be obliged to govern two geographically non-contiguous and demographically distinct wings, the West Bank and Gaza, each separated from the other by Israel. The most prominent twentieth-century example of such an arrangement—East and West Pakistan (1947-1971)—indicates the hazards of the idea, as does a less precise but more geographically proximate example, that of the United Arab Republic (1958-1961). The first led to outright catastrophe, the second to collapse and failure.

Second, a Palestinian state would have to exercise sovereignty over substantial parts of East Jerusalem and the West Bank. Geographically, however, both locations are for purposes of governance hopelessly divided between Palestinian towns and Jewish settlements along with the infrastructure of the latter. It's unclear how a state can exercise effective sovereignty over such a Swiss-cheese-like setup, and it is both implausible and morally problematic to suppose that the settlements can be uprooted and evacuated so as cleanly to resolve the problem.

Third, the existence of an international border between Israel and Palestine would likely undermine the trade links on which Palestinians

Intertwined Worlds, January 18, 2012, accessed online at: <http://intertwinedworlds.wordpress.com/2012/01/18/review-sari-nusseibeh-what-is-a-palestinian-state-worth/>. P. R. Kumaraswamy offers some valuable perspective on Nusseibeh's use of Indian history in his generally positive review, "Sanity Amid Turmoil," *Daily Pioneer*, August 18, 2012, accessed online at: <http://www.dailypioneer.com/sunday-edition/sundayagenda/books-reviews/88192-sanity-amid-turmoil.html>.

²² For an excellent overview, see Ghada Karmi, "The One-State Solution: An Alternative Vision for Israeli-Palestinian Peace," *Journal of Palestine Studies* 40, no. 2 (Winter 2011), pp. 62-76.

currently depend for their livelihoods. Palestinians would be better off economically with more open borders, not tighter ones, and a two-state solution would likely imply the reverse of what good economics would suggest.

Fourth, it's not at all obvious that a Palestinian state would benefit its inhabitants. The legitimacy of a state is measured by the degree to which it secures its inhabitants' equal liberty, and it is hard to see how equal liberty would be the likely offspring of a marriage between the two major parties likely to govern a Palestinian state: Fatah and Hamas. The two parties have so far been unable to achieve political unity, and it may well be that too much divides them to permit them successfully to govern a single nation.

Each of the preceding is a major problem, but taken together, they cast serious doubt on the viability of a two-state solution. If so, we're pushed to some version of a one-state option. One possibility here is to resurrect the old one-state schemes once espoused by Palestinian anti-Zionists (and espoused at one time by Nusseibeh himself).²³ On one version of this view, Israel annexes the West Bank and/or Gaza, granting all of the Palestinians living there both civil and political rights on par with Israel's own citizens. Equal rights in hand, Palestinians flourish alongside Israeli Jews and Arabs, and peace comes at last to the Middle East.

Unfortunately, wonderful as this may sound in the abstract (to non-Zionist ears, at any rate), the old one-state schemes have no hope of success, in two senses of that last phrase. For one thing, none of them has a hope of *happening*. The demand for fully equal electoral representation for Palestinians in a single state is obviously not going to fly with the average Israeli, at least not in the foreseeable future. But the old one-state schemes have no hope of success even if by some miracle they *could* happen. For the hard fact is that Israeli fears about a unitary state are for the foreseeable future true: a one-state solution gives political rights to all citizens of an Israeli state, including current residents of the West Bank and Gaza, but one can't rationally give political rights (e.g., the vote, political power) to people sworn to destroy the state that awards those rights—and Palestine's Islamists have sworn just that.²⁴ For these reasons, the demand for a one-state solution with

²³ The proposal is described in Sari Nusseibeh (with Anthony David), *Once Upon a Country: A Palestinian Life* (New York: Farrar, Straus, and Giroux, 2007), pp. 239-45, but was originally proposed in a 1986 piece in the Palestinian newspaper *al-Mawqef*. Cf. Karmi, "One State Solution," pp. 66-74.

²⁴ See "The Covenant of the Islamic Resistance Movement," August 18, 1988, accessed online at: http://avalon.law.yale.edu/20th_century/hamas.asp. Hamas's position on the rights of Israeli citizens may likewise be inferred from its position on the killing of Osama bin Laden. Even the Government of Pakistan, whose sovereignty was violated in the U.S. operation against bin Laden, managed in a grudging way to condone bin Laden's killing. Hamas, by contrast, unequivocally condemned it. See Fares Akram, "Hamas Condemns the Killing of Bin Laden," *The New York Times*, May 2, 2011, accessed online at:

full and immediate enfranchisement of the Palestinians is quixotic and dangerous, however abstractly desirable it might otherwise have been. Its most likely outcome in the present is not a peaceful settlement, but disaster.

That brings us to the possibility of what might be called a graduated one-state solution. On this view, as remarked above, Israel annexes the Palestinian territories, giving (those) Palestinians the choice of becoming second-class citizens of Israel with civil but not political rights. Though Nusseibeh is a bit vague about the details, civil rights include basic negative rights to take action without coercive interference (e.g., life, liberty, property, contract), along with some positive rights to certain benefits provided by the state (e.g., health care, social security).²⁵ Political rights, by contrast, include the rights to vote and hold electoral office at the national level, as well as to serve in government in executive and judicial capacities.

A graduated one-state solution has to be sufficiently better than the status quo for Palestinians to motivate them to take it, and sufficiently more likely than any other option to motivate Palestinians to forgo the others. It also has to be sufficiently respectful of some reasonable conception of Israeli security to re-assure Israelis that their rights will be respected, and (for whatever it's worth) sufficiently respectful of the Jewish character of Israel as not to require its immediate dismantlement.

It's a tall order, but I think Nusseibeh's heretical proposal satisfies each element. It is better than any available option for the Palestinians because it secures their civil rights to a greater degree and with better likelihood than any other available option. It respects Israeli security by leaving the apparatus of the state, including its security apparatus, essentially in Israeli hands. In doing so, it leaves the Jewish character of the state in place for now—but it doesn't leave Palestinians disenfranchised forever. As time passes, and the Jewish character of the state inevitably comes into conflict with Palestinian rights, I think Nusseibeh's view implies that the imperative to respect universal human rights will have to trump Zionist claims of belonging. In time, the specifically Jewish character of the Israeli state may well have to wither away to nominal and essentially non-political functions, so that Israel becomes a Jewish state in the way that England is an Anglican state, or Norway a Lutheran one.²⁶

http://www.nytimes.com/2011/05/03/world/middleeast/03gaza.html?_r=0.

²⁵ Nusseibeh, *Palestinian State*, pp. 13-14 and 143-45.

²⁶ Two caveats about the views I express in this paragraph and the next. (1) The claims I make in the text are my extrapolations from claims made by various writers on Palestinian politics, including Nusseibeh; they are not strictly speaking an exposition of Nusseibeh's own claims. (2) The phrase "wither away" may seem to conjure up Marx and Lenin, but what I actually have in mind is the saner and more successful model of judicial activism pioneered by libertarian and civil rights organizations in the United States (e.g., the American Civil Liberties Union, the National Association for the Advancement of Colored People, the Institute for Justice, the Pacific Legal

We might think of this process of conflict and state devolution on the model of the American civil rights movement, whose early successes (and some notable later ones) were achieved by judicial rather than legislative means.²⁷ The basic pattern, transposed to the Palestinian context, might be described as follows: A specific legally adjudicable conflict presents itself, pitting Palestinian rights against the Jewish character of the Israeli state. Public-interest legal groups then undertake litigation in defense of Palestinian rights, modeled (say) on the work of the National Association for the Advancement of Colored People in the American civil rights movement. As this litigation succeeds, it creates precedents for future litigation, thereby creating its own momentum for change. Some of this change will require legislative action, but if the demands for action come from the judiciary, they need not require literal Palestinian political representation for their satisfaction. The change itself can be modulated, much as it was in the American case, by political circumstances on the ground. At some point in the admittedly distant future, both sides will have lived long enough under a transitional process to permit (what I would call) the “full naturalization” of West Bank and Gazan Palestinians into Israel. In the meantime, however, Palestinians will have to live as disenfranchised second-class citizens, enjoying civil rights but not political ones.

There are other one-state solutions, some decent and some indecent, but on Nusseibeh’s view, the decent ones require modification by some version of his proposal, and the indecent ones can be rejected out of hand on moral grounds. Yet another possibility, the continuation or intensification of the status quo, can also be rejected on moral grounds. At least *prima facie*, that leaves proposals like Nusseibeh’s the only option standing.

3. Civil Rights and the Function of the State

There is, of course, more to Nusseibeh’s book than its heretical proposal. *Palestinian State* is a philosopher’s take on Israel and Palestine, and the book’s implications extend beyond specific policies and proposals to illuminate the issues that underlie them. In my view, the book serves a valuable function in drawing critical attention to two problematic assumptions that tacitly govern discussion of the Arab-Israeli conflict, assumptions

Foundation, among others). On point (1), see Sari Nusseibeh, “Why Israel Can’t Be a Jewish State,” *al-Jazeera*, September 30, 2011, accessed online at: <http://www.aljazeera.com/indepth/opinion/2011/09/201192614417586774.html>.

²⁷ For an excellent discussion of these issues, see Raef Zreik, “Why the *Jewish State* Now?” *Journal of Palestine Studies* 40, no. 3 (Spring 2011), pp. 23-37. As Zreik notes, the 1995 Israeli Supreme Court case *Ka’adan vs. Israel Land Administration* sets an important precedent (p. 31). For an instructive American precedent, see the 1975 New Jersey Supreme Court case *Southern Burlington County NAACP and Ethel Lawrence vs. Township of Mount Laurel*, accessed online at: <http://njlegallib.rutgers.edu/mtlaurel/docs/67nj151.pdf>.

embedded in the claims of Nusseibeh's critics, but rarely made explicit by them.

The first of these assumptions is a strong attachment to the ideal of ethno-nationalist self-determination through the state. According to its proponents, the *right of national self-determination* is the view that individual identity is constituted by group identity, so that the groups that constitute our identity have the right to determine the character of our social and economic environment, our fortunes, and the course of our development as members of the group.²⁸ *Ethno-national self-determination* is thus the view that the bearers of the right of self-determination are ethnicities, that is, groups united in a vague way by culture, language, and/or a common genetic heritage. In the context of the Arab-Israeli dispute, "Palestinians" and "Jews" are thought to qualify as ethnicities, so that the right of ethno-nationalist self-determination becomes the view that Jewish well-being requires specifically Jewish self-government in a Jewish state, and Palestinian well-being requires specifically Palestinian self-government in a Palestinian state. On this view, Jewish well-being is not possible in a state which grants Palestinians equal political freedom with Jews, whereas Palestinian well-being is not possible as long as state power rests in Jewish hands. Indeed, for some defenders of the view, Palestinian rights are a threat to Jewish well-being even when Palestinians are merely second-class citizens in a Jewish state, and Palestinians without political rights are "colonial subjects" no matter how assiduously their civil rights are respected.

Palestinian State poses the challenge for this view quite starkly: it is fundamentally unclear why ethno-national self-determination is a more attractive or rational ideal than that of a secular republic based on non-ethnic universal human values like freedom and equality. Why insist on being governed by one's specifically *ethnic* peers? What virtue do ethnic peers have that others are presumed to lack?²⁹

Certainly, the track record of ethno-nationalist regimes—from the American Confederacy to Rwanda—leaves much to be desired. Defenders of ethno-nationalism often dismiss this track record as irrelevant to their claims on the grounds that the ethno-nationalism they defend is one safely constrained by a conception of liberal rights and limited government.³⁰ In that

²⁸ I follow here the classic definition of Avishai Margalit and Joseph Raz in their "National Self-Determination," *The Journal of Philosophy* 87, no. 9 (September 1990), p. 440. See also Yael Tamir, *Liberal Nationalism* (Princeton, NJ: Princeton University Press, 1993), chap. 3.

²⁹ For a candid but stunningly irrational answer to these questions, see Isaiah Berlin's account of "the search for status," in his "Two Concepts of Liberty," in Isaiah Berlin, *Four Essays on Liberty* (Oxford: Oxford University Press, 1969), esp. pp. 157-58.

³⁰ E.g., Margalit and Raz, "National Self-Determination," p. 440 with n. 2; Tamir, *Liberal Nationalism*, pp. 6-7.

case, however, we would expect defenders of national self-determination to have a crisp account of the function and limits of the state—a crisp account, in Nusseibeh’s terms, of what states are *for*. I think it can be said with confidence that the literature contains no such account. Indeed, I’m inclined to say that the literature contains no attempt to *produce* such an account. What it contains, instead, are thousands upon thousands of pages devoted to defending the claim that each nation’s “right to culture” requires a “shared public space” codified and enforced by the laws, handcuffs, guns, fines, and prison sentences of the state. That this should be so is regarded as practically axiomatic. Why it should be so is one of the unsolved mysteries of contemporary political philosophy.

The second assumption Nusseibeh puts in doubt is the primacy of politics—voting, office-holding—in a life worth living. Critics of Nusseibeh’s proposal have repeatedly argued that there is something radically defective, on moral and/or political grounds, with any political proposal (like his) that involves the surrender—in any form, for any reason, and presumably for any duration³¹—of political for civil rights. The argument in essence is that civil rights depend asymmetrically on political rights so that civil rights cannot effectively be exercised or protected unless their possessors have full political rights as well.

Though there is clearly some merit to this objection, I think it fundamentally fails to come to grips with Nusseibeh’s argument. Consider four possibilities with respect to civil and political rights. A person can

- (1) have both civil and political rights,
- (2) have civil but not political rights,
- (3) lack civil but have political rights, or
- (4) lack both civil and political rights.

Contrary to the implicit suggestions of his critics, Nusseibeh is not disputing that, other things being equal, (1) is the best of the four options and (4) is the worst. His point is that under current and foreseeable conditions, there is no viable route to (1). If so, (1) is, despite its desirability, not an option worth discussing. One cannot legitimately rebut this claim by asserting that it involves a “rejection of politics,” “a counsel of despair,” or an “invitation to *apartheid*.” Either Nusseibeh is right about the non-feasibility of a two-state solution (and thus, option [1]), or he is wrong. If he is wrong, his critics need to dispute the case against the two-state solution. If he is right, the relevant question concerns the relative merits of option (2) versus option (3) as a means of avoiding option (4), not the indisputable (but irrelevant) merits of option (1) over any of the others. And while (2) is admittedly problematic, (3)

³¹ In fairness to these critics, the surrender of political for civil rights in Nusseibeh’s proposal may not, and probably would not, be temporary from the perspective of a given individual, who might have to live the duration of his life as a second-class citizen.

is positively hopeless. If we bracket (1), (2) wins. The argument may not be palatable, but its conclusion follows deductively from its premises.³²

4. Conclusion

As might be expected, our symposiasts read Nusseibeh in a variety of different ways. Paul Rahe offers a sympathetic contextualization of Nusseibeh's argument as a whole. At a broadly philosophical level, Said Zeedani queries the apparent "modesty" of Nusseibeh's proposal, and Fahmi Abboushi probes Nusseibeh's conception of "secular faith." Coming to more specifically political issues, Donna Robinson Divine treats Nusseibeh's proposal to a large dose of skepticism, and Issam Nassar counter-proposes that we change the question under discussion from the merits of a Palestinian state to the demerits of a Zionist one. Nusseibeh's uncompromising response upholds both the letter and spirit of his book by way of Ibn Sina and Ibn Khaldun.

"It is only light and evidence," Locke writes, "that can work a change in mens' opinions."³³ No symposium could presume to offer the last word on the Arab-Israeli conflict, but we'd like to think that ours succeeds at letting in a bit of light.

³² One significant omission in discussion of Nusseibeh's book is the absence of any sustained consideration of immigrant experience, or of the experiences of second-class citizens generally. Immigrants often have civil but lack political rights, and are in that sense second-class citizens of their adoptive countries, but it hardly follows that they must *necessarily* live under conditions of *apartheid* or subjection. Something similar might be said of individuals in such unconventional political arrangements as, say, the inhabitants of incorporated and unincorporated United States territories (e.g., Puerto Rico, the Northern Marianas, the U.S. Virgin Islands, Guam, American Samoa, etc.), or the similar territories of other countries (e.g., the Crown Dependencies and Overseas Territories of Great Britain). I develop this line of thought in an unpublished paper, "Annexation, Immigration, and Second-Class Citizenship: A Defense of Sari Nusseibeh's Proposal for Israel/Palestine."

³³ John Locke, *A Letter Concerning Toleration*, ed. James H. Tully (Indianapolis, IN: Hackett, 1983), p. 27.

The Return of Abu Nasr al-Farabi

Paul A. Rahe
Hillsdale College

In 1986, a young Palestinian scholar teaching in a great books program at Birzeit University on the West Bank published an inflammatory article in the Jerusalem weekly *al-Mawqef*.¹ The piece—entitled “Annex Us”—was intended as “a thought experiment.” As he later observes,

Looking objectively at the essential Palestinian interest in freedom, I asked which scenario was preferable: autonomy or annexation with full equal rights in Israel? Answering my own question, I said that it stood to reason that as citizens of Israel we would wield far more power in shaping our destiny. A member of the Knesset elected from Tulkarem, say, would not only help pass laws for his home town, or for those areas in the Occupied Territories on which settlements were being built, but he would also participate in legislation for Haifa and Tel Aviv. The ballot box would give us what armed guerrillas never could: control over our own lives, *and over theirs*.²

In publishing what he hoped would be “a bombshell,” he did not seriously intend to bring about what he proposed: an Israeli annexation of the Occupied Territories and the enfranchisement of his fellow Palestinians. His “thought experiment” was, as the more astute of his associates at Birzeit quickly realized, a “ruse”—which is to say, its publication was “a tactical move aimed at waking up the Israelis” and at bringing them “back to their senses.” He intended it as a species of “shock therapy,” which would bring home to the Israelis who ruled Jerusalem, Gaza, and the West Bank the true nature of their interests and the shortsightedness of their settlements policy. His message was simple: “Either we get our state, or they will have a battle for equal rights on their hands.”³

¹ Sari Nusseibeh, “Annex Us,” *al-Mawqef* (1986), cited in Sari Nusseibeh (with Anthony David), *Once Upon a Country: A Palestinian Life* (New York: Farrar, Straus, and Giroux, 2007), p. 240.

² *Ibid.*, pp. 240-41.

³ *Ibid.*, p. 242.

This particular Palestinian knew what he was about. He was the scion of an ancient Jerusalem family. Born in February, 1949, he had grown up in the Holy City when it was controlled by Jordan. In the first years of the Israeli occupation, at the instigation of his father, he had learned Hebrew and had spent a summer on a kibbutz. After reading Philosophy, Politics, and Economics at Christ Church College, Oxford, studying for a year in London at the Warburg Institute, and doing a Ph.D. in Islamic Philosophy at Harvard University, he had for a brief time been a visiting lecturer at the Hebrew University. He was no friend to the Zionist project, but he was in no way hostile to Israeli Jews, and he thought that his fellow “Palestinians should only be playing games” that they could win, “rather than pursuing futile and morally dubious tactics such as guerrilla attacks against the military system that the Israelis had perfected, or engaging in flights of fancy.” All that was required for what he regarded as victory was for the subject population to bring home to its conquerors the indecency inherent in their continued rule over and exploitation of a people whom they would never be willing to admit as equals into their own citizen body. He viewed the Israelis in much the same fashion as Martin Luther King, Jr. viewed white Americans. These people were not instinctively indecent. If made to see what they were doing and to weigh the likely consequences, they would come around. In the long run, if the Jews in Israel were to come anywhere near to living up to the standards which they espoused—in the long run, if they were to be safe and secure in what was for them the Promised Land—they would have to “forget all about their settlement projects and their bogus schemes for Palestinian limited autonomy, all their silly talk of Judea and Samaria,” and either abandon the Zionist project and opt for the establishment of a binational secular state or embrace “the two-state solution as a gift from heaven.”⁴

I describe in some detail the “thought experiment” that Sari Nusseibeh engaged in a quarter of a century ago with an eye to its serving as “shock therapy” for the Israelis, because he uses precisely the same phrases to describe his attempt in his new book—*What Is a Palestinian State Worth?*⁵—to “awaken Israelis” and the rest of us “to the inhumanity of continued occupation” and to alert his fellow Palestinians to the nature of their true interests (pp. 11 and 13). There is a consistency in Nusseibeh’s thinking and in the public posture he has deliberately adopted that is reflective of extended rumination on the role that a man of philosophic disposition can and should play in public life.

At Harvard, Nusseibeh wrote his dissertation on the doctrine of radical metaphysical freedom developed by Ali Aa Hosain Ibn Abdallah Ibn Sina (the

⁴ Ibid., p. 240.

⁵ See Sari Nusseibeh, *What Is a Palestinian State Worth?* (Cambridge, MA: Harvard University Press, 2011). Page references are in parentheses in the text.

figure known in Europe as Avicenna). But he did so only after having studied in depth the thinking of the political philosopher Abu Nasr al-Farabi under the tutelage of Muhsin Mahdi, and there he was persuaded to take to heart Leo Strauss's observation "that al-Farabi's Plato eventually replaces the philosopher-king who rules openly in the virtuous city" with "the secret kingship of the philosopher who, being a perfect man precisely because he is an investigator, lives privately as a member of an imperfect society which he tries to humanize within the limits of the possible."⁶ If Nusseibeh's thinking with regard to the capacity of the Israelis and the Palestinians to transcend the memory of the suffering they have inflicted on one another, to set aside their fears, and to live alongside one another in peace and with mutual respect derives from his reflections on Avicenna, the posture he has adopted as a public intellectual owes even more to his consideration of the theological-political doctrine first elaborated by al-Farabi and later taken up and applied by Avicenna, Averroës, Moses Maimonides, Marsilius of Padua, and Dante Alighieri.⁷ When the "religious zealots" in Nusseibeh's classes at Birzeit angrily reacted to his presentation of the thinking of the political philosopher whom the Arab philosophers revered as "the second teacher" and then published a pamphlet denouncing their professor as "the [false] prophet at Birzeit," he was delighted and had the pamphlet framed and put up on the wall of his office for all to see. If he were to do for his fellow Palestinians and their Israeli neighbors anything even remotely like what al-Farabi and his successors tried to do for the Arabs, Jews, and Christians of the Middle Ages, he would be exceedingly pleased.⁸

The real question is, of course, what "the limits of the possible" are in present circumstances. Nusseibeh's earlier efforts—before, during, and in the period immediately following the first *intifada*—contributed mightily to there being a political opening in the early 1990s. Had the Palestinian delegation at Oslo and those in the Palestinian Liberation Organization (PLO) providing guidance to the negotiators been more astute, had they insisted on reaching something akin to a final status agreement at that time regarding Jerusalem and the Israeli settlements on the West Bank, or had Yitzhak Rabin and his successors adhered to the spirit of the agreement, the Israelis would not have aggressively expanded further their footprint in Jerusalem and on the West

⁶ Leo Strauss, *Persecution and the Art of Writing* (New York: Free Press, 1952), p. 17, quoted in Nusseibeh, *Once Upon a Country*, pp. 145-46.

⁷ For an attempt to describe this doctrine and trace its origins and dissemination, see Paul A. Rahe, *Against Throne and Altar: Machiavelli and Political Theory under the English Republic* (New York: Cambridge University Press, 2008), pp. 59-83.

⁸ Nusseibeh, *Once Upon a Country*, pp. 145-50 and 182-83. In the remainder of his autobiography, Nusseibeh returns to these two thinkers and to Thomas Jefferson repeatedly.

Bank after the accord was signed on September 13, 1993, and the Oslo Agreements would not have turned out to be a false start. Even then, however, had Yasser Arafat not alienated his fellow Palestinians by setting up in the Occupied Territories what Nusseibeh aptly describes as yet “another version of a sleazy Arab kleptocracy,”⁹ had he been prepared to turn his back once and for all on armed struggle, and had he been willing to close a deal with Ehud Barak at Camp David in July, 2000, something akin to what Avicenna had in mind when he spoke of “miracles” might really have taken place. There was a moment when women and men of good will on both sides of the divide were ready, willing, and able to reach an accord and were sufficiently numerous to be able to guarantee that it would be honored. The story that Nusseibeh tells in his autobiography is a disheartening tale of missed opportunities, counter-productive greed, and outright corruption on the part of some politicians and of genuine malice on the part of others, and it allows us to see how the weaknesses and folly of the former played to the advantage of the latter so that, in the end, defeat was snatched from the jaws of victory. It may be a long time before there is another political opening as promising as this one was, and that time may never come.

When Nusseibeh dropped his first “bombshell” back in 1986, it rattled his fellow Palestinians even more than the Israelis. His latest “bombshell”—a proposal that East Jerusalem, the West Bank, and Gaza be annexed and that the Palestinians who reside there be accorded full civil, but not political rights—may well have a similar effect.

The Palestinians are not likely to find such a prospect enchanting. Those who long for a political community that they can call their own will be outraged, and even those who are inclined to think, as Nusseibeh does, that politics is “a means, not an end,” and that states exist solely for the protection of private rights will be skeptical in the extreme. The latter might be satisfied with a condition in which

farmers could tend their fields without being harassed by settlers and without fear of their land being confiscated and their trees and crops destroyed; . . . teachers and professors could be employed on the basis of their academic qualifications and not their security files; . . . people could move and travel freely; . . . companies could be established, services and institutions set up, houses and office buildings constructed. (p. 7)

But they are bound to ask, “How can our enjoyment of equality under the law be protected if we are disenfranchised? What leverage would we possess? How well were African-Americans treated in the South after they were deprived of the vote?” These are legitimate questions, and Nusseibeh’s suggestion that there be “an international guarantee” is not likely to reassure anyone (p. 16).

⁹ Ibid., p. 401.

Those Israelis who take pride in their possession of a political community that they can call their own or who merely believe that Jews, especially in the Middle East, can be safe and secure only in such a community are likely to regard Nusseibeh's proposal as a ruse—which, indeed, it may well be. "In the long run," they will no doubt ask, "how could we in good conscience permanently deny political rights to those who live alongside us within a state we share? And, given demographic trends, if we were eventually to enfranchise the Palestinians, would we not be laying the foundation for destroying the character of Israel as a Jewish state?" From their perspective, Nusseibeh's proposal is bound to look like a Trojan horse.¹⁰

Of course, this proposal may be a ruse of another sort. Nusseibeh is fully aware of the objections I have outlined, and he is an accomplished practitioner of the venerable art of rhetoric. He may or may not have read Theophrastus's advocacy of insinuation as a rhetorical necessity:

It is not essential to speak at length and with precision on everything, but some things should be left also for the listener—to be understood and sorted out by himself—so that, in coming to understand that which has been left by you for him, he will become not just your listener but also your witness, and a witness quite well disposed as well. For he will think himself a man of understanding because you have afforded him an occasion for showing his capacity for understanding. By the same token, whoever tells his listener everything accuses him of being mindless.¹¹

But he certainly understands the psychological principle that Aristotle's successor articulated in this passage, and he has made ample and repeated use of insinuation in the course of his career as a public intellectual.

A quarter of a century ago, when Nusseibeh dropped his first "bombshell," his aim was to induce the Israelis to negotiate a settlement with Yasser Arafat and the PLO. His purpose at this juncture may be similar, for he is clearly persuaded that the current situation is untenable. The territory left to the Palestinian Authority following the construction of Israel's Security Wall is, he quite plausibly asserts, more like a collection of Bantustans than like a country, and it is insufficient for the support of an independent state. When he expresses doubts as to whether land on the West Bank confiscated by the Israelis will ever be returned, he may be hoping—by drawing the disturbing

¹⁰ This would be even more emphatically true if his proposal were regarded—as, at times, he seems to think it ought to be regarded—"an interim arrangement" or "step"; see Nusseibeh, *What Is a Palestinian State Worth?* pp. 15-16 and 143-49.

¹¹ *Theophrastus of Eresus: Sources for His Life, Writings, Thought, and Influence*, ed. and trans. William W. Fortenbaugh et al., 2 vols. (Leiden, The Netherlands: Brill, 1992), frag. 696. All translations are mine, unless otherwise indicated.

political conclusions that follow logically from this premise—to persuade the Israelis that it must, nonetheless, be returned. He does not say, “Either we get a viable state with East Jerusalem as its capital, or they will have a battle for equal rights on their hands.” But, of course, he did not say anything of the kind in the article published twenty-five years ago in *al-Mawqef*. He quite shrewdly left it to the Israelis to draw the proper conclusion for themselves, as many of them did. This time Nusseibeh is proposing “a thought-experiment” that is, he readily admits, “so objectionable that it might well generate its own annulment.” It might, he explains, make “all parties see the need to find a tenable alternative.” Or, “if adopted,” it might serve “as a natural step towards” what he puckishly proposed in 1986: “a single democratic state.” It might even, he tellingly adds, induce the two parties to this ongoing dispute to revisit a suggestion advanced in the wake of the first Arab-Israeli War by Jawaharlal Nehru’s India: that, in the territory in Palestine evacuated by the British, there be “a federal form of government” (pp. 13, 32-35, and 143-44).

In any case, whatever developments take place, Nusseibeh thinks that “Palestinians, just as much as Israelis, need to think deeply about what states are for,” and he insists that their function is “utilitarian”—that they are “means to enhance human well-being rather than to fulfill jingoist or religious imperatives” and that this understanding “needs to be brought to the forefront of their political consciousness” (p. 15). The phenomenon that worries him is “the tragic power of the spells human beings create and then become bounded by in pursuit of their own well-being.” What he has in mind are “meta-biological *structures*,” which “take the form of ideologies, norms, belief-systems, religions, regimes, states, and so on,” and “meta-biological *entities*,” which “take the form of gods, families, tribes, nations, political movements—in short, anthropomorphized higher-order objects acting as if they belong to the biological side of the picture.” It does not, he insists, matter which “form they take.” Either way, “they threaten first to dominate and then to dehumanize the real, flesh-and-blood individuals who created them in the first place” (pp. 13 and 96-98).

Nusseibeh is not the first to confront this challenge. As he is no doubt acutely aware, “anthropomorphized higher-order objects” of the very sort that he has in mind inspired murder and mayhem on an almost unimaginable scale in Europe in the wake of the Reformation and the Counter-Reformation, and philosophers—such as Michel de Montaigne and Thomas Hobbes—stepped forward in the fashion suggested by al-Farabi in an attempt “to humanize” the societies in which they lived “within the limits of the possible.” Moreover, the thought-experiments in which they engaged and the shock therapy they attempted to apply to their contemporaries by means of the books they composed have one crucial component in common with the argument that Nusseibeh articulates: they embody a systematic attempt to induce their readers to think as unembedded individuals, lower their sights, and quell the spiritedness within them that forms the basis for human attachments and so easily gives rise to rage. In his *Essays*, Montaigne does this gently and seductively, in a manner both charming and entertaining, by inviting those

who pick up his book to join him in a great variety of humorous and deflating ruminations focused on the solitary self. In *Leviathan*, Hobbes pursues the same end in a much more brutal fashion with a skeptical epistemology designed to shatter the claims made on behalf of “anthropomorphized higher-order objects” and a phenomenology of mind aimed both at explaining the origins of internecine conflict and at suggesting the manner in which a narrow, selfish focus on security and well-being might open the way to bringing it to an end.¹²

Montaigne, Hobbes, and their successors—including John Locke, Bernard Mandeville, and the Baron de Montesquieu—sought systematically to reduce the hold that “anthropomorphized higher-order objects” have on men and to promote civility within political communities and cooperation among them by debunking idealism, unleashing instrumental reason, and encouraging on everyone’s part a sane, sober calculation of material interests. The three last-mentioned authors in particular thought that the growth of commercial society and the habits of self-interested petty calculation that it would instill would dispel in considerable measure the illusions that give rise to religious and ethnic strife.¹³

In *What Is a Palestinian State Worth?* Nusseibeh chooses a different path, eschewing instrumental reason and its sober calculation of the dictates of material interest and embracing sentiment—above all, compassion (pp. 93-224). This decision I regard as a mistake likely, if it were to take hold among the Israelis and Palestinians, to be fatal to everything he holds dear. After all, Nusseibeh is not the first to have elevated compassion in this fashion. In reaction against the commercial republicanism espoused by Montesquieu and the French *philosophes*, Jean-Jacques Rousseau anticipated Nusseibeh—and in *The Social Contract*, *Discourse on Political Economy*, and the brief treatises that he wrote on Poland and Corsica, laid the foundations for the nationalism that brought murder and mayhem to Europe in the twentieth century on an even greater scale than had religious sectarianism in the sixteenth and seventeenth centuries. As its etymology suggests, compassion is

¹² See Paul A. Rahe, *Republics Ancient and Modern: Classical Republicanism and the American Revolution* (Chapel Hill, NC: University of North Carolina Press, 1992), pp. 249-398; and Rahe, *Against Throne and Altar*, pp. 22-100 and 245-320. Note also Paul A. Rahe, “Don Corleone, Multiculturalist,” *The Journal of Business and Professional Ethics* 16, nos. 1-3 (1998), pp. 133-53.

¹³ See Rahe, *Republics Ancient and Modern*, pp. 445-520; and Paul A. Rahe, *Montesquieu and the Logic of Liberty: War, Religion, Commerce, Climate, Terrain, Technology, Uneasiness of Mind, the Spirit of Political Vigilance, and the Foundations of the Modern Republic* (New Haven, CT: Yale University Press, 2009).

a self-forgetting sentiment.¹⁴ It brings us into a species of union with those whom we pity and causes us to identify our fate with theirs. Unfortunately, however, this fellow feeling loses its force progressively as those within its compass grow more numerous and diverse, and it cannot effectively be extended to mankind as a whole. Compassion is contagious, but it is unreasoning and in its very nature partisan. It is conducive to an unmitigated fury directed against those thought to be responsible for the suffering of the men, women, and children who are its object. Compassion and hatred are, all too often, peas in a pod, and the Middle East in recent years has seen far too much of both.¹⁵

Nusseibeh may well be right in supposing that mankind has—at least in the last two-and-a-half centuries—made moral progress of a sort (pp. 150-66).¹⁶ But he is in error if he thinks that the process by which this took place has anything to do with the spread of compassion. The “universal human values” of which he speaks are first celebrated in the writings of Hobbes, Locke, and Montesquieu. They are the logical conclusion of the account they give of man’s departure from the state of nature along a path charted by the interplay between his desire for security and well-being, on the one hand, and instrumental reason, on the other. All attempts at peace-making follow precisely the same path. And on the practical level, as Montesquieu observes in his *Spirit of Laws*, it is the spread of commerce that fosters the requisite habits of thought.

Were I a Palestinian in Nusseibeh’s predicament, I would want to reflect on the story that the ancient geographer Strabo tells about the stages of development that took place in the Iberian city now called Empuries. There was a time, he reports, in which the people of this community lived “on a small island off the coast, which is called the Old City [*Palaiopolis*].” Later, however, they shifted to the mainland and resided in a city with two discrete parts divided by a wall. In one part lived the Indictans, a people indigenous to Iberia; in the other lived the Greek interlopers. The Indictans, we are told, wanted two things: to preserve their own polity and way of life, and to collaborate with the new arrivals in providing for the security of both ethnic

¹⁴ In this connection, see Paul A. Rahe, *Soft Despotism, Democracy’s Drift: Montesquieu, Rousseau, Tocqueville, and the Modern Prospect* (New Haven, CT: Yale University Press, 2009), pp. 63-140, esp. pp. 116-40.

¹⁵ In this regard, one might want to reflect on the larger implications of what Aristotle has to say with regard to the dependence of *philia* (fondness) on *thumos* (spiritedness); see *The Politics of Aristotle*, trans. Peter L. Simpson (Chapel Hill, NC: University of North Carolina Press, 1997), VII.7.1327b40-1328a5. All translations are mine, unless otherwise indicated.

¹⁶ I leave aside the price paid for this species of moral progress. To address it would require more space than I have been allotted and perhaps more patience than my disquisition deserves.

communities. The wall between the two parts of the city was designed to satisfy the first of their desires; the “common wall encircling” the two communities was intended to satisfy the second. “In time,” Strabo adds, “they joined together to form a single polity with a certain mixture of barbarian and Greek customs, as has happened on many other occasions.”¹⁷

In short, this city progressed from being a binational federation to being a unitary polity by becoming what Americans would call a “melting pot.” Its original name—from which the modern Catalán name is derived—was Emporion, which is suggestive of the dynamics that governed its development. From the very beginning, it was an emporium, a trading post, with commerce as its principal object, and even when it came to possess an inland plain as its territory, that plain, as Strabo’s description makes clear, was used to produce the raw materials from which items for export were fashioned.¹⁸ As best we can tell, then, the solvent responsible for the gradual amalgamation of the Indicitans and the Greek strangers in their midst was not compassion. It was the process of economic interchange that caused them to rub up against one another with great frequency, rendered them interdependent, and promoted an ethos of cooperation and a spirit of mutual respect.

Two millennia thereafter, in the wake of the Second World War, when Jean Monnet and his collaborators in Germany and France joined together to found the Common Market and did so in the hope of making future warfare between their nations unthinkable, they had something like the trajectory followed by ancient Emporion in mind. They were persuaded that it is commerce and the concomitant petty concern with one’s own material well-being that dissolve the fellow-feeling inspired by “anthropomorphized higher-order objects”; cause human beings to think, act, and see themselves first and foremost as individuals; and thereby promote the particular species of moral progress valued by Nusselbeh. The techniques associated with nonviolence that he describes with great enthusiasm in the last chapter of his latest book are not apt to have purchase and be in any way effective except in commercial societies, for it is only where individualism has already in considerable measure triumphed that human beings are apt to envisage members of other communities as women and men just like themselves—intent on making a living and deserving equal respect (pp. 194-224).

Of course, it may have been easier for the tolerant, ecumenical polytheists from Iberia and Hellas to learn to live and let live and eventually to intermarry, for the Protestants and Catholics in early and late modern

¹⁷ Strabo, *Geography, Books 3-5*, trans. Horace Leonard Jones (Cambridge, MA: Loeb Classical Library, 1923), 3.4.8. Note also Livy, *History of Rome, Books 31-34*, trans. Evan T. Sage (Cambridge, MA: Loeb Classical Library, 1935), 34.9. All translations are mine, unless otherwise indicated.

¹⁸ Strabo, *Geography*, 3.4.9.

Germany and France to do the like, and for the Christians and secularists of late twentieth-century France and those of Germany to bury the hatchet and follow suit than it would be for the adherents of Judaism and Islam to treat one another as equals within the contested territory of what both communities regard as sacred soil. Rival monotheistic religions of holy law do not easily a melting pot make. The Islamist wave now sweeping the Arab world may turn out to be a greater obstacle to the realization of Nusseibeh's dream than the Zionism of the Israeli Jews.

A Modest Proposal: Is It?

Said Zeedani
al-Quds University

In his recent book *What Is a Palestinian State Worth?* Sari Nusseibeh urges both Israeli Jews and Palestinian Arabs seriously to entertain the following proposal.¹ In the absence of a viable two-state solution (ranked as the best option), and given the improbability of a secular or binational one-state solution for the short and medium term, the two parties to this perennial conflict, with the blessing and endorsement of the international community, should agree to the following exchange or trade-off as an interim step or as a transitional stage of indeterminate duration: Israeli annexation of the Occupied Palestinian Territories (OPT) since 1967 and Israeli sovereignty over the whole area of “Historic Palestine” in exchange for equal civil, cultural, and human rights for the Palestinians, whether in the OPT or in the Palestinian diaspora (those refugees who wish to return to the homeland). According to this proposal, Israeli Jews would be the owners of the state while Palestinians (even as second- or third-class citizens by their consent) would continue “to feel they owned the *country*” (p. 144), or Israeli Jews (the sovereigns, the citizens) could run the country while the Palestinian Arabs at least could enjoy living in it, though as residents or subjects (p. 146). This proposal is ranked by Nusseibeh as the “second-best option.” The transitional stage is meant, according to Nusseibeh, significantly to reduce or mitigate the evils of occupation, on the one hand, and to avoid a descent into *apartheid*, on the other (the worst options, I assume). In this way, Israel would remain a Jewish state, while the Palestinians would enjoy all of the internationally sanctioned rights, except the political ones (foremost, of course, the right to national self-determination).

The above proposal is defended by Nusseibeh as follows. Against the background of an occupying power “impervious to any such solution [i.e., the one-state or the two-state solution], perhaps we need to think of proposals that may work as shock therapy to awaken Israelis to the inhumanity of continued occupation, or that may provide halfway measures to reduce, as much as possible, the occupation’s deleterious effects on our daily lives” (p. 11). In other words, Israeli Jews, and for that matter the concerned international community, are being challenged either seriously to embrace and implement the best option (two-state solution) or to support this proposal for a

¹ Sari Nusseibeh, *What Is a Palestinian State Worth?* (Cambridge, MA: Harvard University Press, 2011). Page references are in parentheses in the text.

transitional stage, leading eventually to the one-state democratic solution (p. 13; see also p. 143). As for the benefits Palestinians can reap from adopting such a proposal, they can be summed up as follows: Palestinian refugees can return to their homeland and/or get compensated, Palestinians in the West Bank and Gaza would enjoy equal and full civil and human rights in their homeland, and Palestinians in Israel (as well as in Jordan and other countries) would feel more at ease with their citizenship identity. More or less, Palestinians in the West Bank and Gaza, and diaspora Palestinians who decide to exercise their right of return (labeled as a civil right), can enjoy living in conditions similar or comparable to those currently being enjoyed by the Palestinian residents of East Jerusalem. The benefits to Israeli Jews are more than obvious: maintaining Israel as a Jewish state, in addition to maintaining its rule over the whole area of Mandatory Palestine. According to this modest proposal (is it?), Israeli Jews are the owners of the state, and Palestinian Arabs and Israeli Jews share and enjoy the whole country.

For most of his adult life, Nusseibeh has argued and struggled for what he calls the “best option,” the two-state solution. The benefits and costs of such a solution are clear enough. Nusseibeh does not hide the fact that such a solution entails sacrifices by the Palestinians, mainly as far as the right of return is concerned. In this kind of solution the “good” of the collective, the Palestinian People, outweighs the “rights” of the individuals (mainly the right of return). And this is morally and politically justified, in his opinion. But having been a witness to the dwindling prospects of the best solution (p. 137), and given that the one-state solution “does not seem to be right around the next corner either” (p. 143) and we might “find ourselves facing the prospect of another forty years of in-between existence” (pp. 142-43), he justifies his proposal for the short and medium term. Hence also his responses to Uri Avneri (a staunch advocate of the best option) and Ilan Pappé (an equally staunch advocate of the one-state solution). (See Nusseibeh’s discussion in chapter 5.)

But there is more to *What Is a Palestinian State Worth?* than the eye descries. There is more to it, in other words, than identifying the different scenarios or options and assessing the prospects of the realization of each of them. This “more” will become clearer when we try to answer the following two interrelated questions: Who is Sari Nusseibeh? What does he *really* want, that is, what in fact is his preferred option? It is my strong impression that there are two voices, two persona, two impulses in the book. On the one hand, we have Nusseibeh, the nationalist and the national political leader and activist. On the other, we have Nusseibeh the liberal intellectual and thinker. The heart and mind of the former upholds the two-state solution, while the heart and mind of the latter upholds the one-state solution (unitary, federated, or binational). Nusseibeh, the national(ist) leader and activist, has for more than thirty years been one of the staunchest advocates of the two-state solution. His writings as well as his political initiatives—of which the well known Ayalon-Nusseibeh Initiative is the most recent—are the best evidence of that. And he is still a staunch supporter of the two-state solution, which he

regards as the best option. But he is well aware that the prospects for this solution are dwindling, mainly because of the facts on the ground created by successive Israeli governments. This twilight or demise of the two-state solution, added to his withdrawal from intense political activity or activism, reawakens in Nusseibeh the liberal thinker the latent impulse for the one-state solution from its decades-long slumber. On the other hand, though, he is well aware that the one-state solution is not right around the corner. His modest proposal for the transitional stage is, and should be viewed as, expressive of the special appeal of the one-state solution to his liberal mind. As we shall see in what follows, the special appeal of the one-state solution hovers over the Introduction and the different chapters of the book, over the hard questions the author is trying to tackle. What I wish to claim is this: Sari Nusseibeh is both a liberal and a nationalist, but he is much more liberal than nationalist. It is his commitment to liberal values that best accounts for his answers to the hard questions, posed as titles to the different chapters of the book. Of special relevance in this respect are his answers to the two title questions of chapters 3 and 4 (“What Are States For?” and “Can Values Bring Us Together?”). These answers set the stage, and provide the setting, for the “appearance” of the modest proposal in chapter 5.

In chapter 3, Nusseibeh reminds us that states are not ends in themselves. They exist *for* us as tools in our hands, the individual human beings who created them. If that is the case, then individual human beings have primacy over states (p. 84). But under certain circumstances, in some contexts, “the state is so glorified, viewed as so much grander than individuals, that it is no longer conceived as a structure whose purpose is to serve those individuals. Quite the contrary, the relation becomes reversed” (p. 84). The state becomes the subject, instead of being a mere object. In extreme cases, the state becomes some sort of a “leviathan,” a “meta-biological” entity or being, which “overshadows” or even “smothers” the real human beings who created it. Instead of being a servant, the state becomes a relentlessly commanding master. Historically, this is the case of the Stalinist or the fascist state. According to Nusseibeh, these meta-biological entities or beings can also take the form of ideologies, belief structures, religions, tribes, nations, and political movements and parties (p. 98). Whatever form they take, they dominate the real individual human beings who created them in the first place. In the case of identity, one layer, one property, might get blown out of all proportion, and gets transformed into an entity or being which in turn controls the lives of flesh-and-blood individuals. Nusseibeh alerts us to the far-reaching negative consequences when these “grand players” dominate the political stage. In the Palestinian context, these meta-biological entities can take the form of Fatah, Hamas, Islam, a Palestinian state, Palestinian or Arab nationalism, refugee, etc., while in the Israeli context, they take the form of a Jewish state, Zionism, settlers, Hasidic Jew, the Land of Israel, ideological political movements, etc. In the Lebanese context, they mainly take the form of ethnically based political movements or parties. In all of these cases and others, Nusseibeh warns, individual human beings get controlled, dominated,

defined, smothered, transformed into objects and tools, devoid of any moral responsibility for the acts they perform in the name of these meta-biological entities or under their spell or command.

But the author of *What Is A Palestinian State Worth?* doesn't just explain and warn. He also instructs and tries hard to show the way out of this spell and the grip of meta-biological entities that are destined to clash. And the way out, like the search for peace, requires "retrieving" the individual human being, the human face, and putting him at the very center, as a human subject, as a political actor, and as a moral agent. In Nusseibeh's words:

If we take the individual rather than the state or some other meta-biological being as our starting point, and if we peel off enough of the layers we have inherited or constructed over our inner identities, we will indeed find that we share, impelled by our common sentiment for compassion, the will to do what we believe is right. Cumulatively, over time, those things which each of us considers "the right thing to do" converge as common values, coming to command universal consensus and to be considered almost self-evident moral truths. (pp. 119-20)

The above passage raises a host of difficult questions about identity, politics, and morality. To the first question of whether it is possible for individuals to "peel off" layers of their identity, his answer is a clear "yes." Like Amin Maalouf, a French writer of Lebanese descent, Nusseibeh believes that it is a matter of choice, that "the humane spirit within individuals can always control the surrounding layers of identity" (pp. 93-94; footnote omitted).² But there is no argument to show how it is possible to shed layers of identity, which layers are easier to shed than others, and what are the costs to the individual of shedding which layers to the extent that doing so is possible. It is unfortunate that Nusseibeh does not more seriously take into account the communitarian critique of liberalism.

To the second question of whether there are universal moral principles from which we can derive shared core moral values, his answer is, again, a clear "yes." These moral principles, and the shared core values derived from them, are neither God-given nor exist in a Platonic "supra-human order" nor are expressions of the "might is right" dictum. Rather, they are "expressions of the compassionate rather than the hegemonic sense of human nature" (p. 117). In other words, since human values are "rooted in the compassionate impulse" (p. 118), they are independent of context, and, hence, are universally shared. But it is doubtful whether the compassionate impulse or sense, or the sense of benevolent sympathy for that matter, can justify the derivation of the two ultimate principles Nusseibeh has in mind. We should not forget that utilitarianism is justified, partly at least, by appeal to this sense

² Amin Maalouf, *In the Name of Identity: Violence and the Need to Belong*, trans. Barbara Bray (New York: Penguin, 2000).

of sympathy which transports us from psychological egoism to embracing the principle of utility as the universal and ultimate moral principle. To say the least, Nusseibeh's account about the universality of moral values is controversial, if not problematic.

To the third question regarding the identification of the ultimate moral principles that guide and justify core moral values, specific moral rules, and particular actions, Nusseibeh's answer is: lexically ordered equality and (positive and negative) freedom (p. 121). He arrives at this by a thought-experiment, reminiscent of John Rawls's deliberating parties behind a "veil of ignorance" in an "original position."³ But Nusseibeh does not explain why mankind, in his case, would opt or vote for these two principles (equality in the first round of voting, freedom in the second one). We have the conviction, but not the argument. To say the least, Nusseibeh's constructivist account for the derivation or justification of the ultimate moral principle is neither fully developed nor sufficiently or convincingly argued for.

But perhaps we need to remember that *What Is a Palestinian State Worth?* is not a philosophical treatise, nor is it a book about ethical or moral theories and their justification. It is a book about the Palestine-Israel conflict, its history, intractability, the harsh reality of occupation, the dispersion and discrimination Palestinians have had to endure, and the possible ways out of this almost century-old conflict. Nusseibeh's reflections on identity, universally shared core moral values, and whether individual human beings have intrinsic or extrinsic value, are all intended to prepare the reader, and to pave the way, for the political proposal referred to above. Nusseibeh has a set of settled convictions and core universal values that he holds and defends. He also believes that the adoption of such convictions and values is more likely to lead Palestinians and Israeli Jews out of the wilderness, and out of the dreariness of the conflict. It is high time to sum up these convictions and values, to show what the author is really committed to, and whether they can be of real help in the search for genuine peace.

Nusseibeh is a liberal democrat who is also committed to the following propositions:

- Since human life has intrinsic value, the taking of human life for political or ideological causes should be rejected. In the context of the Palestine-Israel conflict, "respect for and the preservation of human life, rather than violation of life in the name of any cause, should be what guides both Israelis and Palestinians in their pursuit of a just peace" (p. 60).
- States are tools, mere means, and therefore should not be treated or regarded as ends-in-themselves. The same applies to political institutions, movements, and parties.

³ John Rawls, *A Theory of Justice*, rev. ed. (Cambridge, MA: Harvard University Press, 1999), pp. 102-68.

- Individual human beings can, have the choice to, and should peel off those layers of their identity that transform them from being masters of their destiny and autonomous responsible moral agents, into tools in the service of states, ethnic groups, ideologies, and ideological movements and causes.
- Human beings, regardless of context, share core universal values. These core moral values, rooted in the compassionate impulse, derive from two fundamental or ultimate moral principles. These universally applicable moral principles are equality and freedom (*freedom from* as well as *freedom to*). These two moral principles are lexically ordered, that is to say, equality takes priority over freedom (positive and/or negative).

In the light of these convictions and commitments, one can fully appreciate Nusseibeh's concluding sentence to chapter 4: "If we wish to achieve peace and stability without oppression, it is vital that we focus on the human face—both our own and those of the 'others'—and on the values shared by all" (p. 123). Otherwise, we—Israelis and Palestinians—will remain "operatives of some larger entity, cogs in some meta-biological machine" (p. 123). In addition, these commitments should guide the search for peace, and characterize the desirable solution—whether it is the one-state solution (*à la* Ilan Pappé) or the two-state solution (*à la* Uri Avneri) is not the essential issue. Since successive Israeli governments have been undermining the two-state solution, and since the one-state solution is not right around the corner, what remains is the modest proposal for the transition period or stage. But if the transition period or stage is to be guided by the above commitments, it can lead ultimately only to one destination: the one-state solution. Seen in this light, Nusseibeh's proposal for the transitional period is far from being modest. This transitional period or stage can function as a "purgatory," a catharsis, and eventually both Israeli Jews and Palestinians will (should) be able to focus on the "human face" and on the universal core values they share. They will (should) both become free, able to free themselves, from the spell and the grip of meta-biological entities. The big question, of course, is whether both Israeli Jews and Palestinians can (be empowered to) rise up to this big and worthy challenge.

In closing, all that Nusseibeh wants is to be free and equal in his own country, as a human being, as a citizen, and as a Palestinian. He grants that all Palestinians (including the refugees) and all Israeli Jews are entitled to that. Whether this can be realized in one state, or two separate states, or no state, is not the main issue. Anyway, states are tools, mere means, and should not be regarded as ends-in-themselves, as having intrinsic value. As a liberal democrat, animated by the compassionate impulse, and by the universal core moral values it justifies, Nusseibeh (like Gandhi) wants ethics to guide and inform politics and to determine the course of political events. To skeptics,

who argue that his account is too idealistic, and that the course of history is determined more by egoism and the will to power, he responds that *faith* can “move the mountains.”⁴ Faith (secular faith, in this case) and its associates—vision and will—are his answer to the critics and skeptics, the fearful and the lethargic, who are unwilling and ill-equipped to take on the risk of peace. The following quotation says it all: “[T]he leaders need to have a vision, to have faith in that vision, and to be able to rally the people to share that faith. . . . whatever form it [peace] takes, it has to be a moral political order, and its foundation must be the two elements of freedom and equality” (p. 193). But as to the big question of what to do in the absence of such prophet-like leaders, Nusseibeh regrettably has no answer. Is it possible that a transitional period of the sort Nusseibeh proposes, guided by a Palestinian Gandhi-like approach, aiming to win the other side rather than to win over the other side (p. 202), will ultimately lead to the truly “promised land” of peace and reconciliation? I suspect this is what he has in mind.

In the end, one can challenge Nusseibeh’s account of human nature and human motivation, his constructivism in ethics, his political morality, his view of reason as merely instrumental, his over-emphasis on faith in determining the course of political events, as well as his under-estimation of what is valuable in nationalism and nation-states. But one cannot resist the appeal of his commitment to liberalism, non-violence, and the universally shared core values that ought to be at the foundation of peace between Palestinians and Israeli Jews. Among other things, it is the power of these commitments, coupled with faith in the ability of humans to overcome even themselves, that makes *What Is a Palestinian State Worth?* a source of inspiration for the seekers of peace in Israel-Palestine and beyond.

⁴ Matt., 17:19-21.

Nusseibeh on Secular Faith

Fahmi Abboushi
Felician College

In chapter 6 of *What Is a Palestinian State Worth?* Sari Nusseibeh points out that an agreement between the Palestinians and the Israelis cannot be reached based on *reason* and/or *force*, for they are neither singly nor jointly sufficient to address the legitimate needs and fears of the other party.¹ A missing ingredient to achieving peace between the two parties is *faith*. Nusseibeh cites faith as a “crucial agent in the transformation of protagonists’ self-definitions” (p. 179). This transformation is critical for reaching an agreement between the two people. Nusseibeh argues that faith “rather than force or reason, has been the determining force of political history” (p. 180). This notion of faith is rather interesting in the context of the Arab-Israeli conflict. We surely cannot deny the role faith plays not only in causing conflicts but also in resolving them. A person may argue that the main force behind the persistence of the Arab-Israeli conflict is itself faith, that is to say, both peoples believe that they are the true inheritors of the land they both live on. Seen from that perspective, how could one argue that faith could also be the solution to this conflict?

In order to answer this question, we need to know what type of faith Nusseibeh is talking about. To Nusseibeh, there are many manifestations of faith; there is the commonly known religious faith, and there is also what he calls “secular faith” (p. 180). What does Nusseibeh mean by “secular faith”? To him, it is a faith in our abilities as individuals and groups to be able to bring about change. It is this type of faith that is missing from the Arab-Israeli puzzle.

Nusseibeh goes on to construct his philosophy of overcoming the insurmountable differences between the Palestinians and the Israelis by arguing that faith constitutes the moral lever by which a person, or a group of persons, can bring about change. There are two essential components to this Archimedean moral lever: (1) will and (2) what Nusseibeh calls “the de-ideologized human being or citizen” (p. 212). Will, or agency, has the power to alter “one’s own identity or another’s; it draws on the notion that human identities are not pre-set or static but are constantly being shaped or formed by conscious acts of will” (p. 211). These two components provide a philosophical/moral solution to the Palestinian-Israeli conflict, and rightly so.

¹ Sari Nusseibeh, *What Is a Palestinian State Worth?* (Cambridge, MA: Harvard University Press, 2011). Page references are in parentheses in the text.

The moral dimension of the conflict forces or obliges us to seek a moral solution to it. And one of the most “peaceful” ways of doing that, so as to avoid resorting to violence, is to de-ideologize the conflict. Whether we agree with Nusseibeh’s characterization of the conflict or not, the moral characterization of the conflict cannot be ignored.

If we agree with this moral notion of faith, whether it is secular, philosophical, or religious, it remains to be seen how it can be the lever by which Palestinians and Israelis can come together, knowing that both claim moral superiority for their cause. Nusseibeh’s proposition takes that moral superiority away from both parties and asks them to replace it with moral courage; it is a moral faith that transforms the antagonist to protagonist.

This proposed recipe of change is very appealing but hard to implement by either party. Middle East political history tells us that faith on the part of a leader is not enough to bring about peace—Anwar Sadat’s faith was not enough to transform his people’s view of the Israelis. Nusseibeh may argue that this transformation has to take place on the individual level rather than being advocated (or imposed) by a leader or a head of state. There must be a change in the peoples’ perceptions of each other, a de-ideologizing of the antagonist, or rather, I may add, a de-ideologi-zing of the Other—the “zing” here adds energy to this de-ideologizing process.

But for this type of change to take place, it demands measures of confidence-building by both sides, hence the proposition by Nusseibeh of a one-state solution. This is rather a leap of faith on Nusseibeh’s part! It is a vision he endorsed for many years before it became another viable option to resolving the Palestinian-Israeli conflict. By proposing the one-state solution, Nusseibeh leaps over the two main obstacles to achieving a meaningful agreement between the two parties, let alone having peace: refugees and borders. In a two-state solution, these two issues remain irresolvable due to demographic and geographic factors. The one-state proposition eliminates these two obstacles and provides a sense of justice to both parties—in the moral sense at least. A one-state solution addresses the “moral” rights, as opposed to the “legitimate” rights, of both peoples to the same land. This sense of justice is a crucial complement to the article of faith Nusseibeh talks about. The two concepts—faith and justice—are so intertwined that we cannot discuss one without the other. Although Nusseibeh does not make clear the connection between these two terms, his one-state solution provides a fertile ground for both to flourish and eventually bring about a peace between the two peoples. It is, in a sense, the Archimedean lever that could move this intransigent conflict to a peaceful resolution.

What Is a Palestinian State Worth to the Palestinians?

Donna Robinson Divine
Smith College

Sari Nusseibeh proposes that Palestinians accept civil but not political rights in a Jewish state because, as he puts it,

the state, as we had conceived it, is no longer practical or realistic [And] if we are facing an obstinate occupying power . . . we need to think of proposals that may work as shock therapy to awaken Israelis to the inhumanity of continued occupation, or that may provide halfway measures to reduce . . . the occupation's deleterious effects on our daily lives. (pp. 10-11)¹

Nusseibeh claims that his proposal breaks through what have become fruitless negotiations to end Israel's occupation while it provides ordinary Palestinian men and women the chance to improve the quality of their lives. Without sovereignty, Nusseibeh argues that Palestinians can only escape their predicament by acknowledging and accepting the futility of pursuing their national cause. The recommendation is intended to force Palestinians and Israelis to think about the purpose of a state—hence, the provocative title, *What Is a Palestinian State Worth?* Focused with sympathetic intensity on the Palestinian ordeal, the book illuminates, as though from within, the tension between the reality of despair in the present and an imagined hope for the future. On one side of the Middle East conflict, Nusseibeh sees military might and massive material resources, while on the other, the most potent of motivations: the desire of Palestinians for the freedom to control their own lives. But can Nusseibeh's vision be translated or even connected to any discernible political reality? For even if just an exercise for the mind, there must be some truth in it to be taken seriously.

Binationalist, proponent of the two-state solution, supporter of the Palestine Liberation Organization, critic of the Palestine Liberation Organization—these can be said to describe Nusseibeh's political convictions at one time or another. Although the list might suggest that Nusseibeh has adopted the most prosaic of Palestinian aims, he has, in fact, crossed semi-sacred lines in presenting his views. Taxing both the vocabulary

¹ Sari Nusseibeh, *What Is a Palestinian State Worth?* (Cambridge, MA: Harvard University Press, 2011). Page references are in parentheses in the text.

and principles of Palestinian identity, Nusseibeh has, on more than one occasion, boldly stated that the right of return will carry Palestinians from their refugee camps only to a newly born Palestinian state and not to the towns or villages left behind in 1948. It is worth remarking that there are few articles of faith as firmly fixed in the Palestinian national canon as the right of return. For Nusseibeh to challenge this principle shows the measure not only of his intellectual audacity but more importantly of his personal courage, for what he advocates amounts to no less than a nationalist heresy with potentially lethal consequences.

From his birth into a family renowned for its educational achievements and national service, Nusseibeh resided at or near the pinnacle of Palestinian politics in a society where lineage matters. Born in Damascus in 1949 but coming of age in the aftermath of the 1967 War, Nusseibeh understood that as much as Palestine belonged to the Arab world, it happened to be located in Israel's geographic domain. That realization led him to learn about Israel by studying Hebrew, traveling across its Jewish communities, and establishing ties with some of its leading intellectuals. He earned respect for his scholarship and admiration for his efforts to understand all sides of the Middle East Conflict while remaining enchanted by none.

Surprisingly, then, given the reputation of the man as an original thinker, Nusseibeh has nothing new to say in this book about Israel's occupation nor about its effect on Palestinian life and behavior. But *What Is a Palestinian State Worth?* warrants attention because it restores focus on the central and critical issue of statehood even as it demonstrates how the best of Palestinian thinkers has really not thought about the state in a serious way or delved deeply into how authoritative institutions can ensure security and protect rights by drawing their energy from political sovereignty. Perhaps because Nusseibeh's views of the state retain a heavy influence of leftist ideology, they emphasize the negative aspects of state power. He tells us that he once believed in

a Palestinian state embodying our national identity on a part of our homeland . . . enabling those in the diaspora to return to the homeland, those under occupation in the West Bank and Gaza to become free, and those within Israel to gain full equality with their Jewish fellow citizens. (p. 6)

But that belief did not last and was replaced by his identification of the state as an entity erecting an army, siphoning off what is likely to be a meager national treasure from health care and education, and as a place where the trappings of power would be disposed to march in response to a highly chauvinistic discourse emptied of consideration for human rights. For this reason, Nusseibeh says that he has no use for politics, and although he has engaged in activism on behalf of the Palestinian struggle for self-determination, he sees himself, first and foremost, as a fighter for human rather than for national rights. The great structural fault of nationalism, then,

on Nusseibeh's reading of history, is the elevation of state power over people's human rights but, paradoxically, also the conventional assumption of a link between the two. But the linkage is misplaced, he now asserts, for a state may not always bestow on its people the capacity to shape their own lives. Thus the crux of Nusseibeh's formulation, the relationship between state and individual, is also the source of its major weakness.

Nusseibeh has come to regard Israel's occupation as too powerful to be removed by any conceivable combination of diplomacy and confrontation, but he apparently believes that the Jewish state would be willing to accord Palestinians individual rights if they stopped short of demanding citizenship. In other words, Nusseibeh, in effect, turns into a reality the polemical charge of *apartheid* against the Jewish state since Palestinians would, in accordance with his proposal, be formally denied full citizenship.

Although the book has been described as putting forward an original proposition, it ends up providing a spurious logic wrapped in a tone of moral loftiness. Its argument stays close to conventional Palestinian claims about their rightful title to all of the land mapped as Palestine after the end of World War I and the dismantling of the Ottoman Empire. Still, it is worthwhile to ask: What would happen to Palestinians and Israelis, if the very unlikely scenario put forward by Nusseibeh were to occur?

If Israel were to grant Palestinians civil rights so as to open up their opportunities and raise their standard of living, would the bestowal of such limited privileges actually raise the level of control Palestinians exercise over their lives and over their destiny? Would Palestinians be granted the possibility of establishing the kinds of communal institutions necessary for a creative culture? If not, and if many individuals were to enjoy professional success, would they be able to live with the fact that their personal ambitions actually result in enfeebling their community?

In effect, Nusseibeh's thesis also posits that Palestinians should claim a special moral mission for themselves by demonstrating the costs of statehood. But can Palestinians remain aloof from politics for the sake of becoming an ethical balance sheet for Israelis and Palestinians as they assess the profits and losses incurred by leaving this conflict unresolved and partly unattended? Is the full cultivation of the mind and spirit possible without political engagement, and would Palestinians, living without citizenship, feel they are pouring their creative energies into a place they will never call their own?

The civil rights that Nusseibeh discusses already reside in Israel's legal system.² If Israel can serve as the provider of civil rights, it is presumably because of the country's commitment to a set of high ethical principles. But why, then, isn't that same state, whose governments since

² David Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories* (Albany, NY: The State University of New York Press, 2002).

1993 have pledged to negotiate an end to the occupation of Palestinian lands, be trusted to fulfill its commitments to bring this conflict to an end?

Finally, describing Palestinian national goals as secular is evidently less discomfiting than acknowledging how much these aims overlap with Muslim religious strictures. For Nusseibeh, the culture and political aspirations of Palestinians emerge from the totality of their work and family ties. Ironically, while Nusseibeh sees no religious imprint on Palestinian nationalism, he discerns only persecution and the call of God as the foundational basis for Zionism. Silent on the religious themes, values, and rituals embedded in Palestinian nationalism while highlighting the Biblical promises as a pillar of Zionism—even as Zionism sought to preserve Jewish culture by redefining it away from its past dependence on supernatural, God-centered meanings—Nusseibeh generates a false impression of which nationalist ideology is more flexible and adaptable to changing circumstances.

It is worth stating that Zionism's own history provides one of the best reasons why Israel would adamantly oppose Nusseibeh's proposal. Opening up a pathway for Palestinians to galvanize their creative energy into cultural organizations is the groundwork for revitalizing a national movement that would inevitably make political demands for equality, a path to citizenship recalling the Jewish state's own trajectory. No one better than the Zionists knows that the development of a secular Jewish culture gave birth to the idea of a Jewish state and to the conviction that only sovereignty could guarantee communal survival.

Look, then, more closely at the dynamics of the power hovering over Palestinians, and you will see how much Nusseibeh misses in his search for ways to remove the obstacles blocking their capacity to exercise control over their daily lives. Ordinary Palestinians are actually caught not only in the crossfire of violence and checkpoints, but also in the clash of diverse political forces that subject them to a multitude of conflicting imperatives. Palestinians struggle with an explosive mixture of strategies for independence, national liberation, and for what might be called redemption. Nusseibeh's argument offers no guidance on how to accommodate the contradictions inherent in simultaneously trying to build a state, create a new nation, and restore justice to a people whose very identity is etched in the injustices meted out to it: exile, dispossession, and subordination.

Apart from Israel's occupation, all Palestinians confront a profound disharmony of political forces that constrain their freedoms. State-building requires the structuring of political life around institutions and laws in borders that can be drawn on a map. This process calls for calculating the costs and benefits not only of policy options, but also of adherence to sacred principles. National liberation inserts Palestinians directly into highly volatile Arab political dynamics as they seek both material resources and land bases for their confrontations with Israel. For this reason, Palestinians are as much creatures of Middle East politics as they are instruments deployed by the area's various regimes to service their own particular interests. For Palestinians, mobilizing resources and support from the Arab states without

diminishing their own autonomy is an almost impossible task to imagine, let alone to discharge. Palestinians also wage their struggle at a third level where memories of past injustices become the warrant for political action. The impulses at play in this kind of redemptive politics mean that returning to Haifa can command more attention and resources than creating a state. Redemptive politics, with its narrowly construed ethical choices, promises much more than it can deliver.

Leaving aside its many flaws, does *What Is a Palestinian State Worth?* offer a new currency for personal autonomy as Palestinians navigate their lives? An essential element of freedom is the power to choose and live with the consequences of choices freely made. Fair elections count because people are voted into office who presumably reflect the popular views on budget allocations and on the priorities to be set for the nation: army and weapons or schools and health care, sewers and roads or buildings and bridges. Without citizenship, Palestinians will have their choices determined by others and their lives regulated by an agenda formed by those who do possess full political rights. Under Nusseibeh's plan, Palestinians would still be living, then, in an environment based on someone else's understanding of what is important. One might well ask how such a situation is better or even different from the occupation Nusseibeh insists is the obstacle to self-fulfillment and self-determination for Palestinians.

Nusseibeh's proposal, even as a theoretical construct, thus appears to change no dynamic or shift no reigning paradigm. Palestinians need and deserve freedom, but they also must give up the notion that their freedom can be won by relying on the correct combination of regional alliances. More importantly, they must liberate themselves from the myth that sovereignty has no value if it fails to produce absolute and perfect redemption from all of the injustices of the past. No strategy can bring Palestinians all they may want or even deserve, nor can any state-building process—anywhere—meet the kinds of ethical commands generated by the belief in political action as a means to redemption.

Reflections on What a Palestinian State Is Worth¹

Issam Nassar
Illinois State University

The state, as an idea, has been at the center of moral and political philosophy even before Plato tackled it in his *Republic*. Philosophers have theorized about it in various ways, and have reached a variety of conclusions. While G. W. F. Hegel considered the nation-state to be the end of history, Karl Marx theorized that its abolition is what constituted an end to history—the history of class struggle in this case.² The state as an idea took its legitimacy historically from various sources including, but not limited to, religion. Empires were formed in the name of progress, dynasty, God, colonial interests, justice, and natural order, to mention a few, and in our current times constitute themselves in the name of international law and national rights.

Still, the question of whose national rights states represent, and what groups in fact deserve to be called “nations” remains an issue of contention to this day. Although the right to statehood appears to be universal in our times, there is nothing to suggest that it is eternal. Constructed over time and in specific historical contexts, nations could disappear in time with the changing contexts that led to their emergence. At the same time, we cannot ignore the fact that in today’s world, states are the source of political, social, cultural, civil, and human rights. Exercising certain political rights for both groups and individuals is today highly connected with the nature of the state under which they live.

However, this fact alone does not mean that states are necessarily the best possible options for organizing societies. Therefore, a discussion of their

¹ This essay is intended neither as a direct response to Sari Nusseibeh’s *What Is a Palestinian State Worth?* (Cambridge, MA: Harvard University Press, 2011), nor strictly speaking as a review of it. Rather, I would call it a meditation on the idea of a Palestinian state inspired by the discussion that Nusseibeh has initiated in his book. For this, among other things, I thank him both for writing the book and for initiating what amounts, among Palestinians, to an unprecedented opportunity for discussion.

² G. W. F. Hegel, *Philosophy of Right*, trans. T. M. Knox (Oxford: Oxford University Press, 1967), III.3, pp. 155-223; Karl Marx, *Economic and Philosophical Manuscripts of 1844*, in *The Marx-Engels Reader*, ed. Robert C. Tucker, 2nd ed. (New York: W. W. Norton, 1978), p. 84; Karl Marx, *The German Ideology*, in *The Marx-Engels Reader*, ed. Tucker, pp. 163-75; and Karl Marx, *The Communist Manifesto*, in *The Marx-Engels Reader*, ed. Tucker, pp. 483-91.

significance and worth is fully legitimate as far as I am concerned, although such a discussion ought not to ignore the fact that states *do* exist and exercise significant power over our lives.

At the simplest level, states are essentially agents that organize violence by exerting their authority to be the only legitimate instruments of power. A state at the end of the day is nothing more, and nothing less, than a police force, army, prison, and the legal systems and institutions of power that claim a monopoly over violence. A people without a state are, at least in theory, free from restrictions traditionally imposed by the state, but at the same time, are without the rights enabled only through the apparatus of the state. A case in question is the Palestinians as a people. While they are free from the restrictions of a state that enacts laws in their name, they are also denied basic rights available to those who do have a state. Sari Nusseibeh's question "what is a Palestinian state worth?"—as stated in the title of his book—is, in light of this fact, an important one with ramifications that have the potential to affect millions of lives. It is a question that has a universal and an epistemological side, but also one that tackles histories connected with the idea of statehood in the territory known as Palestine. It is a question that one could claim has been internalized at the core of the psyche of every Palestinian. Do we really need a state? Or do we just want certain rights that we have been excluded from?

To tackle such questions, we must place them within the historical context that both led to the creation of the Palestinians as people as well as to the fact that they have been deprived of certain rights possible only within the context of a state. When Palestine emerged as a separate geopolitical entity from the larger Ottoman Empire, the people who lived in it and whose ancestors inhabited the region since antiquity were denied the right to have their own state, as was the case with the other regions of the former Ottoman sultanate. Instead, another group, that was not as yet a unified group, was promised a sort of state in their own homeland. The Balfour Declaration of 1917, which formed the basis on which a state was to be established in Palestine, did not even acknowledge them to be a group, but reduced them to "the existing non-Jewish communities," to use the language of the above-mentioned document.³ Being designated as *not* something—rather than as an entity of its own—has become the norm in dealing with the Palestinian people within the context of their homeland and the nearby countries in the period after 1948. In this sense, the issue early on became whether those who are *not* something deserve a state. Do those who are in a sense the antithesis of a "real" people deserve what a recognized people is thought to deserve merely by virtue of being a people?

Dealing with this question, in theory at least, is as absurd as debating whether angels deserve rights reserved to humans. The creation of the state of

³ "Balfour Declaration of 1917," accessed online at: http://avalon.law.yale.edu/20th_century/balfour.asp.

Israel could be argued to be a result of various elements, including the nineteenth-century Jewish Enlightenment, European anti-Semitism, and the diligent work of people like Theodore Herzl. On the other hand, the just-discussed principle concerning the non-Jewish population of Palestine was no doubt the brainchild of the authors of the Balfour Declaration. Just imagine, for the sake of argument, that the text of the Declaration spoke of them not as “non-Jewish communities,” but as the people of Palestine who would live together in a state to which Jews were allowed to immigrate. Arguably, the course of events—including British colonial policy in Palestine, the League of Nations’ approval of the Mandate system, and possibly the very language used by Israel’s 1948 Declaration of Independence—might have looked different. At the same time, my assumption above that things might have looked different does not mean that a conflict would not have existed or that Zionism as an exclusivist ideology would have functioned differently from the way it did in 1948 and after. A conflict might have arisen in any case, but the parameters of the discussion would have looked different from what we have today. If nothing else, at least recognizing the peoplehood of the Palestinians might not have been an issue of contention. However, as far as Zionism is concerned, that is where the problem lies today.

Still, going back to real history, the people of Palestine ended up paying a heavy price for the establishment of a state in their homeland which they were not expected to be part of, nor allowed, for the most part, to live in. Instead, the Palestinians became refugees, minority groups, and displaced people in their homeland and in the neighboring countries. To this day, despite having a recognized non-state entity that rules over a portion of them, they lack many rights and freedoms. They lack freedom of movement, residency, the rule of law, and the right to their own property within the borders of 1948 Israel.⁴ Furthermore, because they live inside different states in the region, they are subjected to various laws that in most cases restrict their basic rights in the current country of residence. There are no real indications to suggest that solutions to these problems are possible without a comprehensive solution to the Palestinian-Israeli conflict.

The basic fact remains that the people of Palestine are largely deprived of what international humanitarian law considers basic rights. Unless a drastic event like the collapse of the state system worldwide were to happen—and obviously nothing of the sort is imminent—granting the Palestinians such basic rights requires them to have a state that can regulate and protect the rights just named. In this sense, and for this reason, a Palestinian state *is* worth seeking. The only alternative, and one that might be more just, would be for Israel to open its borders for Palestinians to return to claim their property and

⁴ See Hillel Cohen, *Good Arabs: The Israeli Security Agencies and the Israeli Arabs, 1948-1967* (Berkeley, CA: University of California Press, 2011); and Oren Yiftachel, *Ethnocracy: Land and Identity Politics in Israel/Palestine* (Philadelphia, PA: University of Pennsylvania Press, 2006).

right of residence (indeed, to change those borders altogether). Additionally, Israel would have to become a state for all of the people who reside within its borders. This could happen in various ways. Israel could become a binational state, a state of its citizens. Or else it could remain a state in which one national group dominates the other, as is now the case. The fundamental problem lies with foundational principles of the Israeli state, principles many people today would like to evade. But without the desire to establish a Jewish state in Palestine, no Arab-Israeli conflict would have existed. It is thus feasible to imagine that minus the founding of Israel, the region could have avoided decades of war, oppression, refugees, exile, detention, killing, and bombing.

However, the undeniable fact is that all of those things happened. In 1948, Palestine disappeared and a self-declared Jewish state emerged in its stead. Anyone who thinks that they can erase the weight of that history is thus mistaken. We must deal with what now exists, and how we ended up with what we have. We cannot reverse history. Therefore, we must look to the future for the best solutions without ignoring the weight of historical collective imagination. In other words, we live at a time when imagining the re-establishment of the British Mandate is not feasible. But what is feasible is to correct, change, and tackle what exists in order to see how it can be part of the solution. What we have now is a state of Israel in control of all of historic Palestine, ruling over two populations, but using different standards for each. We have a Palestinian Authority that can articulate Palestinian demands, but lacks real control over the Palestinian population and lacks the ability to protect them. We have millions of Jews who are now Israelis, many of whom were born in Israel, and millions of Palestinians under one form or another of Israeli rule. We have refugees in Syria, Lebanon, Jordan, and elsewhere who are in need of basic rights. A Palestinian state is one possible solution, but is not the only possible one, nor even the best one. Was it worth all of the struggles, the suffering, and the lives that were lost or damaged forever? I cannot say for sure, but what I do know is that we have a situation resulting from what happened in 1947-1949 and after, which requires a solution.

A state will solve perhaps as many problems as it will create. One needs only to look at the creation of Israel itself to see that fact clearly illustrated. Similarly, a state, at least as envisioned nowadays, will provide many Palestinians with some basic rights, but at the price of abandoning their dreams. Furthermore, we neither know what kind of state it will be, nor how Israel will deal with it. In any case, the sheer establishment of a Palestinian state in the territories occupied by Israel in 1967 will not mean the solution of the problem of the exclusively Jewish character of Israel. The Palestinians in Israel will remain, in a fundamental way, disadvantaged residents.

In essence, I think there is a primary cause for events that unfolded later on. The cause is the act of having created a state in Palestine in 1948, a specific kind of state. Israel's supporters might respond that there might not have been a problem if only the Arabs had accepted Israel, and accepted the partition of Palestine. But such claims do not even begin to challenge the

problem posed by the establishment of Israel as an exclusively Jewish state. Was the price that the world and the region had to pay—that both Jews and Arabs have had to pay—really worth the price of the creation of Israel? In my view, *this* ought to be the central question of our discussion. The basic question is not what a *Palestinian* state is worth, but whether it was worth creating a *Jewish* one in Palestine, if at all.

A Response to Five Critics

Sari Nusseibeh
al-Quds University

There were two questions on my mind when I started thinking some years back about writing *What Is a Palestinian State Worth?*¹ First, how much suffering (its perpetration on others, or having it inflicted upon one) can be considered reasonable in the pursuit of a human end? And second, related to this, what would anyone (not just *us*, but whoever we may happen to be) want a state for? There were countless horrendous acts being carried out by Israelis and—at the time—Palestinians, to make the first question pressing, almost obsessive. As to the second question, I wished for those of us immersed in this seemingly interminable national conflict to remind ourselves as individual human beings of the basic needs we seek to have satisfied by any system of government. Are *national* or *religious* states really necessary for the pursuit of our ends as human beings, or as “normal” people?

Had I tried to challenge the reader to take my questions seriously by proposing that Israel drop its demand for a *Jewish* or *national* state by assimilating Palestinians under its rule into its political system, my Palestinian readers would not have felt the bite of my provocation, and my Israeli readers would have viewed it as yet another call to destroy the Zionist dream. But my real message (to both sides) was that states can be malevolent (not only in the Leninist or class sense, but also in the religious and national senses), and when they are such, sane people should together try to *reduce* the role of states to the bare minimum that serves the welfare of individuals.

Of course, the other factor that troubled me while writing the book was (and remains) whether a reasonable two-state solution is still realistic, and what else we can all realistically work toward, even as a temporary measure. In reading the comments on my book in this symposium, I must say that I haven't come out feeling that my worries (which are not merely academic or scholarly, but are live issues) have been laid to rest. In what follows, I will deal with these comments thematically rather than in strict sequence. My sense is that my underlying questions about what states are for—and by implication what a Jewish state is for—remain unanswered.

¹ Sari Nusseibeh, *What Is a Palestinian State Worth?* (Cambridge, MA: Harvard University Press, 2011).

One could read the negative reaction to *What Is A Palestinian State Worth?* in Donna Robinson Divine's article² as being predicated upon an understandable concern for the viability of a democratic Jewish state. "Nusseibeh, in effect," she writes at one point, "turns into a reality the polemical charge of *apartheid* against the Jewish state since Palestinians would, in accordance with his proposal, be formally denied full citizenship."³ Sensing "despair" and even perhaps the seeds of an unrealistic and "redemptive" rather than a future-looking and constructive politics in the proposal to consider granting basic civil rights to Palestinians under Israel's control, she argues that even if such rights were to be granted, the Palestinian condition would still not be an improvement on their condition under occupation. A two-state solution (allowing for proper engagement in national self-determination through elections, etc.) is a far worthier, and more sensible target to remain committed to, Divine in effect concludes.

But Divine neither states for how long Palestinians should suffer the present conditions until the two-state solution is brought into effect, nor addresses the effects of the passage of time on the practicality of such a solution—effects as simple as the fact that more than half a million Jewish settlers now live across the so-called 1967 lines, and that, unlike Ben Gurion's view of religion and Zionism, recent surveys of the Jewish public in Israel reveal a strongly "biblical" and "messianic" Zionism that would clearly and by definition be far less accommodating to Palestinian national claims (forget "rights") than was the case even twenty or thirty years ago.⁴ (And by saying

² Donna Robinson Divine, "What Is a Palestinian State Worth to the Palestinians?" *Reason Papers* 34, no. 2 (October 2012), pp. 47-51. The negativity I mean is an anger that can be sensed in many of the expressions she uses. For example: "Nusseibeh has nothing new to say . . . about Israel's occupation" (p. 48); "has really not thought about the state in a serious way or delved deeply" (p. 48); and "ends up providing a spurious logic wrapped in a tone of moral loftiness" (p. 49). It is an anger reminiscent of some other reviews of the book; see, e.g., Elliott Abrams, "A Peaceful Palestinian's Perplexing Plan," *Commentary*, January 2011, pp. 41-44; and, from the opposite political angle, Tom H., "What Is a Sari Nusseibeh For?" *Jadaliyya Magazine*, March 2011, accessed online at: http://sari.alquds.edu/state_worth/jadlyh.htm.

³ Divine, "What Is a Palestinian State Worth to the Palestinians?" p. 49.

⁴ There are various indicators of the problems Israel faces in dealing with its increased religious conservatism, including, most recently, public debate over whether or not to renew the law on excluding the (quickly expanding) Haredi community from military service, the court case and consequent street violence concerning the "busing" and separation of (orthodox) school children having eastern and western roots, and attacks on young female school children in Beit Shemesh for "improper" dress, as well as the mounting violence being perpetrated by Israeli settlers against Palestinians and even, in some bizarre cases, against Israeli soldiers. In terms of general trends, perhaps one of the more reliable studies was that published by the Israel Democracy Institute in 2012, but concluded a year before that, which compared its most recent findings with those from 1991 and 1999, where it is revealed that there has been a reversal of democratic

this I should not be thought to be discounting the negative effect of the passage of time on peace-making that a rising religiosity on the Muslim side can have, as Divine points out, and is also expressed in the last sentence of Paul Rahe's commentary.⁵)

Of course, if one were to draw up a balance-sheet of the comparative advantages and disadvantages in a frozen time-slice accruing to Palestinians of having full civil rights within Israel and having political rights in their own independent state, one may well conclude that the second option would be more advantageous for Palestinians than the first. It would certainly also fit more neatly with the concept of a democratic Jewish state. But likewise, and using the same calculus—again thinking in terms of a frozen or provisional time-slice—a regime of full civil rights for Palestinians is surely, and contrary to Divine's claim, far worthier and morally far less offensive (both to Palestinians as well as to a democratic and Jewish Israeli) than the state of occupation. The fact that Divine is unaware of the benefits Palestinians can derive under a regime of full civil rights as opposed to what they have access to in the present regime of occupation, is one that raises the concern that well-meaning Jews are not fully cognizant of the deprivations of basic rights Palestinians suffer, not least being the right of free movement. Security reasons are typically cited to justify these deprivations, but "to justify" cannot be a substitute for "to see," and it is thus a matter of elementary calculus to see that Palestinian living-conditions under a full civil rights regime would be a vast improvement over present conditions.

If so, then why does Divine not see it that way? I believe the answer lies in viewing the "proposal" (that Palestinians be granted full civil rights) with a *dynamic* rather than a *static* lens. Such a condition, viewed long term and cumulatively, rather than in a frozen time-slice, will be seen for what it is, namely, as *apartheid*, thereby constituting an existential threat to the very

trends in Israel as compared with the survey taken in 1991. See Asher Arian et al., *A Portrait of Israeli Jews: Beliefs, Observance, and Values of Israeli Jews, 2009* (Jerusalem: Israel Democracy Institute, 2012), accessed online at: http://www.idi.org.il/sites/english/events/Other_Events/Documents/GuttmanAviChaiReport2012_EngFinal.pdf.

How all of this reflects on the two-state paradigm is best expressed by Israel's latest elections, which resulted in the formation of the most right-wing government in Israeli history. While members of this government (but not all of them) pay lip service to the two-state solution, none of them has in mind a paradigm that would meet even minimal Palestinian demands. Andrew Wilson, in his "Why the Quartet Turned Its Back On The Middle East," *World Policy Blog*, August 28, 2012, accessed online at: <http://www.worldpolicy.org/blog/2012/08/28/why-quartet-turned-back-middle-east>, in effect fingers Israel as the procrastinator in the failed efforts over the past year to put life again in what everyone by now has come to see as a dead peace process.

⁵ Paul A. Rahe, "The Return of Abu Nasr al-Farabi," *Reason Papers* 34, no. 2 (October 2012), p. 37.

concept of a democratic Jewish state. This becomes more obvious once we take the choice of “return” into account, which I include as a basic civil right that, under these terms, would have to be granted for individuals. (The situation—and conditions—would be different under the terms of a two-state solution.)

Viewed this way, Divine’s concern as someone who upholds the vision of a democratic Jewish state is understandable. But herein lies the inconsistency of the position she holds, namely, that a two-state solution is both better and more realistic to stick to. Why should it make more sense for Palestinians to “stick to” a two-state solution regardless of the effects of the passage of time, than it would be for Israelis to deny Palestinians a regime of full civil rights for fear of the effects of the passage of time? If a consideration of the dynamic nature of history is to be heeded at all—as it surely must—then it should be seen as bearing relevance to whether a two-state solution is realistic in the long term just as much as it does to whether a regime of full civil rights is a threat in the long term to the existence of a democratic Jewish state.

This prospect of a civil rights regime for Palestinians “threatening” to transform Israel (and the occupied territories) into a secular binational state (of one form or another) is also noted by the other commentators in this issue of *Reason Papers*. Fahmi Abboushi welcomes the implication,⁶ and Rahe points out that some in Israel will regard my proposal as “a Trojan Horse,” though Rahe quickly adds that while the proposal may well be a ruse, it may be one of another kind: that of trying to awaken Israelis to the interest they have in hastily ending the occupation and allowing Palestinians to establish their own independent state.⁷ Said Zeedani, mindful of the “proposal” as being either an alarm bell or a “threat” (or both), gives his article the interrogative title “A Modest Proposal: Is It?”⁸ But instead of choosing to charge me, as Divine does, with “providing a spurious logic wrapped in a tone of moral loftiness” in its defense, Zeedani opts to take the subject seriously by challenging both the “liberal” notion that the individual’s identity is ultimately “extractable” from its contextual embeddedness, and is subject therefore to being defined anew, as well as the validity of the very principles (freedom and equality) on which the proposal is based, and their derivability from what I call “the compassionate impulse”—both notions constituting the foundation of how I articulate the relationship between individual and state. Neither, he claims, do I take seriously “the communitarian critique of liberalism,” nor is it

⁶ Fahmi Abboushi, “Nusseibeh on Secular Faith,” *Reason Papers* 34, no. 2 (October 2012), pp. 45-46.

⁷ Rahe, “The Return of Abu Nasr al-Farabi,” p. 32.

⁸ Said Zeedani, “A Modest Proposal: Is It?” *Reason Papers* 34, no. 2 (October 2012), pp. 38-44.

evident, he writes, “whether the compassionate impulse or sense, or the sense of benevolent sympathy for that matter, can justify the derivation of the two ultimate principles Nusseibeh has in mind.”⁹

I shall reserve my observations on the important question of compassion for Rahe’s critique below. What I wish at this point to do by way of responding to Zeedani’s “skepticism” concerning my claims in the book on identity and universal moral values is to add what I hope would be corroborative reasons for accepting what admittedly, and as Zeedani suggests, were simply statements of opinion on the matter.

First, then, as to identity, my claim is not that this is not embedded—quite the contrary. It is very often so deeply embedded that, I point out, one ends up simply being a vehicle for an external determining agency (an ideology, a context, etc.) that defines what one does. Zeedani asks whether and how it would make sense to strip away those contextual layers, and whether and in what way it could be claimed that an innermost layer would be left behind after that hypothetical contextual stripping has been done—this innermost layer being regarded as the genuinely human and specifically personal layer constituting an individual’s identity.¹⁰ The answer, I believe, can be given by any one of us on the basis of our experiences, as we can all testify to a self that has the capacity to question at times how “wedded” we are to a particular contextual layer or other, for instance, an ideology, a set of beliefs, or a relationship we happen to have. We needn’t go as far as Rene Descartes or—closer to home—as Avicenna (in his “flying man” thought-experiment) in trying to articulate such a core layer by abstracting from our sensations, thoughts, and physical extensions.¹¹ Surely, though, we all have the capacity to imagine ourselves as somehow abstracted from the contexts we happen to be embedded in, and it is precisely this (very human-specific and

⁹ Ibid., p. 41.

¹⁰ Ibid.

¹¹ Rene Descartes, “First Meditation: What Can Be Called into Doubt,” *Meditations on First Philosophy*, in *Descartes, Selected Philosophical Writings*, trans. John Cottingham, Robert Stoothoof, and Dugald Murdoch (Cambridge: Cambridge University Press, 1988), pp. 76-79. Two references to Avicenna’s so-called “Flying Man Experiment” are found in *Avicenna’s De Anima (Arabic Text) Being the Psychological Part of Kitab al-Shifa’*, ed. F. Rahman (London: Oxford University Press, 1959), pp. 15-16 and 255. In these thought-experiments Avicenna “calls attention” to the sense one can begin to have of one’s separateness from one’s body through an introspective process in which one proceeds to deny the attribution of bodily parts to oneself. Avicenna does not propose this as proof for the existence of immaterial souls or selves, but simply as a “reminder” to any of us that we can in fact engage in this kind of experiment and come to this conclusion by ourselves. At one stage, he likens the imaginary process of shedding one’s physical parts to the shedding of the clothes one wears, so that there remains in each case a core substance beneath or behind the contingent layers that constitute the whole person.

imaginative) capacity that allows us to seek to be better people, or to be better positioned in the world. Not all of us take charge of ourselves, or try to, but the very fact that some of us do, and that we understand what it is for a person to do that, proves that identities to one extent or the other can be *made* or developed through one's life rather than are such as to be impervious to human agency. While this is not an *argument* to prove that we are capable of "renewing" ourselves by getting rid of some layers in favor of others, it is more tellingly an empirical *fact*, and is thus more reason to accept my claim. But the ability I attribute to individuals need not imply, as Zeedani suggests, that I therefore discount (like some versions of liberalism do) the individual's surrounding environment. Quite the contrary, my reading of the role of compassion (see below) might rightly place me in the communitarian camp by some, if only to show how simplistic this (liberal/communitarian) division can be if taken to extremes.

Turning to an even more abstruse area of ethics, Zeedani questions my account of universal moral values—that there are such, that they are chiseled out from human experience over a long period of time, that they are rooted in the sentiments of love and compassion, and that a model can be set up in which they can be seen to rest on two ultimate principles, namely, freedom and equality.¹² It is clearly impossible to defend these claims in a short space, but I can perhaps add a few comments to the brief account given in the book, especially concerning Rawls-type thought-experiments. Clearly, a more detailed explanation of my various claims here would need to separate between a *genetic* account (how values evolve in different societies, and finally converge), and what one might describe as a *structural* account (how, given a jumbled bag of such values that have been developed over time, one can in retrospect organize, structure, or order these items in relation to one another). My thought-experiment addresses the second of these issues, simply by positing a situation where rational agents, having become stripped of all of their possessions (or having been pulled out of the game of life), are given the chance to "play again" by an omnipotent god who asks them to choose from among the bag of all the goods/possessions in the world, including those states and conditions they believe to be desirable, as well as those principles that can determine their relations with one another, those items—one by one and in consecutive order—that they most highly value. Ballots will be cast in secret and simultaneously, and the results will be announced after the end of each round. The idea behind the thought-experiment is to determine, when push comes to shove, what order of importance might be given to worldly goods by rational individuals making a choice, while accounting as they do so for the choices that would be made by their peers. The players in this game, unlike Rawls's, are not innocent newcomers to the world,¹³ but mature citizens who

¹² Zeedani, "A Modest Proposal: Is It?" p. 41.

¹³ See John Rawls's discussion of the "veil of ignorance" in his *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971), pp. 118-23.

are conscious of who they are and of the past and the possessions of which they have just been dispossessed. The ticket that receives the highest number of votes in each round will be the winner (the correlated “good” will be duly granted to all), and voting will proceed item by item in this manner until the number of participants no longer constitutes a quorum, indicating a waning common relevance, as this is viewed, of the voting procedure for the distribution of the remaining goods in the world.

It is important to note that this is not necessarily a zero-sum electoral procedure for all goods, where a good (e.g., wealth or health) that fails to get the highest vote will be lost forever. But there will remain an important element of doubt in the players’ minds, namely, whether a good they highly value will be similarly valued by a sufficient number of other players for it to get voted on at all. On the whole, as all of the participants will know, “highly valued” goods will most likely await their being given their place in the order being established. On the other hand, participants can immediately calculate that specific choices will not have a chance (being specific, people will not know about them, let alone vote for them), while some general goods (such as gold or property) are limited (so that a rush on them will not make a difference as to the share each can eventually have). Under the circumstances, the question therefore being posed—which item is most likely to be voted for in the first round, and which in the second?—can of course elicit different answers, but my contention (equality in the first round, and freedom in the second) is supported by the consideration that, while I can ask for, and probably receive, everything I may desire in some amount or other, I need first to ensure that I will not be short-changed in anything that I may or may not think of that will be a good to be distributed. The principle of equality, being so comprehensive, will therefore ensure for me the same chances, especially those that have not occurred to me but may well occur to those more in the know, as everyone else in the new world. The same consideration of “general coverage” will dictate my second choice, as it will guarantee for me access to all of those goods that I will need in order to develop myself to the extent possible, and protection from all of those restrictions that may arrest this development. But I note that “the reach” of the first principle is more extensive than that of the second, which is what gives it priority. Given those two items as a foundation, I could proceed to vote for more specific goods or possessions (such as love, health, wealth, happiness, etc.).

The above should be seen as a “fuller explanation” of the reasons for selecting these two items as foundational principles of the values that are held by rational agents (assuming there are such values). This should be sufficient, given that I do not believe (nor, presumably, does Zeedani) that a foolproof argument can be provided to show that this is exactly how the new game might be played. But I hope it is clear that, were there to be a rational public discourse in anticipation of the vote and in preparation for it, the choices I outline would stand a very good chance of winning wide support.

Now I wish to turn to that other area—concerning psychology or genealogy—of whether compassion can be considered a *source* and ultimate standard of measure of universal moral values. And here Rahe reminds us that, while the highfalutin and domineering ideologies and political systems feeding the Israeli-Palestinian conflict, and which mercilessly hound normal human beings, may drive some of us (including me) to take refuge in what seem to be more down-to-earth humane sentiments as compassion, similar states of mayhem in Europe in the Reformation and post-Reformation eras persuaded thinkers from Montaigne through Hobbes and Montesquieu to take the opposite path. They sing the praises of reason and commerce instead, finding an exit route from that chaos through these values rather than through human sentiment:

Montaigne, Hobbes, and their successors—including John Locke, Bernard Mandeville, and the Baron de Montesquieu—sought systematically to reduce the hold that “anthropomorphized higher-order objects” have on men and to promote civility within political communities and cooperation among them by debunking idealism, unleashing instrumental reason, and encouraging on everyone’s part a sane, sober calculation of material interests. The three last-mentioned authors in particular thought that the growth of commercial society and the habits of self-interested petty calculation that it would instill would dispel in considerable measure the illusions that give rise to religious and ethnic strife.¹⁴

Having thus outlined the path from the state of nature to peace charted by the requisite habits of thought that are fostered by “the spread of commerce,” Rahe then takes to task Rousseau for having reintroduced a compassion that he blames for “the nationalism that brought murder and mayhem to Europe in the twentieth century on an even greater scale than had religious sectarianism in the sixteenth and seventeenth centuries.”¹⁵ In addition to compassion’s nature not being such as to lay the ground for a wide-ranging sympathetic and civil polity (it is “contagious” but “partisan”), Rahe tells us that it is even more dangerously inflammatory, compassion and hatred being, all too often, “peas in a pod.”¹⁶ Rahe goes on to cite, by way of indicating better routes to Rome, the story of what is now the city of Empuries, as told by the ancient geographer Strabo. Strabo explains how the indigenous Indicitans eventually merged with the Greek interlopers into a single polity on the Iberian mainland, with “a certain mixture of barbarian and Greek customs.” The dynamic

¹⁴ Rahe, “The Return of Abu Nasr al-Farabi,” p. 34.

¹⁵ *Ibid.*, pp. 35 and 34.

¹⁶ *Ibid.*, p. 35.

involved in the process was commerce, aptly also indicative of the original meaning of the city's name, Emporium, as a trading post.¹⁷

I wish to address the question of reason below, in my commentary on Abboushi's observations, where it is juxtaposed with will and faith. As to commerce and compassion, I will confess straightaway that I find Rahe's argument, in one respect, perfectly persuasive. Europe post-Monnet is not the same as Europe before, and a regime of commercial interchange between Arabs and Jews in the Middle East—where people can “rub up” against one another with great frequency, with a view to mutual financial benefit—can certainly foster the habits of thought conducive to a civil polity, as well as of moral behavior and values. But while I agree that commercial society can only function in a civil state, or in a state of peace, and becomes an ingredient in the nurturing of a civil polity, I question whether it is itself what *produces* such a state of peace (or a civil state). I question, in other words, whether it is a source or a result. In the years between 1967 (when Israel took the West Bank and Gaza by war) and 1993 (when the Oslo peace accord was signed), there were ebbs and flows in the level and rate of commerce between Israel and Palestinian society, but never enough to create a state of peace, let alone a civil polity, between them. This was the case, let it be noted, despite the fact that over 90% of the entirety of goods and services consumed by Palestinians during that period were of items that either originated in Israel or came via Israel. And in the post-Oslo period (1993 onwards, and until this day), the existence both of an on-paper peace agreement and a semi-total economic dependence on Israel for goods and services, has also failed to produce the much sought-after state of peace or the requisite “habits of thought” for a civil polity. Yet, admittedly, this is no reason to discount Strabo's paradigm. Assuming an extension of another sixty-odd years or more of more or less the same conditions of life for Israelis and Palestinians in the region between the Jordan River and the Mediterranean Sea, it is possible, and even quite probable, that a single civil polity can emerge. But when it does, I would still claim that it would do so not *because* of commerce, but because, through human interaction, both sides come to see and recognize the human face of the other, having become disenchanted and fatigued with previous images each had of the other. I would still claim, in other words, and would not have had my claim disproved by the said paradigm, that it would be human sentiment in the end that brings about a real state of peace (along with its values).

I find irresistible the urge here to refer explicitly to Ibn Khaldun, which I resisted in the text of *What Is a Palestinian State Worth?* While accounting for *fear* as a primary motivation for bonding with others (a theme common to social-contract theories, its Hobbesian version underpinning much of modern-day preemptory strategic thinking), Ibn Khaldun's incredible and under-recognized insight in this regard is that this instinct's bonding function

¹⁷ Ibid., p. 36.

is the fear one has not for oneself, but for *the other*.¹⁸ Ibn Khaldun's paradigm is the mother's protective instinct for her child, extending to placing herself in harm's way on that child's behalf. Surely this instinct is, as Rahe observes in referring to compassion, "partisan." Likewise, for Ibn Khaldun, it is tribal. But in Ibn Khaldun it constitutes, politically, a genealogical starting point for a social relationship that, ultimately and cumulatively, leads to and is replaced in larger human contexts by what he calls "kingship," which by now becomes the civil contract between ruler and ruled. There is, undeniably, and as Rahe observes, the constant danger that, besides the positive aspect of bonding that compassion brings with it, it can be accompanied by correlated passions such as hatred and fury (e.g., against those who are seen to have done harm to one's kin or relatives). But surely, this is no reason to banish it, or to diminish its role, just as it is no reason to banish love or to deny it its positive role in human affairs just because of the devastating fury or wars it can unleash. The question that should be of concern is: Is it the cold-blooded calculation of financial benefit between individuals that accounts in the first place for a state of peace between them, or is the state of peace based on the natural instincts of love and compassion people have, commerce being consequent upon this? Hobbesian strategizing (that is, building up relations with the other on the assumption of having to avoid a constant potential threat from them) has had, and continues to have—especially in the Israeli-Palestinian context—unfortunately calamitous results. It is only once we return to our real selves as human beings that we can begin to sense the naturalness and attraction of building peace with the other.

Rahe rightly places commerce alongside reason as being its logical extension or companion. This being the case, he trusts it more than faith for peacemaking. Abboushi also questions faith as a mechanism for bringing about peace, arguing both that it needs to be embraced by the two peoples as a whole rather than only by leaders for it to work, and, indirectly, that it has to be accompanied by justice—and therefore result in a one-state solution—if it is to succeed. Abboushi also brings up the question of moral as opposed to

¹⁸ In *Muqaddimat Ibn Khaldun* (Cairo: Matba'at al-Bahiyah al-Misriyah, 1930), I.8, p.108, Ibn Khaldun first introduces and explains the term *assabiyya* (commonly translated as solidarity). Kinship, he claims, is to have a natural disposition to protect one's kin and blood-relatives and to be averse to any harm or misfortune befalling them—indeed, even to wish that one could place oneself in the way of any such harm lest it befall them. Suffice it in this context to point out that, for Ibn Khaldun, what binds people together in the first place and in advance of any social or political contract of any sort, is a basic protective instinct toward loved ones. But even in primitive bedouin groupings, where political leadership first comes into play through the role of the local chieftain who enforces peace and security for all, *it is already formed kinship groups* which are capable of providing the chieftain in question to the larger community. More on this can be found in a lecture I gave (in Abu Dhabi, March 15, 2009), "Fear of the Other, Fear for the Other," accessed online at: <http://sari.alquds.edu/ad.pdf>.

legitimate rights, referring to two major “moral compromises” that have to be made (borders and refugees) for a two-state solution to work. Indeed, there is something of the “redemptive politics” of which Divine speaks expressed in Abboushi’s comments, which, however, I will leave aside in order to concentrate on the roles of reason and faith. The reservation that I express about reason in my book primarily has to do with defining objectives.¹⁹ In some contexts, such as that of the Israeli-Palestinian conflict, protagonists define their objectives by factors other than reason (beliefs, inclinations, desires, etc.), which is why negotiations in these situations—even though apparently carried out rationally—cannot be expected to resolve anything. I explain this by saying that the two negotiating parties in contexts like this do not operate in the same “rational space”—they would not be “on the same page,” to use a common modern-day metaphor.²⁰ The focus on reason in searching for a resolution through negotiations would therefore be like barking up the wrong tree, and is a waste of time—as our own experience of negotiations has only too painfully proved. In such cases, what is required for making negotiations potentially fruitful, I argue, is “a change of heart,” or a transformation of attitudes—a process involving what can be viewed as an identity change, or a rearrangement of the layers of one’s identity.²¹ Such a change of heart (a realignment that places the two sides on the same rational plane) can then allow for a rational discourse that is at least so positioned that it can lead to a resolution of the conflict. But how can such a transformation occur?

Proactively speaking, it has first to occur in oneself, by oneself. Strongly held but wrong beliefs about oneself and the other must bravely be questioned, and shed; objectives begin to be adjusted, and behavior is consequently affected. Self-change begins to have an effect on the other, transforming the antagonist into a protagonist, to use Abboushi’s words. We already have many examples in our own history showing how this works, Yitzhak Rabin’s change of heart being one of them. But I agree with Abboushi that one individual cannot by himself bring about the desired change.²² A critical mass of the respective populations must form, requiring transformations of the collective identities. My use of the three elements of will, faith, and vision in this context is meant to address this. A leader, or group of leaders, must first have a vision—of a prophetic nature, if you will. A beautiful new world beyond the conflict is imagined, that is, it is thought possible “of itself,” or thought at least not to be inherently self-contradictory.

¹⁹ Nusseibeh, *What Is a Palestinian State Worth?* pp. 180-93.

²⁰ *Ibid.*, p. 183.

²¹ *Ibid.*, pp. 210-11.

²² Abboushi, “Nusseibeh on Secular Faith,” p. 46.

One then has to have faith that such a vision can be brought about by one's own efforts. This is faith in one's self and in one's abilities. Unlike optimism, which is an observer's passive (though positive) reading of the world, faith in oneself that one can bring about the new world is a proactive attitude, and extends naturally to the third element, which is the exercise of one's will to bring it about. And faith, let us not forget, works like a magnet—that is what prophets, political leaders, innovators, and others throughout history have proved possible. One man's dream can become that of a nation. This is the secret of faith, namely, that it can start with the few, but then become the creed of many. It is in seemingly intractable situations like the one we have that peace, I argued, could be made to come about. All this, of course, is not a foolproof or magical mechanism that works automatically. But a human conflict so deeply embedded in history, religious beliefs, and conflicting self-righteous claims should not be thought of as being amenable to mechanistic conflict-resolution theories, such as straightforward market-place and interest-focused negotiations.

Issam Nassar reminds us of the present state of affairs, where Palestinians as Palestinians are deprived of their basic rights, and look to a state therefore as the agency through which such rights could be assured.²³ After all, ours is a world already made up of states, and it is natural therefore for Palestinians seeking their rights to seek them through the agency of their own state. Even so, Nassar is cognizant of the fact that a state, while potentially securing certain rights, will also and by definition require the forgoing of other rights (territory, return, etc.). How does one weigh the pros and the cons here, the value of some rights as opposed to the value of others? He leaves the question unanswered.

In the book, I take up this dilemma and I argue in favor of a state (assuming it fits Palestinian requirements) as against the right of return. However, it seems to me that Israel has made this dilemma obsolete through its unyielding aggrandizement of Palestinian territory beyond the Green Line of 1967. But in raising the question of whether states are the agencies of rights, Nassar in fact echoes concerns also expressed by other authors. The general question here is whether civil rights aren't by (historical or logical) definition dependent upon (or follow upon or are guaranteed by) political rights. My short response is that while some have argued that the existence of civil rights requires political rights, in fact, historically speaking, civil rights have typically (in stages and in different forms) preceded and led political rights.²⁴ Furthermore, there is nothing in my proposal that excludes the

²³ Issam Nassar, "Reflections on What a Palestinian State Is Worth," *Reason Papers* 34, no. 2 (October 2012), pp. 52-56; see p. 54.

²⁴ See, e.g., the far-reaching critique of the ideas expressed in the book by Avner Inbar and Assaf Sharon in their "A Too-Modest Proposal: A Palestinian Peacemaker Gives Up on Politics," *Boston Review*, July/August 2011, pp. 58-62. The point about which

possibility of moving on from full civil rights in an open geo-economic space in the area under discussion to a new version of a two-state model, now conceived confederally, or federally, and whose borders are not necessarily defined by what have now become an obsolete 1967 line. Such an outcome might, at the end of the day, be an “honorable” way out for both contestants.

comes first, political or civil rights, is just one of many dimensions raised in their article.

Articles

Independence and the Virtuous Community

Daniel O. Dahlstrom
Boston University

1. Introduction

In 1999 Alasdair MacIntyre altered the philosophical landscape and largely for the better, I think, with the publication of his *Dependent Rational Animals (DRA)*. In this work he puts front and center the overlooked senses of dependence, disability, and vulnerability that, in varying degrees but always in some measure, make up the human condition and one's animal identity in the course of a lifetime.¹ Drawing out the implications of those senses, he presents a stirring defense of the virtues of giving and receiving as a realistic alternative to social thought that, by taking its bearings from sympathy or rational choice, prompts the illusion of assimilating the state to the family or vice versa (pp. 116-17 and 132). Ever aware of the real-life stakes of his topics, MacIntyre never tires of reminding us that, when we talk about practical knowledge, we are talking about something acquired and exercised not through theory or theoretical instruction, but through shared activities and practices (pp. 135-36). Challenging the traditional dichotomy of justice and benevolence as well as a misguided notion of self-sufficiency, MacIntyre champions virtues of acknowledged dependence and just generosity, virtues that must inform networks of giving and receiving. At the same time, his analysis displays a healthy wariness of these dual aspects of social life, pervaded not only by such networks constitutive of human flourishing, but also no less by hierarchical instruments of domination and deprivation, that come with the unequal distribution of power in society (pp. 102-3). While Aristotle reminds us that the level of justice in a society is relative to the kinds of friendship that prevail in it, MacIntyre reminds us that this friendship, this foundation for a just and generous politics, must extend to

¹ Alasdair MacIntyre, *Dependent Rational Animals* (Chicago, IL: Open Court, 1999), p. 130. All numbers within parentheses in the body of this article refer to page numbers of *Dependent Rational Animals*.

able and disabled alike (p. 139). In a certain respect, MacIntyre's work can be read as a powerful attempt to demonstrate the utter reasonableness and secular import of the theological virtue of charity (pp. 124-25).

Yet, despite these genuine achievements, *DRA* is problematic in at least two ways that I would like to address in this article. One problem concerns the meaning of "independence" in his account of independent practical reasoning (IPR), and the other concerns restrictions he places on the relation between the virtuous community and the state. The aim of my following remarks is to show how both difficulties emerge from MacIntyre's argument and why they are substantive, calling for considerable clarification, amplification, or even revision of his argument.

2. IPR and the Virtue of Authenticity

In a book with the title "Dependent Rational Animals" and with the aim of stressing the human animal's vulnerability and dependence on others, it is perhaps understandable that MacIntyre recognizes the need to focus on the topic of "independent practical reasoning" (IPR) at some length. He addresses the topic of practical reasoning in chapter 7, which is devoted to discussing "flourishing" and "goods." In this chapter, he begins with the general distinction between goods so-called because they are the objects of certain directed activities and desires, and goods so-called because they contribute to and are constitutive of flourishing (pp. 63-64). He then proceeds to distinguish four senses of "good" (pp. 65-68):

- pleasurable goods (when something is good because it is pleasurable, i.e., because it satisfies felt bodily wants or felt wants generally);
- instrumental goods (when something is good merely as means to some other good);
- non-instrumental, practice-intrinsic goods (when something is good in the sense of being intrinsic to a particular practice); and
- individual and communal human goods (when something is good because it is something that an individual person qua human being or society qua human should make a place for in its life).

Answers to the question why I should do one thing rather than another can always be put in question and, when they are, MacIntyre notes, they can only be answered by reflection on the practical reasoning that issued in or was presupposed by my actions. What distinguishes human beings from other animals is precisely their "need to learn to understand themselves as practical reasoners about goods" (p. 67). Thus, MacIntyre contends that practical reason is necessary for the sort of flourishing that is distinctively human.

Using his own taxonomy, we might say that practical reasoning is a human good and, indeed, one of the pre-eminent human goods.

While recognizing that humans, no less than dolphins, can only flourish through the right sorts of social relationships, MacIntyre notes that humans face a particular threat to developing practical reason. That threat is the human, all-too-human tendency to identify all goods with desires. Practical reason involves separating ourselves from our desires in the light of the recognition of goods that may or may not be in keeping with those desires—though importantly this recognition does not rule out the possibility that those goods become objects of desire themselves. Practical reason thus supposes a capacity to recognize goods different in kind from pleasurable goods and, in effect, a capacity to distinguish expressions of desire from evaluations.² But, of course, practical reason is more than a capacity to recognize and distinguish. We say that someone possesses practical reason when she is capable of explaining or justifying her reasons for acting one way rather than another—in short, when she indicates that she has “a good reason” for acting in the way that she does or did.

Tellingly perhaps, MacIntyre’s account of practical reason up to this point makes no explicit mention of its being independent in one way or another.³ However, he first introduces the qualifier “independent” in the course of noting a fundamental difference between judgments about our desires and judgments about what is good for us. He notes that, while we typically, if not invariably, have a kind of privileged access to our desires, the same cannot be said for what is good for us. When it comes to goods, we have to learn from others. At this juncture, MacIntyre explicitly notes that the kind of practical reasoning that contributes to human flourishing must be independent.⁴ Before turning to what makes practical reason independent on MacIntyre’s account, let us first try to reconstruct formally what is required for practical reason. In order to become practical reasoners (on MacIntyre’s account), we must

- (a) learn from others what is good for us beyond our pleasurable goods, that is, beyond what satisfies our bodily desires;
- (b) embrace those other goods, separating ourselves from our desires in the process; and

² In this respect I take it that MacIntyre is taking aim at latter-day versions of Charles L. Stevenson’s emotivism.

³ I say “no explicit mention” since, as will be evident below, he does understand the capacity to separate oneself from one’s desires as integral to the development of IPR.

⁴ “Independence” in this context thus first means independence from one’s desires by virtue of the embrace of inherited, indoctrinated, or in some sense received ideas of goods other than the goods that satisfy one’s desires.

- (c) develop the capacity to evaluate, justify, and—if necessary—revise our reasons and actions accordingly by appeal to those goods.

In order to become *independent* practical reasoners, MacIntyre contends, we must make the transition from what our teachers taught us about goods “to making our own independent judgments about goods, judgments that we are able to justify rationally to ourselves and to others” (p. 71). He then sketches three elements of the transition, though they are all arguably—and, again, perhaps tellingly—contained in his account of practical reason generally (i.e., without the “independent” modifier). The first two elements (“the ability to distance ourselves from our present desires” and “the ability to evaluate our reasons for action”) are obviously already explicitly broached in the account of practical reason under (b) and (c) above. The third element of the transition to IPR consists, on MacIntyre’s account, in the capacity to envisage different and alternative goods as realistic possibilities in the future. This third element also arguably follows from the third feature of practical reason.

MacIntyre rounds out his gloss on IPR with a characterization of it that also mirrors his characterization of practical reason. IPR, he tells us, is the key to human flourishing, in any culture, economy, or context (pp. 76-77). So, too, the “focal uses of ‘good’” are those that apply to members of the species as such or, in the case of human beings, to those with that nature (p. 78).

This naturalistic approach is controversial, to be sure, but I mention it only in passing because it is related to the issue that I would like to consider, namely, the very meaning or possibility of *independent* practical reasoning, at least on MacIntyre’s account. The issue can be framed in the form of the question: does he provide us with the resources to explain IPR? In my exposition I flagged how his account of IPR differs little from his account of practical reasoning (PR). Now this fact about his presentation may be attributable to a stylistic or rhetorical feature of his argument. But if we assume, as MacIntyre’s account straightforwardly suggests, that there is a legitimate distinction between PR and IPR, the question presents itself as to whether he has given us the goods to identify what makes IPR different from PR. To give a homely example of my query, consider the difference between a school board and an independent school board. Once we know what a school board is, our ability to understand the latter depends upon some explanation of what is meant by calling it “independent,” presumably including some account of what it is independent of.

Let me try to frame the issue in MacIntyre’s own terms. We noted that he considers IPR a human good and that for all goods other than pleasurable goods, we have to learn them from others. Presumably, the same applies to IPR. Indeed, in its case, we cannot learn that it is a good without learning how to use it; we have to learn how to justify our reasons and actions to others. In other words, we can only learn from others that IPR is a good and we can only learn that it is a good by learning—again, from others—what

it is, that is, the very practice of exercising practical reason independently. Yet the fact that it is learned raises the question of just what is meant by labeling it “independent.”

At one level, it seems easy enough to dispose of this question. Being able to throw a slider and knowing when to throw it are things that are good for a pitcher. Indeed, they are arguably goods that form essential parts of a pitcher’s practical reasoning. They are also things that a would-be pitcher typically has to learn from others, perhaps a pitching-coach, ideally one who transmits not simply mechanics and technique, but also a feel for the pitch and how to use it. In an actual game, however, the coach can never replace the pitcher; in other words, quite independently of any mentor, the pitcher has to be able to throw and know when to throw the slider himself. The fact that the pitcher himself pitches seems to confirm the independence. In similar fashion we might argue that, even if we have to learn from others what is good for us beyond what pleases us, including separating ourselves from our desires in the light of recognizing certain goods and how to justify our actions on their basis, actually doing so is not shared.

Still, one might counter this argument with the observation that, when it comes to exercising practical reason, as a virtue of playing baseball or excelling as a human being, an agent’s irreplaceable role in constituting a unique action does not establish the independence of the agency. Indeed, it only establishes independency in the logical sense of the distinctness of one exercise of practical reason from another. It merely indicates that the practical reasoning involved is a token of a type, a type of good in each case, where the token is distinct from some other token. In this sense, one token of throwing a slider is logically independent of another token of the same type of pitch.

Of course, to suggest that MacIntyre’s conception of IPR amounts to this sort of logical independence is a poor parody of it. The logical independence of one token (be it the virtue or its exercise) from another token should not be confused with the independence that the exercise of virtue designates, that is, the disposition of the virtuous person to reason and to act on her own. Nor from the fact that the virtue has to be learned in some sense, and thus signals a dependency in the order of acquisition, can it be inferred that the independent possession and exercise of the virtue itself necessarily suffers. The possession and exercise of a language provides a helpful analogy here. Language is acquired and, indeed, not only the acquisition but also the use of it is arguably dependent upon others. Yet it would be folly to contend that this dependency rules out the independent use of language, virtuously, we might say, in the case of poetry, viciously, in the case of libel. Nonetheless, precisely because we typically understand such virtues and their exercise as forms of IPR, it would be helpful to have a robust account of IPR.

MacIntyre devotes an entire chapter of *DRA* (chapter 8) to the question: “How do we become independent practical reasoners?” Note, however, that the question supposes a concept of IPR and, indeed, in the chapter he is keen on establishing the sort of social relationships that foster it. More precisely, his aim is to demonstrate the sort of virtues that must be

possessed by those on whom a child is dependent (namely, parents and educators) in order for the child to develop those virtues required for IPR. Still, this chapter is a likely place to look for more clues to the nature of the independence in IPR, on his account. Not surprisingly, MacIntyre observes that what we need from others are

relationships necessary for fostering the ability to evaluate, modify, or reject our own practical judgments, to ask, that is, whether what we take to be good reasons for action really are sufficiently good reasons, *and* the ability to imagine realistically alternative possible futures, so as to be able to make rational choices between them, *and* the ability to stand back from our desires, so as to be able to enquire rationally what the pursuit of our good here and now requires and how our desires must be directed and, if necessary, reeducated, if we are to attain it. (p. 83)

This quotation, like many others in the chapter (see pp. 88, 91, and 96), essentially reprises the earlier accounts of the three elements of PR and IPR, though it does amplify those accounts in instructive ways. Thus, MacIntyre emphasizes the necessity, for the purposes of developing IPRers, that parents and teachers reinforce the difference between pleasurable goods and other goods, precisely by teaching the child “that it will please them, *not* by acting so as to please them, but by acting so as to achieve what is good and best, whether this pleases them or not” (p. 84). (He later adds that we needed to receive unconditional care in order to become IPRers [p. 100].)

Yet early in the chapter MacIntyre also makes the following observation that is directly relevant to our concerns: “Acknowledgement of dependence is the key to independence” (p. 85). I think that MacIntyre could have done a better job of elaborating what he means by this observation, one that draws on the work of D. W. Winnicott. But I take him to be emphasizing the important point that trust in others, a comfort zone where we know that we depend on others, provides the basis for the sort of independent exploration, the playfulness, necessary to think, judge, and act to some extent on our own. The virtues of mothering and parenting epitomize how others make this dynamic possible (pp. 89-90). MacIntyre’s gloss of this dynamic is helpful and illuminating for at least two reasons: first, it illustrates the conditions in a child’s development for imaginatively expanding the three elements of PR mentioned above and, second, it underscores that the difference between PR and IPR is a matter of degree. There is no point in the development and exercise of IPR, MacIntyre later observes, “at which we cease altogether to be dependent upon particular others” (p. 97).

Despite this weighty acknowledgement or perhaps because of it, MacIntyre’s characterization of the process of the transition to IPR arguably gives dependencies the upper hand. Teachers, he remarks, have to try to

“inculcate” the habits that are virtues (p. 89).⁵ After acknowledging that “independence of mind” requires that we from time to time “defend and act on conclusions that are at variance with everyone else,” he quickly adds, “[b]ut we always require exceptionally good reasons for doing so” (p. 97). Both self-knowledge and honesty (as truthfulness about ourselves to ourselves and others) are requisites of IPR, but they are also only possible, he emphasizes, as a consequence of social relationships (p. 95). Acknowledging the Wittgensteinian inspiration of his account of the interconnectedness of self-identity and social identity, our criterion-less self-knowledge and others’ criterion-based knowledge of us, MacIntyre observes: “It is because and insofar as my judgments about myself agree with the judgments made about me by others who know me well that I can generally have confidence in them” (p. 95).

There is obviously a good deal that speaks for these claims about the dependency of PR and even IPR on others. Yet they underscore the problematic status of the independence of IPR, sketched above. Given this dependence of IPR on social relationships, is the expression ‘IPR’ not really a euphemism for ‘less dependent practical reasoning’? The prefix ‘in’ in ‘independent’ is a privative, suggesting that the unprefix root is the originary meaning, while the prefixed term is derivative, perhaps even achieved through mere negation of the root. The linguistic form thus leads to the question: Is there some positive phenomenon that IPR denotes or is it merely the substitution of one set of dependencies for another? Of course, one might insist that the pair ‘dependent’ and ‘independent’ are capable of the sort of analysis that Ludwig Wittgenstein gives of ‘composite’ and ‘simple’, where the significance of the terms depends upon the context of the language game in which they are used. But this sort of answer merely kicks the can down the road, begging the question that we are asking, namely, how do we distinguish dependent from independent rational reasoning in, to be sure, the language game at hand? What are we independent of and how are we independent of it when we are independent practical reasoners?

In chapter 9 MacIntyre appears to address this issue head on, as he writes:

By independence I mean both the ability and the willingness to evaluate the reasons for action advanced to one by others, so that one makes oneself accountable for one’s endorsements of the practical conclusions of others as well as for one’s own conclusions. One cannot then be an independent practical reasoner without being able to give to others an intelligible account of one’s reasoning. (p. 105)

⁵ Adapting Bernard Williams’s terminology for his purposes, MacIntyre characterizes the transition to IPR as a matter of internalizing external reasons. See Bernard Williams, “Internal and External Reasons,” in Bernard Williams, *Moral Luck* (Cambridge: Cambridge University Press, 1981), pp. 101-13.

He then stresses the importance of the fact that this exercise hardly needs to be a theoretical account. It is important because it underscores that any rational debate must be based upon “agreement about the relevant ends” (goods) and social relationships in which one cannot pursue one’s own good without pursuing the good of all (p. 107). But here, too, his gloss on independence, the conditions of its employment, and its accountability, far from illuminating the issue, exacerbate the difficulty of saying precisely what is independent about IPR.⁶

The issue is by no means peculiar to MacIntyre’s philosophy. One finds a version of the same issue in Martin Heidegger’s existential analysis and, in particular, in his contention, influenced by Augustine’s account of temptation, that human existence is a constant struggle between the pull of the crowd and the demands of authenticity.⁷ In his analysis of authenticity, Heidegger taps into resources that MacIntyre largely ignores. (I say “largely” because MacIntyre’s account of the virtue of truthfulness bears some resemblance to what Heidegger understands as authenticity.) These resources, I suggest, at once challenge and complement MacIntyre’s account. The resources I have in mind are Heidegger’s existential analyses of the phenomena of anxiety, death, and conscience. The significance of these phenomena, as Heidegger analyzes them, lies in the way they constitute a situation where the human being is faced with coming to terms with its own individual and finite existence and, indeed, at arm’s length from the community and tradition with which it otherwise identifies itself. It deserves noting that anxiety, despite being disabling at one level, is for Heidegger a crucially enabling experience, one in which a human being experiences not its disability, but the disabling of any account of the purposiveness of the world. The human being’s resolute embrace of conscience’s silent call to project the anxiety-ridden possibility of the complete closure of one’s possibilities provides a fulcrum of the individual’s authenticity or, in MacIntyre’s terms, its existence as an IPRer.

Is authenticity ever complete and entire for Heidegger? That would no more be conceivable in his eyes than an earthly life without temptation is in Augustine’s. Yet precisely therein lies one of the ways Heidegger’s account may complement MacIntyre’s. But, of course, the existential analysis eschews any reliance upon final causes or natural law and herein undoubtedly lies part of its challenge to MacIntyre’s account of IPR. Let us

⁶ In the penultimate chapter of *DRA*, MacIntyre asserts that we learn how to be able to speak for others by learning how to speak for ourselves, adding that it is “something more complex and more difficult than it is often taken to be” (p. 147). This context is yet another place in which he flags the issue that I am trying to raise.

⁷ Martin Heidegger, *Being and Time*, trans. John Macquarrie and Edward Robinson (New York: Harper & Row Publishers, 1962).

put the challenge in the form of a question: In what sense, if at all, can authenticity be a virtue, for MacIntyre and, indeed, a virtue that is constitutive of IPR?

3. The Virtuous Community and the Making of the State

The second aspect of MacIntyre's analysis that I would like to call into question is his contention that recognition of IPR and human beings' intrinsic interdependency together with the practice of just generosity fall outside of the family and the state. More precisely, he contends that those whose relationships embody that dual recognition of independence and dependency must share a common good that cannot be realized in either the contemporary family or the modern state (p. 131). Instead, the common good is constitutive of a network of giving and receiving, forms of local community that embody the virtue of just generosity. This network must be composed of institutionalized forms of deliberating and decision-making by IPRers as well as those who speak for others with limited or no capacity for practical reason. Though distinct from the state, this network is "political" in the sense that requires the sort of shared deliberation and decision-making entailed by the attitudes of recognition and respect toward able and disabled alike (pp. 140-41). For brevity's sake, in what follows I usually refer to this political network, embodying the virtue of just generosity, simply as "the virtuous community."

While MacIntyre thus gives a clear account of the make-up of this network in abstract terms, he refrains from specifying it in a more detailed and concrete way. Nonetheless, he gives a few lists of the sorts of associations he has in mind, each of which contains references to workplaces, schools, parishes, and clubs (pp. 134-35 and 145). Clearly, he has no intention of specifying all that falls under such a network, and it would probably be inappropriate to demand that he do so. He is largely content to refer to this network as the "social environment" or, more often, "local community" or "some form of the local community" (pp. 134-35 and 142). It is perhaps telling that, while MacIntyre adds temporal qualifiers to the relevant conceptions of the family and the state, he characterizes the network in spatial terms ("local" and "environment"). Whether this difference in mode of characterization is deliberate or not, it is at once consistent and ironic that MacIntyre observes that some standards of the community, by virtue of being non-competitive, are "Utopian." While the actual realization of a virtuous community in the various forms of local community is always imperfect and flawed, it is not Utopian, MacIntyre adds, to try to live by Utopian standards (p. 145).

This observation is central, I think, and I return to it below. But first, in fairness to MacIntyre's contention, let us briefly review his reasons for excluding the family and the state from this sphere of just generosity. First of all, it should be emphasized that MacIntyre regards families as "key and indispensable constituents of local community" and, indeed, a paradigmatic locus of the virtues of acknowledged dependence (p. 135). Nonetheless,

according to MacIntyre, the family, considered as a nuclear unit—the so-called “nuclear family” (p. 131) or the family as “a distinct and social unit” (pp. 134-35)—lacks the “self-sufficiency” required for a network of giving and receiving (p. 134). We might label this the “it takes a village” argument since it amounts to the argument that the family flourishes, that is, achieves its common good, only in the course of achieving the common goods of its local community.⁸ As a matter of fact, if we consider such common goods as basic as adequate sources of nourishment and educational opportunities, this argument appears quite sound. Providing for sufficient supplies of food and water and for adequate schooling, for example, is typically a responsibility of a local community, not least because it lies beyond the reach and competence of the average family. There is another, obvious reason for the family’s lack of self-sufficiency, though MacIntyre does not himself exploit it, namely, the discrepancy in parents’ and children’s capacities for IPR at various stages of the latter’s development. Particularly for young children IPR is necessarily nascent, requiring a level of paternalism that must be overcome in a virtuous community (a local community based upon the virtue of just generosity).

So far, so good. There are good reasons (economic and generational) to exclude the family from the virtuous community (the potential network of giving and receiving based upon just generosity). But are there also good reasons to insist, as MacIntyre does, on excluding the state or, more precisely, the modern state, from the virtuous community? MacIntyre appears to have two reasons for this insistence: the economics and the size of the modern state. The modern state is dominated by money and the interests it serves in such a manner that “the distribution of goods by government in no way reflects a common mind arrived at through widespread shared deliberation by norms of rational enquiry” (p. 131). He then quickly adds that the size of modern states precludes such a means of determining the distribution of goods. MacIntyre also acknowledges that a state can only operate under the constraint of assuring most citizens some share in such “public goods” as security (pp. 131-32). Yet he also insists that the shared public goods of the modern state are not to be confused with the common goods of the community. The confusion is of one cloth with a citizenry’s misconception of itself as a *Volk*—a commonplace, by the way, of contemporary political claims of adhering to the will of the “American people” (pp. 132-33).

MacIntyre thus presumes that adhering to the norms of rational enquiry would yield a virtuous distribution of goods, that is, a distribution in keeping with the demands of just generosity, and that there is some size threshold for such adherence on a social level. These are weighty presumptions and, in particular, the second presumption that size matters to the modern state’s prospects of being part of a virtuous community is in need

⁸ At times MacIntyre has in mind “the common good,” other times “common goods.” Some work of sorting this difference, along with possible “public goods,” would be helpful. In what sense is security a public good? A common good?

of more argument than MacIntyre provides. But regardless of whether these considerable presumptions hold up under scrutiny or not, he is making the independent observation that the modern state is essentially constituted in such a way that the power to determine its policies can be or, more precisely, has to be purchased and that this purchasing power—the power to purchase the power to determine public policy—is not itself a common good, but a limited good for which the members of the state compete and, indeed, compete in a way driven by capitalist market mechanisms and forces, where the competing members of the state are not on the same footing. Given this competition for a limited good and, indeed, within an inegalitarian framework, there are always winners and losers and, in fact, far more losers than winners whose interests hold sway over others. As a matter of historical record, that is, as a matter of registering the nature of the state operating under the “economic goals of advanced capitalism” (p. 145), this observation is undoubtedly accurate.

As in his discussion of the family, MacIntyre does not want to diminish or understate the continued importance of the state. He recognizes that the public good of security provided by the state is a necessary condition for the community’s achievement of common goods. Citing the Americans with Disabilities Act, he notes that the state can provide resources for removing obstacles to the achievement of the common good; he also acknowledges that “numerous crucial needs of the local community . . . can only be met” through the intervention of state agencies (p. 142). Nonetheless, he insists that it is the politics of local communities—and not the state—that are crucial for defining the needs in question and seeing to it that they are met. Not only, in MacIntyre’s view, is the modern state, given its constitution, unable to be the political framework for a just society, it is, he adds, a “communitarian mistake” to attempt to infuse the politics of the state with the values of the local community (p. 142).

MacIntyre thus appears to have trenchant reasons for denying the state as well as the family the capacity to be communities embodying the virtue of just generosity.⁹ But his trichotomy in one respect underestimates the prerogatives of the state and in another respect underestimates the potential political force and responsibility of the network he envisions. In regard to the first point, if we look at the actual forms of local community identified by MacIntyre, we are hard pressed to find a form that is not beholden to the state. Certainly, the workplace supposes economic policies

⁹ In passing, it is perhaps useful to note that MacIntyre’s trichotomy here bears a superficial resemblance to the three stages of objective spirit in G. W. F. Hegel’s philosophy of right. It should be obvious, from the gloss of the virtuous community just given, that it is a far cry from the civil society or *bürgerliche Gesellschaft* that, in Hegel’s theory, mediates between the family and the state. See G. W. F. Hegel, *Elements of the Philosophy of Right*, ed. Allen W. Wood, trans. H. B. Nisbet (Cambridge: Cambridge University Press, 1991).

underwritten by the state, even private schools must abide by state regulations, and a tax-exempt status is hardly incidental to parishes in the U.S. To be sure, these aspects of the local community are not the aspects that would necessarily instantiate the virtuous community touted by MacIntyre, and he is clear that there is nothing good about local community as such. But as concrete matters of historical fact, the above examples of state involvement in forms of local community, the very forms that, in MacIntyre's view, have the potential for realizing the virtue of just generosity, raise at least two questions about his trichotomy: first, the question of the concrete possibility of isolating the local community or, more precisely, its relevant forms from the state and, second, the question of its advisability.

How can these forms of local community establish themselves as independent of the state? Can we imagine today forms of virtuous community, for example, in the workplace and in schools, that can dispense with the state's prerogatives of protecting citizens, enforcing laws, and providing for security? Does not the state, in its role of maintaining security and perhaps in part because of its impersonality, serve as a check on aspects of local community that, as MacIntyre rightly notes, can conflict with the demands of virtue? What I am suggesting is that MacIntyre's trichotomy is false or at least misleading in pretending that the demands of giving and receiving can be isolated from concerns for security, the only good identified by him as a legitimate matter of the state, or, for that matter, the need for enforcement of the decisions reached by IPRers in a virtuous community. To presume that a virtuous community is physically and morally powerless to enjoin and back up injunctions, that it can dispense with such power, or that its deliberating process will render such injunctions superfluous is Utopian. As the original Greek makes clear, there is no place for it and the pursuit of it is, at best, a blueprint for disappointment, and at its worst, a recipe for escapism.

This last remark introduces the second issue flagged above and it concerns the potential for quietism lurking in MacIntyre's trichotomy, given once again the supposed independence of the virtuous community. How can the ideals of giving and receiving, of just generosity, not be sources of radical protest and struggle against the state, as MacIntyre portrays it? After recognizing, as noted above, that everyone necessarily has "a significant interest" in his or her relationship to the nation-state, MacIntyre cautions that we "weigh any benefits to be derived from it with the costs of entanglement" (p. 132). Here we see a practical directive, supposedly flowing from the independence of the virtuous community from the state (and vice versa), suggesting that we can focus on the network of giving and receiving while holding our relationship to the big, bad state at arm's length.

One is reminded here at once of both Hegel's account of the beautiful soul and Karl Marx's criticism of Hegel's manner of distinguishing civil society from the state.¹⁰ For Marx, the distinction between a capitalist civil

¹⁰ Hegel, *Elements of the Philosophy of Right*, sec. 13, p. 47; and Karl Marx, *Critique*

or, better, bourgeois society and the modern state is ultimately a dissembling bit of ideology. What Marx understood and MacIntyre endorses as justice in a socialist society demands, according to Marx, a lengthy and arduous struggle against both the economic relations of capitalism and the political forces that guard them. Nor can this struggle be a merely local one. There cannot be just generosity in the workplace in Bochum or Detroit without the same in Bangladesh or Hanoi. If forms of local community are to exemplify just generosity, they cannot remain local and they cannot pursue their proper activities and ends—in the workplace, in schools, in parishes, in clubs, and the like—without, at the same time, challenging the current political order that makes them possible in an unjust world.

Now it is certainly possible that these remarks are tendentious and that MacIntyre would agree with my inference about the obligatory, *subverting* political role of the virtuous community *within* the capitalist state. His central interest, after all, lies not in specifying that relationship but in identifying what sorts of political associations allow for such a community. As noted above, MacIntyre reiterates that the fact that he rules out the state in this regard by no means entails a denial of the continuing importance of the state. Still, as also noted above, while recognizing the necessity of the state to meet certain crucial needs, he contends that the politics of local community are crucial for determining those needs and seeing that they are met. But then I am led to ask, how can it see that those “crucial needs” are met without engaging in and contesting the politics of the modern capitalist state? If, as MacIntyre contends, relatively small inequalities of wealth or income are required for a virtuous community (p. 144), how in the present concrete situation does one go about establishing a virtuous community without actively contesting the policies of the modern state? Again, if, as MacIntyre observes, striving to achieve a community infused by the virtue of just generosity demands a “rejection of the economics of advanced capitalism,” how can this striving avoid challenging the state-level policies that make those economics possible?¹¹ It is illusory to think that we can go about the business

of Hegel's *Philosophy of Right*, ed. Joseph O'Malley, trans. Annette Jolin and Joseph O'Malley (Cambridge: Cambridge University Press, 1970 [1843-44]).

¹¹ One can read MacIntyre's sketch of the virtuous community as an answer to the question of what society would be like if the state, whose rationale is tied to capitalist economics, “withers away,” in Friedrich Engels's memorable phrase. MacIntyre's advice to compare different forms of local communities echoes Marx's more sober recommendation that the future constitution of the state within a socialist economic structure cannot be determined *a priori* (and certainly not from some assimilation of *Volk* with *Staat*) but only through scientific investigation; see Marx's “Critique of the Gotha Programme,” part IV, accessed online at: <http://www.marxists.org/archive/marx/works/1875/gotha/ch04.htm>. Yet, Marx is talking about the continuing nature of the state and, hence, MacIntyre's views would seem closer to Engels than Marx on this score. However, for an argument that Marx

of establishing virtuous forms of local community independently of addressing such matters as legal enforcement, power, and security that are traditionally prerogatives of a state.

and Engels are in accord, see V. I. Lenin, *State and Revolution*, chap. 5, accessed online at: <http://www.marxists.org/archive/lenin/works/1917/staterev/ch05.htm#s1>.

Is Life the Ultimate Value? A Reassessment of Ayn Rand's Ethics

Ole Martin Moen
University of Oslo

1. Introduction: The Problem of Ultimate Value

We all value things. For example, we value friendships, prosperity, and knowledge. These seem to be good things and things worthy of pursuit. They seem better and more worthy of pursuit, at least, than do their opposites: enmity, poverty, and ignorance.

A notable fact about the things we consider valuable is that most of them appear to be valuable not merely as things worth having for their own sake, but as things worth having for the sake of something else. Consider prosperity: Though we genuinely value prosperity—we want it, we think it is good, and we act to gain and keep it—we value it not merely so as to be prosperous, but so as to achieve something further, such as steady access to food, drink, and clothes. Were it not for the food, drink, and clothes—and the other things that prosperity brings about, such as transportation, medicine, and homes—a great deal, if not all, of the value of prosperity would be lost. Food, drink, and clothes, moreover, do not seem to be ends in themselves either. Though they are *ends* of prosperity, they are also—from another perspective—*means* to avoid hunger, thirst, and cold. Furthermore, avoiding hunger, thirst, and cold seems to be a means to yet another end: remaining in good health.

Where does the chain of values end? It seems that the chain of values must end somewhere, for though *some* values can be values by virtue of being means to or constituent parts of further values, not *all* values can be values of this kind. If they were, all values would be values only insofar as they contribute to something further, in a justificatory regress. In order to get a chain of values off the ground, it seems that something will have to be valuable by virtue of itself, not by virtue of that to which it contributes. Aristotle puts forth this point as follows in the *Nicomachean Ethics*:

[T]hings achievable by action have some end that we wish for because of itself, and because of which we wish for the other things, . . . we do not choose everything because of something else—for if we do, it will go on without limit, so that desire will prove to be empty and futile.¹

¹ Aristotle, *Nicomachean Ethics*, trans. Terence Irwin, 2nd ed. (Indianapolis, IN: Hackett Publishers, 1999), I.2.1094a18-21.

Ayn Rand states the point like this in “The Objectivist Ethics”:

Without an ultimate goal or end, there can be no lesser goals or means: a series of means going off into an infinite progression towards a nonexistent end is a metaphysical and epistemological impossibility. It is only an ultimate goal, an *end in itself*, that makes the existence of values possible.²

What is ultimately valuable? There are many proposed answers. Some propose that ultimate value can be found in developing oneself to the fullest or in cultivating one’s character and one’s virtues. Others argue that it is ultimately valuable to have one’s preferences or desires satisfied, to act in accordance with one’s sentiments, or to experience enjoyment or pleasure. Still others argue that there are *several* things worth having for their own sake, without any of these being reducible to one supreme value; perhaps pleasure, knowledge, friendship, and virtue are all ultimately valuable.³

Rand’s suggested answer is that life is the ultimate value. Life, in Rand’s view, is the only thing worth having for its own sake, not for the sake of something else. All things, Rand maintains—from friendship, prosperity, and knowledge to enmity, poverty, and ignorance—are valuable or disvaluable (to an agent) in proportion to whether they enhance or undermine (that agent’s) life.⁴

How can Rand’s view—or, for that matter, any view—on the nature of ultimate value be justified? This is a difficult question, because it is not clear how we must proceed to justify an ultimate value. When we justify a non-ultimate value, such as prosperity, we do so by showing what it contributes to—for example, important goods such as food and medicine. This is a satisfactory justification for a non-ultimate value. It is not a satisfactory justification for an ultimate value, however, since an ultimate value—being truly ultimate—is not valuable in virtue of that to which it contributes. If it were, it would not be ultimate, and we would merely move the problem one additional step in the regress. When we seek to justify an ultimate value,

² Ayn Rand, “The Objectivist Ethics,” in Ayn Rand, *The Virtue of Selfishness: A New Concept of Egoism* (New York: Signet, 1964), p. 17.

³ It is also possible to deny that there is an ultimate value, as anti-realists and coherentists do. I will not discuss those options here.

⁴ Rand’s own presentation of this point, which I discuss in detail below, is found primarily in her “This Is John Galt Speaking,” in Ayn Rand, *For the New Intellectual* (New York: Signet, 1963), pp. 117-92; Rand, “The Objectivist Ethics,” in Rand, *The Virtue of Selfishness*, pp. 13-35; and Ayn Rand, “Causality versus Duty,” in Ayn Rand, *Philosophy: Who Needs It* (New York: Signet, 1982), pp. 95-101.

therefore, we have to show that something is valuable irrespective of that to which it contributes. How, if at all, can this be done?

My aim in this article is to present and assess Rand's justification for her view on this issue. I first (Section 2) present Rand's argument, with emphasis on her appeal to a specific dependence relationship between values and life. In order to understand the procedure involved in Rand's reasoning, and to bring out the distinctive force of her argument, I start by briefly discussing certain aspects of her epistemology. I thereafter (Section 3) raise a challenge to Rand's theory. This challenge concerns the reconciliation of two of the theory's features: on the one hand, its dependence on a pre-rational choice (the "choice to live"), and on the other hand, its objectivity and bindingness. I will refer to the tension between these two features as "the problem of subjectivity." I then (Section 4) examine four different attempts to solve this problem. These are, respectively, the solutions suggested by Douglas Rasmussen, Nathaniel Branden, Irfan Khawaja, and Allan Gotthelf. For each of these suggestions, I explain why I believe it is unsatisfactory. I then (Section 5) present my own position on the issue. In a nutshell, the view for which I will argue is that the claim "life is the ultimate value" can be understood in two different ways: either as a claim about the ultimate purpose of valuing or as a claim about the proper ultimate standard of practical reasoning. In the latter sense, I argue, we are justified in holding that life is the ultimate value. In the former sense, however, we are not. In the former sense, *happiness*, not life, is the ultimate value—and grasping this, I further argue, is crucial to grasp how "life is the ultimate value" in the latter sense can be justified. At the end of the article I indicate my reasons for believing that this view might also have been Rand's own, and I offer, in support of this, a new interpretation of her distinction between an "ultimate purpose" and a "standard of value."

2. The Dependence of "Value" on "Life"

Rand writes:

What is morality, or ethics? It is a code of values to guide man's choices and actions—the choices and actions that determine the purpose and the course of his life. Ethics, as a science, deals with discovering and defining such a code.

The first question that has to be answered, as a precondition of any attempt to define, to judge or to accept any specific system of ethics, is: *Why* does man need a code of values?

Let me stress this. The first question is not: What particular code of values should man accept? The first question is: Does man need values at all—and why?⁵

⁵ Rand, "The Objectivist Ethics," in Rand, *The Virtue of Selfishness*, p. 13.

What Rand urges in these three short paragraphs is to search for what gives rise to the distinction between the valuable and the disvaluable. We should not, Rand claims, merely take this distinction and these concepts for granted. We should ask *why* we need them; we should seek to identify what purpose, if any, drawing this distinction and forming these concepts serves.

So as to understand what such a procedure involves and why Rand deems it helpful, we must see it as part of the epistemological background from which Rand approaches the problem of value. In *Introduction to Objectivist Epistemology*, Rand presents what Darryl Wright has coined her “basing requirement for concepts.”⁶ This requirement states that when using concepts, “one must be able to retrace the specific (logical, not chronological) steps by which they were formed, and one must be able to demonstrate their connection to their base in perceptual reality.”⁷ This holds for the concept “value” as for all other concepts. In order to understand this requirement, we must understand, at least in outline, what Rand thinks on a more general level is the nature and purpose of concepts.

Rand is an epistemic foundationalist who holds that all knowledge is ultimately based on perceptual experience. Concepts, within this framework, are tools we use to organize and draw inferences from our perceptual experiences. More specifically, concepts are mental groupings of the entities we perceive, based upon these entities’ intrinsic or extrinsic similarities.⁸ Even though we can form complex concepts—and we can use concepts as the basis of forming new concepts (say, we form “furniture” on the basis of “chair,” “table,” and “sofa”)—all concepts must ultimately refer back to entities that we perceive. If they don’t, they fail to fulfill the purpose for which we need them, namely, helping us to organize and draw inferences from our perceptual experiences.

Tracing concepts back to their perceptual basis is a crucial component in Rand’s philosophical methodology, the motivation for which is to ensure that we have our concepts firmly anchored in reality. When we use concepts that we are *not* ultimately able to trace back to perceptual experiences, we are using what Rand calls “floating abstractions.”⁹ Floating abstractions are

⁶ Darryl F. Wright, “Evaluative Concepts and Objective Values: Rand on Moral Objectivity,” *Social Philosophy & Policy* 25, no. 1 (2008), p. 168.

⁷ Ayn Rand, *Introduction to Objectivist Epistemology*, expanded 2nd ed. (New York: Meridian, 1990), p. 51.

⁸ For a discussion of Rand’s view on what similarities are, and how similarities can give rise to concepts, see Rand, *Introduction to Objectivist Epistemology*, chaps. 1–3; and Allan Gotthelf, “Ayn Rand on Concepts,” accessed online at: <http://www.bristol.ac.uk/metaphysics/science/naicpapers/gotthelf.pdf>.

⁹ Leonard Peikoff, *Objectivism: The Philosophy of Ayn Rand* (New York: Meridian, 1991), p. 96.

abstractions that we have taken over from others without having gone through the mental steps of forming them for ourselves. The reason why such conceptual second-handedness is problematic is that when we merely take concepts over from others, we do not grasp first-hand what things in reality they refer to, and we are doomed to use our concepts in the same way children use concepts from the adult world which they lack the necessary experiential background to form. Though children might have a vague and associative understanding of what, say, “mortgage” means, and though they can parrot it and apply it correctly in some contexts, they do not grasp it. As philosophers in search of a sound theory of value, we should ensure that we do not treat the central concept “value” as a six-year-old treats “mortgage.”

What, then, is the observational foundation of the concept “value”? According to Rand, the concept “value” rests on observations of intentional action, which is action performed in order to reach a goal. We observe intentional action when we observe that someone goes to bed *in order to sleep*, lifts a cup *in order to drink*, turns on the air conditioner *in order to cool the room*; that is, when we observe that someone acts so as to achieve certain effects. Values, as we first and in an elementary sense encounter them, are the goals of intentional action. As Rand defines it, a value is “that which one acts to gain and/or keep.”¹⁰

Having grasped “value”—the *goal* of an intentional action—Rand claims that we are in a position to form two other concepts intimately related to “value”: “valuer,” which refers to an *agent* performing an action, and “valuing,” which refers to an *action* performed by an agent for the sake of reaching a goal. Indeed, these three concepts are interdependent: None makes sense without the others.

Most of us form the concepts “value,” “valuer,” and “valuing” from observing human behavior, both our own and that of others. These concepts, however, also apply to animal behavior (in Rand’s view, they apply across the biological realm). To the extent that a cat intentionally runs *in order to* catch a mouse, there is a valuer (the cat), a value (catching the mouse), and valuing (the chasing). Also, and as far as the mouse runs *in order to* escape the cat, there is—from the mouse’s perspective—a valuer (the mouse), a value (avoiding being caught by the cat) and valuing (the running away). This provides us with an observational basis for evaluative terms.

Having grasped “value” and its corollaries “valuer” and “valuing,” Rand claims that we can identify an important relationship between the

¹⁰ Rand, “This Is John Galt Speaking,” in Rand, *For the New Intellectual*, p. 121. Rand operates with two definitions of “value,” one descriptive and one normative. These, importantly, are not two different concepts referred to by the same word. The normative definition, as Rand sees it, is a development of the descriptive definition. I discuss this issue in more detail below. For Rand’s view on the contextual nature of definitions, see Ayn Rand, “Definitions,” in Rand, *Introduction to Objectivist Epistemology*, pp. 40-54.

phenomenon of “value” and another phenomenon, “life”—namely, that it is only within the realm of living things that values exist. Non-living things—such as stones, rivers, windows, cigarettes, and application forms—do not value anything, nor are they able to. Though such non-living things are involved in various goal-directed actions, they do not themselves pursue goals.

This correlation between “value” and “life” is not accidental. On the one hand, life seems to be what makes values possible, since it is only living things that can pursue goals. On the other hand, life seems not only to make values possible, but also to make values necessary. Life can only be sustained under certain conditions, and actions are required on the part of living organisms in order to meet these conditions.

Most values, moreover, seem to be geared toward different organisms’ lives: chasing mice (as cats do) is vital to cats, and escaping cats (as mice do) is vital to mice. Cats that stop chasing mice and mice that stop escaping cats will die. They are unlikely to die at the very instant they stop valuing, but they will nonetheless fail to do what is required by them to remain alive, thus staying temporarily alive only for so long as the surplus of past actions can carry them. It is in this sense that life seemingly makes values not only possible, but also necessary—necessary, if life is to be sustained.

Following Rand’s reasoning one step further, we may observe that the relationship between values and life is not only a means/end relationship, but also a constituency relationship. Valuing is both what sustains life *and* a crucial part of what constitutes life. This is important to Rand, and it is made clear by her definition of life as “a process of self-sustaining, self-generated action.”¹¹ This definition can be rephrased in terms of values. In terms of values, life is a process where a *valuer* (an agent) *values* (runs a process in order to) a *value* (sustain itself). Values, therefore, seem to be as deeply interconnected with *life* as they are to valuers and valuing, because valuing both constitutes and sustains life.

According to Rand, it is only within the context of a living being, whose life must be sustained by this being’s own actions, that the phenomenon of values occurs. To illustrate this principle, Rand invites us to imagine “an immortal, indestructible robot, an entity which moves and acts, but which cannot be affected by anything, which cannot be changed in any respect, which cannot be damaged, injured or destroyed.” Such an entity, Rand maintains, “would not be able to have any values; it would have nothing to lose; it could not regard anything as *for* or *against* it, as serving or threatening its welfare, as fulfilling or frustrating its interest. It could have no interests and no goals.”¹² Her point is that without the fundamental alternative of life or death, values are impossible. Without an organism that is

¹¹ Rand, “The Objectivist Ethics,” in Rand, *The Virtue of Selfishness*, p. 15.

¹² *Ibid.*, p. 16. I discuss this example in detail below.

vulnerable—in the sense that its life can be threatened or, alternatively, enhanced—the question of value does not arise. Moreover, in adherence with the grounding requirement for concepts, this is the only context in which Rand believes it makes sense to speak of values. Values occur because we have a life that can be threatened or enhanced—and because we, through our actions, can affect this.

To speak of values apart from a life that can be threatened or enhanced, and for other purposes than enhancing life, is to treat “value” as a floating abstraction not anchored in facts of reality. Rand thus rejects all claims of “free-floating value,” that is, value that is not tied to a valuer and a life being valued. The reason why is that this sort of claim “divorces the concept of ‘good’ from beneficiaries, and the concept of ‘value’ from valuer and purpose—claiming that the good is good in, by and of itself.”¹³ A paradigmatic example of a free-floating value is G. E. Moore’s “Beautiful World.” According to Moore, a beautiful world has value in and of itself, and would retain its value even if there were no valuers there to benefit from its beauty.¹⁴ Speaking of value in such a sense is, in Rand’s view, to use the concept “value” in the absence of that which gives the concept meaning: a life that can be enhanced or threatened. Speaking of values in the absence of lives, therefore, is tantamount to speaking of “libraries” in the absence of “books” or of “funerals” in the absence of “deaths.” “Value” is a derivative phenomenon made possible by the phenomenon of life, so “value” is hierarchically dependent upon “life” in the same way “library” is dependent on “book” and “funeral” is dependent on “death.” Rand explains:

Metaphysically, *life* is the only phenomenon that is an end in itself: a value gained and kept by a constant process of action. Epistemologically, the concept of “value” is genetically dependent upon and derived from the antecedent concept of “life.” To speak of “value” as apart from “life” is worse than a contradiction in terms. “It is only the concept of ‘Life’ that makes the concept of ‘Value’ possible.”¹⁵

Thus Rand speaks of values only *in relation to individual living entities*. “It is

¹³ Ayn Rand, “What Is Capitalism?” in Ayn Rand, *Capitalism: The Unknown Ideal*, Centennial ed. (New York: New American Library, 1967), p. 13. Rand sometimes called a value that is divorced from any beneficiary an *intrinsic value*. This terminological choice might be confusing to some contemporary readers. Today, such value is commonly referred to as “value *period*,” or “absolute value,” and is contrasted with “value *for*.” On Rand’s view, all values are values *for*.

¹⁴ G. E. Moore, *Principia Ethica*, ed. Thomas Baldwin, rev. ed. (Cambridge: Cambridge University Press, 1993), pp. 132-47.

¹⁵ Rand, “The Objectivist Ethics,” in Rand, *The Virtue of Selfishness*, p. 17.

only,” she argues, “to a living entity that things can be good or evil.”¹⁶ To the extent that friendships, books, hospitals, computers, and kindergartens are valuable, they are valuable *to* someone. If they are not valuable to someone, they are not valuable at all, since in the absence of a relation to someone, the question of value or disvalue does not arise—and speaking of “value” in such a sense is to speak of “value” in a context in which one is not justified in using it. To do so would be to commit what Rand calls the “fallacy of the stolen concept,” which is to use a concept outside of the context in which one is justified in using it.¹⁷

So far, we have discussed values in relation to living organisms in general. How does Rand get us from descriptive biological values—which concern all living organisms—to human values and to ethical values? In order to understand this, we must understand in what relevant respects Rand takes humans to be different from other animals. Rand writes that

an animal has no choice in the knowledge and the skills that it acquires; it can only repeat them generation after generation. And an animal has no choice in the standard of value directing its actions: its senses provide it with an *automatic* code of values, an automatic knowledge of what is good for it or evil, what benefits or endangers its life. An animal has no power to extend its knowledge or to evade it. In situations for which its knowledge is inadequate, it perishes—as, for instance, an animal that stands paralyzed on the track of a railroad in the path of a speeding train. But so long as it lives, an animal acts on its knowledge.¹⁸

Animals are automatic value-seekers in that they have instincts that guide their actions toward survival. Human beings are not like animals in this respect. As humans, we have a much more complex and plastic repertoire of actions, and are thus *not* automatic value-seekers. Though we have a pleasure/pain mechanism that roughly prompts us to perform basic life-enhancing actions, we can also err and evade, and indeed, we have the ability systematically to pursue courses of actions that harm us. We can become hermits, terrorists, Nazis, or bums who merely live from moment to moment according to what feels good at the time. Doing such things, however, will not promote a human life. In order to promote our lives, Rand claims, we need long-term plans and principles, and we need guidance in the process of forming such principles. Providing such guidance is what morality, in Rand’s

¹⁶ Ibid., p. 16.

¹⁷ Rand, “Axiomatic Concepts,” in Rand, *Introduction to Objectivist Epistemology*, pp. 59-61.

¹⁸ Rand, “The Objectivist Ethics,” p. 19.

view, is about. As we saw in the definition quoted above, morality is “a code of values to guide man’s choices and actions.” Because of our nature, we need morality for the same reason that birds need nests and trees need sunlight; we need morality so as to sustain and enhance our lives.¹⁹ (For more about the practical consequences of Rand’s normative ethics—which I will not discuss here—see Rand’s *The Virtue of Selfishness* and Tara Smith’s *Ayn Rand’s Normative Ethics*.²⁰)

3. The Problem of Subjectivity

So far I have surveyed Rand’s arguments for three main claims:

- (1) Values are made possible by life.
- (2) Life, in turn, is constituted by and depends upon valuing.
- (3) Values exist only in relation to living agents.

I think these observations are all correct, and that they have important implications for value theory and philosophy of biology. Still, none of these observations, either alone or in conjunction, establishes that life is the ultimate value. These observations are compatible with but do not establish it.

First, they do not establish that, descriptively, life is the goal of all valuing. Though the ultimate reason organisms need to pursue values might be that such activity is required to sustain their lives—and though a great many of our actions are in fact life-enhancing—we are clearly able to pursue values that harm our lives. The most obvious example is suicide.

This, though, is not what Rand claims to establish. Rand does not defend the view that we in fact *do* value only that which is life-promoting (a psychological thesis), but rather the view that we *should* value, or have reason to value, only that which is life-promoting (an ethical thesis). This ethical thesis, moreover, is very different from the psychological thesis. In fact, the

¹⁹ Implicit in this lies a distinctive metaethical position. On the one hand, Rand’s theory of value is agent-centered and agent-relative. In her view, an object that is good for me need not be good for you. This, however, does not make Rand a moral subjectivist. Rand is an objectivist. The reason why is that even though “valuable” and “disvaluable” do not refer to objects, they refer to relationships between agents and objects. What is valuable to an agent is that which stands in a beneficial relationship to the agent; the disvaluable is that which stands in a harmful relationship to that agent. What things and actions stand in such a relationship, moreover—though it might vary from one agent to another—is a factual matter open to empirical investigation. This is why, in the definition quoted above, Rand speaks of ethics as a “science.” Note also that for Rand, “value” is the fundamental normative concept. “Right,” “good,” “virtue,” “reason for action,” “ought,” and “should” are all ultimately defined in terms of “value.”

²⁰ Tara Smith, *Ayn Rand’s Normative Ethics: The Virtuous Egoist* (Cambridge: Cambridge University Press, 2006).

two theses seem incompatible. If all of our actions were automatically to promote life, we would not need guidance to reach that goal. It is precisely because the psychological thesis is false that we need the ethical thesis.

What, then, is needed in addition to the argument above in order to ground the view that life is the ultimate value in the prescriptive sense? According to Rand, what is needed is a *choice to live*—a commitment to continue living.

In John Galt's speech in *Atlas Shrugged*, Rand writes that her morality "is contained in a single axiom: existence exists—and in a single choice: to live."²¹ In "Causality versus Duty" she writes, "Life or death is man's only fundamental alternative. To live is his basic act of choice. If he chooses to live, a rational ethics will tell him what principles of actions are required to implement his choice. If he does not choose to live, nature will take its course."²² As is expressed in the latter quotation, the choice to live is a pre-moral, pre-rational choice. Rather than this choice itself being either moral or rational, the choice to live opens up the realm of ethics and of reasons for action. Ethics provides rules for living, so if living is not a goal, the science of ethics does not arise.

Rand did not write extensively on the choice to live. This is unfortunate, for the choice to live, at least on some interpretations, appears to cast doubt on the binding force of moral obligations. It might seem, as writes Douglas Rasmussen, that if morality depends on a *choice to live*—a choice which is not rationality-apt—then "obligation is hypothetical" (rather than categorical), since by making a different pre-moral choice an agent might "choose to opt out of the 'moral game'."²³ This, Rasmussen argues, is problematic, for moral obligations are supposed to be obligations that we cannot opt out of. We do not accept "Well, I chose otherwise" as a satisfying excuse if we blame someone for not living up to his moral obligations. The "choosing otherwise" is not supposed to be the solution in such cases. It is supposed to be the problem.

Still, some of Rand's formulations do seem to point in a direction that suggests it is indeed possible to opt out of morality. In Galt's speech, Rand explicitly writes that "you do not have to live."²⁴ In "The Moral Revolution in *Atlas Shrugged*," written by Nathaniel Branden and approved by Rand, we read that "[t]he man who does not wish to hold life as his goal and standard is free not to hold it."²⁵ On such a view, we could still blame, for their lack of

²¹ Rand, "This Is John Galt Speaking," in Rand, *For the New Intellectual*, p. 128.

²² Rand, "Causality versus Duty," in Rand, *Philosophy: Who Needs It*, p. 99.

²³ Douglas Rasmussen, "Rand on Obligation and Value," *The Journal of Ayn Rand Studies* 4, no. 1 (Fall 2002), p. 71.

²⁴ Rand, "This Is John Galt Speaking," in Rand, *For the New Intellectual*, p. 124.

²⁵ Nathaniel Branden, "The Moral Revolution in *Atlas Shrugged*," in *Who Is Ayn*

consistency, those who choose to live yet who do not take the required actions. But, as notes Darryl Wright, there are

individuals, such as suicide terrorists, who could only be described as patently life-hating, obsessed with destroying themselves and innocent others. It would be hard to view them as choosing to live, and yet it seems equally as unacceptable to hold that they have no moral obligations, as if their nihilism were a moral dispensation.²⁶

A similar worry is raised by Irfan Khawaja, who argues that, granted morality's dependence on a choice to live, obligations appear merely "hypothetical," and thus "arbitrary" and "escapable." In a question that aptly formulates the problem, Khawaja asks: "If the Objectivist view is really 'objective', how can morality's binding force rest on a choice? Doesn't it then collapse into subjectivity?"²⁷ If Rand's theory is to be firmly supported, this problem—which I call the problem of subjectivity—must be solved.

4. Four Suggested Solutions to the Problem of Subjectivity

I shall now examine four different attempts to resolve the problem of subjectivity, and provide my reasons for believing that these attempts are unsuccessful. Thereafter, I sketch my own position on the issue.

a. The argument from denying the choice to live (Douglas Rasmussen)

Rasmussen seeks to solve the problem of subjectivity by arguing that morality in fact does *not* rest on a pre-moral choice to live. Rasmussen's view is that "[l]ife is not a value because we choose it, but rather because of what it is." As such, he maintains, it is mistaken to believe that "there can be no obligation without the choice to live."²⁸ In his view, it is rather the other way around: admitting that a choice is needed opens the door for subjectivism, as well as opting out of the moral game. Rasmussen, we might say, favors choice/obligation incompatibilism, and seeks to save obligation by throwing out choice.

Rand? ed. Nathaniel Branden and Barbara Branden (New York: Random House, 1962), p. 27.

²⁶ Darryl Wright, "Reasoning about Ends: Life as a Value in Ayn Rand's Ethics," in *Metaethics, Egoism, and Virtue: Studies in Ayn Rand's Normative Theory*, ed. Allan Gotthelf and James G. Lennox (Pittsburgh, PA: University of Pittsburgh Press, 2010), p. 26.

²⁷ Irfan Khawaja, "Review: Tara Smith's *Viable Values: A Study of Life as the Root and Reward of Morality*: A Discussion," *Reason Papers* 26 (Summer 2003), p. 83.

²⁸ Rasmussen, "Rand on Obligation and Value," pp. 76 and 74.

There are two issues at stake here. The first issue is whether or not this is a proper interpretation of Rand. According to Rasmussen, it is a proper interpretation, since in his view, “the choice to live,” as Rand uses the expression, refers not to a choice that is necessary for life to be valuable, but rather to a choice or a commitment that we need to make in order to carry out what we ought to do independently of this choice. I believe this is a mistaken interpretation of Rand, and I believe a convincing argument against Rasmussen’s interpretation has been offered by Allan Gotthelf.²⁹ Since my main concern in this article is value theory, however, rather than interpretation of Rand, I will not discuss this issue further. Let me instead assess the second issue at stake, the philosophical soundness of Rasmussen’s argument.

Although my own position, as will become clear, is similar to Rasmussen’s in several respects, I do not find his arguments convincing as they stand. Rasmussen speaks at length of the close relationship between life and values, and he recapitulates points (1) through (3) in Section 3 above.

The first new (or semi-new) argument presented by Rasmussen is that the ultimate value is “set by our nature” because “metaphysically, life is . . . an end in itself: a value gained and kept by a constant process of action.”³⁰ This, however, is macrobiology, not normative theory, and it remains unclear how the biological root of value, by itself, can issue binding obligations. Macrobiologically, it is true that life exists for its own sake. If we take for granted the biological teleology favored by Rand, life (in an inclusive sense that includes reproduction) is roughly the *telos* of our actions.³¹ Moreover, there seems to be no further *telos* to which life is the means. Such an argument, however, is doomed to fail as an argument for life’s being the ultimate value in an ethically relevant sense. If our *non-volitional* actions are bound to aim toward life, this is irrelevant, since it is not the case that the right thing to do is that to which our body prompts us. If our *volitional* actions are bound to aim toward life, we have psychological egoism, which not only fails to support the desired conclusion, but is incompatible with it. Gotthelf advances a similar line of argument against Rasmussen.³²

Rasmussen’s second argument is that “[c]hoice is not the cause of the ultimate value of life, but life as the ultimate end is the cause—in the sense of creating the need for—the activity that is choice.”³³ This is true, but trivial. It

²⁹ Allan Gotthelf, “The Choice to Value,” in *Metaethics, Egoism, and Virtue*, ed. Gotthelf and Lennox, pp. 33-46.

³⁰ Rasmussen, “Rand on Obligation and Value,” pp. 78 and 76.

³¹ See Harry Binswanger, “Life-Based Teleology and the Foundations of Ethics,” *The Monist* 75, no. 1 (1992), pp. 84-103; and Harry Binswanger, *The Biological Basis of Teleological Concepts* (Los Angeles, CA: Ayn Rand Institute Press, 1990).

³² Gotthelf, “The Choice to Value,” p. 39.

³³ Rasmussen, “Rand on Obligation and Value,” p. 77.

is true that in order to live, we must choose certain actions before other actions, and we must also (at least implicitly) make the decision to remain alive and pursue values. This, however, does not settle the issue of what is ultimately valuable.

A similar problem is present in David Kelley's rendering of Rand's argument:

In regard to point (ii),³⁴ Rand observed that *all* living organisms are capable of initiating goal-directed action, unlike rocks, rivers, and other inanimate things, which act mechanically in response to outside forces. In regard to point (iii), she observed that life versus death is the fundamental alternative that living organisms face, because it is the alternative of existing or not existing—than which you can't get more fundamental. In light of points (ii) and (iii), an organism's own life is the only thing that can be an ultimate value for it.³⁵

This argument is invalid, for it does not follow from the premises laid out by Kelley that life is the only thing that can be an ultimate value. What Kelley does is first to recapitulate Rasmussen, and then add the fact that the alternative of life and death is the most fundamental alternative we face. Rand presents the latter point as follows:

There is only one fundamental alternative in the universe: existence or nonexistence—and it pertains to a single class of entities: to living organisms. The existence of inanimate matter is unconditional, the existence of life is not: it depends on a specific course of action. Matter is indestructible, it changes its forms, but it cannot cease to exist.³⁶

Adding this, however, does not suffice. It is true that all particular values—whatever they are—exist on the side of life and not on the side of death. This, however, shows only that values *presuppose* life. Moreover, the fact that we face an alternative in this regard does not solve the problem of

³⁴ Kelley refers to three enumerated points; see David Kelley, "Choosing Life," accessed online at: <http://www.atlassociety.org/choosing-life>:

- (i) A value is a goal, something that is sought.
- (ii) A value requires a valuer capable of initiating action for the goal.
- (iii) The valuer must face an alternative: success or failure in achieving the goal must make a difference; achieving the goal must confer some benefit on the valuer and failure must bring some loss.

³⁵ Ibid.

³⁶ Rand, "The Objectivist Ethics," in Rand, *The Virtue of Selfishness*, p. 15.

ultimate value. This point is well captured by Wright, who writes, “By definition, an alternative presents one with two or more possible pathways, but the mere existence of multiple pathways does not usually settle the question of which one of them an agent ought to take; on the contrary, it usually *raises* this question.”³⁷

A possible counter-argument could be that what Kelley presents is not a deductive argument, but an inductive argument. As far as I can see, however, Kelley draws no inductive generalization. As such, I believe that both Rasmussen’s and Kelley’s arguments fail; the choice to live cannot be seen as superfluous to the justification of the principle that life is the ultimate value.

b. The argument from performative contradiction (Nathaniel Branden)

Branden acknowledges that ethics rests on a choice, yet argues that this does not jeopardize its objectivity and binding force. He does this by arguing that as long as one acts and values, “*not to hold man’s life as one’s standard of moral judgment is to be guilty of a logical contradiction.*”³⁸

Unfortunately, Branden does not present this argument in detail. Rasmussen does, however, and although Rasmussen’s aim is to reject Branden’s argument in favor of his own incompatibilism, he sketches Branden’s argument charitably. Rasmussen writes: “If life is the basic value that makes all other values possible, including even one’s valuing not to live, then a person who prefers not to live is implicitly accepting the value of life.”³⁹ He continues: “If it is true that logically one cannot value anything without valuing that which makes such valuation possible, and if life is the very thing that makes valuation possible, then the value ‘life’ is implicit in any choice or valuation a person makes, and thus in making *any* choice, one chooses to live.”⁴⁰ If this is the case, it follows that when one acts, one chooses life. Acting against life, then, is acting in a way that defies the purpose one has accepted by acting. As such, to act against life is to engage in a performative contradiction.

For the sake of argument, I will take for granted that Branden is right in claiming that every agent who chooses to act does, at least to some extent, value his life. An agent who acts has chosen to act, which implies valuing acting, which implies valuing life for the reason that life is constituted by actions. What weakens Branden’s argument, however, is that to the extent one can say that all valuing presupposes valuing life, one speaks of “valuing life”

³⁷ Wright, “Reasoning about Ends: Life as a Value in Ayn Rand’s Ethics,” p. 23.

³⁸ Branden, “The Moral Revolution in *Atlas Shrugged*,” in *Who Is Ayn Rand?* ed. Branden and Branden, p. 26.

³⁹ Rasmussen, “Rand on Obligation and Value,” p. 72.

⁴⁰ *Ibid.*, p. 73.

in a much weaker sense than Branden needs for his argument to be effective. In order to avoid contradiction, it is only required that the agent values his life to *some* extent. It is not required that he holds his life as his ultimate value. As such, a man who acts for any goal other than enhancing life—say, he is a hedonist, and aims at maximizing his long-term pleasure—could say that there is no contradiction in his actions, since of course, he values life. Indeed, he would probably say that he values life passionately. He does not, however, hold it as his ultimate value. If he says this and puts his theory into practice, one can argue against him, but one will need to do so on grounds other than an alleged performative contradiction inherent in his actions. So even though we should perhaps grant that Branden’s argument is effective against a nihilist who rejects all values,⁴¹ it fails as an argument against competing value theories.

A variant of this argument could be that if one does not choose life, one in effect chooses death, since everything but life is death. If one chooses death, moreover, one does not need values at all since, as Rand notes, “nature will take its course.”⁴² Such an argument fails for the same reason that the above argument fails, however, since it is wrong to assume that not choosing A as one’s ultimate value means that one chooses the opposite of A as one’s ultimate value. If this premise were true, a hedonist—who holds that pleasure is the ultimate value—would be right in claiming that Rand’s theory, in choosing something other than pleasure as the ultimate value, is tantamount to “choosing pain.” This is not a fair criticism of Rand, and the criticism is not fair the other way either, since a hedonist does not hold death as his ultimate value. A hedonist, though he disagrees with Rand, probably abhors death, seeing it as a fundamental threat to everything he values. After all, every pleasure, like every value, exists on the side of life. Accordingly, we should acknowledge that life can be (and is) an important value for many value theories. To the extent that it is, the argument from performative contradiction does not work.

c. *The argument from axiomaticity (Irfan Khawaja)*

Khawaja argues that we should understand “the binding force of an ultimate value by analogy with the binding force of a logical axiom.” He suggests this analogy since, as he states, “an axiom can be thoroughly conditional in its binding force without being either escapable or arbitrary.”⁴³ This, moreover, seems to be exactly what we are looking for in arguing for a binding ultimate value. What Khawaja sets out to argue is that although

⁴¹ This can also be doubted. A performative contradiction need perhaps not be a problem for a nihilist.

⁴² Rand, “Causality versus Duty,” in Rand, *Philosophy: Who Needs It*, p. 99.

⁴³ Khawaja, “Review: Tara Smith’s *Viable Values*,” p. 84.

morality is conditional on the choice to live, this does not mean that the choice is escapable or arbitrary, and as such, that it is, *ipso facto*, binding.⁴⁴

Drawing the parallel between justifying axioms and justifying the choice to live, Khawaja appeals to Aristotle's Principle of Non-Contradiction,⁴⁵ which states that a thing cannot both be and not be at the same time and in the same respect. This principle, Khawaja notes, cannot be justified in the sense that it is possible to *prove* it. It is also, in some sense, possible to abandon it. At the same time, however, this principle is neither "optional" nor "arbitrary." The reason why is that anyone who opposes the principle must take it for granted in his opposition, so in any attempt to refute the principle, the principle is reaffirmed. The principle of non-contradiction is a presupposition for all reasoning. Therefore, the only way to abandon the axiom is not to reason at all. A non-reasoner cannot make a counter-argument, however, so as long as we reason, we are bound by the axiom. Linking this to the choice to live, Khawaja writes:

As a matter of non-prescriptive fact, life can only be kept in existence by a constant process of self-sustaining action. Moreover, life is unique in this respect: it's the underlying generator of practical requirements that explains why there are practical requirements at all, themselves requiring self-sustaining action. [So life is the ultimate value.]⁴⁶

As in the case of Kelley, the conclusion does not follow. Neither does it help when Khawaja further argues that the choice to live is "escapable in the sense that one can, in principle, fully opt out of the task of aiming at one's self-preservation," but that it is escapable only in this sense.⁴⁷ Here, Khawaja's argument suffers from the same problem as Branden's: He constructs a false alternative by suggesting that to hold anything but life as one's ultimate value implies not valuing life at all. Since Khawaja offers no further argument, I believe he fails to show that there is an important parallel to be drawn between the choice to live and the axiom of non-contradiction. Gottlieb presents a similar criticism of Khawaja. Gottlieb writes that contrary to axiomatic facts,

⁴⁴ Tara Smith can perhaps be interpreted as holding the same view. See Tara Smith, *Viable Values: A Study of Life as the Root and Reward of Morality* (Lanham, MD: Rowman and Littlefield, 2000), p. 107. I agree with Khawaja, however, that based on *Viable Values*, it is hard to say where Smith stands, for she does not address this issue head on; see Khawaja, "Review: Tara Smith's *Viable Values*," p. 84.

⁴⁵ See Aristotle, *Metaphysics*, trans. W. D. Ross, in *The Complete Works of Aristotle*, ed. Jonathan Barnes, vol. 2 (Princeton, NJ: Princeton University Press, 1984), IV.3.1005a19–b33.

⁴⁶ Khawaja, "Review: Tara Smith's *Viable Values*," p. 86.

⁴⁷ *Ibid.*

“moral obligations (‘shoulds’) are not categorical or intrinsic aspects of reality”; as such, “there is no such thing as discovering the obligatoriness of the choice to live as there is discovering the truth of a metaphysical or epistemological axiom.”⁴⁸ This is another way to explain why there need be no contradiction involved in choosing an ultimate value other than life.

Khawaja does suggest that it might be instructive to look to the ways in which Rand’s view on axioms is distinct from Aristotle’s in order to see how the choice to live is axiomatic. I doubt, however, that the difference between Rand and Aristotle in this respect is relevant. If Khawaja thinks it is, he should explain how.

d. The argument from denying the applicability of “optionality” (Allan Gotthelf)

The last argument that I shall discuss is presented by Gotthelf. He is concerned both to show that Rasmussen’s interpretation of Rand is mistaken and to offer a separate way out of the problem of subjectivity. My discussion addresses the latter concern.

Gotthelf argues, contra Rasmussen, that the choice to live is not a *necessary* choice. He writes: “When one asks what facts necessitate a choice, one can mean only one of two things: what causally necessitates the choice or what morally necessitates the choice. In either sense, the answer from an Objectivist standpoint is ‘*Nothing* necessitates.’”⁴⁹ The reason for this, Gotthelf explains, is that on the first reading of “necessitates,” human volition falsifies it. On the second reading, no moral necessitation is possible with regard to the choice to live, since morality first arises after the choice is made. As such, asking what morally necessitates the choice to live, granted Rand’s context, is tantamount to asking for the weight of a number: It is the application of a concept to a context in which the concept has no meaning.

The fact that the choice to live is not necessary, however, does not imply, in Gotthelf’s view, that it is optional. His argument for this is that in the same way that “necessary” is an inapplicable concept in the present context, so is “optional.”⁵⁰ Gotthelf presents three arguments for this.

His first argument is that for optionality to be an applicable concept, there must be an overarching evaluative principle by reference to which two possible outcomes of a choice, although different in nature, are identical or roughly identical in worth. Gotthelf’s example is the optionality present in the choice of vanilla or chocolate ice cream. Provided that one should buy ice

⁴⁸ Gotthelf, “The Choice to Value,” p. 45.

⁴⁹ Ibid., p. 43.

⁵⁰ Gotthelf claims that what is true for “optional” is also true for “arbitrary,” “irrational,” and “arational”; see *ibid.* He does not, however, provide reasons for this being the case other than for “optional.” I assume that Gotthelf supposes that his argument generalizes.

cream, and provided that one has no relevant allergies, both the vanilla and the chocolate option will serve one's purposes, and as such, they are "optional values." Such is not the case, however, with regard to the choice to live. The choice to live is prior to any evaluative principle. As such, and even though the choice to live is not necessary, it is not optional either.

I find this argument unconvincing, for Gotthelf uses the concept "optional" in a problematically restrictive sense when he equates it with Rand's concept of the "optional" as used in the case of optional values. In Rand's use, optionality does indeed seem to presuppose a further evaluative principle, but it is not clear that Rand's use of the term exhausts the term's meaning. It seems plain that we face an option when we are to choose whether we shall hold life or something else as our ultimate goal, and in this wider sense, the choice to live is undeniably optional (else this debate would not arise). As such, Gotthelf's first argument does not rule out the possibility that the choice to live is optional in the relevant sense.

The second argument offered by Gotthelf is that under normal circumstances, you are—when given an option—present after you have made the choice. With regard to choosing life you are not present after choosing not to live, and thus it seems that the choice to live is not optional in any normal sense of the term "optional."

I believe that both of the central premises in this argument can be contested. First, it can be contested that it is a requirement for optionality that the agent shall be present regardless of which option he chooses. One could imagine cases of euthanasia where, granted the low quality of life, choosing to live or choosing to die seems optional. If so, it could be that although we are usually alive after having made optional choices (this has an obvious explanation), survival is not a formal requirement for the application of the concept "optional"—it is just an often-present characteristic of such choices.

Regardless of this, however, the argument fails because it takes for granted that not choosing life as one's ultimate value means choosing (imminent) death. This is a mistake, since one can commit and adhere to a wide range of ethical views without being wiped out of existence; even if one does not choose life as one's ultimate value, one can be present after that choice is made. Both Kantians and utilitarians, it seems, stay alive. As such, I believe that both Gotthelf's first and second arguments are insufficient.

Gotthelf's third argument seems unclear to me, and I am not certain that I fully grasp it. For this reason, I will quote the argument in full before examining it. Gotthelf writes:

Third, an optional choice is a choice of the normal, non-basic (or nonfundamental) type: it is a situation in which you consciously reflect on both options, and if necessary deliberate about them—a situation in which you initiate a process of *evaluation*. But if you do that in the case of a choice to live, if you consciously choose to think about the issue, you are asking its relationship to your already existing ultimate value. Barring the cases of justifiable suicide referred to by Rasmussen,

where the ultimate value is actually unachievable . . . , once you ask whether you *should* continue to live, i.e., should take the actions your continued survival requires, there is no option. The only answer, on any reasonable interpretation of Objectivism, is *yes, of course*. Have I reason to take the actions which my continued existence as a rational being requires? Yes, precisely because my continued existence requires them. A basic (or fundamental) choice not to live is not a deliberated choice; it is simply a shutting down. And if it should be the case psychologically that no one reaches that stage without first, across some time, consciously acting against his life (an issue on which I reserve judgment), then it follows that no one can exit the realm of morality guiltlessly. But once he closes down completely, he is, from that point on, as I see it, outside the moral realm.⁵¹

This paragraph initially restates the first two arguments. Thereafter, Gotthelf states that, barring possible extreme cases of justified suicide, the only answer to the question of whether one should live, is “*yes, of course*.” This is not argued for, and Gotthelf’s query and response—“Have I reason to take the actions which my continued existence as a rational being requires? Yes, precisely because my continued existence requires them”—are not an argument, but a restatement. Since I see no further argument presented, I fail to see how Gotthelf saves Rand’s theory from the problem of subjectivity.

As will become clear below, however, I am in partial agreement with Gotthelf, especially taking into account another claim of his, namely, that we have “all the reason in the world” to live.⁵² This claim implies that there are in fact reasons for living, and that once these reasons are identified, we are given reason to pursue values exactly because our continued existence requires them. As it stands, however, Gotthelf’s argument is not convincing, and it remains to be explained why one cannot, without making a mistake, choose something other than life as one’s ultimate value. This includes choosing death, and more interestingly, something else as one’s ultimate value. As such, the problem of subjectivity remains in need of a solution.

5. My Solution: The Value of Happiness

Let me preface my own suggested solution to the problem of subjectivity by stating that I agree with Gotthelf, Khawaja, and Branden (contra Rasmussen) that ethics rests on a pre-rational choice or, at least, on a pre-rational move or a pre-rational acknowledgement.⁵³ Moreover, I agree that this pre-rational choice, move, or acknowledgement is neither optional nor

⁵¹ Gotthelf, “The Choice to Value,” p. 44.

⁵² *Ibid.*, p. 43.

⁵³ I speak of “pre-rational” in a wide sense, to include “pre-moral.”

arbitrary nor escapable. At the same time, I agree with Rasmussen (contra Gotthelf, Khawaja, and Branden) that there is something to life that makes it valuable by virtue of what it is, rather than by virtue of our choice to value it.

The solution for which I shall argue is that choosing to live is conditionally rational: it is rational insofar as certain conditions are met, irrational insofar as these conditions are not met. As such, I contest Tara Smith's claim that "the choice to live is not subject to rational appraisal."⁵⁴ The condition on which the rationality of the choice to live depends, I argue, is the prospect for happiness for the agent making the choice. It is rational for an agent to choose to live if and only if she has reason to believe that life will bring more happiness than unhappiness; irrational if and only if she has reason to believe that life will bring more unhappiness than happiness.

One can imagine two immediate challenges to this proposed solution. The first challenge is that in treating the choice to live as something to be judged by reference to a further standard, I do not approach a real solution; rather, I move the problem one additional step in the regress. The second challenge is that in holding happiness as the justification for living, I deny rather than affirm that life is the ultimate value, and give in to a form of subjectivism and emotionalism that is fundamentally at odds with Rand's position. I will answer both of these challenges below. First, however, let me motivate my view.

a. Happiness as the ultimate value

If we take a step back from philosophical theorizing, and examine first-hand our lives and how we assess them, it seems plain that some lives are more worth living than others. A life of happiness and excitement, for example, seems more worth living than a life of suffering. It also seems that if one's suffering is sufficiently severe, and there are few prospects for future happiness, life might no longer be worth living. This is granted by Smith, who claims that under certain conditions, "the decision to commit suicide could also be rational."⁵⁵ If this is the case, then it seems that some features of life have the power to make it more worth living (say, friendship, love, excitement, pleasure, and health) while other features make life less worth living (say, failure, agony, pain, and disease). How can this be accounted for if life is the ultimate value? Interestingly, it is not obvious that it can. If life is the ultimate value, then how can some lives be more worth living than others, granted that "worth," like every other evaluative concept, is parasitic on "value" and "value" is parasitic on "life"? Arguably, a longer life would be better than a shorter life, but this seems not to exhaust what we are looking for. It seems that a happy life that is one day shorter than a life in misery is still a better life—but this, one might object, seems to be outside of what the

⁵⁴ Smith, *Viable Values*, p. 107.

⁵⁵ *Ibid.*, p. 144.

theory that life is the ultimate value can explain. The problem Rand's theory faces in this respect is similar to the problem hedonists face in seeking evaluatively to differentiate between "valuable" and "disvaluable" pleasures. If pleasure is that which is ultimately valuable, there cannot (ultimately) be "valuable" and "disvaluable" pleasures, since if there were, something other than pleasure would be the ultimate value. A hedonist who speaks of "valuable" and "disvaluable" pleasures uses those concepts outside of the context in which he is justified in using them, and commits the fallacy of the stolen concept. But if a hedonist cannot discriminate between valuable and disvaluable pleasures, how can someone who holds life as the ultimate value discriminate between valuable and disvaluable lives? How can it be, granted that life is the ultimate value, that happiness and joy are so important?

There seem to be two main ways to account for the value of happiness within Rand's view that life is the ultimate value, both of which I think are unsatisfactory. One way is to appeal to the fact that mental well-functioning (which Rand sometimes refers to as "psychological survival"⁵⁶), which crucially involves happiness, is vital for sustaining life. If Rand is right that our minds are our most crucial means of survival,⁵⁷ and that we must be happy and motivated for our minds to serve our lives, it is vital that we pursue happiness. Rand writes:

A chronic lack of pleasure, of any enjoyable, rewarding or stimulating experiences, produces a slow, gradual, day-by-day erosion of man's emotional vitality, which he may ignore or repress, but which is recorded by the relentless computer of his subconscious mechanism that registers an ebbing flow, then a trickle, then a few last drops of fuel—until the day when his inner motor stops and he wonders desperately why he has no desire to go on.⁵⁸

I believe that it is consistent, on the premise that life is the ultimate value, to hold happiness as an important non-ultimate value. This, however, cannot account for why happiness is important to the extent and in the way we are looking for, since appeals to psychological survival cannot explain why some lives are more worth living than others. In seeking to ground the value of happiness in psychological survival, one treats happiness as an instrumental value—as something that has value by virtue of being needed in order to support and promote life. One cannot, however, decide whether or not an

⁵⁶ See Ayn Rand, "The Goal of My Writing," in Ayn Rand, *The Romantic Manifesto* (New York: Signet, 1975), p. 169; see also Rand, "The Psycho-Epistemology of Art," in *ibid.*, pp. 16-17.

⁵⁷ See Rand, "The Objectivist Ethics," in Rand, *The Virtue of Selfishness*, p. 21.

⁵⁸ Ayn Rand, "Our Cultural Value-Deprivation," in *The Voice of Reason: Essays in Objectivist Thought*, ed. Leonard Peikoff (New York: Penguin Plume, 1990), p. 104.

ultimate value is truly valuable by reference to whether or not an instrumental value is present. As long as we have merely argued that happiness is instrumentally valuable, we would need to accept that a life filled with unhappiness and pain is quite alright if we were only able to clench our teeth and grudgingly go on living. This, however, seems wrong, since a life of happiness—by virtue of being a life of *happiness*—undeniably is more worthwhile than a life without happiness. The harmfulness of unhappiness, in other words, seems not to be exhausted by its effects on one's survival. If this is right, we cannot appeal to the importance of psychological survival to cash out why some lives are more worth living than others, and why some lives are perhaps not worth living at all.

A second suggestion could be that I misunderstand what Rand means by "life." Perhaps life, in the context of Rand's ethics, means not only a process of self-sustaining, self-generated action (to which happiness is extrinsic), but a form of flourishing (to which happiness is intrinsic). Perhaps the goal of ethics is not life as such, but what Rand calls a life suitable for man *qua* man: a life of happiness, ambition, achievement, and so on.⁵⁹

This seems like a plausible suggestion, and Rand does often operate with an enriched understanding of "living" that includes happiness. Rand explains that life's being the ultimate value does not mean "*momentary* or a merely *physical* survival Man's survival *qua* man means the terms, methods, conditions and goals required for the survival of a rational being through the whole of his lifespan—in all those aspects of existence which are open to his choice."⁶⁰ The same point is made by Rasmussen, who states that "[t]hat which is required for man's survival *qua* man is the standard of value for a human being."⁶¹ This could explain, Rasmussen notes, why "[t]here can be times in which choosing to die is better, because there might be no chance to live a life proper to a human being."⁶² Rand herself, in a 1936 letter, wrote that "any form of swift physical annihilation is preferable to the inconceivable horror of a living death,"⁶³ "living death" presumably referring to a life without happiness, ambition, achievement, and so on.

I do not doubt that there are proper and improper lives. I do, however, doubt if this position is open to Rand, granted the macrobiological rationale offered in support of her view. The reason why is that it is unclear what the concepts "proper" or "*qua* man" refer to in this context, since "proper" and

⁵⁹ Rand, "The Objectivist Ethics," pp. 24-25.

⁶⁰ Ibid, p. 24.

⁶¹ Rasmussen, "Rand on Obligation and Value," pp. 76-77.

⁶² Ibid, p. 84 n. 9.

⁶³ Ayn Rand, "Letter to John Temple Graves" (July 5, 1936), in *Letters of Ayn Rand*, ed. Michael Berliner (New York: Penguin Plume, 1997), p. 33.

“*qua* man”—just as “worth,” which I discussed above—are parasitic on “value,” and “value,” in turn, is parasitic on “life.” Thus it seems that in order to attain the desired result of the “man *qua* man” argument, the expression “man *qua* man” must be used equivocally.

In one sense of the statement that man must live a life proper to “man *qua* man,” the statement is obviously true. Man has a certain nature, and if he is to live, he must live in accordance with this nature. If he tries to live life not as a man, but as a snail, a hippopotamus, or a bed bug, he will fail to perform the actions that his nature requires, if he is to go on living.

This is uncontroversial, however, and seems not to exhaust what Rand means by the claim that man must live a life proper for man *qua* man. Rand seems to mean something stronger, namely, that within the realm of lives open to and possible for man, some lives are better than others—not just that some lives are impossible.

Here is the equivocation: In justifying the “*qua* man” hypothesis, Rand seems to use the descriptive sense of “man *qua* man,” stating that a man must live in accordance with his nature in order to live. When applied, however, the expression is used in the prescriptive sense, to point to certain ways—among those open to him—in which he *should* live and certain other ways in which he *should not* live. Rand leaps, or so it seems, from a description to a prescription—and this prescription seems to lie outside of what can be justified by the strict doctrine that life is the ultimate value.⁶⁴ I think it is easy to accept Rand’s theory that life is the ultimate value—and to accept in conjunction with it the view that happiness is intrinsically more valuable than unhappiness—without asking whether the latter follows from or is consistent with the former. On the standard understanding of Rand’s theory of ultimate value, I believe they are inconsistent. In another understanding, however—an understanding which grants that in one sense, *happiness is the ultimate value*—the problem is resolved.

In order to justify this, let me start by re-examining one of the cases discussed above: that of the indestructible robot. As we saw, Rand uses the example of an indestructible robot—“which moves and acts, but which cannot be affected by anything, which cannot be changed in any respect, which cannot be damaged, injured or destroyed”—as an example of a being that “would not be able to have any values.”⁶⁵ Rand’s aim with this thought-experiment seems to be to illustrate that without the fundamental alternative of life or death, there can be no values.

⁶⁴ A similar objection has been raised by Michael Huemer in his “Critique of ‘The Objectivist Ethics,’” accessed online at: <http://home.sprynet.com/~owl1/rand5.htm>. Huemer describes “*qua* man” as a “fudge word” that can be bent to “mean whatever it is convenient for [it] to mean at a particular time.”

⁶⁵ Rand, “The Objectivist Ethics,” in Rand, *The Virtue of Selfishness*, p. 16.

Insofar as this is Rand's aim, her thought-experiment fails. It fails because it seems that we can have destructible robots without values and indestructible robots with values. We can see this if we carefully examine the example.

Imagine, first, that we have a robot that is destructible, and that must (and can) act in certain ways in order to avoid destruction. Do we know, solely from this description of the robot, that the robot has a reason to act in some ways rather than others? I believe we do not. For practical reasons to enter the picture, the robot would need something more, like the ability to feel happiness and unhappiness, joy and suffering. Without such an ability, none of its actions would seem to be of significance to the robot. Its actions would merely be various instances of moving stuff around, and its life—the aggregate of its stuff-moving activities—would also be an instance of moving stuff around. It is not clear how engaging in stuff-moving, however, would have any meaning or significance to the robot, and thus it seems hard to grasp why its life would be of any value to it. After all, it would not *care*. If this is right, then it seems that we can have a destructible robot without values. If we can have a destructible robot without values, moreover, destructibility (in conjunction with the option of avoiding destruction by acting in a certain way) is insufficient for value.

In order to illustrate that destructibility is not only insufficient, but also unnecessary, we need an example of a robot that is *indestructible* yet has values. I believe that we can find such an example, if we imagine that the robot is sentient. Imagine, therefore, a robot that cannot go out of existence, but that has a full repertoire of human emotions. It can feel happiness and joy, agony and pain. It will, for example, experience strong sadness if its house burns down. Would this robot, in spite of never being able to go out of existence, have a reason not to burn down its house? Would its house be a value to the robot? It seems plain that it would.

An objection to this thought-experiment could be that a robot that does not confront the alternative of life or death could not be sentient either. Sentience, it could be argued, has the function of prompting us toward life-promoting actions, and without the option of life or death, the pleasure/pain mechanism would be purposeless. My reply to this objection is that the purposelessness of sentience does not imply the impossibility of sentience—and as such, that there is nothing formally wrong with the thought-experiment. In a functional and evolutionary sense, it is true that the *telos* of sentience is to promote life and reproduction, so if we all suddenly became indestructible, sentience would (to the extent that it is biologically costly and thus taxes resources that could be used for reproduction) gradually wither away. This does not, however, have any impact on the metaphysical possibility of a being that is indestructible yet experiences happiness and suffering.

Alternatively—and this is sufficient for the present purposes—we can imagine a normal human being who is placed in a position where none of her actions can affect her life, and not because she is metaphysically indestructible, but because her range of action has been severely restrained.

Even under such conditions, it seems that her actions would have value-significance for her, insofar as she is sentient and her actions affect her hedonic level, regardless of whether the end result of her actions could promote or destroy her life.

Here is a scenario to consider.⁶⁶ Imagine that you are about to undergo surgery and you are given the option of buying anesthetics for \$5. If you choose to do so, you will feel a tiny pin prick, fall asleep, and wake up again after the surgery. If you choose not to buy anesthetics, the surgery will be excruciatingly painful. The end result, however, will not be affected by what you choose, since if you do not buy anesthetics, the nurses will skillfully strap you to the hospital bed so that you cannot move a limb, and the surgeon will use earplugs so that your screams will not disturb him. Apart from the excruciating pain, therefore, nothing hinges on whether or not you buy the anesthetics. (Imagine, for the sake of the thought-experiment, that you will not suffer any psychological problems after the operation.) Granted this, would you have a reason to spend \$5 of your savings on anesthetics, even if this affects nothing but your pain level? It seems plain that you would. At the same time, it seems plain that in the relevant sense, you would be in the same situation as a sentient indestructible robot.

We can also think of other examples. Imagine, for instance, that you know that you will be executed tomorrow at noon. You are given a choice, however, regarding the execution method. You can choose between being executed with a lethal injection—which will make you die in ten minutes—or by crucifixion—which will make you die in two days. Which execution method should you choose? It seems plain that you should choose lethal injection, even if you get a longer life by choosing crucifixion, and the reason why you should choose lethal injection seems to be that crucifixion is extremely painful, while lethal injection is much less painful.⁶⁷

As a last example, imagine that you have caught a vicious disease. The disease will kill you in two years, but it will not be painful until the last days before you die. You then get the option of buying a medicine that halts the development of the disease. It costs 75% of your salary, so buying the medicine will make you very poor; it has bad side-effects, so you will feel constantly nauseated; and it will only extend your life by two to three months. Should you buy the medicine? Here, it seems that if the poverty and the nausea are sufficiently bad, you should not buy the medicine. Instead, you should enjoy your last two years in health with enough money to live comfortably—even if this means saying “no” to two to three additional months of living.

If these examples illustrate what I believe they do, it seems that sentience is crucial to value—perhaps so crucial that what is ultimately

⁶⁶ I owe this example to Ivar Labukt.

⁶⁷ Thanks to Alexander R. Cohen for suggesting this example.

valuable is not life as such, but a certain kind of mental state—happiness or enjoyment—and that what is ultimately disvaluable is not death as such, but unhappiness or suffering. Can this be right?

b. Challenge #1

The first challenge raised above was that positing that happiness rather than life has ultimate value, cannot be a solution to the problem of ultimate value, since it merely moves the problem one step ahead in the regress. Rather than facing the problem of justifying life as the ultimate value, the objection states, we would—if we suggest that happiness is the ultimate value—face a similar problem of justifying happiness instead, with all of the same problems still ahead.

Within the limits of this article, I cannot expect to settle the dispute. I will be content with explaining why it is argumentatively less costly to justify the ultimate value of happiness than the ultimate value of life.⁶⁸

The first reason is that the view that happiness is the ultimate value seems to be much more in line with both how we view our lives and how we view imaginary cases. It seems very clear that there are lives worth living and lives not worth living. It seems far from clear, however—keeping all else equal—that there is happiness worth having and happiness not worth having. Unless we are misguided in holding such priorities, it seems that happiness is a value according to which life should be evaluated.

The second reason concerns the prerequisites for being committed to values at all. I concede that regardless of whether happiness or life is that which is ultimately worth having, a pre-rational move or a pre-rational acknowledgement is required to be bound by values. There is a crucial asymmetry, however, between the pre-rational move required for life to be the ultimate value and the pre-rational move required for happiness to be the ultimate value.

If life is the ultimate value, this pre-rational move is—in Rand’s words—a “choice.” “Choice” is an apt word, since what one faces is genuinely a choice: Among all the things that it is possible to hold as one’s ultimate value, one is urged to choose one among these, namely, life. In the case of happiness, however, it seems that one would not make a choice, but rather, acknowledge a fact. I, for one, do not *choose* that happiness is better for me than suffering is. I *acknowledge* that happiness is better than suffering, and granted the kind of being I am, I cannot acknowledge otherwise. This is why there is a sense in which I side with Rasmussen, who holds that there is something intrinsic to that which is ultimately valuable that makes it valuable, and that this value does not hinge upon an act of choice. Of course, I am forced to admit that if someone truly does not acknowledge or experience the fact that happiness is better than suffering, he or she does not enter the realm

⁶⁸ I discuss this in considerably more detail in my doctoral dissertation, “Hedonism and the Mystery of Value” (PhD Diss., University of Oslo, forthcoming).

of values and could not be argued into doing so. Stepping outside of the realm of values, however, seems harder in the case of happiness than in the case of life as the ultimate value, since in the case of happiness, the bar for entering the realm of values has been lowered. One would need to be a metaphysically different being from the one I am in order to be neutral with respect to happiness and suffering. Thus, if happiness is the ultimate value, even the life-hating terrorist in Wright's example would be bound by values, insofar as he is able to experience happiness and suffering, and he sees that happiness is better than suffering. Only if he truly does not experience that happiness is better than suffering could we say that he is beyond good and evil.⁶⁹ Since the goodness of happiness is less escapable than the goodness of life, the view that happiness is the ultimate value seems more apt at ending the regress than does the view that life is the ultimate value. So much for the first challenge.⁷⁰

c. Challenge #2

The second challenge is that the view that happiness is the ultimate value, rather than being a vindication of Rand's view, constitutes surrender to the very emotionalism and subjectivism that Rand attacks. I believe that this is false and, in fact, that the view that happiness is the ultimate value—in one specific sense of that statement—is compatible with, and might be, Rand's view.

Let me start by surveying some examples of where happiness is treated as an ultimate value in Rand's writings and in the secondary literature on Rand. In *The Virtue of Selfishness*, Rand seems to hold that happiness is the ultimate reason for living when she writes, "It is by experiencing happiness that one lives one's life, in any hour, year or the whole of it. And when one experiences the kind of pure happiness that is an end in itself—the kind that

⁶⁹ This is so, I believe, because the view that happiness is the ultimate value is more in line with a Humean moral psychology than is the view that life is the ultimate value. Humean moral psychology holds that to get motivation into a chain of reasons, one must ultimately appeal neither to a state of affairs in the world nor to causal relations in this world, but to an emotional state or to some form of valenced experience. If one believes that happiness is that which ultimately benefits an agent, one holds that that which ultimately supplies us with reasons for action is indeed a form of hedonically valenced experience. If life is the ultimate value (in the strict sense), the ultimate value is a certain state of affairs (the functioning of the organism according to certain ideals). This suggests that the view that happiness is the ultimate value is compatible with a Humean view of moral motivation, whereas the view that life is the ultimate value is not.

⁷⁰ Clearly, more work must be done in order to ground securely the identification of ultimate value with happiness or enjoyment. One path to doing so could be to use Rand's methodology, and seek to establish how our concepts of "good" and "bad," "valuable" and "disvaluable," have their source not in observing biological processes, but in experiencing enjoyment and suffering. That, however, is a project for another occasion.

makes one think: ‘*This is worth living for*’.”⁷¹ Branden, in the same collection of essays, writes, “Through the state of enjoyment, man experiences the value of life, the sense that life is worth living, worth struggling to maintain.”⁷² That happiness gives life value is also conceded by Wright, who claims, “To find one’s life worth living, then, must be to experience the process of living—the activities that define and give substance to one’s life—as intrinsically motivating, as a source of pleasure and fulfillment.” Wright concludes by saying (giving the most explicit formulation of this point in the secondary literature on Rand), “Of course, it is primarily for the psychological rewards of living that we do want to live; merely soldiering on as a physical organism has no independent value for us.”⁷³

Smith, after having argued that there is no rational answer to the question of what makes life worth living, claims that “[m]y point is not to deny that life is worthwhile,” and writes that “the choice depends on what kind of experience a given individual finds satisfactory.” This seems to allow for the possibility that we can judge whether or not a life is worth living by reference to a further standard, and later in the same paragraph, Smith writes that we can judge the value of life according to “the prevalence of unhappiness or pain in the world.”⁷⁴

Kelley seems to embrace the same position when discussing a poster listing “50 Reasons for Living,” where these reasons include things such as balloons, ice cream, hugs, Thanksgiving, and flowers. He uses this example to illustrate that you cannot reason someone into choosing life other than ostensibly, by pointing to the different things that bring happiness—just as the poster does. The interesting question to pose in response to Kelley’s position is the following: How could such pointing make sense, if the value of life does not hinge on happiness? In both the view that life, in the biological sense, is the ultimate value and in the view that happiness is the ultimate value, it is true that one could never non-ostensively reason a person into choosing to live. If life, in the biological sense, were the ultimate value, however, it is not clear how the ostensive would be of any more help than the non-ostensive. If the value of life does not hinge upon happiness, how could an act of pointing to elicitors of happiness help to justify choosing life? It seems that in the strict sense of the doctrine that life is the ultimate value, the choice to live would have to be made without regard for the experiential content of life. These hints from Rand, Branden, Smith, Wright, and Kelley,

⁷¹ Rand, “The Objectivist Ethics,” in Rand, *The Virtue of Selfishness*, p. 29.

⁷² Nathaniel Branden, “The Psychology of Pleasure,” in Rand, *The Virtue of Selfishness*, p. 61.

⁷³ Wright, “Evaluative Concepts and Objective Values: Rand on Moral Objectivity,” pp. 174 and 176.

⁷⁴ Smith, *Viable Values*, p. 107.

on the contrary, point toward the view that happiness is what benefits us as agents and makes our lives worth living. How, if at all, can this be reconciled with the view that life is the ultimate value?

One way to reconcile the view that life is the ultimate value with the view that happiness is the ultimate value could be to suggest that Rand means the same thing by life and happiness. If she does, the claims that “life is the ultimate value” and “happiness is the ultimate value” would be equivalent. This, however, seems not to be Rand’s view. Happiness, in her view, is a state of consciousness, specifically, “the state of consciousness that results from the achievement of one’s values.” Life, by contrast, she defines as “a process of self-generated, self-sustaining action.”⁷⁵ Although life and happiness are closely related, they cannot be identical, since they refer to things with different ontological status—happiness is a state of consciousness, while life is a process.

Another way to reconcile the view that life is the ultimate value with the view that happiness is the ultimate value could be to suggest that the expression “ultimate value” is ambiguous. “Ultimate value” may have two different meanings, so that in one sense, life is the ultimate value, in another sense, happiness is the ultimate value. I think that this is a more promising path, and to see why, we need to look at an often-neglected distinction drawn by Rand between “purpose” (or “ultimate purpose”) and “standard of value.” Rand explains, “The difference between a ‘standard’ and a ‘purpose’ [is that] a ‘standard’ is an abstract principle that serves as a measurement or gauge to guide man’s choices and actions in the achievement of a concrete, specific purpose.” Adding substance to her concepts, Rand writes that “Happiness can properly be the *purpose* of ethics, but *not* the *standard*.” The “standard of value,” she writes, is “life.”⁷⁶

This statement is worth a pause for careful consideration. What Rand introduces is a separation between our ultimate “purpose,” which is happiness, and our ultimate “standard of value,” which is life. This distinction has an air of paradox to it. On the one hand, Rand claims that the purpose of life—the reason that makes it worth engaging in—is happiness. On the other hand, she claims that what we should use as our yardstick to determine whether or not a certain course of action is proper, is not happiness but *life*. How can it be that if happiness is the thing ultimately worth having for its own sake, then life is what we should ultimately pursue?

If we understand Rand’s view on the nature of happiness, though, the view does not seem as paradoxical, since on this view, it could be that even though the benefit that makes life worthwhile is happiness, what we need to

⁷⁵ Rand, “This Is John Galt Speaking,” in Rand, *For the New Intellectual*, pp. 123 and 121.

⁷⁶ Rand, “The Objectivist Ethics,” in Rand, *The Virtue of Selfishness*, pp. 25, 29, and 16.

do in order to reap this benefit is not to pursue happiness, but to pursue life. As we saw, happiness, according to Rand, is the state of consciousness that proceeds from the pursuit of one's values.⁷⁷ If this is correct, then happiness is causally dependent on values. To the extent that we value something, Rand holds, we will typically experience happiness after having successfully pursued it. Conversely, we will typically experience unhappiness after having failed in pursuing it. To the extent that we value our careers and our friends, therefore, we will tend to be happy when our careers go well and our friendships grow stronger, and tend to be unhappy when our careers decline and our friendships grow weaker. In Rand's formulation, "Emotions are the automatic results of man's value judgments integrated by his subconscious."⁷⁸

An implication of this view is that to the extent that we can choose between different values, we are—within certain measures—plastic with respect to what gives us emotional gratification. This seems intuitively correct. Those who favored Barack Obama in the 2012 U.S. presidential election seemed to be happy when he won. Those who favored Mitt Romney seemed not to be happy. The difference in emotional reaction, moreover, seemed to stem from the difference in their value-judgments about Obama and Romney. Because the Obama supporters judged Obama to be the superior candidate, they felt good when he won; because the Romney supporters judged Romney to be the superior candidate, they felt bad when he lost. How we feel about something, it seems, depends on how we judge it.

Explaining Rand's view on emotions, Leonard Peikoff writes, in a piece endorsed by Rand, that happiness is "not a psychological primary; it is a consequence, an *effect*, of one's previously formed value-judgments." This has an important implication for the practice of pursuing happiness. Peikoff writes: "To say, therefore, that men should determine their values by the standard of what gives them pleasure, is to say: 'Men should determine their values by the standard of whatever they already value.'" This, Peikoff observes, would be "circular," "content-less," and, ultimately, "suicidal," since it would lead us into a circle where we do nothing but pander to our own biases. Doing so, moreover, seems not to be the way to achieve happiness.⁷⁹

To illustrate this point, imagine that you had grown up being told that homosexuality is disgraceful, and had come to internalize this view, feeling disgust at the thought of a romantic relationship between two persons of the same sex. Then one day your best friend tells you he is gay. How would you react? If you were an emotionalist, in Rand's sense of the term, you would most likely condemn him. After all, what he said would be emotionally

⁷⁷ Rand, "This Is John Galt Speaking," in Rand, *For the New Intellectual*, p. 123.

⁷⁸ Rand, "The Objectivist Ethics," in Rand, *The Virtue of Selfishness*, p. 27.

⁷⁹ Leonard Peikoff, "Why Does Objectivism Reject Ethical Hedonism?" *The Objectivist Newsletter* 1, no. 2 (February 1962), p. 7.

disturbing. The problem with condemning him, however, is that you would be condemning someone whom you have no good reason to believe has done anything wrong or who poses any threat to you. As such, condemning him might well mean throwing away a valuable friendship. It might be that if you had forced yourself to remain calm and had carefully reconsidered your views, you would have come to continue enjoying a highly rewarding friendship, and gradually, your emotions would have adjusted to your new, consciously reasoned value-judgments.

The plasticity of what gives us emotional gratification, therefore, has implications for how happiness is achieved: One does not achieve happiness merely by doing what gives one pleasant emotions. In Rand's words, "Happiness is not to be achieved at the command of emotional whims. Happiness is not the satisfaction of whatever irrational wishes you might blindly attempt to indulge."⁸⁰ If this is right, it seems that happiness can be that which ultimately benefits an agent without happiness itself being the proper evaluative standard according to which an agent should guide his actions. It might be that in order to achieve happiness, an agent must hold as his standard of value not happiness, but something external to his emotions—for example, his *life*. Perhaps holding life as one's ultimate value and acting accordingly is the best means to achieve happiness. Whether or not this is in fact true is ultimately a psychological issue, but it seems like a plausible suggestion.

In pursuing life as one's ultimate aim, one performs actions that naturally—due to our biological makeup—are both enjoyable and conducive to further enjoyment. One will also, over time, adjust one's emotions to reward what promotes one's life, and as such learn to find enjoyment in that which is conducive to further enjoyment, and one will make one's life a unified project, without contradictory values tearing one apart. This integrates well with Rand's description of happiness as "a state of non-contradictory joy."⁸¹ Indeed, by pursuing life, one pursues that which is the very source of one's happiness: one's status as a valuer. If life is a process of self-generated, self-sustaining action,⁸² then life is crucially the activity of valuing, so to value life, in an important sense, is to value valuing. To value valuing in order to achieve happiness, moreover, makes a lot of sense, if Rand is right that happiness is the "state of consciousness that proceeds from the pursuit of one's values." As such, it is not far-fetched to hold that in order to reach long-term happiness, one should hold life as one's ultimate value.

If we achieve happiness by aiming at life, this is a form of indirect teleology. Indirect teleology refers to cases where, in order to attain

⁸⁰ Rand, "This Is John Galt Speaking," in Rand, *For the New Intellectual*, p. 132.

⁸¹ Ibid. Thanks to Alexander R. Cohen for reminding me of this formulation.

⁸² Ibid., p. 121.

something, one must aim at something else. This is a fairly common form of teleology. Think, for example, of an archer who must aim above the bull's eye in order to hit it. Another example might be that of a jogger who jogs up a hillside for the health benefits this brings. Even though good health is the jogger's purpose, the jogger would not aim directly at his purpose when he jogs. When jogging, he would aim at getting up the hill. If he were to try directing his jogging by aiming for health, he would be paralyzed, and would not be able to get the health benefits he would have gotten had he managed to focus on the concrete task ahead. If this generalizes to issues involving happiness, it could be that happiness is gained as a byproduct of taking part in life-promoting activities. If so, it could plausibly be argued that although happiness is that which ultimately benefits an agent, life is the proper ultimate standard in practical reasoning. As such, it could be that although happiness is the ultimate benefit, we are—in one sense—justified in stating that life is the ultimate value, if by “ultimate value” we mean ultimate standard in practical reasoning.

This seems to be Rand's view, moreover, since she writes that “[t]he difference between a ‘standard’ and a ‘purpose’ [is that] a ‘standard’ is an abstract principle that serves as a measurement or gauge to guide man's choices and actions in the achievement of a concrete, specific purpose,” and while the “standard of value” is “life,” “[h]appiness can properly be the *purpose* of ethics, but *not* the *standard*.”⁸³ Rand also writes that “[i]t is only by accepting ‘man's life’ as one's primary and by pursuing the rational values it requires that one can achieve happiness—not by taking ‘happiness’ as some undefined, irreducible primary and then attempting to live by its guidance.”⁸⁴

6. Conclusion

It might or might not be correct that Rand uses the phrase “ultimate value” to refer to two different things: that which is ultimately worth pursuing, happiness, and that which is the standard by which we determine how to act, life. Regardless of whether or not this is in fact Rand's view, it does provide a path out of the problem of subjectivity.

The problem of subjectivity, to recapitulate, is the problem of reconciling two aspects of Rand's theory. On the one hand, Rand's theory relies on a pre-rational move, and on the other, it requires mandatoriness and objectivity. So as to clarify how accepting that happiness is the ultimate benefit can help us to solve this problem, and thus provide a justification for valuing life, let me explain how this view can rely on a pre-rational move yet retain its mandatoriness and objectivity.

The view that happiness is the ultimate benefit, and thus the ultimate reason for living, depends on a pre-rational move in the sense that it depends

⁸³ Rand, “The Objectivist Ethics,” in Rand, *The Virtue of Selfishness*, pp. 25 and 29.

⁸⁴ *Ibid.*, p. 29.

on the recognition of the fact that happiness is better than suffering. This move is pre-rational in the sense that one cannot reason anyone into acknowledging it (other than ostensively, by pointing). In spite of the fact that this pre-rational move is required for entering the realm of values, however, the view is mandatory for the reason that it depends on an *acknowledgement* or a *recognition* rather than on a choice. Insofar as one is a sentient being for whom happiness is better than suffering, no act of choice can remove an agent from the realm of values. The view is objective, moreover, since in any given situation, what is valuable and what is disvaluable to an agent is an objective fact. Neither the fact that happiness is mind-dependent, nor the fact that emotional-reaction patterns are plastic, threatens the objective and factual nature of what will be conducive to an agent's long-term happiness.

If this argument holds—and if it is true that in order to achieve happiness, one should hold life as one's ultimate aim in practical reasoning—it seems that we have arrived at a way to save the view that life is the ultimate value from the problem of subjectivity.

Self-Ownership and Justice in Acquisition

Lamont Rodgers
Tulane University

1. Introduction

Edward Feser has argued not only that there have been no unjust initial acquisitions, but that there cannot be.¹ He reaches this judgment by way of an argument to show that questions of justice do not apply to acquisitions. If this thesis is correct, it blocks the claim that since many current holdings are the result of unjust initial acquisitions, they must be rectified by a scheme of redistributive taxation. Importantly, Feser thinks he can block this claim while not giving up the self-ownership proviso (SOP) that Eric Mack has developed.² Feser regards Mack's SOP as "a major contribution to the theory of self-ownership and to libertarian theory in general."³

Section 2 of this article sketches Robert Nozick's entitlement theory and Mack's SOP, both of which Feser accepts. I then construct the argument Feser wishes to block. Section 2 ends with a presentation of Feser's argument to show that questions of justice do not apply to acquisitions.

Section 3 constructs two arguments. The first finds within Feser's position a rationale for believing that questions of justice do apply to acquisitions. This argument is generated by distinguishing between possessive

¹ Edward Feser, "There Is No Such Thing as an Unjust Initial Acquisition," *Social Philosophy & Policy* 22 (2005), pp. 56-80. There are other ways of arguing for Feser's thesis. Most of those arguments turn on denying the self-ownership proviso. I do not argue against that move here, since Feser does not wish to make it. Also, the arguments presented here may not be a problem for Feser himself. He has moved from the position he defends in "There Is No Such Thing as an Unjust Initial Acquisition"; see Edward Feser, "Reply to Block on Libertarianism Is Unique," *Journal of Libertarian Studies* 22, no. 1 (2010), pp. 261-72. Still, I speak as if I am addressing Feser's position so as to avoid syntactic oddities.

² Eric Mack initially constructed the proviso in his "The Self-Ownership Proviso: A New and Improved Lockean Proviso," *Social Philosophy & Policy* 12 (1995), pp. 186-215. He takes up the topic again in "Self-Ownership, Marxism, and Egalitarianism, Part II: Challenges to the Self-Ownership Thesis," *Politics, Philosophy & Economics* 1, no. 2 (2002), pp. 237-76.

³ Feser, "There Is No Such Thing as an Unjust Initial Acquisition," p. 76.

acquisitions, on the one hand, and destructive and consumptive acquisitions, on the other. Feser's position allows for the latter sort of acquisitions to fall under the purview of justice. Crucial to Feser's position is the idea that an acquisition can violate the SOP only if some other individual had a right to the acquired object. The second argument I construct shows that the acceptance of the SOP requires the rejection of this claim. The upshot is that Feser must choose between two alternatives. He must either give up the SOP or he must admit that questions of justice do apply to acquisitions.

In Section 4, I first reinforce the argument to show that there can be unjust initial acquisitions. This is accomplished by blocking two objections. The first is an attempt to wiggle out of the argument presented in Section 3. The second is an attempt to show that the argument from Section 3 proves too much. Perhaps this article shows that it is too easy for there to be unjust initial acquisitions, so surely there have been many, and thus redistributive taxation is justified. This conclusion is blocked by referring to Feser's separate, powerful argument to block the claim that a scheme of redistributive taxation is justified as a means of rectification, *even if there can be unjust initial acquisitions*. So the fact that there can be unjust initial acquisitions does not by itself justify redistributive taxation. We can only demand compensation and rectification from those who have done wrong. The entitlement theory is historical, so the fact that there *could* be unjust initial acquisitions does not show that justice demands that we act as if everyone has committed them. However, this article shows that, contrary to what Feser argues, we cannot regard unjust initial acquisitions as conceptual impossibilities.

2. There Are No Unjust Initial Acquisitions

Feser begins his discussion by articulating the motivation for his thesis:

If, as nearly all of Nozick's commentators, friendly and unfriendly, agree, Nozick fails to give an adequate theory of justice in acquisition, then his libertarianism appears to have at most *partial* foundations, and this may be enough to undermine it. For if, contrary to what Nozick implies, existing inequalities in holdings reflect significant injustices in the initial acquisition of resources, then redistributive taxation of a sort incompatible with Nozick's libertarianism may be justified.⁴

Nozick's entitlement theory consists of three parts. Individuals can acquire portions of the unowned world, they may transfer their holdings, and they may engage in transfers and acquisitions that are just or unjust. Accordingly, the three parts of the theory are an account of justice in acquisition, an account of justice in transfer, and an account of rectification of unjust acquisitions and transfers.

⁴ Ibid., p. 57.

I ignore justice in transfer here, because it is not particularly relevant to Feser's thesis. Of course, he does claim that all past injustices were the result of unjust uses of property, and some of those uses may count as unjust transfers. However, the primary concern for this article is whether considerations of justice apply to acquisitions; if they do, then unjust acquisitions need to be rectified.

In most discussions of justice in acquisition, two questions arise. The first question is how an individual can generate private property rights in the external world. The second question is whether there are limits on how the acquisitions of some may bear on the situation of others. The first question receives no treatment here, because Feser's argument is aimed entirely at showing that the *second* question of justice in acquisition requires no answer.⁵ Accordingly, the present article is directed at the second question of justice: Are there limits on how the acquisitions of some may bear on the condition of others? Feser's argument is that the question of how one individual's actions can bear on another arises only in relation to *uses* of property. Thus, this article focuses on whether there is a way to use Feser's argument for that conclusion to show that there can be unjust acquisitions.

On the second question of justice, Nozick writes that acquisitions are unjust if they prevent individuals from "improv[ing their] situation by a particular appropriation or any one."⁶ What Nozick wants his proviso to do is prevent the acquisitions of some from putting others in a position where they cannot improve their lives via an acquisition. To illustrate the sort of thing he wishes to prevent, Nozick has us imagine an individual acquiring the lone water hole in a desert.⁷ This individual then either precludes others from accessing the water altogether, or allows access only if others pay some exorbitant fee. Nozick thinks there is something wrong with the behavior of the owner of the water hole, and his proviso is intended to explain what that is.

When individuals engage in unjust acquisitions, they owe others compensation. That compensation can be some sort of payment, but it can also be the case that the acquisition itself creates more opportunities for others to

⁵ There may be a back-door response to Feser. Such a response would show that the most plausible answer to the first question of justice in acquisition requires us to believe that acquisitions can be unjust. However, that route is not essayed here. One reason for not pursuing the back-door strategy is that the present article shows that it is unnecessary, for there is available a more direct rebuttal of Feser.

⁶ Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), p. 176. The violation of the proviso is a sufficient, but not necessary, condition for injustice in acquisition. For a discussion of this issue, see Eric Mack, "The Natural Right of Property," *Social Philosophy & Policy* 27, no. 1 (2010), pp. 53–78.

⁷ Nozick, *Anarchy, State, and Utopia*, p. 180.

improve their situations. John Locke defends this idea in the following passage:

[H]e who appropriates land to himself by his labour, does not lessen, but increase the common stock of mankind. For the provisions serving to the support of human life, produced by one acre of enclosed and cultivated land, are (to speak much within compass) ten times more than those which are yielded by an acre of land of an equal richness, lying waste in common. And therefore he that encloses land, and has a greater plenty of the conveniences of life from ten acres, than he could have from a hundred left to nature, may truly be said to give ninety acres to mankind. For his labour now supplies him with provisions out of ten acres, which were but the product of a hundred lying in common.⁸

While Nozick expresses very much the same idea, he judges that not all acquisitions allow others the opportunity to improve their situation. When this happens, the acquisitions are unjust and need to be rectified. As Feser observes in the quotation that begins this section, Nozick grants that unjust acquisitions are possible. This concession opens the door to the claim that many current holdings result from past unjust initial acquisitions. Thus, the argument goes, significant redistributive taxation is justified in order to rectify those past injustices. The upshot of this would be that the libertarianism Nozick defends is not something we can implement immediately. Of course, this shows that Feser overstates his case. If current taxation *is* rectification of past unjust acquisitions, there is no incompatibility between libertarianism and taxation. What Feser must mean is that it would be a long time before we can get to a minimal, tax-free (but not dues-free) state that Nozick endorses as the ideal.⁹

Justice in acquisition is, for Nozick and Locke, underpinned by the self-ownership thesis. This thesis is a normative claim about who has discretionary power over persons and their world-interactive powers. The persons and powers that are owned are simply “bodies, faculties, talents and energies.”¹⁰ The concept of self-ownership thus introduces a reflexive relation

⁸ John Locke, *The Second Treatise of Government*, in *Two Treatises of Government*, ed. Peter Laslett (Cambridge: Cambridge University Press, 1988), sec. 37. Spelling modernized.

⁹ It is the ideal unless individuals contract into more extensive states. Nozick rejects the idea that there is one social arrangement that is best for everyone apart from the framework for utopia that protects side-constraints; see Part 3 of *Anarchy, State, and Utopia*, p. 312.

¹⁰ Eric Mack, “Self-Ownership, Marxism, and Egalitarianism, Part I: Challenges to Historical Entitlement,” *Politics, Philosophy & Economics* 1, no. 1 (2002), p. 76.

between what owns and what is owned. The thing that owns has ownership over itself.¹¹

Part of the task of a fundamental moral norm is to explain common moral judgments. Some of the appeal of the self-ownership thesis lies in its ability to explain why “unprovoked acts of killing, maiming, imprisoning, enslaving, and extracting labor from other individuals” are wrong.¹² Each of these actions in some way violates the ownership rights individuals have over themselves and their world-interactive powers.

Another task of any fundamental moral norm is to limit how individuals may treat each other. The self-ownership thesis claims that it is only the individual who rightly has discretionary control over his body, mind, and powers. It is only if some contractual agreement or other abdication of rights changes this that an individual can lose ownership rights over himself.¹³ The self-ownership thesis poses a limitation on how individuals may treat each other, and this limitation is called the self-ownership proviso (SOP).

The SOP has been articulated mostly by Eric Mack. The SOP claims that, morally speaking, we are not allowed to employ our holdings in a way that nullifies the world-interactive powers of others. These world-interactive powers include the individual’s “capacities to affect her extra-personal environment in accord with her purposes.”¹⁴ As Mack sees it, these powers are “essentially relational. The presence of an extra-personal environment open to being affected by those powers is an essential element of their existence.”¹⁵ Because the powers individuals own are essentially related to an extrapersonal environment, Mack presents the following argument:

I maintain that recognition of persons’ rights over their world interactive powers, and of the essentially relational character of these powers, supports an “anti-disablement constraint” according to which individuals may not deploy themselves or their licit or illicit holdings in ways that severely, albeit noninvasively, nullify any other agent’s capacity to bring her talents and energies purposively to bear on the world. The SOP is a special case of this anti-disablement constraint.¹⁶

¹¹ This is G. A. Cohen’s helpful explanation; see his *Self-Ownership, Freedom, and Equality* (Cambridge: Cambridge University Press, 1995), pp. 69 and 211.

¹² Mack, “Self-Ownership, Marxism, and Egalitarianism, Part I,” p. 76.

¹³ Crimes, insanity, and the like may account for the “other abdications” I mention above.

¹⁴ Eric Mack, “The Self-Ownership Proviso: A New and Improved Lockean Proviso,” p. 186.

¹⁵ *Ibid.*

¹⁶ *Ibid.*, p. 187.

The SOP is distinct from the Lockean proviso that Nozick offers. The Lockean proviso seems to be a restriction on acquisitions. This is why Nozick discusses the proviso largely, but not entirely, in relation to acquisitions.¹⁷ The SOP limits not only the kinds of acquisitions in which individuals may engage, but how individuals may employ their property. If acquiring all of the water available in a certain area and preventing others from accessing it violates the rights of others, so would the following scenario presented by Mack:

Imagine that Adam, who along with Zelda inhabits a bountiful pre-property state of nature, possesses a device that causes any physical object he designates to disappear. Imagine further that, for whatever reason, he continually designates precisely those objects toward which Zelda begins to direct her talents and energies. Zelda reaches for this branch, Adam designates it, and it disappears. Zelda snatches at that apple, Adam designates it, and it disappears. And so on.¹⁸

The idea here is that individuals might violate the ownership rights of others both invasively *and* non-invasively. The former violations involve disabling the capacities of another agent by directly impinging on her body. The latter have the same effect, but do not involve directly impinging on her body. So Mack's argument is that the very same good reasons we have for regarding invasive disabling as wrong, yield the conclusion that non-invasive disabling is wrong as well. In the scenario presented above, while Adam does not invade Zelda's body in any way, he does wrong her. The SOP is developed to explain that wrong. Adam nullifies Zelda's world-interactive powers. Similarly, in the water hole case, it *seems* that the owner of the hole disables the talents and energies of the travelers. Accordingly, Nozick and others regard the acquisition as unjust. What Feser will challenge is the judgment that it is the *acquisition* that disables the talents and energies of the travelers. Feser does not deny that there is something wrong with what the owner of the hole does, and he does not deny that the SOP explains why the owner does something wrong.

A second way in which the SOP is distinct from Nozick's proviso is that Nozick's proviso deals with whether an acquisition allows others to

¹⁷ Nozick does seem to regard his proviso as limiting transfers as well. He says, "If the proviso excludes someone's appropriating all the drinkable water, it also excludes his purchasing it all"; see Nozick, *Anarchy, State, and Utopia*, p. 179. Of course, this is not explicitly a limitation on property *use*; instead, it seems to be a limitation on how much one may *acquire via transfer*.

¹⁸ Mack, "The Self-Ownership Proviso: A New and Improved Lockean Proviso," pp. 186-87.

improve their situation by making an acquisition. If an acquisition fails to allow this opportunity, then compensation is required. As I explain above, this compensation can occur simply because an acquisition may improve the stock of objects available for acquisition. The SOP does not focus on whether others can engage in acquisitions; instead, what matters is that others may bring their powers to bear on the world. So even if individuals cannot make acquisitions, they may come to have plenty of opportunities to bring their world-interactive powers to bear in some other way. The example Mack uses to illustrate this possibility is Tokyo. There is no opportunity for initial acquisitions in Tokyo, but the prospects of bringing one's world-interactive powers to bear have increased dramatically. Thus, the initial acquisitions do not run afoul of the SOP.¹⁹

While he accepts the SOP and not the Lockean proviso, Feser denies that the following example from Mack illustrates an unjust initial acquisition. Here is Mack's *Adam's Island* example:

Since his arrival at a previously unowned and uninhabited island, Adam has engaged in actions that, according to liberal entitlement theory, confer upon him sole dominion over all of this island. Now the innocent, shipwrecked Zelda struggles toward the island's coast. But Adam, in what purports to be a legitimate exercise of his property right, refuses to allow Zelda to come ashore.²⁰

It certainly seems that Adam is preventing Zelda from bringing her world-interactive powers to bear, so it also seems that Adam's interaction violates the SOP. Just as any acquisition or use of property that violates the SOP is unjust, it seems we should regard Adam's acquisition of the island as unjust.

Feser believes that an important fact about acquisitions blocks the conclusion that taxation is justified to rectify unjust acquisitions. He writes, "There is *no such thing* as an unjust initial acquisition of resources; therefore, there is no case to be made for redistributive taxation on the basis of alleged injustices in initial acquisition."²¹ This is a strong modal claim: it is not merely that there have been no unjust acquisitions—the point is that there cannot be.

In order to establish this conclusion, Feser argues: "The concept of justice . . . simply does not apply to initial acquisition. It applies only after initial acquisition has already taken place. In particular, it applies only to

¹⁹ This is no vindication of the Japanese government's actions. It is merely an illustration of what could happen legitimately.

²⁰ Mack, "The Self-Ownership Proviso: A New and Improved Lockean Proviso," pp. 187–88.

²¹ Feser, "There Is No Such Thing as an Unjust Initial Acquisition," p. 58.

transfers of property (and derivatively, to the rectification of injustices in transfer). This, it seems to me, is a clear implication of the assumption (rightly) made by Nozick that external resources are initially unowned.²² He then offers the following explanation for why initial acquisitions cannot be unjust:

Suppose an individual A seeks to acquire some previously unowned resource R. For it to be the case that A commits an injustice in acquiring R, it would also have to be the case that there is some individual B (or perhaps a group of individuals) against whom A commits the injustice. But for B to have been wronged by A's acquisition of R, B would have to have had a rightful claim over R, a *right* to R. By hypothesis, however, B did *not* have a right to R, because *no one* had a right to it—it was unowned, after all.^[23] So B was not wronged and could not have been. In fact, the very first person who could conceivably be wronged by anyone's use of R would be, not B, but A *himself*, since A is the first one to own R.²⁴

What, then, of the examples of (purportedly) unjust acquisition Nozick himself adduces? Nozick clearly says that the Lockean proviso precludes a person's acquiring the only water hole in the desert and charging what he will for access to it.²⁵ Feser claims that the only way it can be wrong for the individual to acquire the water hole is if others have already homesteaded it. Otherwise, there is nothing wrong with the acquisition. He writes:

The correct interpretation of this sort of case is, I suggest, as follows: The water hole is not unowned in the first place when the person in question tries to acquire it. After all, other people had been using it, and their use (especially since it is presumably regular, continuous use) *itself* amounted to initial acquisition of the water hole. Their use counts as a kind of labor-mixing, a bringing of the resource under their control. Thus, they have every right to object to what the would-

²² Ibid.

²³ Feser seems to overstate his position here. Surely one can be *harmed* by the acquisitions of others, even if one lacks the right to the objects the others require. Since Feser endorses the SOP, we should read him to say that individuals may be harmed by acquisitions that do not violate their rights, but that this sort of harm is irrelevant to the question of justice. I thank Tristan Rogers for bringing this to my attention.

²⁴ Feser, "There Is No Such Thing as an Unjust Initial Acquisition," pp. 58-59.

²⁵ Nozick, *Anarchy, State, and Utopia*, p. 180.

be acquirer tries to do, precisely because *they* have already acquired it.²⁶

There is an alternative case. Suppose that nobody is using the water hole and then someone acquires it. Suppose that other individuals merely happen upon the hole and it is the only way for them to remain alive. Can the owner still charge what he will for access? In dealing with this possibility, Feser outlines two types of responses. One he calls the “hardliner” and the other the “softliner.”

The hardline response “involves holding that this is the place where the advocate must simply bite the bullet and argue that however selfish, cruel, or wicked the initial acquirer would be to exploit his water hole for personal gain, or even to refuse (from sheer misanthropy) to let anyone drink from it, he still commits no *injustice* in doing so.”²⁷ This view holds that others have no right to the water hole; thus, the acquisition is not unjust, because it violates no one’s rights. The acquirer “has a *right* to act that way, even if there are other moral considerations that ought to move him not to use his right in that way.”²⁸

Feser feels some sympathy for the hardline response, though he officially takes on the weaker “softliner” stance. The softline approach involves acknowledging “that the initial acquirer who abuses a monopoly over a water hole (or any similar crucial resource) does commit an injustice against those who are disadvantaged, but such an approach could still hold that the acquirer nevertheless has not committed an injustice in acquisition.”²⁹ Feser locates the injustice not in the acquisition of the water hole, but in the individual’s *use* of the water hole. He writes:

[H]is injustice is an unjust *use* of what he owns, on a par with the unjust use I make of my self-owned fist when I wield it, unprovoked, to bop you on your self-owned nose. In what sense does the water-hole owner use his water unjustly, though? He doesn’t try to *drown* anyone in it, after all—indeed, the whole problem is that he won’t let anybody near it!³⁰

Feser ultimately endorses the softline response. His argument turns on the idea that one can have a property right in something without having the

²⁶ Feser, “There Is No Such Thing as an Unjust Initial Acquisition,” p. 68.

²⁷ *Ibid.*, p. 70.

²⁸ *Ibid.*

²⁹ *Ibid.*, p. 71.

³⁰ *Ibid.*

ability to exercise all of the incidents of those property rights. Mack finds nothing untoward about this conclusion. Though he does not argue that there can be no unjust acquisitions, Mack does think that circumstances can shrink the sphere of acceptable exercises of property rights. However, Mack claims that this does not deny that individuals have full ownership over their property.³¹ Instead, property rights are always limited by the SOP. Thus, Mack writes, “The existence of this constraint against Harry’s inserting *his* knife into Sally’s chest does not at all show that Harry has anything less than full ownership of his knife.”³² This is because the property right is itself constrained by the self-ownership of others. So the owner of the water hole owns it, even though he cannot preclude the travelers from drinking from it. The owner may well have a right to demand compensation for the access, but he cannot fully exercise his right to exclude people from the hole.

This point is crucial, for it allows Feser to hold that initial acquisitions are neither just nor unjust. This is so because the acquisition itself does not nullify the world-interactive powers of others. Instead, it will only be the use of acquired property that does so. The softliner can hold that the acquisition in the water hole case is fine; the problem is just that the acquirer does not have a right to exercise the exclusion incident of property rights. Or, more guardedly, he did not have the right to exercise that incident in the fashion he did. Accordingly, Feser concludes with the following claim: “In particular, the SOP allows me to defend my central thesis in this paper without having to take on board what I have called the ‘hard-line thesis.’ And it does all this without drawing us into the briar patch of the Lockean proviso, understood as a constraint on initial acquisition, with all the redistributionist hay that critics of libertarianism have tried to make of it.”³³

3. Justice in Acquisition

This section aims to show that, for the very same reasons Feser regards the use of property as unjust, we should regard certain acquisitions as unjust. In particular, I try to show that the question of justice does pertain to acquisitions. I begin here by illustrating something that standard examples of allegedly unjust acquisitions share, and I agree with Feser that these are not cases of unjust acquisition. I then introduce two other sorts of acquisitions, and argue that they are unjust.

In the standard cases of alleged unjust acquisition, we find individuals who acquire and then keep the items they acquire. This has to be

³¹ As far as I can tell, Feser himself seems to think this does show that individuals do not have full ownership over the objects; see his “Reply to Block on Libertarianism Is Unique,” p. 262.

³² Mack, “Self-Ownership, Marxism, and Egalitarianism, Part I,” p. 98.

³³ Feser, “There Is No Such Thing as an Unjust Initial Acquisition,” p. 76.

true, if we agree with Feser that the problem lies in the *use* of the holding, for one cannot use what one does not have.³⁴ This is the case with the water hole scenario Nozick presents and Feser discusses. This is also the case with Mack's *Adam's Island* scenario. In these cases we can grant that the problem is with *how* Adam uses his property. Adam comes to possess the island, as often occurs when individuals acquire things. Since the island still exists, Adam can use it, and he may use it in ways that do or do not violate the rights of others. I call these standard sorts of acquisitions "possessive acquisitions." Such acquisitions are characterized by the fact that some part of the object remains in the world to be used.

There are other ways of acquiring things, though. Suppose instead that Gulliver wanders around Lilliput searching for water holes for which lost travelers are roaming. He then stomps on the water hole as a means of mixing his labor with the land. When he stomps on the water hole, all of the water is forced into the ground and thus becomes undrinkable. Gulliver has acquired the plot of land via his labor-mixing, but his acquisition has prevented others from bringing their world-interactive powers to bear. Gulliver's acquisition has just the same effect on others as would his both acquiring the water hole and refusing to allow others to access it. So Gulliver has acquired something (a patch of land), but his acquisition has removed something (the water) from the world so that it may no longer be used. I call these sorts of acquisitions "destructive acquisitions."

Individuals can also engage in purely "consumptive acquisitions." In consumptive acquisitions, individuals use up portions of the unowned world, but leave nothing behind to be used in any relevant sense of the term. Here we might imagine Gulliver roaming the seas in Lilliput. Gulliver can thrive by eating standard fare, but what he enjoys doing is searching for unowned islands toward which castaways are unknowingly swimming. When Gulliver finds those islands, he eats them. He finds this sort of thing amusing because he likes to watch people drown.³⁵

It is important to note a temporal consideration at work in the two previous examples. Perhaps acquisitions like those described above are not subject to questions of justice if they occur a relevantly long enough time before the castaways arrive. After all, proponents of self-ownership deny that we have enforceable obligations to rescue others. So why would we have an obligation to preserve resources on the off chance that others might need

³⁴ One need not be in physical contact with an object in order to possess it. One can possess a water hole, even if one does not sit there attending to it. One might, for example, put a fence around it.

³⁵ We might also imagine Adam going about in search of unowned islands with the appropriate castaways swimming toward them. Then Adam burns those islands, sand included, so that he can acquire the carbon dioxide and water. He then packs the carbon dioxide and water in special containers and jettisons them into space. He, like Gulliver, finds this sort of thing amusing.

them? I do not wish to deal with this issue here, so I stress the stipulation that Gulliver looks for water holes and islands that lost travelers are currently approaching. The travelers have not yet seen the holes and islands, and the travelers do not know that the water holes and islands exist. There is thus no sense in which those individuals have homesteaded the items Gulliver acquires.

Destructive and consumptive acquisitions are distinct.³⁶ Destructive acquisitions occur when the process of acquiring something involves rendering some object unusable by others. Importantly, destructive acquisitions do result in an individual's still holding some portion of the world which he may then use. Gulliver holds a portion of the world in the water hole case: the ground he claimed. He can allow individuals access to that patch of land, but there is now no water on that land.

Consumptive acquisitions, on the other hand, leave nothing to be used. Gulliver cannot use the island he ate.³⁷ What is crucial about the two kinds of acquisitions, though, is that they would prevent others from bringing their world-interactive powers to bear, if others were in the right area. It is this factor that runs the risk of violating the SOP. The fewer opportunities there are for others to employ their world-interactive powers, the more likely it is that the acquisition will nullify those powers.

I want to be clear about what the problem is here. The problem is not the fact that the acquisitions diminish aggregate opportunity. The SOP does not require that acquisitions increase or preserve maximum aggregate opportunity. The problem is that consumptive and destructive acquisitions *can* nullify the world-interactive powers of some individuals; *when* they do this, they violate the SOP.³⁸ If they violate the SOP, they are unjust. Thus, unjust acquisitions are possible.

The acceptance of the SOP thus does not require us to believe the following claim from Feser: "For it to be the case that A commits an injustice in acquiring R, it would also have to be the case that there is some individual B (or perhaps a group of individuals) against whom A commits the injustice. But for B to have been wronged by A's acquisition of R, B would have to have had a rightful claim over R, a *right* to R."³⁹ We do not need to grant that the individuals in question have a right to the island; instead, they have a right not to have their world-interactive powers nullified. It is possible for the

³⁶ They find their motivation in Locke's discussion of spoilage; see Locke, *Second Treatise of Government*, sec. 46.

³⁷ Digesting something does not seem to count as a use. Still, I leave aside both this question and the possibility that Gulliver might regurgitate the island. The latter could count as a use, if he does it intentionally, say, as part of a side show.

³⁸ I do not say that they always do this, but only that they can.

³⁹ Feser, "There Is No Such Thing as an Unjust Initial Acquisition," pp. 58-59.

acquisitions of some to nullify their world-interactive powers. Thus, the concept of justice applies to acquisitions. This is a point that Mack stresses. He has us imagine the following scenario:

Here between Red and White is a nice, ripe, recently fallen acorn. Surely either of them may permissibly appropriate it as long as she or he does not violate various antecedent rights which the other actor has over *other things*.⁴⁰

It is clear from Mack's remarks that acquiring the acorn can be unacceptable even if others have no right to the acorn. In particular, acquiring the acorn can be wrong if it somehow violates the self-ownership rights of others. This is what happens in the acquisitions in which we imagined Gulliver engaging above.

In order to reinforce this conclusion, notice that Gulliver and Adam might rescue the castaways by taking them to the mainland and refusing to allow them on the island, and this is not what we may do to individuals who have rights to things. If the individuals have a right to the island, Gulliver and Adam may not preclude those individuals from accessing it.

It is the right to our world-interactive powers that at least sometimes precludes others from engaging in destructive and consumptive acquisitions. The arguments from this section thus show that Feser has a choice: he can give up the SOP and hold that there are no unjust initial acquisitions, or he can retain the SOP but grant that there can be unjust initial acquisitions.

Having established that there can be unjust initial acquisitions, I turn in the final section to objections. First, I block attempts to avoid the conclusion that the concept of justice applies to initial acquisitions. Second, as a proponent of the SOP and entitlement theory, I do not wish to saddle those principles with commitments that undermine them. Thus, I defuse a response that claims that the argument from this section has proven too much.

⁴⁰ Eric Mack, "What Is Left in Left Libertarianism?" in *Hillel Steiner and the Anatomy of Justice*, ed. Stephen de Wijze, Matthew H. Kramer, and Ian Carter (New York: Routledge, 2009), pp. 101-31; italics in original. Mack makes this point to stave off Hillel Steiner's claim that individuals must have original rights to all of the physical components involved in acquiring something in order to have an ultimately vindicable title in the acquired object. Mack's response involves showing that no such titles are required in order for an acquisition to be just; what must be the case is that the acquisition does not violate any rights others have over other things. So while Mack's point is distinct from the one I am pressing here, the idea that an acquisition can be unjust even if others do not have a claim to the object in question is at work in Mack's writings.

4. Objections

One way of avoiding the conclusion that there are unjust initial acquisitions is to take the hardline approach Feser suggests. Here one claims that there is nothing wrong with actions of individuals in possessive acquisitions and there is thus nothing wrong with Adam's acquisitions described above. This view, as Feser himself seems to grant, requires rejecting the SOP. I will not explain why I think rejecting the SOP is a bad idea. All that needs to be noted is that Feser himself wishes to retain that proviso, and he cannot do so if he regards destructive and consumptive acquisitions as neither just nor unjust. Those acquisitions *ex hypothesi* clearly prevent individuals from bringing their powers to bear on the world.

Another means of responding to the argument from the previous section involves slicing finely between an acquisition and the manner in which the acquisition occurs. This response would target the destructive acquisition in particular. What one might hold is that there is nothing wrong with the acquisition in which Gulliver engaged. After all, no one else had a right to the island. The problem lies instead in the way he acquired the island. The idea here is to distinguish between two aspects of an action. There may be nothing wrong with what one does, but there may be something wrong with *how* one does it.⁴¹

There is no real need to refute this response, because it seems to deny two crucial claims in Feser's initial argument. Importantly, it seems to deny his conclusion. If there are unjust *ways* of acquiring unowned things, the question of justice *does* apply to acquisitions.⁴² So it does not matter for the purposes of the argument I present against Feser whether acquisitions themselves are unjust or whether the manner in which the acquisitions take place is unjust. Either option grants that the concept of justice applies to acquisitions, and on either option, acquisitions, whether because they themselves were unjust or because the fashion in which they occurred was unjust, may need to be rectified. It is not a conceptual truth that such is the case.

Notice that the present objection also denies the following premise in Feser's argument. Feser argues that the only way A's acquisition of R can be unjust is if some other individual B has a claim over R. However, the present objection would say that A can acquire R in an unjust manner, even if B has no claim over R. So it seems that distinguishing sharply between acquisitions

⁴¹ An anonymous referee suggested a response similar to this when commenting on an earlier draft of this article. If the response now lacks force, it is because I have reshaped the examples used to illustrate destructive and consumptive acquisitions in a fashion that avoids earlier, better objections.

⁴² Of course, acquisitions that occur by violating rights that individuals have in other things are a different question. If I acquire land by using a shovel I have stolen from you, injustice infects the acquisition because of my theft, which represents an unjust transfer.

and the manner in which they occur is of no help to Feser. Doing so seems to deny both his conclusion and a key premise in his argument for that conclusion.

Having established that the concept of justice applies to acquisitions may raise broader concerns for proponents of the entitlement theory, though. Does the argument from Section 3 require an extreme version of conservatism? Can we never acquire things that others might, under some strange circumstances, require in order to bring their world-interactive powers to bear on the world? I do not believe that this conclusion follows, but I lack the space to offer a complete explanation. Here I offer a series of responses. The first is found in both Nozick and Feser.

Suppose an individual does engage in a purely consumptive or destructive acquisition. Suppose also that someone's ownership rights are violated by that acquisition. Is it the case that taxation is justified so as to rectify the situation? Not if the taxation is levied on all members of society. The following point from Feser is very important: "'We as a society,' as any good Nozickian knows, never commit injustices against anyone, past or present; it is only *specific individuals* and *groups* of individuals who can commit them."⁴³ It is only the individuals who in fact have their rights violated who can make a claim, and it is only the individuals who have in fact violated those rights who owe compensation.⁴⁴ If we tax everyone in order to right the wrongs committed by specific individuals, we likely cause new injustices. Feser rejects a policy of taxing everyone so as to rectify past injustices on two grounds. First, he writes, "this would only result in new injustices against those whose current holdings were *not* a result of past injustices in acquisition."⁴⁵ Second, such a policy of taxation as rectification would likely generate injustices "against those whose holdings partly resulted from [past] injustices, but not to an extent that would justify the inevitably arbitrarily-set level of taxes they would be forced to pay in restitution."⁴⁶ So the conclusion that we can go ahead and tax everyone is not licensed by the mere possibility of unjust initial acquisitions.

The previous argument blocks concerns about taxation. However, it may be that the argument from Section 3 shows that we should entirely *preclude* purely consumptive and destructive acquisitions. I do not think that follows, because the mere fact that an acquisition *could* violate the SOP is insufficient for showing that the acquisition is unjust. The individual needs to exist in order to have a right against others. In order to illustrate this point,

⁴³ Feser, "There Is No Such Thing as an Unjust Initial Acquisition," p. 78.

⁴⁴ Innocent individuals holding stolen property can be required to return it, and they may seek redress from those who gave or sold them that property. I sidestep a detailed analysis of this issue here.

⁴⁵ Feser, "There Is No Such Thing as an Unjust Initial Acquisition," p. 78.

⁴⁶ *Ibid.*

think of unjust property uses. If an individual puts a fence around a water hole, the fact that he may need to allow access in order to avoid violating the SOP, does not show that putting the fence around the hole is unjust. It is only when someone precludes access to the water hole in a manner that violates the SOP that the use is unjust. Similarly, it is only when an individual has his or her rights violated that destructive and consumptive acquisitions are unjust. So the most extreme version of the suggested conclusion does not follow.

Finally, the point that I believe makes the argument from Section 3 convincing to proponents of self-ownership is the stipulation that Gulliver engaged in his acquisitions as individuals were *on the verge* of saving themselves. Gulliver intervened in a manner that prevented them from doing this. So I suggest the intuitive appeal lies in the fact that there is an urgency requirement at play in the unjust acquisitions developed in Section 3. I do not develop this idea here, though.

The primary upshot of this article is that the concept of justice does apply to acquisitions. It is then an empirical matter to determine whether the acquisitions that are taken to warrant redistributive taxation are destructive or consumptive, and whether there are individuals who have a right to compensation as a result. Those individuals will have claims against specific individuals, so Feser's general conclusion stands. However, it stands because it is not a conceptual truth that unjust initial acquisitions are impossible.

Discussion Notes

Direct and Overall Liberty: Replies to Walter Block and Claudia Williamson

Daniel B. Klein
George Mason University

Michael J. Clark
Hillsdale College

1. Introduction

In this journal in 2010 we published an article entitled “Direct and Overall Liberty: Areas and Extent of Disagreement.”¹ In the next volume (2011), two comments on our article were published, one by Walter Block and one by Claudia Williamson. Here, we reply to each.

Our 2010 article explores possible disagreement between direct and overall liberty. Direct liberty corresponds to the more inherent or immediate aspects of a policy reform (and its concomitant enforcement), while overall liberty subsumes also the indirect, or wider and long-run, aspects and effects of the policy reform. Both direct and overall liberty are important, and each has virtues relative to the other. The virtue of direct liberty is its concreteness and definiteness. The virtue of overall liberty is its more extensive view of an action’s consequences in terms of liberty. If direct and overall liberty often disagree, then there is ambiguity in saying whether a policy or action augments “liberty,” and critics will contend that “liberty” is meaningless or illusory. The article explores eleven possible areas of disagreement between direct and overall liberty. We maintain that some areas of possible disagreement are genuine and perhaps significant. Yet we argue that on the whole the main tendency is for direct and overall liberty to agree. Thus, we may maintain a focus on direct liberty and presume that the results also go for overall liberty, while being ready to consider the limitations of that presumption.

¹ Daniel B. Klein and Michael J. Clark, “Direct and Overall Liberty: Areas and Extent of Disagreement,” *Reason Papers* 32 (Fall 2010), pp. 41-66.

The liberty principle says that if Reform 1 rates higher in direct liberty than Reform 2, then Reform 1 is more desirable than Reform 2. The present article fortifies the presumption of the liberty principle by arguing that the tension between direct and overall liberty is not so great as to undo its coherence and focalness.

2. Reply to Walter Block

We are grateful to Walter Block for his commentary,² which runs a few pages longer than our own article. We find ourselves in odd circumstances, however, for the sentiments of our critic seem friendly but the treatment of our paper is generally of very low quality, almost as if Block's intention were to entertain us with a parody of himself. He makes quite a few points that are based simply on misunderstanding, thereby misrepresenting us. In Block's article, for example, after the introduction, he launches into a two-page elaboration of the classical-liberal configuration of ownership, as though to correct our thinking, when our only purpose was to affirm that very thing.

Working within the configuration of ownership with which Block agrees, our piece employs a strategy of posing limitations to the direct-liberty principle in such a fashion that we do not diminish or evade them too hastily. Furthermore, in the discourse around us, we often see people express beliefs that could be interpreted as belief in such disagreement, and we want to learn how to parse such beliefs, even if they are not our own. For some of the cases we raised we do not feel decided one way or the other. For example, given the situation in 1941, did U.S. government involvement in World War II, as compared to staying out of the war, augment or reduce overall liberty?

The essence of our piece affirms a type of libertarianism without reconfiguring the foundational classical-liberal views on property. While affirming libertarianism we are nonetheless attempting to drive home problems of some of the more absolutist slogans often associated with libertarianism. We sometimes use striking phrases, as when we say, "sometimes coercion is our friend." To our mind, the possibility of disagreement between direct and overall liberty is real, so sometimes a reduction in direct liberty augments overall liberty.³

Many libertarians read the preceding paragraph and recoil—as do we to some extent. It must be kept in mind that such talk does not preclude one from being an ardent supporter of liberty. As is stated in the Simon Newcomb quotation in the original article, a principle does not lose worth just because there are cases of ambiguity and exception:

² Walter E. Block, "Critical Comment on Klein and Clark on Direct and Overall Liberty," *Reason Papers* 33 (Fall 2011), pp. 110-36.

³ And furthermore, we do not rule out disagreements between overall liberty and desirability.

Not only should their limitations be pointed out, when necessary, but the student should be encouraged to find or even to imagine conditions under which the maxims would fail. In doing this, the vice he should be taught to avoid is that of concluding that because he can imagine a state of things under which a maxim would fail, therefore it is worthless.⁴

Although there are surely real disagreements between Block and us, Block repeatedly misreads our raising for a particular case the possibility of disagreement between direct and overall liberty as a conclusion that such a possibility is weighty. Block's criticisms often continue as refutation of the misplaced judgment ascribed to us. A series of unhelpful detours by Block can be pointed out, and we relegate them to a footnote.⁵ All in all, perhaps half of Block's words are given to well-intentioned but unhelpful detours. In concluding, Block throws his arms around us, saying, "happily, when push comes to shove, they [that is, Klein and Clark] embrace Rothbardian libertarianism" (p. 135), and finishes with words favorable to our article.

At moments in his article, Block seems prepared to enter into our formulation of a direct-liberty operator and an associated ordering of reforms, as when he writes, "direct liberty is liberty, period" (p. 130). He seems to see an affinity between direct liberty and what he calls the Non-Aggression Principle (NAP). Still, it certainly is not with complete comfort that Block enters into our framework of direct liberty. Regarding the 1964 Civil Rights Act, for example, he says that because it included anti-liberty provisions,

⁴ Simon Newcomb, "The Problem of Economic Education," *Quarterly Journal of Economics* 7, no. 4 (1893), p. 399.

⁵ Here are some examples of Block's points that are unhelpful: (1) On page 122, he belabors that Woolworth's is private property, while our uncertainty was over whether the owners demanded that the protesters stay off the property. (2) On pages 124-25, Block elaborates his view of pollution as trespass, and gives nearly an entire page to a quotation from Martin Anderson. (3) On page 126, Block asserts that "Klein and Clark accept Smith's argument, in principle, that people would indeed not be very careful with penny ante currency," but the assertion is simply unfounded and wrong. (4) On pages 127, 129, 131, and elsewhere Block upbraids our libertarian judgment for not being sufficiently categorical and absolute. (5) On page 128, Block asserts that because we say "at least not in" one context is something the case, we therefore must believe that outside such a context the opposite must be the case. (6) On page 131, Block upbraids us for referring to the United States as a "stable liberal democracy." (7) On page 132, Block says "Klein and Clark reveal themselves as war-mongering libertarians of the David Boaz and Barnett stripe. It would appear that there is hardly an instance of U.S. militarism abroad (i.e., imperialism) that does not meet with their approval." (8) On page 132, Block seems to offer opinions about U.S. entry into World War I as resolving issues about U.S. entry into World War II. (9) Throughout Block's article there appear numerous footnotes overflowing with references that speak to unhelpful detours he pursues.

“[a]nyone who favors the law because of its admittedly pro-liberty aspects, acts against (direct) liberty on this occasion” (p. 131). He thus refuses to enter into the direct-liberty question on the table, namely, whether the status quo circa 1964 or the reform represented by the Civil Rights Act scored higher in direct liberty. Block sometimes exhibits the millennialist “endzone” orientation of the NAP in a way that refuses our direct-liberty framework.

Block writes, “these authors and I disagree, sometimes sharply, as to what constitutes direct liberty itself” (p. 112). We are uncertain about whether to regard the impasse between Block and us over direct liberty more as a framework disagreement or simply as disagreements about how things cash out, in terms of direct liberty, when trying to rank two reforms.

When it comes to overall liberty, Block’s refusal is emphatic and entire. One aspect of that refusal is to say that, because any augmentation of direct liberty might give life to a Hitler, we can never be certain about when an augmentation of direct liberty will reduce overall liberty, and, lacking absolute certainty, the idea of overall liberty therefore lands us in “extreme skepticism” (p. 118). In short, without absolute certainty we have none. Block repeatedly raises the Hitler point (“Hitler” occurs seventeen times in the piece).

But just because something is not certain does not mean we do not think and talk sensibly about tendencies, proportions, probabilities, and so on—and judge and act accordingly. If we say that Rafael Nadal is a better tennis player than David Ferrer (who, to date, has a 4-16 lifetime record against Nadal), the meaningfulness and worthiness of that statement is not dependent on the idea that in a match between Nadal and Ferrer it is 100 percent certain that Nadal will win. It is Block’s insistence on absolute certainty, not a natural attitude to work with things that fall between zero and 100 percent, that would land us in deep trouble—if not extreme skepticism, then fanaticism.⁶

A more important aspect of Block’s refusal of overall liberty is his belief that, as he puts it, “[o]verall liberty, paradoxically, fatally weakens the power of the NAP, which I see as the essence of the freedom involved in libertarianism” (pp. 111-12). Block says that we “give away the entire libertarian store” (p. 135), that we have “tossed libertarianism under the wheels of the oncoming bus” (p. 134).

Our idea of overall liberty subsumes direct and indirect effects of policies. Because Block refuses any notion of indirect effects, he also refuses

⁶ A sign of fanaticism is when someone meets direct challenges by contorting or gerrymandering his most sacred principles. We are struck by Block’s view (p. 119) that murder of an innocent person is not a violation of the non-aggression principle provided that the murderer is properly punished. Moreover, Block offers that view in responding to the hypothetical of having to murder an innocent person to save humankind, apparently without seeing its inadequacy, for the hypothetical can simply be clarified to be a matter of murdering an innocent person *without punishment* to save humankind.

the very idea of overall liberty. He writes:

On a practical note, libertarians have sufficient difficulty agreeing on *direct* liberty with regard to such contentious issues as voluntary slavery, abortion, immigration, just to name a few—and this is in the entire absence of any worry about indirect effects. Were those taken into account as well, *it would eliminate any last vestige of a coherent libertarian philosophy.* (p. 122; italics added)

The italicized statement is precisely what our article says is *not* so. Compared to Block, we are libertarians of greater faith. The overarching point of our article is that we should face up to disagreements between direct and overall liberty. A braver libertarianism will be a more robust libertarianism.

Block raises a prudential concern that once people enter into the idea of overall liberty, and admit that direct and overall liberty can disagree, then some will use those ideas to propagate and excuse coercion: “They can always claim that, in terms of *direct* liberty, their act amounted to a heinous crime. However, as long as *indirect* liberty points in the other direction, and outweighs the first consideration, their crime actually amounts to promoting liberty” (pp. 117-18). His prudential point expresses a natural sensibility that parallels our approach: It shows concern about the indirect effects of our decisions, in this case the talk we decide to adopt and practice. If certain Rothbardian libertarians would protest our talk of indirect effects or overall liberty for its supposedly presuming to know the future, for its supposedly neglecting Frank Knightian uncertainty, or for its acceptance of an only vaguely defined notion of the greater good, would the same charges not work here against Block? Such charges, whether leveled against us or against Block, would be immature. The problem with Block’s prudential point is that it misjudges, not that it naturally worries about indirect effects and involves vague notions of the greater good.

Imagine Mitt Romney, Barack Obama, Bill O’Reilly, or Paul Krugman saying: “This act which I favor admittedly reduces direct liberty, but that is redeemed by the act’s indirect contributions to overall liberty.” Any such talk entails the parsing of direct and overall liberty on a classical-liberal configuration of ownership. It would entail an admission of treading on direct liberty. It would make the distinction between voluntary and coercive action, parsed on the classical-liberal configuration of ownership, central to the debate. It would be hard not to see such a development as a big step forward.

Libertarians see and trace out direct liberty, but others have greater difficulty. One of the reasons that libertarianism is not more effective is that people do not take liberty—not even direct liberty—seriously. Distinguishing between direct and overall liberty helps to clarify the meaningfulness of direct liberty. By delineating certain effects as only indirect, the direct effects come into sharper relief. To those who do not see liberty, our analysis may help to make direct liberty more focal. If so, they would then be in a better position to appreciate its worthiness. That would win a stronger presumption in its favor.

3. Reply to Claudia Williamson

In a brief comment Claudia Williamson develops an insight.⁷ She writes:

When Klein and Clark find a dyad (R1, R2) for which direct and overall liberty disagree, very often the liberty principle points to further relevant policy reforms, or an R3 . . . [such that] for (R1, R3) there is no disagreement, and for (R2, R3) there is no disagreement. Thus, the disagreement between direct and overall liberty for dyad (R1, R2) does not force us to maintain our focus on R1 versus R2. Instead, the very disagreement may lead us to focus on a conspicuous R3 for which there is no such disagreement. Klein and Clark neglect this dimension of the liberty principle as a guide for formulating the political discussion. (p. 108)

Williamson illustrates the point using the financial-bailouts problem, which we term “coercive hazard”:

Suppose a new policy, R1, is proposed to allow further restrictions in financial dealings, and R2 is to keep the current level of financial restrictions in place. The argument is that since the taxpayers pay for risky financial decisions undertaken by private companies, these decisions should be restricted and regulated. Direct liberty may be reduced because of new government regulations, but overall liberty could be increased as the restrictions may reduce an individual’s tax burden in the future. However, the conversation does not have to end with (R1, R2). Through political discourse, an alternative R3 could arise . . . that includes reducing or eliminating a large portion of government regulations on financial dealings *and* not to engage in future bailouts. In this scenario, R3 trumps both R1 and R2 as direct and overall liberty are in agreement. (pp. 108-9; footnote omitted)

We agree entirely with Williamson’s point, and with her complaint that we “fail to explore . . . how the liberty principle is also an engine for formulating relevant, focal policy reforms” (p. 108). Williamson’s overarching point is that the trouble posed by the tension between direct and overall liberty is even less than we said, because for a disagreeing dyad (R1, R2) there often exists a relevant and dominating R3. That, too, is something with which we agree.

Williamson, however, does not make clear whether she offers her insights more as a way of diminishing our approach, or as a way of enriching

⁷ Claudia R. Williamson, “Disagreement between Direct and Overall Liberty: Even Less Troubling than Suggested,” *Reason Papers* 33 (Fall 2011), pp. 107-9.

and advancing it. We take this opportunity to expound on how they enrich our approach, and in the next section we connect those insights to Adam Smith's work.

We warmly embrace Williamson's emphasis on the liberty principle as "an engine for formulating relevant, focal policy reforms" (p. 108), and we are grateful for her correcting our error in neglecting that. Indeed, it is chiefly by way of using the liberty principle to formulate reforms that the (direct) liberty operator really becomes serviceable: Classical liberals tend to formulate and distinguish positions by applying the idea of liberty. That is usually how they frame the issue. We would be at a loss to say which ranks higher in liberty—legalizing marijuana or abolishing the minimum wage—but we do not frame issues that way. We well know that, compared to the status quo, legalizing marijuana augments liberty, and abolishing the minimum wage augments liberty. We treat each as a separate issue. Using liberty as an engine for formulating reforms helps us to avoid the impotence that would result from applying liberty to reforms brought into comparison in a random fashion. The pairing of reforms is not random; it is guided by principles, notably the liberty principle.

The emphasis on the liberty principle as an engine of formulation, though, might be carried to such lengths as to diminish the importance of our approach. One might argue that disagreements between direct and overall for some (R1, R2) are rather unimportant because, so typically, there is a more sweeping R3 that dominates both R1 and R2, and that, for any real libertarian, deserves all of the focus. That is, we real libertarians never need to engage disagreements between direct and overall liberty, nor consider the possibility that in some cases coercion is our friend, because the most worthwhile discourse always entails a focus on some R3 that dominates in both liberty orderings.

There are a number of problems with such an attitude. First of all, there may not always be such a dominating R3. Second, even if you think that some R3 does dominate in both direct and overall liberty, that claim, particularly as regards overall liberty, might not be very persuasive, even to many libertarian comrades, and so the focus on R3 might be unwarranted. Third, there may be not only a dominating R3, but also a dominating R4, R5, R6, and R7, and the multiplicity and open-endedness of dominating options might leave any one of them much less focal than the contest between R1 and R2. Fourth, and perhaps most importantly (and related to the previous points), in the spirit of Tyler Cowen,⁸ R3 might be so far out on the scale of socio-political feasibility that it does not deserve such exclusive focus. In the terminology of Daniel Klein,⁹ we applaud both libertarian challenging and

⁸ Tyler Cowen, "The Importance of Defining the Feasible Set," *Economics and Philosophy* 23 (2007), pp. 1-14.

⁹ Daniel B. Klein, "Mere Libertarianism: Blending Hayek and Rothbard," *Reason Papers* 32 (2004), pp. 7-43, see esp. pp. 35-39.

libertarian bargaining, and we do not see any contradiction in saying, like Cowen, that one libertarian should challenge by focusing on R3 while another should bargain by focusing on the dyad (R1, R2), even though the dyad entails disagreement between direct and overall liberty.¹⁰

Bargaining does not necessarily entail lying. The existence of a dominating R3 does not undo the fact that (R1, R2) entails a disagreement between direct and overall liberty.¹¹ Those who share Cowen's attitude of "practical advocacy" profit from learning to think in terms of both direct and overall liberty and to sketch categories that will help us to qualify our statements. We do not mean to lionize bargaining, or to oppose challenging, but we oppose any approach that has little regard for bargaining.

4. Connecting to Adam Smith

Discourse situations range between those more constrained by audience discordance, or "politics," and those less constrained. Adam Smith makes a distinction that helps us to see that different types of libertarians deal with different situations and work in different modes of operation.

Smith discusses a matter for which the direct-overall liberty distinction is very apt. He considers whether the government might engage in trade-policy retaliations as a way to lessen protectionism by foreign governments, and gives an example of the English proposal to remove a prohibition "upon condition that the importation of English woollens into Flanders should be put on the same footing as before."¹² He continues: "There may be good policy in retaliations of this kind, when there is a probability that they will procure the repeal of the high duties or prohibitions complained of."¹³ Thus, Smith raises the possibility that a reduction in direct liberty may be an augmentation of overall liberty. Incidentally, when we look at the full range of Smith's exceptions to and ambiguities about the application of the liberty principle, we find that arguments involving possible disagreements between direct and overall liberty play a role in a good number of cases, for example, as regards schooling, certain provisions in the Navigation Acts, standing armies, export taxes on strategic military goods, nightwatchman functions, and even small-denomination notes.¹⁴

¹⁰ Cowen, "The Importance of Defining the Feasible Set," p. 8.

¹¹ Note that the existence and viability of some R3 may be a factor in ranking R1 and R2 in overall liberty.

¹² Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, ed. R. H. Campbell and A. S. Skinner, 2 vols. (Indianapolis, IN: Liberty Fund, 1976), vol. 1, p. 468.

¹³ *Ibid.*

¹⁴ Michael Clark, "The Virtuous Discourse of Adam Smith: The Political Economist's

Smith, in fact, does not see much probability that trade retaliations will procure such repeal; he tends more toward a position of unilateral free trade. But he allows possible disagreement between direct and overall liberty, and that leads immediately into his saying the following:

To judge whether such retaliations are likely to produce such an effect, does not, perhaps, belong so much to the science of a legislator, whose deliberations ought to be governed by general principles which are always the same, as to the skill of that insidious and crafty animal, vulgarly called a statesman or politician, whose councils are directed by the momentary fluctuations of affairs.¹⁵

Smith's description of the politician as "that insidious and crafty animal" has often been quoted as though it were an expression of contempt. Politics as a realm of such animals is a big reason to degovernmentalize social affairs. Nonetheless, Smith sees such animals as playing an important and necessary role in liberal reform. Later in the work, Smith writes: "[I]n what manner the natural system of perfect liberty and justice ought gradually to be restored, we must leave to the wisdom of future statesmen and legislators to determine."¹⁶

Smith distinguishes "the science of a legislator" and what might be called the art of liberal politics. In the quoted passage above, the distinction is presented as simply twofold. As is often the case with Smith, the distinction lends itself to recursive application, giving rise to an open-ended iteration or series. Our tendency is toward such recursivity, and toward reading such recursivity into Smith, even though it entails an ellipsis at each end of the iteration. That is, there is no realm of pure science, untainted by politics. It is not meaningful for a political economist to separate entirely his discourse from politics, in a broad sense of the term.

Smith achieved something that has only very rarely ever been achieved by a liberal (perhaps also Milton Friedman?), namely, a sort of cultural royalty, in which he is first among his circle of peers, and his circle forms a cultural mountain peak within society at large. While everyone adjusts the bargaining-challenging knob depending on the situation, liberal royalty especially will mix bargaining and challenging in ways that seem inconsistent and even baffling. Many have noted Smith's exceptions to and ambiguities surrounding natural liberty, and Block cites what he calls "devastating critiques launched at the libertarian credentials of . . . Smith" (pp. 112-13;

Measured Words on Public Policy" (PhD Diss., George Mason University, 2011), pp. 55-67.

¹⁵ Smith, *Wealth of Nations*, vol. 1, p. 468; footnote omitted.

¹⁶ *Ibid.*, vol. 2, p. 606; footnote omitted.

footnotes omitted).

In Smith, though, there is also the challenging side, and we see him using the liberty principle as an engine of formulation much along the lines that Williamson suggests. Smith's discussion of trade liberalization provides an example. The example here does not address direct versus overall liberty, but rather the highly parallel matter of direct liberty versus desirability. Smith asks whether the unilateral and *sudden* removal of significant trade barriers, which might "deprive all at once many thousands of our people of their ordinary employment and means of subsistence," might be less desirable than gradual removal.¹⁷ He admits the concern and shows his willingness to depart from the direct-liberty principle, but he bounces back to challenging, and in two ways. First, he uses the example of the rapid integration of "a hundred thousand soldiers and seamen" released "at the end of the late war," and he elaborates why he thinks that such liberalization would not, in fact, produce such extensive disorder: people and markets adjust fairly swiftly.

Second, Smith goes beyond his initial formulation of the issue. He suggests an R3 that, both in direct liberty and in desirability, dominates mere trade liberalization, whether it be sudden (R1) or gradual (R2). That R3 subsumes sudden liberalization but goes much farther:

[B]reak down the exclusive privileges of corporations, and repeal the statute of apprenticeship, both which are real encroachments upon natural liberty, and add to these the repeal of the law of settlements, so that a poor workman, when thrown out of employment either in one trade or in one place, may seek for it in another trade or in another place, without the fear either of a prosecution or of a removal, and neither the publick nor the individuals will suffer much more from the occasional disbanding some particular classes of manufacturers, than from that of soldiers.¹⁸

Another famous passage opens the next paragraph: "To expect, indeed, that the freedom of trade should ever be entirely restored in Great Britain, is as absurd as to expect that an Oceana or Utopia should ever be established in it."¹⁹ Friedrich Hayek later adds: "Yet seventy years later, largely as a result of his work, it was achieved."²⁰ That achievement was the product of liberal bargaining and liberal challenging, which cohere as a liberal outlook by virtue of making focal the principle of direct liberty. But the clarity

¹⁷ Ibid., vol. 1, p. 469.

¹⁸ Ibid., pp. 470-71.

¹⁹ Ibid., p. 471.

²⁰ Friedrich A. Hayek, *Law, Legislation, and Liberty, Vol. 1, Rules and Order* (Chicago, IL: University of Chicago Press, 1973), p. 65.

and worthiness of direct liberty is better understood when we learn to distinguish it from overall liberty and from desirability, and to appreciate the relationships among the three.²¹

²¹ We thank Niclas Berggren for valuable feedback on an earlier version of this article.

Property and Progress

Gordon Barnes
State University of New York, Brockport

1. Introduction

In a series of articles published since 1990, David Schmidtz has argued that the institution of property plays a crucial role in the progress of humanity.¹ According to Schmidtz, the original appropriation of resources as property is necessary to prevent the tragedy of the commons. Moreover, the ongoing practice of property facilitates the mobilization of those resources in a way that creates wealth and opportunity. Thus, Schmidtz argues that property is the engine of human progress. In what follows I will carefully examine Schmidtz's arguments. Despite their ingenuity, I will explain how these arguments fail to support Schmidtz's conclusions. Property is not the only way to avoid the tragedy of the commons, nor is it evident that property is the only way to achieve progress.

2. Is Property Necessary to Avoid the Tragedy of the Commons?

Schmidtz's first argument begins with a description of life without property.² Without property, everything would be part of an unregulated commons. The defining feature of an unregulated commons is that no one has a right to exclude anyone from using anything. Consequently, it is in everyone's self-interest to take whatever they can get, and it is in no one's self-interest to preserve or protect anything. To preserve or protect something would risk wasting valuable energy, since someone else might come and take it. In these circumstances, the resources in the commons will be depleted and perhaps even destroyed. That is the tragedy of the commons, and it is imperative for human beings to find a way to prevent this tragedy. Therefore, human beings must not allow an unregulated commons to persist. That is the

¹ See David Schmidtz, "When Is Original Appropriation Required?" *The Monist* (1990), pp. 504-18; David Schmidtz, "The Institution of Property," *Social Philosophy & Policy* 11, no. 2 (1994), pp. 42-62; David Schmidtz and Robert E. Goodin, *Social Welfare and Individual Responsibility* (Cambridge: Cambridge University Press, 1998); and David Schmidtz, "Property and Justice," *Social Philosophy & Policy* 27, no. 1 (2010), pp. 79-100.

² What follows in this paragraph is a summary of Schmidtz, "When Is Original Appropriation Required?" pp. 506-8.

first step in Schmidtz's argument. What follows from this? According to Schmidtz, in order to exit an unregulated commons, people must appropriate resources as property. By appropriating resources as property, people are able to exclude others from the use of those resources, and thus they can preserve and protect those resources from depletion and destruction. So the appropriation of resources is required in order to prevent the tragedy of the commons.

However, the fact that appropriation will prevent the tragedy of the commons is not sufficient to justify appropriation. If appropriation is not the *only* way to prevent the tragedy of the commons, then we must consider the other ways of doing this before we can conclude that appropriation is justified. The relevant question is not whether appropriation is *sufficient* to prevent the tragedy of the commons, but whether it is *necessary* for preventing the tragedy of the commons. And the problem is that the answer appears to be *no*. Instead of appropriating resources as property, people could establish regulations for the responsible use of resources, and then enforce those regulations. This would prevent the tragedy of the commons without converting the commons into property. So the appropriation of resources as property is not necessary for preventing the tragedy of the commons.

Schmidtz argues that regulating the use of resources in the commons is not really an option. The reason is that "we choose for ourselves, not for everyone. And what people should choose for themselves differs from what would be right . . . if they were choosing for everyone."³ If an individual finds himself in an unregulated commons, and the community as a whole does not establish regulations for the preservation of the commons, then the only way for that individual to preserve resources is to exclude others from using resources, so that he can protect them from depletion. In excluding others from the use of those resources, he has effectively appropriated those resources as property.

This argument fails to support its conclusion, and for at least two reasons. First, an individual need not exclude others from the use of a resource in order to prevent its depletion. One could simply regulate the use of that resource. I am not repeating the previous suggestion that this individual can somehow decide for everyone else how they will behave. Rather, the point is that a single individual could regulate the use of some particular resource without appropriating it as property. The difference between merely regulating and appropriating is that in mere regulation others will not be *excluded* from using the resource. Their use will simply be regulated. Schmidtz might reply that it is impossible for a single individual to enforce such regulations. However, if it is impossible for one to enforce regulations for the use of a resource, then it would be equally impossible for anyone to enforce an appropriation of that resource as property. So if appropriation of property is possible, then mere regulation is also possible.

³ Ibid., p. 507.

Consequently, an individual does not need to appropriate resources from the commons as property in order to protect those resources from depletion.

Second, and more importantly, Schmidtz's argument makes his conclusion conditional on the absence of any other communal agreement to regulate the use of resources. Schmidtz's argument shows only that *if* there are no enforced regulations for the responsible use of resources, *then* one is entitled to appropriate those resources as property. If a community were to establish some other set of regulations for the responsible use of resources, then the reason that formerly justified appropriation of property would disappear. This undermines the significance of Schmidtz's argument, because it reduces the argument to saying: "Property is justified, at least as long as you cannot agree on anything else." That conclusion is simply too weak to be of any interest in the debate over property.

3. Does Property Create Wealth and Opportunity?

Schmidtz's second argument for property is based on the claim that the institution of property has played an indispensable role in creating wealth and opportunity. The core of the argument is contained in the following passages:

[I]n taking control of resources and thereby reducing the stock of what can be originally appropriated, people typically generate massive increases in the stock of what can be owned.

Leaving resources in the commons is not at all like putting resources in a time capsule as a legacy for future generations. Time capsules may be a fine thing. They certainly preserve things. But before you can put something in a time capsule, you have to appropriate it.

The institution of private property preserves resources under a wide variety of circumstances. It is surely the preeminent vehicle for turning negative-sum commons into positive-sum property regimes.⁴

According to Schmidtz, then, the institution of property has prevented serious harms, and has caused great benefits.

Suppose that Schmidtz is right about this. What follows from it? Presumably, Schmidtz sees these facts as reasons for the institution of property. However, that does not follow. That is because there might be other, better ways to achieve these same results. A simple analogy will illustrate the point. Imagine a follower of Thomas Hobbes who asserts that absolute monarchy will prevent a war of all against all, and thus maintain the peace that is necessary for commerce. Suppose that he cites this fact as a

⁴ Schmidtz, "The Institution of Property," pp. 46, 48, and 50, respectively.

reason for absolute monarchy.⁵ We could respond to him, in the spirit of John Locke, by pointing out the disadvantages of absolute monarchy.⁶ However, we need not go that far in order to respond to the argument. We could simply point out that there are other ways to keep the peace. The alleged benefits of absolute monarchy can be achieved through other forms of government. Since those benefits can be achieved in other ways, they do not constitute a reason for choosing absolute monarchy over other ways of achieving them. If either of two actions, X or Y, will achieve a certain benefit, then achieving that benefit is not a reason for doing X rather than doing Y. Here is the fundamental mistake in Schmidt's defense of property. Schmidt asserts that the institution of property has produced certain benefits, and then implies that this is a reason for maintaining that institution. However, if those same benefits can be achieved through some other institution, then those benefits do not constitute a reason to prefer that institution to another institution that also could achieve them. Thus, the fact that property has caused these benefits is not, in itself, a reason in its favor.

However, that is not the end of Schmidt's argument on the subject. In much of Schmidt's work, he offers historical case studies as empirical evidence for his assertions about property. As Schmidt interprets them, these cases show that property has succeeded where other arrangements have failed. One such case is the story of Jamestown, a colony in seventeenth-century Virginia. Here is Schmidt's summary of that story:

The Jamestown colony is North America's first permanent English settlement. It begins in 1607 as a commune, sponsored by the London-based Virginia Company. Land is held and managed collectively. The colony's charter guarantees to each settler an equal share of the collective product regardless of the amount of work personally contributed. Of the original group of 104 settlers, two-thirds die of starvation and disease before their first winter. New shiploads replenish the population, but the winter of 1609 cuts the population from 500 to 60. In 1611, visiting governor Thomas Dale finds living skeletons bowling in the streets, waiting for someone else to plant the crops. Their main food source consists of wild animals such as turtles and raccoons, which settlers can hunt and eat by dark of night before neighbors can demand equal shares. In 1614, Governor Dale has seen enough. He assigns three-acre plots to

⁵ Thomas Hobbes, *Leviathan*, ed. Edwin Curley (Indianapolis, IN: Hackett Publishing Company, 1994), p. 104. Hobbes himself argues for absolute political authority in this text, but in this passage he does not insist on monarchy as the form of government. That is why I have imagined a follower of Hobbes making this argument.

⁶ John Locke, *The Second Treatise of Government*, ed. C. B. Macpherson (Indianapolis, IN: Hackett Publishing Company, 1980), secs. 137-38.

individual settlers, which reportedly increases productivity sevenfold. The colony converts the rest of its landholdings to private parcels in 1619.⁷

This example is intended to constitute evidence for Schmidt's claims about property.

However, there are simply too many variables that are peculiar to this case to draw any general conclusions. This is the standard problem with using an anecdote to support a general conclusion. A preposterous argument will illustrate my point. Suppose that I argue as follows: "We once set up a socialist society among a group of convicted criminals in a maximum security prison, and it didn't work. Therefore socialism doesn't work." Obviously, that would be a terrible argument. The fact that socialism doesn't work among convicted criminals in a maximum security prison does not show anything about the prospects for socialism in other circumstances. Although this is a preposterous argument, the very same problem undermines Schmidt's use of the case of Jamestown. The fact that common ownership and guaranteed provisions did not work among those particular people, in those particular circumstances, does not show anything about the prospects for those social arrangements among other people, in other circumstances. There is no reason to think that this small group of people was representative of the whole population, nor that the circumstances of Jamestown were representative of the kinds of circumstances that people find themselves in. So any attempt to generalize from this case would be a hasty generalization. Unfortunately, that is what Schmidt does.

It is worth stopping to note the rest of the Jamestown story.⁸ The dark side of the Jamestown story was the growth of indentured servitude. In fact, some historians argue that indentured servitude was the real key to the survival of Jamestown. Needless to say, indentured servitude was no picnic. In the later years of the Jamestown colony, forty percent of the indentured servants did not survive long enough to become freemen. Between 1619 and 1622, company records indicate that 3,570 settlers arrived in America, yet the population remained constant at the 1619 figure. If we subtract the 347 settlers who were killed in the Native American attack of 1622, we can conclude that 3,223 settlers died of other causes (presumably, malnutrition, etc.) in Jamestown during 1619-1622, despite the institution of property. So, contrary to Schmidt's suggestion, the institution of property in Jamestown was no panacea.

⁷ Schmidt and Goodin, *Social Welfare and Individual Responsibility*, pp. 53-54; footnotes omitted.

⁸ What follows in this paragraph is from Karen Ordahl Kupperman, *The Jamestown Project* (Cambridge, MA: Harvard University Press, 2007).

Before I proceed to the last issue raised by Schmitz's work, I should address what appears to be an additional argument for the claim that property is necessary for prosperity. Schmitz contends that people are better off when they internalize responsibility. To internalize responsibility is "to plan your future, to deal with your own mistakes as best you can, to deal with other people's mistakes as best you can, to make the best of your good luck, and your bad luck as well."⁹ According to Schmitz, people's lives go better when they internalize responsibility, because people are more productive when they internalize responsibility. According to Schmitz, "A variety of property institutions are internalizing responsibility and unleashing people's productive energies right now, not merely in the distant future. And that is why not everyone is destitute."¹⁰ By giving people control over resources, the institution of property gives people some control over their well-being. If they use their property to produce, then they will prosper, whereas if they do not use their property to produce, then they will not prosper. This control over one's own prosperity encourages one to internalize responsibility for one's own prosperity, and that, in turn, makes people more productive than they otherwise would be.

No one would doubt that property often has this effect, but is there any reason to think that property is the *only* way to get people to internalize responsibility? Schmitz offers no argument for this supposition. The closest thing he offers to an argument is a detailed description of the enormous progress that has been made in the United States over the course of the twentieth century.¹¹ The tacit implication is that the institution of property is at least partially responsible for this progress. However, there is another plausible hypothesis about what caused this increase in well-being. The twentieth century marked the advent of a multitude of social programs: Social Security, Medicare, Medicaid, Aid to Families with Dependent Children, Temporary Assistance to Needy Families, Federally Subsidized Student Loans, etc. Why think that the institution of property rather than the advent of these social programs caused the increase in prosperity in the twentieth century? Schmitz offers no reason to prefer his hypothesis to this one. I will now turn to the latest move that Schmitz makes in his defense of property.

4. Is Property Prior to Justice?

Even if property is the only way to achieve great benefits, does it automatically follow that property is just? In his latest work on this topic, Schmitz maintains that property is, in some important sense, "prior to

⁹ Schmitz and Goodin, *Social Welfare and Individual Responsibility*, p. 10.

¹⁰ *Ibid.*, p. 36.

¹¹ *Ibid.*, pp. 37-42.

justice.” After comparing the institution of property with a system of traffic lights, Schmitz says:

The traffic management function of property conditions what can count as justice, given that whatever we call justice has to be compatible with the system of property that enables people to prosper. If whatever we choose to call justice is not compatible with property, then we have no reason—indeed, no right—to take so-called justice seriously.¹²

He proceeds to amplify this point:

Property’s normative roots are to be found less in philosophical theorizing about justice and more in whatever the truth of the matter happens to be in a given time and place about what it takes for people to be able to prosper together.¹³

Schmitz seems to think that the nature of justice is conditional on which practices generate prosperity. However, that is unacceptable. Imagine a society that has an institution very similar to slavery. Whether or not it really is slavery is immaterial for my purposes here. In this society, some people are compelled by law to do whatever labor their masters command. However, their masters are required by law to provide these laborers with a very comfortable life outside of work. Let us suppose that this system, which we could call a quasi-slave system, is very effective at generating productivity. Would that suffice to make it just? Surely not. Even if the laborers share in the prosperity of the society, this would not suffice to make their situation just. On the contrary, the subordination of the laborers to the masters is unjust, no matter how much prosperity it brings. So if Schmitz is saying, as he appears to say, that whatever generates prosperity is *ipso facto* just, then that is mistaken.

5. Conclusion

Despite the ingenuity of Schmitz’s arguments, they fail to justify the institution of property. It is not evident that the appropriation of resources as property is the only way to preserve those resources, nor is it evident that the practice of property is the only way to generate prosperity. Moreover, prosperity is not sufficient for justice, and so the institution of property is not prior to justice. These claims require further defense, if Schmitz is to justify the institution of property.

¹² Schmitz, “Property and Justice,” p. 86.

¹³ *Ibid.*, p. 96.

Rejoinder to David Prychitko on Austrian Dogmatism

Walter E. Block
Loyola University New Orleans

1. Introduction

David L. Prychitko, a self-styled Austrian economist, inveighs against “some” Austrians, who are guilty of a “cart-load of dogmatism.”¹ He makes his case as follows:

Among some Austrians, a peculiar form of praxeology plays the defining role. As a deductive approach to the study of human action, praxeology makes a great deal of pragmatic sense. But some Austrians have anointed praxeology, and therefore Austrian economics as a whole, with grand and apparently unquestionable epistemological claims. The praxeologist is a self-described deducer of apodictic certainty, of ironclad proofs that display the Truth about empirical economic phenomena. Hard-core praxeology seems to be the unshakable trunk of the great tree of Austrian economics. Mises and Rothbard stand among its champions in their appeal to scientific *certainty* regarding, in Mises’s case, the viability of the completely unhampered market/minimal state system, and in Rothbard’s case, outright anarcho-capitalism. (Strange how praxeology is employed to deduce two fundamentally different positions on the role of the state.) And it’s that unflinching certitude about the equilibrating properties of the unhampered market that has, shall I say, both fascinated and irked me over the years.²

It is the contention of this article that there are more fallacies in this short paragraph than you can shake the proverbial stick at. It shall be the burden of this article to point them out, in Section 2, as it pertains to Austrian economics. In Section 3, I wrestle with equally fallacious arguments of Prychitko concerning libertarianism. The burden of Section 4 is to assess

¹ David L. Prychitko, “Thoughts on Austrian Economics, ‘Austro-Punkism’ and Libertarianism,” in David L. Prychitko, *Markets, Planning, and Democracy: Essays After the Collapse of Communism* (Cheltenham, UK: Edward Elgar, 2002), pp. 186-90.

² *Ibid.*, p. 187.

Prychitko's assessment of his own views. In Section 5, I make several suggestions to Prychitko and his ilk, and I conclude in Section 6.

2. Incomprehension of Austrian Economics

a. Pragmatic sense?

Praxeology is the science of human action.³ It is predicated upon some basic postulates, which are incapable of refutation. For example, there is such a thing as human action. As the very attempt to deny this involves the denier in human action (the human action of denial), it *must* be accepted. This premise plays a role in economic analysis similar to the law of non-contradiction, or of the excluded middle, in logic. This makes very little “pragmatic sense,” in that it will not help fix plumbing, plant crops, or cure disease. It is no more “pragmatic” than is the Pythagorean theorem. However, to maintain that the laws of logic or economics are “pragmatic” in any but the most poetic of senses, bespeaks a profound misunderstanding of praxeology.

Prychitko characterizes in the above quotation the practice blazed by Ludwig von Mises and Murray Rothbard as “a peculiar form of praxeology.” Possibly, this implies that there is a better form of praxeology engaged in by the intellectual opponents of these two Austrian economists. But what does this alternative consist of? Prychitko vouchsafes us no answer to this vital question, which leads me to conclude that he has no alternative praxeology in mind, but is merely engaging in name-calling.

However, there is a possible alternative explanation, to wit, Prychitko is merely implying that there are forms of praxeology lacking the peculiarities that the Mises/Rothbard form has. “Peculiar” doesn't necessarily mean “bad”; it could also mean “odd.” You could call something odd without needing to have a better version of that thing in mind. And calling something odd doesn't oblige you to have an alternative in mind at all. On this interpretation, all that Prychitko would mean is: “Of all the forms of praxeology I've seen, the Mises/Rothbard one sure has some peculiarities about it.” Above, I call this

³ See Hans-Hermann Hoppe, “On Praxeology and the Praxeological Foundation of Epistemology and Ethics,” in *The Meaning of Ludwig von Mises*, ed. J. Herbener (Boston, MA: Dordrecht 1992); Ludwig von Mises, *Theory and History: An Interpretation of Social and Economic Evolution* (New Rochelle, NY: Arlington House, 1969); Thorsten Polleit, “Mises's Apriorism Against Relativism in Economics,” accessed online at: <http://blog.mises.org/archives/008051.asp>; Murray N. Rothbard, “In Defense of Extreme Apriorism,” *Southern Economic Journal* (1957), pp. 314-20; Joseph Salerno, “The Sociology of the Development of Austrian Economics,” in *Property, Freedom, and Society: Essays in Honor of Hans-Hermann Hoppe*, ed. Jorg Guido Hulsmann and Stephan Kinsella (Auburn, AL: Ludwig von Mises Institute 2009), pp. 95-108, accessed online at: http://mises.org/books/hulsmann-kinsella_property-freedom-society-2009.pdf; George A. Selgin, “Praxeology and Understanding: An Analysis of the Controversy in Austrian Economics,” *Review of Austrian Economics* 2 (1988), pp. 19-58.

“mere” name-calling, but it actually would be vague and non-committal of him. On this interpretation, my criticism over-reads him and is over-stated.

I reject this interpretation, however. In my view, taking into account the entire tenor of Prychitko’s article, by “peculiar” he means heavily to criticize Austrian praxeological economics, at least the Mises/Rothbard version thereof. And, if he is going to criticize it, it is incumbent upon him to give some *reasons* for so doing. He does not, so how else is any rational person to interpret this but as “name-calling”?

b. Apodictic certainty

Prychitko is less than happy with the “apodictic certainty,” or “ironclad proofs,” that comprise Austrian economics. He characterizes this as seeking after truth with a capital “T,” or “Truth.” Admittedly, to the non-initiated, this smacks of hubris. How can there be any such thing as absolute truth? It is not scientific. It smacks of religion, which may well have its place, but surely not within the realm of economics, they might say.

But the aforementioned Pythagorean theorem, too, is absolutely certain.⁴ To deny it involves one in self-contradiction. Triangles have 180 degrees. Every last one of them comes replete with precisely this number of degrees, not one more or less. If there is *any* deviation, the figure is not a triangle at all. Even imaginary triangles, if they are indeed triangles, exhibit this characteristic. There are no exceptions. Would maintaining these truths justify calling the mathematicians who profess them arrogant, “dogmatic,” or “anointed”? Surely not. Not even Prychitko, presumably, would have such presumption. Why, then, apply such characterizations to the logicians of economics? For non-Austrian economists such as Prychitko who are ignorant of praxeology, this is all inexplicable or “irksome.” But there is no mystery here. Praxeologists employ a technique that is simply not acknowledged in his philosophy.

c. Certainty

Praxeology consists of synthetic *a priori* statements. They are as undeniable as tautologies, and yet apply to the real world just as empirical truths do. Hans-Hermann Hoppe offers the following examples of synthetic *a priori* statements:

⁴ To put this into context, in saying this, I am assuming away Rene Decartes’s scenario that we are all asleep, the possibility that we are all deluded, crazy, whatever. Mathematicians, too, make mistakes, and, who knows, this may be one of them. It doesn’t do to think of oneself as intellectually invincible, after all. What is commonly meant by expressions of this sort, and I certainly subscribe to this more modest way of putting the matter, is that claims like the Pythagorean theorem, “ $2 + 2 = 4$,” “man acts,” “price floors create surpluses,” and other such statements cannot be refuted by empirical testing, are not falsifiable, etc. Of course, we imperfect humans can be in error on this or anything else, but statements of this sort occupy a different universe of discourse from empirical claims. They are economic *laws*, not mere hypotheses.

Whenever two people A and B engage in a voluntary exchange, they must both expect to profit from it. And they must have reverse preference orders for the goods and services exchanged so that A values what he receives from B more highly than what he gives to him, and B must evaluate the same things the other way around.

Or consider this: Whenever an exchange is not voluntary but coerced, one party profits at the expense of the other.

Or the law of marginal utility: Whenever the supply of a good increases by one additional unit, provided each unit is regarded as of equal serviceability by a person, the value attached to this unit must decrease. For this additional unit can only be employed as a means for the attainment of a goal that is considered less valuable than the least valued goal satisfied by a unit of such good if the supply were one unit shorter.

Or take the Ricardian law of association: Of two producers, if A is more productive in the production of two types of goods than is B, they can still engage in a mutually beneficial division of labor. This is because overall physical productivity is higher if A specializes in producing one good which he can produce most efficiently, rather than both A and B producing both goods separately and autonomously.

Or as another example: Whenever minimum wage laws are enforced that require wages to be higher than existing market wages, involuntary unemployment will result.

Or as a final example: Whenever the quantity of money is increased while the demand for money to be held as cash reserve on hand is unchanged, the purchasing power of money will fall.⁵

The list could be added to, not indefinitely, to be sure, but significantly. Here are a few more entries that I could add: When rent control is imposed, there will be less investment in residential rental housing than would otherwise be the case. When tariffs are introduced, there will be fewer gains from trade than would obtain in their absence. Price controls tend to decrease the ability of markets to allocate resources in accordance with consumer demands. Profits tend to equalize over industries, assuming away risk considerations. Profits tend toward zero, in the absence of economic changes. Would Prychitko be so rash as to deny any of these claims? If so, he is on similarly shaky ground as those who quarrel with the statement that rectangles have four right angles or that $2 + 2 = 4$.

I defy Prychitko, or anyone else for that matter, to come up with a case of two people, A and B, who engage in a voluntary exchange, neither of whom expects to profit thereby. I defy Prychitko, or anyone else for that

⁵ Hans-Hermann Hoppe, *Economic Science and the Austrian Method* (Auburn, AL: Ludwig von Mises Institute, 1995).

matter, to explain the logic of a case where A and B do not have reverse preference orders for the goods and services exchanged, so that A values what he receives from B more highly than what he gives to him, and B must evaluate the same things the other way around. Ditto for all of the other synthetic *a priori* statements mentioned above having to do with rent control, profits, etc.

d. Testing

My doctoral dissertation is on rent control.⁶ It is an econometric study of the effects of this sort of legislation on the quantity and quality of rental housing, vacancy rates, etc., which are dependent variables. Typically, I would get the “correct” signs for my independent variable, such as the duration of time rent control was in effect. And, usually, I obtained significance at least at the 10% level, and often at the 5% level. Every once in a while, however, I would record the *wrong* sign for my independent variable, and sometimes this coefficient would be statistically significant.

Did my thesis advisor say something along the lines of, “Wow, I’ve got this young student, Block, who is going to turn microeconomics upside down? Why, with these results we can show that everything we thought we knew about rent control was wrong? This is publishable in the best journals. Who knows, a Nobel Prize is in the offing.”

Not a bit of it. He was far too kind to say the following to me, but his facial expression upon reading my results was telling. What he was thinking, based on his attitude to me was, “Block, you moron, go out and do this again, until you get it right. Maybe, change some of your other independent variables. Make sure the data you entered is correct. But, we surely know the correct signs of these coefficients.”

So what was testing what here? Were my econometric regressions “testing” the apodictically certain insight that, *ceteris paribus*, if the government places obstacles in the way of earning profits in one industry, this will tend to reduce investments therein, and incentives to maintain, repair, and upgrade heterogeneous capital? Or was it the other way around? Of course, the latter was true. *We full well knew* what the “correct” sign was for the rent control variable before we even began.

This is not “dogmatic,” as Prychitko proclaims. Rather, it arises directly from basic supply-and-demand analysis. Other things being equal, price ceilings cause shortages, and price floors create surpluses. Most economists, I dare say, not merely Austrian ones, have “unflinching certitude”⁷ that these claims are correct. Yes, we might all be dreaming or some such. Maybe there is, really, no such thing as the science of economics,

⁶ Walter E. Block, “The Economics of Rent Control in the U.S.” (PhD Diss., Columbia University, 1972), accessed online at: <http://tinyurl.com/24ljyz>.

⁷ Subject to the qualifications mentioned in note 4.

or reality. But coming back to the real world: if there is anything true in economics, it is that price ceilings cause shortages and price floors create surpluses. Prychitko's attack on Austrian economics for maintaining the truths⁸ of these statements excludes him not only from praxeological economics, but from economics as a whole.

And precisely the same analysis applies to all of the other synthetic *a priori* statements mentioned in Section 2c of this article. Not one of them can be "tested," since they are apodictically true. Austrian economics is modeled not on any of the physical sciences, such as chemistry, biology, or physics, but rather, is a *logical* endeavor, built along the lines of symbolic logic, geometry, trigonometry, calculus, and many of the other branches of mathematics.

e. Mises versus Rothbard

Prychitko makes much of the fact that Mises and Rothbard, both praxeologists, nevertheless arrive at different positions regarding limited-government libertarianism, favored by the former, and anarcho-capitalism, the viewpoint of the latter. How can this be, wonders Prychitko, if praxeology is a guarantee of Truth?

There are two good reasons for this. First, neither Mises nor Rothbard regarded their respective positions as following ineluctably from basic Austrian economic premises, such as human action, positive time preference, diminishing marginal utility, or any such thing. Rather, both limited-government libertarianism for Mises and anarcho-capitalism for Rothbard, can be interpreted as *normative* claims. Each of these scholars believes that his chosen system *should* be implemented, that it is the only *moral* thing to do, but they both accept the positive/normative distinction, and hence believe that economics is a value-free positive science. Therefore, for them, their political economic philosophy is not a matter of praxeology.⁹

Second, let us interpret matters differently, *arguendo*. Here, we posit that both Mises and Rothbard started off with the same basic premises, and

⁸ Prychitko capitalizes this word, and renders it as "Truth." Here, I detect more than a whiff of logical positivism. There are no such things as truths in (social) science; all claims are only tentative, and must be dependent upon the latest statistical finding. Here, Prychitko aligns himself with the majority of mainstream economists, who at least pay lip service to this viewpoint. But, when push comes to shove, the ire of even neoclassical economists can be raised when economist renegades question whether or not price ceilings cause shortages, and price floors create surpluses.

⁹ Well, I go too quickly here. Rothbard, at least, did regard his libertarian views as based on undeniable premises, but the premises were not part of Austrian ones, such as human action, etc. Rather, they were based on the twin pillars of the non-aggression axiom and property rights based on Lockean homesteading. See Hans-Hermann Hoppe, "The Ethical Justification of Capitalism and Why Socialism Is Morally Indefensible," in Hans-Hermann Hoppe, *A Theory of Socialism and Capitalism* (Boston, MA: Kluwer Academic Publishers, 1989).

yet, through a chain of complicated and complex reasoning, arrived at different conclusions. And not only divergent conclusions, but those that were mutually incompatible with one another, to wit, minarchism and anarcho-capitalism. In Prychitko's view, this renders the entire process specious. Not so.

Suppose that two trigonometricians start off with the same principles and end up differently, one concluding "sine" and the other "cosine." Would we move, automatically, to a complete rejection of trigonometry as hopelessly illogical? We would not, if we retain a modicum of rationality. Rather, we would deduce that one of these mathematicians is correct and the other incorrect.¹⁰ Why then treat two (supposed¹¹) praxeologists any differently? Why not conclude, instead, that one of these two scholars, Mises or Rothbard, made a misstep, a miscalculation, in one of the lines of his argument? There is nothing in Austrian economics that is "ironclad." To write this, as does Prychitko, bespeaks a profound misunderstanding of the enterprise. As for "unflinching certitude," this is, surely, a psychological state, one profoundly incompatible with science, whether empirical or logical. Surely, there are some Austrian economists who are no doubt guilty of it, but they are not culpable *because* they are praxeologists. It cannot be denied, moreover, that there are non-Austrian economists who are equally given to this irrational, non-scientific, dogmatic state of mind. Hubris finds its way into *all* human endeavor; no one method should be singled out for condemnation in this regard.

But what of the following possible objection to the thesis I am supporting: There is a fundamental problem with my analogy of Austrian economics to logic and mathematics. Logic and mathematics do not seek causal explanations of the form "What *causes* what?" But even as I describe it, Austrian economics does precisely that. It is sciences like physics, chemistry, and biology, not sciences like logic and math, that are cause-seeking. Why doesn't this fact undermine my analogy? If economics is essentially cause-seeking and mathematics is not, how can economics be like mathematics in any important way? If the analogy doesn't hold, have I really answered Prychitko's point about testing?

I answer this excellent objection in two ways. First, to be sure, chemistry and physics attempt to discern causal relationships. In so doing, however, they certainly *utilize* mathematics and logic to this end. They often make deductions from premises. For example, chemists deduce, from the number of electrons in a substance, which other ones it can be combined with. Austrian economics, too, even though it also attempts to unravel causal connections, also engages in this sort of thinking. For example, from

¹⁰ Or alternatively, they might both be in error.

¹¹ Remember, we are now stipulating, *arguendo*, that Mises and Rothbard both derive their political philosophies from Austrian principles through praxeology.

diminishing marginal utility, we infer that when a human actor is called upon to relinquish one benefit of his present stock, it will be the one upon which he places the lowest value.¹²

Second, the analogy between mathematics and logic, on the one hand, and economics, on the other, can only be carried so far. They are akin in that both sciences use deduction; they are identical insofar as yielding undeniable conclusions. But yes, there is a disanalogy as far as seeking causal explanations is concerned. Does this render invalid the analogy between Austrian (not mainstream) economics, on the one hand, and disciplines such as trigonometry, calculus, geometry, symbolic logic, and mathematics, on the other? Not at all. This is only an analogy, not an identity. For an analogy to be valid, *some* (important) elements need be held in common, but not *everything*. In the latter case, we have an identity, not an analogy.

According to Paul Heyne, Peter J. Boettke, and Prychitko, “A shortage of 250 units emerges (can you see how we arrived at that number?) This is an *unintended consequence* of the rent control.”¹³ Is this dogmatic? A case can be made that this is indeed so.¹⁴ After all, how do they *know* that a shortage comes about as a result of the rent control price ceiling? Maybe there could have been a surplus; stranger things have happened. Maybe we should *test* this *hypothesis* a few more hundred thousand times so as to ensure its correctness. But even then, according to the logical positivists, we would only know this sort of claim provisionally, not apodictically.

One wonders in this regard what Prychitko would make of syllogisms such as (1) All men are mortal; (2) Socrates is a man; therefore, (3) Socrates is mortal. Or (a) $8 > 7$; (b) $7 > 6$; therefore, (c) $8 > 6$. If he were to carry through on his radical skepticism, he would doubt that Socrates is mortal and that 8 is a larger number than 6. Maybe he would call for a “test” of these conclusions. He would characterize as “anointed” and “dogmatic” anyone who had “unflinching certitude” about these syllogisms or who thought they were “ironclad.”

Implausible as it may seem to some, I am here saddling Prychitko with the claim that if he carries through consistently on his position because he rejects the Austrian economic method, he rejects arithmetic and syllogistic argumentation. It might be suggested that that would only follow if (a) some

¹² A man has four units of water. The first and most important he uses to drink. The second to clean his food. The third to wash himself. The fourth to clean his house. He gives up one of these units. As a result, his home becomes dirtier.

¹³ Paul Heyne, Peter J. Boettke, and David L. Prychitko, *The Economic Way of Thinking*, 10th ed. (Upper Saddle River, NJ: Prentice Hall, 2002), p. 127.

¹⁴ Here is another instance: “Rent controls, for example, don’t reduce scarcity. Rather, they unintentionally create shortages and lead to nonmonetary forms of competition”; see *ibid.*, p. 133. That sounds pretty dogmatic to me.

aspect of the Austrian economic method were on a par with arithmetic, syllogisms, geometry, etc., and (b) Prychitko were attacking that very aspect of the method. I now go on record as making precisely these two claims.

In my view, the essentials of the Austrian economic method are no different from the claims of arithmetic, etc., in the relevant senses. That is, all of these realms—praxeology, arithmetic, geometry, and syllogistic argumentation—contain synthetic *a priori* truths; they are undeniably, apodictically true, and they apply to the real world. To wit, if one denies valid syllogisms, one commits a self-contradiction. This is *equally* true, if one denies “man acts,” since the very denial constitutes human action. In addition, this is *precisely* the aspect of Austrian economics that is scorned, denigrated, and denied by Prychitko.

3. Libertarianism

I find Prychitko’s comments about libertarianism to be as problematic as his analysis of Austrian economics. He states yet again that he is opposed to the deductive method, which he characterizes as “dogmatic.”

a. Normative versus positive

According to Prychitko, “Conceptually, of course, one can imagine a sphere of Austrian economic theory and a separate sphere of libertarian political philosophy.”¹⁵ Merely conceptually? Conceptually *only*? There is in fact a *gigantic* logical divide between Austrian economics, on the one hand, and libertarian political philosophy, on the other. The former is a positive science, while the latter a normative discipline. Austrian economics, as in the case of all other schools of thought in the “dismal science,” is concerned with issues such as: What causes what? How do we explain and understand economic reality? How are prices determined? Why do we have depressions? What are the effects of tariffs? Libertarianism, in sharp contrast, addresses itself to an *entirely* different set of issues. It asks: Under what conditions is the use of force justified? Should abortion be allowed? Would voluntary slave contracts be legitimate in a free society? Is the death penalty justified? Is the minimum-wage law legitimate? What immigration policy is compatible with libertarianism?

Now, of course, the two sets of questions are not *entirely* unrelated. For example, whether or not the minimum-wage law is compatible with justice in some measure depends upon what, precisely, are its effects. However, only someone with a very different outlook on philosophy would aver that there is no real difference between the two issues, or claim that only “conceptually” are they to be distinguished from one another.

¹⁵ Prychitko, “Thoughts on Austrian Economics,” p. 190.

b. Coercion

Prychitko is not just opposed to the syllogistic format of deduction, but also dismissively rejects the basic premise from which libertarians typically derive their worldview: opposition to coercion. So elemental to the libertarian philosophy is this that it is usually characterized as the “non-aggression axiom” or the “non-aggression principle” (NAP). Libertarians may well, and often do, differ sharply over the *derivation* of this principle. Utilitarians base it on maximizing utility, natural-rights libertarians see it as stemming from man’s basic nature, religious libertarians view it as deriving from the commandments of God, Hoppean libertarians see the denial of the NAP as a performative contradiction.¹⁶ What they *all* have in common, though, is that for some reason or other they accept the NAP as crucial. Indeed, all reaches of the libertarian edifice are united in this one thing. To the extent that they reject the NAP, they are not libertarians at all in that respect. Say what you will of Prychitko, it would not appear that he is any more of a libertarian than he is an Austrian economist.

c. Negative rights

Another way to express libertarianism is that it champions negative rights, but completely eschews so-called positive rights. Negative rights include the right *not* to be murdered, raped, stolen from, victimized by fraud, threatened, etc. Positive “rights” include the “right” to be *given* food, clothing, shelter, health care, and other such goodies. The problem with positive “rights” is that they imply the violation of negative rights. If you have a right to food or medicine, then I have an obligation to provide them for you. Unless I have contractually obligated myself to do so (say, you paid me for these services), then forcing me at the point of a gun to offer these to you amounts to stealing from me, which is a violation of my negative right not to be victimized by theft.

How does Prychitko stand on this important issue? Not with the libertarians. He says that there is “an equally dogmatic kind of libertarianism, claiming to deduce all sorts of radically individualistic rights claims from unshakable axioms. A kind of abstract, natural rights—and purely negative rights—reasoning that raises no moral questions over the voluntary use of private property.”¹⁷

Yes, “purely negative rights” are part and parcel of libertarianism. Positive “rights,” in contrast, are a not-so-heavily disguised call for theft from property owners. They are an attempt to impose egalitarianism on society. And as for “moral questions over the voluntary use of private property,” *of*

¹⁶ See Hoppe, “The Ethical Justification of Capitalism and Why Socialism Is Morally Indefensible,” in Hoppe, *A Theory of Socialism and Capitalism*; and Hans-Hermann Hoppe, *The Economics and Ethics of Private Property* (Boston, MA: Kluwer Academic Publishers, 1993).

¹⁷ Prychitko, “Thoughts on Austrian Economics,” p. 190.

course they arise. Some people do indeed use their liberty to do things that are widely considered immoral, but that is not a libertarian political issue. Prychitko's understanding of this viewpoint is so tenuous that he confuses them. Some people, through the "voluntary use of private property," indulge in pornography, prostitution, suicide, reliance on addictive drugs, etc. These are considered immoral, but as long as these acts are conducted with other consenting adults, they violate no libertarian law. Morality and libertarian law are not the same thing.

Why, moreover, is it "dogmatic" to "deduce" conclusions from basic principles, whether in the realm of Austrian economics or in the arena of libertarian political philosophy? Legal theorists do this all the time, as when they apply principles of law to cases unanticipated by a legislative enactment or judicial finding. What else are we to do, when the solution to a problem is not immediately apparent, if *not* to deduce conclusions from settled principles or precedents? Nor is there anything "unshakable" in either universe of discourse. Again, Prychitko confuses the deductive method with hubris. Is only induction, not deduction, acceptable?

d. Full development of the human person

Libertarianism is a *political* philosophy, and *only* a political philosophy. It is not a philosophy of life that indicates the best way to live, apart, of course, from refraining from initiating or threatening violence against other people and their justly owned property. It asks but one question: When is force justified? And gives but one answer: Only in retaliation or defense against a prior use of violence. The rest is merely the drawing out of the implications of this question and that answer.

However, on Prychitko's view, "liberty . . . is not only a political end. Liberty is also a means toward the full development of the human person.¹⁸ My normative vision of the ideal community . . . would be politically libertarian *and* infused with a solidaristic moral element."¹⁹ No doubt, liberty, the absence of initiatory violence, has *many* results, for example, greater cooperation, increased wealth, more happiness—and yes, the more "full development of the human person." But adherence to the NAP is not to be confused with these *results* of adherence to the NAP. Adherence to the NAP is *different* from the results thereof.

It is by no means clear what "solidaristic" means. One gathers that it implies communal living, or some such. And that is, indeed, *one* way that liberty may be enjoyed. However, liberty may also properly be utilized in the exact opposite way, for example, as a hermit rather than in "solidarity" with anyone else, or as a hater, a bigot, whatever,²⁰ as long as no threat or

¹⁸ Is this not a redundancy?

¹⁹ Prychitko, "Thoughts on Austrian Economics," p. 190.

²⁰ In some quarters, unless one is "cosmopolitan," one is not really a libertarian.

aggression is visited upon the despised group. As for the “moral element,” while some may choose to employ their liberty in such a manner, others may do the exact opposite. There is no doubt some connection between morality and libertarianism, but it is by no means a tight fit.

4. Dogmatism

Prychitko cites me as characterizing scholars such as him who have “penned a general criticism of the kind of praxeology defended by Mises and Rothbard” as an “Anti-Austrian Austrian.”²¹ Well, yes, the kind of praxeology employed by Mises and Rothbard is indeed the paradigm case of Austrian economics. If someone offers a “general criticism” of these insights, as Prychitko does, as opposed to questioning this or that element of them, then he is an “Anti-Austrian Austrian.”

Austrian praxeologists do criticize each other’s work, but only *within* the general framework of praxeological Austrianism. If they question the general framework of praxeological Austrianism, they are to that extent not Austrian economists. However, if none of them were ever to call into question anything written by any other member of this school in good standing, then there would be strong suspicions that they were a cult. For an example of a true cult, consider the Randian movement, at least that part of it now centered around Leonard Peikoff. But it is always and ever in this way. One mathematician may properly criticize another’s findings, but if he calls into question the basic elements of mathematics, as do some economists such as Prychitko with regard to praxeology, then he is no longer a mathematician, just as such economists are not really Austrian economists.

5. Suggestions

I call upon all anti-Austrian “Austrians”²² to cease and desist from identifying themselves as Austrian economists and, instead, to embrace the

Cosmopolitanism usually applies to people who live within big cities (preferably, inside of the Washington D.C. beltway), who frequent gymnasiums, have homosexual and black friends, and eat quiche. Others are dismissed as hicks, rednecks, or people from the sticks or “flyover country.” Needless to say, none of this has anything to do with libertarianism, properly understood. Aspersion was cast upon Ron Paul’s libertarian credentials by beltway “libertarians” of this sort in the 2008 and 2012 presidential elections.

²¹ Prychitko, “Thoughts on Austrian Economics,” p. 187, citing Walter E. Block, “Radical Economics: An Interview with Walter Block,” *The Austrian Economics Newsletter* 19, no. 2 (1999), accessed online at: <http://www.mises.org/journals/aen/blockaen.asp>.

²² It is surely problematic to attempt both to maintain a connection with Austrianism and to advocate that this very name be dropped. Before dropping the name “Austrian economics” in favor of Coordination Problem Economics, many of these same anti-Austrian “Austrians” favored replacing “Austrian” economics with “Market Process”

more honest role of schismatics. I urge them to engage in a serious bit of product differentiation and no longer try to cleave to the Austrian name. Some of them may have started their intellectual careers in this capacity, but what they now do isn't really Austrian economics; it is, if anything, anti-Austrianism. Prychitko is a clear case in point. Let them have the decency and the intellectual courage to call themselves something else, given that they are now something very different.

I urge that they borrow a leaf from other intellectual schismatics in the field of economics. At least the Public Choice School, for example, had the decency to call themselves something other than Chicagoans; yet, there are undoubtedly fewer differences between the Chicago and the Public Choice Schools than there are between the Austrian and anti-Austrian "Austrian" economists.

To what should they change their appellation? My suggestion is that they change it to "Market Process."²³ These folks once had a journal by this name; maybe they can be enticed into reverting back to this nomenclature, thus in effect leaving Austrian economists in peace. Alternatively, they could adopt "Coordination Economics," which is the name of their blog. One benefit of either change would be that the two very different schools of thought would no longer be confused one with the other.²⁴ Mainstream economists would no

economics. There is also a Program on Social and Organizational Learning; they are nothing if not creative with respect to nomenclature alternatives to "Austrian economics." See David Gordon, "What Should Anti-Economists Do? Review of *The Market Process: Essays in Contemporary Austrian Economics*," *The Mises Review* 1, no. 1 (1995), accessed online at: http://mises.org/misesreview_detail.aspx?control=81.

²³ Another significant deviation of the anti-Austrian "Austrians" was their embrace of hermeneutics. For critiques of that deviation, see David Gordon, "Hermeneutics versus Austrian Economics," accessed online at: <http://mises.org/etexts/hermeneutics.asp>; Hans-Hermann Hoppe, "In Defense of Extreme Rationalism: Thoughts on Donald McCloskey's *The Rhetoric of Economics*," *Review of Austrian Economics* 3 (1989), pp. 179-214; Murray N. Rothbard, "The Hermeneutical Invasion of Philosophy and Economics," *Review of Austrian Economics* 3 (1989), pp. 45-59; and Murray N. Rothbard, "Intimidation by Rhetoric," *Review of Austrian Economics* 9, no. 1 (1996), pp. 173-80. But market process economics beats "hermeneutics" by a long shot. At least market process is an important, if subsidiary, aspect of Austrian economics; hermeneutics, in contrast, is unrelated, actually anathema, to praxeology. Since anti-Austrian "Austrians" endorse hermeneutics, that fact shouldn't be part of their name. "Market Process" beats a name with "hermeneutics" in it, because it is at present a more accurate description of their actual practice and beliefs.

²⁴ As it happens, they have already taken steps in this direction; they have changed the name of their blog from "Austrian Economics" to "Coordination Problem"; see <http://www.coordinationproblem.org/2010/01/new-thinking-for-a-new-decade-1.html>. See also an important commentary on this occurrence: "Good News from GMU," *The LRC Blog*, January 1, 2012, accessed online at:

longer confuse them with us, and think that all Austrians are “dogmatic,” as they insist we are. Nor would they confuse us with them or think that all Austrian economists had embraced hermeneutics, no longer supported praxeology, revered economists such as Ronald Coase and James Buchanan, etc.²⁵

What would be the implication if my advice were carried out? The Society for the Development of Austrian Economics (SDAE) would be changed to The Society for the Development of Market Process Economics (SDMPE), or perhaps, for short, The Society for the Development of Market Process (SDMP). The present *Review of Austrian Economics* would become *Review of Market Process Economics*, or perhaps, the old *Market Process* journal name would be revived and substituted for it. “Austrian” summer programs at places like Foundation for Economic Education, Institute for Humane Studies, Cato, and elsewhere would no longer be advertised in that way; instead, they would be promoted as Market Process summer programs.

A note to my anti-Austrian “Austrian” friends: There is nothing to be ashamed of in taking on the mantle of Market Process. This perspective has an illustrious pedigree. It embodies enough Austrianism so that your views can still be respected. Let us agree to distinguish ourselves from each other by appropriate terminology, rather than continue to struggle acrimoniously.

6. Conclusion

Three different colleagues read an earlier version of this article, and their reaction to it was identical: they characterized my criticism of Prychitko as “gratuitous nastiness.” I use quotation marks around this phrase, since it was mentioned by all three. I have no doubt that this is a correct assessment of the present article—well, at least the word “nastiness,” if not “gratuitous.” That is, I fully accept that this is a nasty article, but reject the notion that it is gratuitous. What evidence can I offer in support of this assessment?²⁶

Carl Menger had this to say to Gustav Schmoller:

I am aware, my friend, that it is a grievous sin to ridicule the ridiculous. Moreover, it is so hard not to fall into the tone of contempt toward an insolent opponent. But what other tone is

<http://www.lewrockwell.com/blog/lewrw/archives/45955.html>.

²⁵ James Buchanan has produced subjectivist works that fall within the Austrian tradition; see, e.g., James M. Buchanan, *Cost and Choice: An Inquiry into Economic Theory* (Chicago, IL: University of Chicago Press, 1969); and James M. Buchanan and G. F. Thirlby, *L. S. E. Essays on Cost* (New York: New York University Press, 1981). But Buchanan characterizes Austrianism as a “cult,” and would be mortified to be included in that number. Thus, only an anti-Austrian “Austrian” would consider Buchanan an Austrian (apart from his adherence to Austrian subjective-cost theory).

²⁶ Empirical evidence applies to non-praxeological statements such as this one.

appropriate toward the utterances of a man who, without the slightest substantial orientation in the questions of scientific methodology, carries himself like an authoritative judge of the value or non-value of the results of methodological investigation? . . . Discuss in serious fashion the most difficult questions of epistemology with a man in whose mind every effort for reform of theoretical [economics], indeed every cultivation of the same, is pictured as Manchesterism! Discuss, without dropping into a bantering tone, questions with a scholar whose entire stock of somewhat original knowledge in the field of theoretical [economics] consists of a primordial ooze of historico-statistical material; with a scholar who incessantly confounds with one another the most simple concepts of the theory of knowledge! And such a quarrel as that should afford me satisfaction? . . . The most difficult and uninspiring experience in the field of science is always critical contact with one-sided representatives of practical partisanship; with men who carry over their one-sidedness and bad habits of party conflict into scientific discussion. How much more unedifying when such opponents pose as of superior scientific rank! . . . If anyone gropes in such complete darkness with reference to the aims of research in the field of [economics], as does the editor of the Berlin *Jarhbuch*, his ideas about the processes of knowledge in the field of our science will be insured against early attack.²⁷

Now, I full well accept the notion that I am no Menger, and that Prychitko is no Schmoller. Yet, the *relationship* my outlook bears to Prychitko's is eerily similar to the one Menger's bore to Schmoller's. That is, Menger is to Schmoller as I am to Prychitko.²⁸ If Menger can so nastily reject Schmoller without his dismissal being considered "gratuitous," perhaps there is hope that my criticism of Prychitko can be interpreted in that same light. My other defense against this charge is that Prychitko "started up," since he initiated the accusation that Austrians peddle a "cart-load of dogmatism." If that is not gratuitous nastiness, I don't know what is. In my view, the level of discourse is appropriate to the occasion. When Prychitko accuses Austrians of dispensing a "cart-load of dogmatism," he cannot expect kid gloves in return.

As Mises states: "Man can . . . never be absolutely certain that his inquiries were not misled and that what he considers as certain truth is not error. All that man can do is submit all his theories again and again to the

²⁷ Quoted in Richard M. Ebeling, "An 'Austrian' Interpretation of the Meaning of Austrian Economics," *Advances in Austrian Economics* 14 (2010), pp. 5-6.

²⁸ Matters are even worse, since at least Schmoller had the decency never to characterize himself as an Austrian, while the same cannot be said about Prychitko.

most critical examination.”²⁹ If that is a “cart-load of dogmatism,” make the most of it. Or rather, realize that Prychitko confuses a *psychological* state of certainty with a *praxeological* understanding of economics.³⁰

²⁹ Ludwig von Mises, *Human Action*, The Scholar’s Edition (Auburn, AL: Ludwig von Mises Institute, 1998 [1949]), p. 68.

³⁰ I thank an unusually forceful, active, and insightful editor of *Reason Papers* for dragging me, kicking and screaming, to confront several possible objections to my thesis. Thanks to his efforts, this is a much stronger article than the one I originally submitted. I alone am, of course, responsible for any and all remaining errors.

Review Essays

The Space of Music: Review Essay of Dmitri Tymoczko's *A Geometry of Music*

Roger Scruton
University of St. Andrews;
University of Oxford

In recent decades we have seen a gradual shift of emphasis in academic musicology, away from the study of the great tradition of Western art music to the empirical investigation of the musical ear. The rise of cognitive neuroscience has given impetus to this shift. For it reminds us that music is not sound, but sound organized “in the brain of the beholder.” Musical organization is something that we “latch on to,” as we latch on to language. And once the first steps in musical comprehension have been taken, we advance rapidly to the point where each of us can immediately absorb and take pleasure in an indefinite number of new musical experiences. This recalls a fundamental feature of language, and unsurprisingly, results from linguistics have been transferred and adapted to the analysis of musical structure in the hope of showing just how it is that musical order is generated and perceived, and just what it is that explains the grip that music exerts over its devotees.

We should recognize here that music is not just an art of sound. We might combine sounds in sequence as we combine colors on an abstract canvas, or flowers in a flowerbed. But the result will not be music. It becomes music only if it also makes *musical sense*. Leaving modernist experiments aside, there is an audible distinction between music and mere sequences of sounds, and it is not just a distinction between *types* of sound (e.g. pitched and unpitched, regular and random). Sounds become music as a result of organization, and this organization is something that we perceive and whose absence we immediately notice, regardless of whether we take pleasure in the result. This organization is not just an aesthetic matter, not simply a *style*. It is more like a grammar, in being the precondition of our response to the result *as music*. We must therefore acknowledge that tonal music has something like a syntax—a rule-guided process linking each episode to its neighbors, which we grasp in the act of hearing, and the absence of which leads to a sense of discomfort or incongruity.

Of course there are things called music which do not share this syntax, for example, modernist experiments, African drum music, music employing scales that defy harmonic ordering, and so on. But from medieval plainsong to modern jazz we observe a remarkable constancy, in rhythmical, melodic, and harmonic organization, so much so that one extended part of this tradition has been singled out as “the common practice” whose principles are taught as a matter of course in classes of music appreciation. This phenomenon demands an explanation.

Leonard B. Meyer argues that we understand music by a kind of probabilistic reasoning, which endows musical events with varying degrees of redundancy.¹ The common practice has emerged from a steady accumulation of conventions and expectations, which enable listeners to predict what follows from what, and which give rise to the distinctive “wrong note” experience when things go noticeably astray. This suggestion was taken forward by Eugene Narmour, to produce what he calls the “implication-realization model” of musical structure.² And more recently, David Temperley has applied Bayesian probability theory to standard rhythms and melodies, in order to “model” the way in which listeners assign meter and tonality to sequences.³ Temperley’s work raises three questions: What is a “model”? When is a model “adequate” to the data? And what might the discovery of an adequate model show, concerning our understanding and appreciation of music? A model that can be rewritten as an algorithm could program a computer to recognize (or should we say “recognize”?) metrical order and key. Such a model can be tested against human performance, and if it successfully predicts our preferences and decisions, it offers the beginning of a theory of musical cognition. It suggests an account of what goes on in the brain, when a listener identifies the metrical and tonal structure of the piece he is listening to. And that seems to be the aim of Temperley’s reflections.

However, others use the term “model” more loosely, to mean any way of representing the musical surface that displays the perceived connections among its parts, and which suggests a way in which we grasp those connections, whether consciously or not. In this sense the circle of fifths, chord-sequence analysis, and the old charts of key relations are all partial “models” of our musical experience. They enable us to predict, up to a point, how people will respond to changes of key and to accidentals in a melody, and they also suggest musical “constants” on which a composer can lean when constructing the harmonic framework of a piece. But they do not

¹ Leonard B. Meyer, *Emotion and Meaning in Music* (Chicago, IL: University of Chicago Press, 1956).

² Eugene Narmour, *The Analysis and Cognition of Basic Melodic Structures* (Chicago, IL: University of Chicago Press, 1990).

³ David Temperley, *Music and Probability* (Cambridge, MA: MIT Press, 2007).

aim to reduce musical understanding to a computational algorithm, nor do they offer anything like a complete theory of musical cognition that will explain how we assemble a coherent musical surface from our experience of its parts. Rather, they describe the surface, by identifying the salient features and the perceived relations between them.

Things would look a little different, however, if we could take the idea of a musical “syntax” literally. Linguistics attempts to model language use and comprehension in ways that lend themselves to computational analysis. If we could extend to the realm of musicology the advances made in psycholinguistics, therefore, we might be nearer to explaining what goes on, when people assemble the notes that they hear into coherent structures. Inconclusive research by neuroscientists suggests that “although musical and linguistic syntax have distinct and domain-specific syntactic representations, there is overlap in the neural resources that serve to activate these representations during syntactic processing.”⁴ This—“the shared syntactic integration resource hypothesis”—would be of considerable interest not only to evolutionary psychology but also to musicology, if it could be shown that the syntactic processes involved in the two cases work in a similar way. The neurological research does not show this. But there is a kind of speculative cognitive science that suggests that it might nevertheless be true, and that a “grammar” of tonal music could be developed which both resembles the grammar of language and can also be rewritten as a computational algorithm.

One goal of Noam Chomsky’s generative grammar has been to explain how speakers can understand indefinitely many new utterances, despite receiving only finite information from their surroundings.⁵ Formal languages like the predicate calculus provide a useful clue, showing how infinitely many well-formed formulas can be derived by recursion. If natural languages are organized in the same way, then from a finite number of basic structures, using a finite number of transformation rules, an infinite number of well-formed sentences could be extracted. Understanding a new sentence would not be a mystery, if speakers were able to recuperate from the string of uttered words the rule-governed process that produced it. Likewise, the widespread capacity to latch on to new music without any guidance other than that already absorbed through the ear, could be explained if musical surfaces were the rule-governed products of a finite number of basic structures, which might be partly innate and partly acquired during the early years of acculturation.

Certain aspects of music have been modeled in ways that suggest such a generative grammar. If metrical organization proceeds by division, as in Western musical systems, then surface rhythms can be derived from basic

⁴ Aniruddh D. Patel, *Music, Language and the Brain* (Oxford: Oxford University Press, 2008), p. 297.

⁵ Noam Chomsky, *Syntactic Structures*, 2nd ed. (Berlin: Walter de Gruyter, 2002).

structures by recursion and also understood by recuperating that process. This is made into the basis of a generative grammar of metrical rhythm by Christopher Longuet-Higgins and C. S. Lee.⁶ Others have made similar first shots at grammars for pitch organization.⁷

Such small-scale proposals were quickly displaced by the far more ambitious theory presented by Fred Lerdahl and Ray Jackendoff in their ground-breaking book, *A Generative Theory of Tonal Music*.⁸ Their argument is bold, ambitious, and detailed. But they recognize at many points that the analogy with language is tenuous, and that Chomskian linguistics cannot be carried over wholesale into the study of tonal music. For one thing, the hierarchical organization that Lerdahl and Jackendoff propose is an organization of individual musical objects, such as notes and chords, and not, as in Chomsky, of grammatical categories (verb, noun-phrase, adverb, etc.). There are no grammatical categories in music. Moreover, while we can distinguish “structural” from “subordinate” events in music, there is much room for argument as to which is which, and there is no one hierarchy that determines the position of any particular event. An event that is structural from the “time-span” point of view might be metrically subordinate and also a prolongation of some other event in the hierarchy of tension and release. Still, the various hierarchies identified by Lerdahl and Jackendoff capture some of our firmer intuitions about musical importance. The task is to show that there are transformation rules that derive the structure that we hear from a more deeply embedded structure, and do so in such a way as to explain our overall sense of the connectedness of the musical surface.

In order to grasp the point of the generative theory of tonal music it is important to distinguish two kinds of hierarchy: generative and cumulative. A generative hierarchy is one in which structures at the level of perception are generated from structures at the “higher” level by a series of rule-governed transformations. Perceivers understand the lower-level structures by unconsciously recuperating the process that created them, “tracing back” what they see or hear to its generative source. By contrast, a cumulative hierarchy is one in which perceived structures are repeated at different temporal or structural levels, but in which it is not necessary to grasp the higher level in order to understand the lower. For example, in classical architecture, a columnated entrance might be contained within a façade that exactly replicates its proportions and details on a larger scale. Many architectural effects are achieved in that way, by the “nesting” of one aedicule within

⁶ Christopher Longuet-Higgins and C. S. Lee, “The Rhythmic Interpretation of Monophonic Music,” *Music Perception* 1, no. 4 (Summer 1984), pp. 424-41.

⁷ For example, Diana Deutsch and John Feroe, “The Internal Representation of Pitch Sequences in Tonal Music,” *Psychological Review* 88, no. 6 (1981), pp. 503-22.

⁸ Fred Lerdahl and Ray Jackendoff, *A Generative Theory of Tonal Music* (Cambridge, MA: MIT Press, 1983).

another, so that the order radiates outward from the smallest unit across the façade of the building. This is not an instance of “generative” grammar in the sense that this term has been used in linguistics, but rather of the amplification and repetition of a separately intelligible design. It is true that the order of such a façade is generated by a rule, namely, “repeat at each higher scale,” but we understand each scalar level in the same way as every other. You recognize the pattern of the entrance, and you recognize the same pattern repeated on a larger scale in the façade. Neither act of recognition is more basic than the other, and neither depends on the other. In my *The Aesthetics of Music*, I argue that many of the hierarchies discerned in music, notably the rhythmic hierarchies described by Grosvenor Cooper and Leonard B. Meyer,⁹ are cumulative rather than generative, and therefore not understood by tracing them to some hypothetical “source.”¹⁰ In the case of rhythm there are generative hierarchies, too, as was shown by Longuet-Higgins, writing at about the same time as Cooper and Meyer. But it seems to me that, in the haste to squeeze music into the framework suggested by linguistics, writers have not always been careful to distinguish the two kinds of hierarchy. Music, in my view, is more like architecture than it is like language, and this means that repetition, amplification, diminution, and augmentation have more importance in creating the musical surface than do rule-guided transformations of some structural “source.”

The place of semantics in the generation of surface syntax is disputed among linguists, and Chomsky has not adhered to any consistent view in the matter. As a philosopher, however, influenced by a tradition of thinking that reaches from Aristotle to Gottlob Frege and Alfred Tarski and beyond, I would be surprised to learn that deep structure and semantics have no intrinsic connection. Language, it seems to me, is organized by generative rules not by chance, but because that is the only way in which it can fulfill its primary function of conveying information. Deep structures must surely be semantically pregnant if the generative syntax is to shape the language as an information-carrying medium, one in which new information can be encoded and received. Without deep structure, language would surely not be able to “track the truth,” nor would it give scope for the intricate question-and-answer of normal dialogue. A syntax that generates surface structures from deep structures is the vehicle of meaning, and that is why it emerged.

Take away the semantic dimension, however, and it is hard to see what cognitive gain there can be from a syntax of that kind. In particular, why should it be an aid to comprehension that the syntactical rules generate surface structures out of concealed deep structures? This question weighs heavily on

⁹ Grosvenor Cooper and Leonard B. Meyer, *The Rhythmic Structure of Music* (Chicago, IL: University of Chicago Press, 1960).

¹⁰ Roger Scruton, *The Aesthetics of Music* (Oxford: Oxford University Press, 1997), p. 33.

the generative theory of music, precisely because music is not “about” anything, either in the way that language is about things or in the way that figurative painting is about things. Indeed, musical organization is at its most clearly perceivable and enjoyable in those works, like the fugues of Bach and the sonata movements of Mozart, which are understood as “abstract” or “absolute,” carrying no reference to anything beyond themselves.

You might say that a hierarchical syntax would facilitate the ability to absorb new pieces. But this ability is as well facilitated by rules that operate on the surface, in the manner of the old rules of harmony and counterpoint or by the techniques of local variation and embellishment familiar to jazz improvisers. What exactly would be added by a hierarchical syntax, that is not already there in the perceived order of repetition, variation, diminution, augmentation, transposition, and so on? Perhaps it is only in the case of metrical organization that a generative hierarchy serves a clear musical purpose, since (in Western music at least) music is measured out by division, and divisions are understood by reference to the larger units from which they derive.

There is a theory, that of Heinrich Schenker, which offers to show that harmonic and melodic organization are also hierarchical, and Lerdahl and Jackendoff acknowledge their indebtedness to this theory.¹¹ According to Schenker, tonal music in our classical tradition is (or ought to be) organized in such a way that the musical surface is derived by “composing out” a basic harmonic and scalar progression. This basic progression provides the background, with postulated “middle ground” structures forming the bridges that link background to foreground in a rule-governed way. Musical understanding consists in recuperating at the unconscious level the process whereby the background *Ursatz* (or fundamental structure) exfoliates in the musical surface.

Objections to Schenker’s idea are now familiar. Not only does it reduce all classical works, or at least all classical masterpieces, to a single basic gesture. It also implies formidable powers of concentration on the listener’s part, to hold in suspension the sparse points at which the *Ursatz* can be glimpsed beneath the surface of a complex melodic and harmonic process. Moreover, it leaves entirely mysterious what the *benefit* might be, either in composing or in listening to a piece, the understanding of which involves recuperating these elementary musical sequences that have no significance when heard on their own.

More importantly, the whole attempt to transfer the thinking behind transformational grammar to the world of music is a kind of *ignoratio elenchi*. If music were like language in the relevant respects, then grasp of musical

¹¹ Heinrich Schenker, *Free Composition*, ed. and trans. Ernst Oster (New York: Longman Press, 1979). For an exposition of Schenker’s analysis, see Felix Salzer, *Structural Hearing: Tonal Coherence in Music*, two vols. (Mineola, NY: Dover Publications, 1982 [1952]).

grammar ought to involve an ability to produce new utterances, and not just an ability to understand them when produced by someone else. But there is a striking asymmetry here. All musical people quickly “latch on” to the art of musical appreciation. Very few are able to compose meaningful or even syntactically acceptable music. It seems that musical understanding is a one-way process, and musical creation a rare gift that involves quite different capacities from those involved in appreciating the result.

Here we discover another difficulty for theories like that of Lerdahl and Jackendoff, which is that they attempt to cast what seems to be a form of aesthetic preference in terms borrowed from a theory of truth-directed cognition. If understanding music involves recuperating information (either about the music or about the world), then a generative syntax would have a function. It would guide us to the semantically organized essence of a piece of music, so that we could understand what it says. But if music says nothing, why should it be organized in such a way? What matters is not semantic value but the agreeableness of the musical surface. Music addresses our preferences, and it appeals to us by presenting a heard order that leads us to say “yes” to this sequence, and “no” to that. Not surprisingly, therefore, when Lerdahl and Jackendoff try to provide what they regard as transformation rules for their musical grammar, they come up with “preference rules,” rather than rules of well-formedness. These “rules” tell us, for example, to “prefer” to hear a musical sequence in such a way that metrical prominence and time-span prominence coincide. There are some one hundred of these rules, which, on examination, can be seen not to be rules at all, since they do not owe their validity to convention. They are generalizations from the accumulated preferences of musical listeners, which are not guides to hearing but by-products of our musical choices. Many of them encapsulate aesthetic regularities, whose authority is stylistic rather than grammatical, like the norms of poetic usage.

The formal languages studied in logic suggest, to a philosopher at any rate, what might be involved in a generative grammar of a natural language: namely, rules that generate indefinitely many well-formed strings from a finite number of elements, and rules that assign semantic values to sentences on the basis of an assignment of values to their parts. Nobody, I believe, has yet provided such a grammar for a natural language. But everything we know about language suggests that rules distinguishing well-formed from ill-formed sequences are fundamental, and that these rules are not generalizations from preferences but conventions that define what speakers are doing. They are what John Searle calls “constitutive” rules.¹² Such rules have a place in tonal music, for example, the rule that designated pitches come from a set of twelve octave-equivalent semitones. But they do not seem to be linked to a generative grammar of the kind postulated by Lerdahl and Jackendoff. They simply lay down the constraints within which a

¹² John Searle, *The Construction of Social Reality* (New York: Free Press, 1997).

sequence of sounds will be heard as music, and outside of which it will be heard as non-musical sound. Moreover, these constitutive rules are few and far between, and far less important, when it comes to saying how music works than are the résumés of practice that have been studied in courses of harmony and counterpoint.

This brings me to the crux of the issue. There is no doubt that music is something that we can understand and fail to understand. But the purpose of listening is not to decipher messages, or to trace the sounds we hear to some generative structure, still less to recuperate the information that is encoded in them. The purpose is for the listener to follow the musical journey, as rhythm, melody, and harmony unfold according to their own inner logic, so as to make audible patterns linking part to part. We understand music as an object of aesthetic interest, and this is quite unlike the understanding that we direct toward the day-to-day utterances of a language, even if it sometimes looks as though we “group” the elements in musical space in a way that resembles our grouping of words in a sentence.

This does not mean that there is no aspect to musical grammar that would deserve the sobriquet “deep.” On the contrary, we recognize long-term tonal relations, relations of dependence between episodes, ways in which one part spells out and realizes what has been foretold in another. These aspects of music are important: they are the foundation of our deepest musical experiences and an endless source of curiosity and delight. But they concern structures and relations that are created in the surface, not hidden in the depths. The musical order is not generated *from* these long-term relations, as Schenker would have us believe, but points *toward* them, in the way that architectural patterns point toward the form in which they culminate. We come to understand the larger structure as a result of understanding the small-scale movement from which it derives.

One of the strengths of Lerdahl and Jackendoff’s *A Generative Theory of Tonal Music* is that it emphasizes these long-term relations, and the way in which the listener—especially the listener to the masterworks of our listening culture—hears the music as *going somewhere*, fulfilling at a later stage expectations subliminally aroused at an earlier one. The mistake, it seems to me, comes from thinking that these perceived relations define a hidden or more basic structure, from which the rest of the musical surface is derived. The perceived relations should rather be seen as we see the relation between spires on a Gothic castle. The pattern made by the spires emerges *from* the supporting structures, but does not generate them.

In a formidable recent work, musicologist and mathematician Dmitri Tymoczko argues that the common practice of Western classical music is really just one section of an “extended common practice” that stretches from early medieval times down to modern jazz, pop, and such concert-hall music as pleases the normal musical ear.¹³ And it is the existence of this extended

¹³ Dmitri Tymoczko, *A Geometry of Music: Harmony and Counterpoint in the Extended Common Practice* (New York: Oxford University Press, 2011). Page

common practice that gives credibility to the hypothesis that there is a unified generative grammar of tonal music. If we think that there is a process of “grasping” musical order that is somehow prior to and necessary for aesthetic understanding, and if this process engages with deeply embedded cognitive capacities, then this would explain the longevity and seeming naturalness of the extended common practice. It would also explain such otherwise remarkable facts as these: that Western music, whether classical or pop, is of global appeal, and has a lamentable tendency to drive out the native music of every place where it is introduced; that works of music are easily memorized both by listeners and performers; that those with a knowledge of the common-practice tradition can assign a previously unheard work with the greatest precision to its date (that is, to its point of syntactical development); that the chords and scales of concert-hall music reappear in popular music, often embedded in similar harmonic networks.

Tymoczko is, for good reasons, unpersuaded by the analogy between musical and linguistic comprehension. Nevertheless, his theory resembles the “generative theory of tonal music” in one important respect, which is that it offers to explain the observable in terms of the hidden. Tymoczko accounts for our intuitive ability to latch on to musical sequences by reference to an arcane geometry that arranges musical objects in another space from the one in which we hear them. Somehow, this “geometry of music” is supposed to be what we are mentally exploring when we hear the rightness of chord progressions and the persuasive nature of voice-leading. Music is not, as Gottfried Wilhelm Leibniz famously said, a matter of unconscious arithmetic, but more a matter of unconscious geometry.¹⁴ (As for Arthur Schopenhauer’s view of music, as “unconscious metaphysics,”¹⁵ this no longer gets a look in.)

The attempt to arrange musical relations in a geometrical model is by no means new. Circles, maps, and spirals modeling root progressions and key shifts are associated with such names as Johan Mattheson, David Kellner, Gottfried Weber, and Leonhard Euler, and played a large part in the great explosion of music theory in the eighteenth century. More recently, Longuet-Higgins has developed a geometrical model of tonal relations, and Lerdahl, in a formidably difficult work, has recast the findings of *A Generative Theory of Tonal Music* in terms of paths taken through “tonal pitch space,” although, as he here and there acknowledges, his model is numerical rather than spatial, and talk of “regions” of “pitch space” involves a kind of metaphor.¹⁶

references are in parentheses in the text.

¹⁴ Gottfried Wilhelm Leibniz, “Letter to Christian Goldbach, April 17, 1712,” in *Epistolae Ad Diversos*, ed. Christian Kortholt, vol. 1 (Leipzig: Breitkopf, 1734), p. 240.

¹⁵ Arthur Schopenhauer, *The World as Will and Representation*, ed. and trans. E. F. J. Payne, vol. 1 (New York: Dover, 1969), sec. 52.

¹⁶ Fred Lerdahl, *Tonal Pitch Space* (Oxford: Oxford University Press, 2001).

However, Tymoczko takes the idea of a musical geometry forward in a novel way, by proposing a complete account of voice-leading and harmonic progression, and mounting a kind of *a priori* argument for the naturalness of the “extended common practice,” by which he means, essentially, Western music from plainsong to pop (p. 27).

Tymoczko begins from a pre-theoretical conception of tonal music, in terms of five features that are so familiar to us that we find it hard to define them precisely. Tonal music shows a preference for “conjunct melodic motion” (that is, small intervals and fluent movement across them); it exhibits a widespread use of “acoustic consonance,” with octave, fifth, and fourth assuming prominent melodic and harmonic roles; there is a tendency to “harmonic consistency” (consonant sequences or dissonant sequences, but not a scrambled mixture of both); pitches are organized as scales within the octave; and certain notes are singled out as more important or central than others (for instance, the tonic, the dominant, the leading note) (p. 4). Tymoczko’s description of these features is loose, although they serve as his definition of tonality, and are probably no more deficient as a definition than other attempts to pin down a phenomenon that is as elusive to the intellect as it is familiar to the ear. Tymoczko’s purpose in *The Geometry of Music* is to explain and vindicate four claims about tonal music, so defined.

The first claim is that harmony and counterpoint constrain one another, so that harmony cannot be understood independently of the voice-leading that generates each chord from its predecessor. The second claim is that scale, macroharmony (which is the total collection of notes used over small stretches of musical time), and centricity are independent. In other words, a piece might be centered around a given pitch class (but use scales that do not identify that pitch class as the tonic) and notes that have no designated function in the given key. The third claim is that modulation tends to involve what Tymoczko calls “efficient” voice-leading, in which voices tend to move by scale steps or semitones (pp. 11-19).

Those three claims are, in my view, true, and the strongest aspect of Tymoczko’s book is the case that he gives for voice-leading in the common practice. He makes abundantly clear, both theoretically and through detailed examples, that real musicians in the tonal tradition think of chords not as pitch-class sets but as structures emerging from the movement of voices. This is as true of jazz as it is true of Bach’s fugues or Mozart’s symphonies. It explains why Berg’s Violin Concerto is so popular—namely, that the harmonies (notwithstanding their atonal character) are almost entirely derived by voice-leading, whether or not they also conform to the permutational calculus of pitch classes which supposedly organizes the piece.

In 1973 Allen Forte published his highly influential book, *The Structure of Atonal Music*, in which he develops a set-theoretic analysis of serial music.¹⁷ Forte’s approach involves rewriting “simultaneities” as pitch-

¹⁷ Allen Forte, *The Structure of Atonal Music* (New Haven, CT: Yale University Press,

class sets and reducing them to their “normal” ordering, with intervals arranged to be as short as octave equivalence allows. This clever book, the influence of which can be discerned in many subsequent academic studies, did an enormous disservice to musicology. For it describes harmony while entirely ignoring voice-leading, which is the vehicle of harmonic progression and therefore an integral component of harmonic meaning even in atonal chords.¹⁸ Maybe it is true in some works of serial music that voice-leading has no role, and maybe that is why we hear the result not as “harmony” but as “simultaneity.” But that is exactly what leads us to resist that kind of serial music and why it will never have a place in ordinary musical affections. By describing harmonies in Forte’s way you deprive yourself of an instrument of musical criticism. You also ignore a whole dimension of musical understanding, a dimension that Tymoczko works hard to make central to the nature and meaning of tonal music. As he shows, the basic sonorities of Western tonal music arise from efficient voice-leading, harmonic consistency, and acoustic consonance, and these three features are woven together in the extended common practice. That, in a nutshell, is why “tonality rules OK.”

Forte’s nonsensical account of atonal music issues from an earlier attempt to explain musical understanding mathematically, using modulo twelve arithmetic to model pitch-class sequences and simultaneities. For Tymoczko it is not arithmetic but geometry that contains the secret, and his fourth claim is that “music can be understood geometrically.” Or rather, as he instantly explains, “geometry provides a powerful tool for modelling musical structure” (p. 19). Those two statements are not equivalent, however, and Tymoczko never makes entirely clear which of them he wishes to insist upon. Moreover, in the sense that he intends them, neither claim is true.

If you take the notion of a model in the loose manner that I above remarked on, then many things that we do not understand geometrically can be provided with geometrical models. You can model a game of soccer by a path evolving in forty-six dimensions (two dimensions for each of the twenty-two players and two for the ball), but the result will not help you to understand or play a game of soccer, since it is derived from moves that we recognize in another way, and adds nothing to our ability to decide or predict them. The geometry is a shadow cast in forty-six-dimensional space by the light of intuitive practice. Even if we can model the chords of tonal harmony in an “ordered pitch space,” in such a way as to represent the efficient voice-leads between them, this too may be no more than a shadow cast by a practice that we understand in another way. Tymoczko’s “tool for modelling musical structure” would be “powerful” only if it either were to add to our understanding of music or to suggest an explanation of how musical elements

1973).

¹⁸ See the discussion of Berg’s Violin Concerto in Scruton, *The Aesthetics of Music*, pp. 301-2.

are processed in the brain. But, after wrestling for painful hours with his “ordered pitch spaces,” in which chords are assembled in relation to their standard transformations on an infinite Möbius band, I came to the conclusion that this “geometry of music” is exceedingly clever but more or less irrelevant. I was confirmed in this conclusion by Tymoczko’s own critical studies in the second part of the book where, with very few exceptions, he explains his interesting ideas concerning voice-leading, chromaticism, and scalar organization more or less entirely in traditional analytical language, using old-fashioned chord grammar and setting out the passages to be explained not in his n -dimensional pitch space, but in ordinary musical notation. When expounding his geometry, he writes that

learning the art of musical analysis is largely a matter of learning to overlook the redundancies and inefficiencies of ordinary musical notation. Our geometrical space simplifies this process, stripping away musical details and allowing us to gaze directly upon the harmonic and contrapuntal relationships that underlie much of Western contrapuntal practice (p. 79).

He makes this point in the context of an analysis of a few bars from a Brahms Intermezzo, giving both a complex geometrical graph and the relevant bits of the score. The graphs are all but unintelligible, but through the score you “gaze directly” on the notes, and the score offers all the reader needs in order to grasp Tymoczko’s argument.

I make this point with some hesitation, being impressed by Tymoczko’s singular combination of mathematical knowledge and musical insight. But it is perhaps worth pointing out that his geometry of chord progressions and harmonic relations was anticipated by Longuet-Higgins.¹⁹ Longuet-Higgins introduced a three-dimensional tonal space, with octaves assigned to one dimension, fifths to another, and thirds to another. All of the intervals in tonal music can be defined on this space, in which they appear as vectors. Moreover, and this particularly interested Longuet-Higgins, this tonal space distinguishes between intervals that are indistinguishable from the point of view of modulo twelve arithmetic. Thus, it distinguishes between a major third and a diminished fourth, for example, even though they are both (in well-tempered scales) made up of four equal semitones. The tonal space displays the real, hidden, grammar of tonal music, since it preserves the scalar

¹⁹ Christopher Longuet-Higgins, “Two Letters to a Musical Friend,” *The Music Review* 23 (1962), pp. 244-48 and 271-80, reprinted in Christopher Longuet-Higgins, *Mental Processes: Studies in Cognitive Science* (Cambridge, MA: MIT Press, 1987), pp. 64-81. Longuet-Higgins, a theoretical chemist by training, was a brilliant musician, who invented the term “cognitive science” and who did as much as anyone else to set up the discipline to which that term now refers; he was at least as multi-competent as Tymoczko.

meaning of the intervals in their harmonic representation. A succession of triads defines a path in this space, and this path may either hop around a center, in which case the music remains in one key, or move from one center to another, in which case there has been a modulation to another key. Longuet-Higgins gives a precise definition that distinguishes these two cases, and uses it to assign notation to difficult examples of highly chromatic pitches, such as the *cor anglais* solo in the introduction to the third act of *Tristan*. The geometry used by Longuet-Higgins does not emphasize voice-leading as Tymoczko does, but in other respects it applies the same intuitive idea, namely, that musical relations can be mapped onto geometrical relations by preserving “betweenness.” It also looks very much like the first step in an explanatory theory, suggesting a way in which the brain “maps” the musical input, as the visual system maps orientation, distance, etc., so as to represent edges, discontinuities, and oclusions. Here is one of Longuet-Higgins’s typically laconic summaries:

The three-dimensionality of tonal space follows directly from the fact that just three basic intervals are necessary and sufficient for the construction of all others. Given any note such as middle C we may place it at the origin in tonal space and relate all other notes to it by assigning them coordinates (x,y,z) which represent the numbers of perfect fifths, major thirds and octaves by which one must move in order to get from middle C to the note in question. In principle, then, the notes of tonal music lie at the points of a discrete three-dimensional space which extends infinitely in all directions away from any starting point. Viewed in this way, the notes of a melody perform a “dance” in an abstract conceptual space; the appreciation of tonality depends upon the ability to discern the direction and distance of each step in the dance.²⁰

Tymoczko does not mention Longuet-Higgins, who nevertheless deserves credit for his lapidary articles, which take only a few pages (compared to some 150 pages of Tymoczko) to show how to represent musical relations geometrically. But there is an important point to be made in response to both writers, which is that we already have an idea of musical space, which is quite unlike the geometrical orderings set forth in their studies. We hear music as a kind of movement in one-dimensional space. This space is ordered in terms of a betweenness relation defined on the axis of pitch (the axis of “high” and “low”). It has interesting topological features, for example, most three-note chords cannot be transposed onto their mirror images. It is folded over at the octave, so that movement in one direction returns to the same place after twelve semi-tone steps. In its musical use it is endowed with

²⁰ Longuet-Higgins, “The Grammar of Music,” in Longuet-Higgins, *Mental Processes*, p. 140.

gravitational fields of force, according to scalar measure and key relations. The leading note is drawn toward the tonic; dominant seventh chords tend toward tonic chords, and so on. But this space is a purely phenomenal space. No musical object can be identified except in terms of its place (middle C, for instance), so that position in musical space is an essential property of whatever possesses it. Hence, although we hear movement, nothing moves. The space that we hear is a kind of metaphorical space, but one that is vividly etched on our auditory experience. Moreover, it is a space that contains interesting symmetries and which can be treated mathematically in ways that cast light on our musical experience.²¹

Tymoczko's "process-based" approach to chromaticism, which emphasizes voice-leading as opposed to static chords, is persuasive, largely because he takes us on journeys through this phenomenal space, rarely troubling to look behind him, at the spooky shadows cast on those Möbius bands. Standard clef notation represents the phenomenal space of music with all of the clarity and detail that a critic needs, and when a critic tells us that the G-sharp of the "Tristan chord" moves chromatically to B while the D-sharp moves to D, he describes exactly what we hear as well as what we see on the page—even though the description is literally speaking nonsense, since G-sharp cannot move to B nor D-sharp to D. Moreover, the one-dimensional space of standard notation reminds us of a fact that Tymoczko rarely adverts to, namely, that voice-leading is not merely a matter of relations between adjacent notes and adjacent chords. It runs through a whole piece of music, creating expectations in each note that reach well beyond its immediate successor. The Prelude to *Tristan* is a wonderful example of this. It does not merely proceed from one unsaturated harmony to the next; each voice pursues its own lonely anxiety-ridden journey through tonal space, moving by semi-tone or whole-tone steps in obedience to a kind of obsession that seems to owe nothing to the harmonic network of which it is a part.

Tymoczko rightly comments on the way in which the circle of fifths gave way, in romantic music, to the circle of thirds, and he offers sensitive and persuasive accounts of the way in which third-relations in Schubert and Chopin arise from chromatic voice-leading. But these accounts rely on our intuitive understanding of the one-dimensional phenomenal space of music, and the gravitational tensions implanted in that space by scales and chords. Tymoczko tells us that "the geometry of chord space ensures that (Schubert's and Chopin's) sort of intuitive exploration will necessarily result in music that can be described using the major- and minor-third systems," and he adds that

²¹ For an example of this, see Wilfrid Hodges, "The Geometry of Music," in *Music and Mathematics: From Pythagoras to Fractals*, ed. John Fauvel, Raymond Flood, and Robin Wilson (Oxford: Oxford University Press, 2003), pp. 90-111. As Hodges shows, there is another and more useful geometry of music, which describes the phenomenal space in which music exists, rather than the imaginary n -dimensional "model" which breathlessly tries to keep track of it.

his “geometrical spaces . . . are literally the terrain through which chromatic music moves” (p. 220). Both claims are surely unjustified. For one thing, chromatic music does not literally move through any space at all, and it metaphorically moves through the one-dimensional space identified by the ordinary musical ear. Tymoczko’s description of the way in which triads are smoothly connected by chromatic voice-leading to their major-third transpositions and seventh chords to their minor-third and tritone transpositions is a description of movements and relations in phenomenal space. And when he adds that his “geometrical spaces . . . offer a convenient way to visualize these facts” (p. 220), he in effect concedes that he has not given an explanation, but only a model in the loose sense of that term mentioned above. The question then arises how this model might be used: Is it the first step in a cognitive science of music, such as Longuet-Higgins wishes to provide? If so, what would be the neural correlate of the infinite Möbius strip? Here we come up against a brick wall. We can translate tonal music into a kind of geometry. And we can understand how computations can combine variables in more than one dimension. But how do we get from the geometrical models to the computations in the brain?

If we adhere to the strict sense of “model” that I referred to at the start of this review, according to which a model is the first step toward a computational algorithm, then it is clear that no model can make use of the phenomenal space that is described by ordinary musical notation. A space in which position, movement, orientation, and weight are all metaphors is not a space that can feature in a computer program, or indeed in any kind of theory that seeks to explain our experience rather than to describe its subjective character. But here is a point at which the defenders of old-fashioned musicology might wish to step in with a long suppressed protest. Musicology, they might say, is a form of humanistic study and not a science. It cannot be replaced by mathematical analysis, nor is it a prelude to a theory of musical cognition, whatever that may be. It is devoted to describing, evaluating, and amplifying the *given* character of musical experience, rather than to showing how musical preferences might be tracked by a computer. Hence the one-dimensional pitch space in which *we*, self-conscious and aesthetically motivated listeners, situate melodic and harmonic movement, is the real object of musical study—the thing that needs to be understood in order to *understand music*. From this point of view even the three-dimensional pitch space explored by Longuet-Higgins is of little musical relevance, while Tymoczko’s Möbius bands might just as well go and tie themselves in knots, for all that they tell us about music.

I have dwelt on Tymoczko’s fourth claim, the one contained in the title to his book, for two reasons: first, because it gives rise to the illusion that musical order is a *secret* and that Tymoczko is now able to reveal what that secret is, and second, because its prominence distracts the reader from the real merits of his argument. The idea of a secret order of music is far from new, nor is it new to suggest that this order is geometrical. That was the master-thought of the Pythagorean cosmology and of the theory of the universe

summarized by Ptolemy and accepted throughout the Western world until the scientific revolution. In a recent work that relies heavily on Lerdahl and Jackendoff (and on many other sources from psychology and cognitive science), Charles Nussbaum offers a similar “key to all the secrets,” arguing that music supplies “plans of action”: it provides “musical mental models” that “represent the features of the layouts and scenarios in which . . . virtual movements occur.”²² In another uncritical application of Lerdahl and Jackendoff, Diana Raffman uses the generative hypothesis to explain why the “secret meaning of music” is in fact an illusion, arguing that the syntax of music tempts us to attribute semantic significance to patterns that have no significance other than their musical form.²³ Tymoczko’s is the latest in a series of books that promise more than they deliver, since they rely on theories whose application to music is largely wishful thinking. Longuet-Higgins, by contrast, seems to be getting somewhere, since his geometry clarifies distinctions between intervals that we hear but which are not easily represented in traditional notation. Moreover, his geometry is expressly directed toward providing a computational theory of tonal music—a theory that would show how musical objects and transitions might be represented in the nervous system.

The fourth claim of Tymoczko’s argument, the claim to have revealed a hidden geometry of music, distracts us, I suggest, from his book’s real merits. It is in his treatment of the other three claims that he makes his strongest case for the *musical constants* that anchor the extended common practice in the ordinary musical ear. He rightly argues that “for the foreseeable future, the majority of successful Western music will continue to exploit acoustic consonance, small melodic motions, consistent harmonies, clear tonal centers, and identifiable macroharmonies” (p. 392). He brushes aside serialism and makes a strong case for jazz and its offshoots as a refreshment of the old tonal principles, providing a new future for Western music beyond the decline of concert-hall listening.

Tymoczko’s real purpose is to vindicate the grammar of the common practice not as a generative syntax, but as a form of “prolongation,” to use the expression favored by Lerdahl and Jackendoff. His study of voice-led harmony in both the classical and the jazz traditions certainly succeeds in this. He makes some astute critical observations—especially in his discussions of Chopin and Debussy—but remains true to his purpose, which is to describe principles of musical organization that are parts of grammar rather than aesthetic effects. This leads to a certain non-judgmental vision of what is at stake in our musical tastes. For Tymoczko anything goes except deviant grammar. Not surprisingly, therefore, he mentions neither Theodor Adorno’s

²² Charles Nussbaum, *The Musical Representation* (Cambridge, MA: MIT Press, 2007), p. 82.

²³ Diana Raffman, *Language, Music and Mind* (Cambridge, MA: MIT Press, 1993).

critique of jazz as “musical fetishism” nor the apocalyptic vision of Thomas Mann’s *Doktor Faustus*, and concludes his book with the very catholic hope that “there is music waiting to be written that combines the intellectuality of Bach (or Debussy) with the raw energy of Coltrane (or The Pixies or Einstürzende Neubauten)” (p. 395). Whatever you think of Einstürzende Neubauten, raw energy is not one of their leading characteristics, and I can only guess at the cultural pressures that led Tymoczko to conclude his book with a reference to that peculiarly depressing gang of nostalgic nihilists. Nevertheless, there is something right in Tymoczko’s observation that all of the musics that he considers share the voice-led and prolongational structure of the common practice, and if we are to make distinctions among them (which surely we must) they must be made on grounds other than grammar. It is not grammar that distinguishes The Pixies from Elvis, but style, movement, and the quality of life.

Or is it so simple? When Adorno and Arnold Schoenberg argued that the tonal idiom had “become banal,” they were not talking about *mere* syntax. They were referring to the way in which musical syntax is through and through subservient to its aesthetic employment. It is not Tymoczko’s argument, therefore, that will offer the final reply to the modernists. For they were surely right to think that the common-practice grammar is something more than a grammar, and that it brings with it an emotional baggage acquired from centuries of use and maybe some decades of misuse, too. Consider “Here Comes Your Man,” by the Pixies: perfect grammar, empty sentiment, both contained in a sequence of chords. It is not simply that we have heard this before. A simple melody harmonized over tonic and dominant can be pure, profound, and eternally fresh, like Schubert’s “Wiegenlied.” A piece laden with advanced harmonies, fabricated scales, and surprising cadences like Skryabin’s seventh sonata can be shallow and stale by comparison. Skryabin was trying to escape one form of pollution—the obvious, the insincere, the banal—and fell victim to another. The Pixies have no such desire, but they certainly show why Skryabin ran away screaming from the kind of tonal thinking that prevails in pixieland.²⁴

²⁴ I am grateful to Malcolm Budd, Wilfrid Hodges, Sarah-Jane Leslie, and Graeme Mitchison for comments and suggestions on an earlier version of this review.

Review Essay: Ralf M. Bader's *Robert Nozick* and Ralf
M. Bader and John Meadowcroft's (ed.) *The
Cambridge Companion to Nozick's Anarchy, State, and
Utopia*

Dale Murray
University of Wisconsin, Baraboo/Sauk County;
University of Wisconsin, Richland

1. Introduction

Ralf M. Bader and John Meadowcroft have been extremely busy of late. Bader recently penned *Robert Nozick* and co-edited *The Cambridge Companion to Nozick's Anarchy, State, and Utopia* (henceforth, the *Cambridge Companion*).¹ Meadowcroft is the series editor for the former book and the co-editor with Bader on the latter. Each also found the time to contribute an essay to the *Cambridge Companion*. Wearing the dual hats of editor and writer can be extremely challenging, but both thinkers handle these duties seamlessly—to the benefit of all those interested in Nozick's work in political philosophy. I shall comment first on *Robert Nozick*, and then turn my attention to the *Cambridge Companion*.

2. Bader's *Robert Nozick*

Obviously, any expository monograph on a famous philosopher should reflect the virtues of accurately recounting his work and its significance to the field. Exemplary cases of this type of monograph go beyond this by also providing keen insight into the methodology of the thinker and giving a flavor of the person behind the work. Bader has artfully accomplished all of this and more in this brief but valuable book (136 pages). *Robert Nozick* is another edition in the Major Conservative and Libertarian Thinkers Series published by Continuum Press under the oversight of Meadowcroft. The series has traditionally called for concise contributions that require careful investigation of the views of its subjects, all the while demanding that the subject matter be handled rigorously.

Bader commendably follows in this tradition by offering a crystal-clear analysis of Nozick's *Anarchy, State, and Utopia* (henceforth, *ASU*).

¹ Ralf M. Bader, *Robert Nozick* (London: Continuum Press, 2010); and Ralf M. Bader and John Meadowcroft, eds., *The Cambridge Companion to Nozick's Anarchy, State, and Utopia* (New York: Cambridge University Press, 2011).

Bader argues that Nozick should be regarded as not only one of the most significant *political* philosophers of the twentieth century, but also as one of the top *philosophers* of that century (p. 111). Such ebullient celebration of Nozick might be thought hyperbolic until the reader is reminded not only of the breadth of Nozick's work in several areas of philosophy, but also of the many innovative thought-experiments and examples that he developed and employed throughout his career. Though Bader may not convince many readers of Nozick's "top-tier" philosophical stature, he certainly conveys the brilliance and excitement of Nozick's thought, ensuring that Nozick will surely have a deep and lasting influence on the discipline.

Bader divides *Robert Nozick* into four chapters. The first presents a short but useful biography of Nozick, detailing his philosophical beginnings and his initial acceptance of socialism. Bader provides an intriguing exposition of Nozick's (albeit begrudging) conversion from left-wing political sentiments to libertarianism (pp. 2-3). We are allowed insight into Nozick's insistence that he thought of himself not so much as a political philosopher, but as a thinker who happened to have a good idea in that subfield yet was mainly interested in other things, namely, epistemology and metaphysics. Many political philosophers have been vexed by *ASU*, which they see as a once-off provocation that Nozick refused to defend. But Bader offers an alternative take on this conventional judgment: Nozick simply had other interests and was a unique polymath of our time (p. 9).

The second chapter is a much more detailed exposition of *ASU*. Bader quickly turns to the moral foundations that underlie Nozick's arguments for a "nightwatchman" state (p. 14) and then proceeds to show how seriously Nozick takes the anarchist objection to the legitimacy of government (pp. 28-35). Bader also provides a lucid account of how Nozick's "invisible-hand" argument for the state functions. Moreover, Bader carefully explains the limitations of such an argument for justifying any state more expansive than a minimal one.

But what is particularly impressive in Bader's exposition is how he focuses on Nozick's thoughts on property acquisition and to what degree this relies on John Locke's theory and his famous Proviso in *The Second Treatise of Government*. Bader is clear that Nozick's use of Locke's theory of property acquisition and the Proviso is essentially a starting point for discussion of Nozick's theory of entitlement. He shows precisely why Nozick's appeal to Locke is complex (pp. 37-40). In addition, Bader takes great care not only to detail Nozick's most famous examples, including Wilt Chamberlain and the experience machine, but also to explicate the entitlement theory of justice and Nozick's vision of utopia. In fact, Bader's exposition of the Wilt Chamberlain example, which Nozick uses to show that liberty disrupts patterns, and of Nozick's general approach to "patterned" theories of justice, is so clearly revealing that it could be used in any undergraduate political philosophy class. Yet rigor is never sacrificed to clarity in *Robert Nozick*. Bader splendidly brings all of this out, accurately representing Nozick while unveiling the originality and vivacity of Nozick's ideas.

Bader is likewise to be applauded for not falling into the common trap of simply skimming over the third section of *ASU*. He spends a good deal of space surveying this section in the “Critical Exposition” (pp. 60-68), returning to the section again in his final two chapters. Bader also does a superb job of explaining Nozick’s view that realizing utopian visions is best served by a minimal-state framework, as well as how this is supposed to serve as an independent argument for such a state. Despite writing a relatively brief book, Bader still finds room to challenge the longstanding view that Nozick simply disavowed libertarianism late in life (pp. 68-72).

In the third chapter, Bader recounts a goodly portion of the critical challenges to Nozick’s *ASU*. Again, he serves as an excellent guide to the issues that arise with Nozick’s attempt to justify the minimal state, to show why no more expansive notion of the state is legitimate, and to explain why such a state should be inspiring. In this chapter, Bader also tries to defend a number of Nozick’s claims, responding to several criticisms of the latter’s arguments against patterned and end-state theories of justice (pp. 89-98, 100, and 104-6). Since by his own admission what makes Bader’s commentary on Nozick unique is his analysis of the arguments for a state and its utopian possibilities, I will focus on these topics. This will at least give the reader some flavor of Bader’s analysis.

Bader rightfully presents Simon Hailwood’s several criticisms of Nozick’s meta-utopian framework (and adds a few more problems in the final chapter). Yet, Bader also jumps in to defend the third section of *ASU* when the opportunity presents itself. For example, consider his response to Peter Singer’s critique of Nozick’s argument that the minimal state is inspiring as a sort of meta-utopia. Singer’s main worry is that the free-market environment which the minimal state espouses will not result in a wide array of utopian communities available to sundry kinds of people as Nozick promises. As Singer argues, in the marketplace of possible communities to choose from it is more likely that a dominant culture will arise, especially as other communities wither away. Could an austere culture, for example, survive when the “flashy temptation” of a highly consumerist culture lies just next door?

Bader channels Nozick in offering a possible reply—that freedom comes with a cost, but this cost does not justify coercing some to contribute to saving fringe cultures (pp. 107-8). Regardless of whether one agrees with Bader on this point, there is a great deal of grist here. He succeeds in showing that these issues are relevant today even in ways that he doesn’t directly acknowledge, including debates over minority rights (especially with respect to the preservation of language and other cultural traits) and political sovereignty.

In the final chapter of the book, Bader expounds on what he takes to be Nozick’s legacy in political philosophy. Again, Bader’s account of Nozick’s work is very detailed and captures the spirit of Nozick’s vision. While Bader pays a good deal of attention to why Nozick is so important due to his reinvigoration of Lockean rights-based libertarianism, it is what he says about Nozick’s work in response to anarchists that is of particular interest.

Bader makes an intriguing case that Nozick put the topic of state legitimacy back on the map. Anyone who takes rights seriously also has to take seriously what any state has the right to do to the individual (p. 117). Bader notes that most contemporary political philosophers simply assume that the state is legitimate. But again, Nozick bucked this mainstream opinion and Bader brings out nicely how sympathetic Nozick is with anarchists, even if at the end of the day Nozick thinks that the minarchist position is more plausible.

Despite the praise that has been heaped on Bader and his project here, this judgment is not unqualified. Certain weaknesses in the book need to be identified. While the reader can marvel at Bader's lucid descriptions of the many criticisms of Nozick's political theory, there are surprising gaps in this presentation. One of these gaps arises when Bader tries to meet the sundry objections to the decided absence of a foundation for individual rights in Nozick's theory. It is understandable why Bader is careful to take on this topic; it is admittedly a major objection to Nozick's brand of libertarianism, since individual rights appear to be at the center of the theory. This is especially important because, as Bader readily admits, Nozick doesn't rely in a simple way on Locke's theory of property acquisition and never replaces it with a detailed theory of his own.

Bader's response in defense of Nozick is to note that it wasn't Nozick's purpose to build a moral theory from the ground up; the idea that individuals have rights is a plausible enough intuition to use as a starting point to see what sort of political theory could be built on this axiom (p. 114). This may be the case. However, there is another possible response to Nozick's critics that Bader could have explored which is already in the secondary literature. For instance, Loren Lomasky has written in great detail about how a libertarian account of a foundation for moral rights could be given.² This omission of Lomasky's defense of Nozick is all the more puzzling, since Bader does in passing refer to the possibility that Nozick's thoughts on the meaning of life have some role to play in grounding individual rights. Lomasky in fact fleshes out the possibility that individual rights are so important because they originate in an impulse to take seriously the ability of individuals to pursue the projects necessary to carve out their own individual lives. Lomasky also writes about other parts of *ASU* that Bader finds particularly neglected. For example, Lomasky devotes an article to Nozick's framework for utopia,³ but nowhere in Bader's book does he acknowledge this work. It is interesting that in so many places Bader is cautious and notes with great acuity and detail the secondary literature associated with Nozick's work, and yet these puzzling gaps exist.

² See Loren Lomasky, *Persons, Rights, and the Moral Community* (New York: Oxford University Press, 1987).

³ See Loren Lomasky, "Nozick's Libertarian Utopia," in *Robert Nozick*, ed. David Schmidtz (New York: Cambridge University Press, 2002), chap. 4.

It is also strange that Bader does not point to some of the most well-known (and likely most caustic) critiques of Nozick's *ASU*. In this case, we need to look no further than to some of the immediate negative reactions to Nozick's work that came in the form of early book reviews of *ASU*. Brian Barry is a case in point, as he launched a particularly ferocious attack on the book shortly after its publication.⁴ Now of course, defenders of Nozick might say that Barry's scathing review of Nozick's work so closely borders on *ad hominem* that it doesn't deserve a serious reply. But even some who thought that Barry's review of *ASU* was unfair to Nozick still took the time to point out the transgression. For example, even though Jerry Millet objected to the review as a "hysterical attack on Nozick," he at least thought Barry's critique warranted a response.⁵ In a book that does so well otherwise to give the flavor of the reaction to Nozick's *ASU*, neglecting to mention Barry's review is a noticeable oversight.

But even having noted these fairly minor shortcomings, Bader writes a fabulous book that is a must-read for any serious researcher on Nozick's political philosophy. It is ideal for the researcher who wants a quick survey of important critical replies to *ASU*. It is also essential reading for the graduate student who needs a crash course on Nozick's political philosophy that doesn't sacrifice rigor to accessibility. The writing is sufficiently clear and jargon-free to serve advanced undergraduates who want an introduction to Nozick's political theory in a way that brings the issues of *ASU* alive. Bader is sympathetic to Nozick without being overbearing. In fact, it is interesting to witness how Bader defends Nozick on numerous occasions and on a variety of topics against critics coming from a number of different perspectives. This is not the usual tack for a commentator and adds to the vivacity of the work, suggesting that Nozick continues to stimulate vigorous debate.

3. Bader and Meadowcroft's (ed.) *The Cambridge Companion to Nozick's Anarchy, State, and Utopia*

For the *Cambridge Companion*, Bader and Meadowcroft have assembled an impressive array of philosophical talent. In addition to fine essays by Bader and Meadowcroft themselves, the guest contributors include Richard Arneson, Michael Otsuka, Fred Feldman, Eric Mack, Gerald Gaus, Peter Vallentyne, David Schmidtz, Barbara Fried, and Chandran Kukathas. As one would expect from a *Cambridge Companion*, all of the essays contain numerous fine and interesting insights. Yet, just as with Bader's *Robert Nozick*, what makes the *Cambridge Companion* of particular interest is the

⁴ Brian Barry, "Review of *Anarchy, State, and Utopia*," *Political Theory* 3, no. 3 (1975), pp. 331-36.

⁵ Jerry Millet, "On Brian Barry's 'Review of Nozick'," *Political Theory* 4, no. 2 (1976), pp. 236-37.

attention that is paid to topics in Nozick's political thought which have been left relatively untouched.

After a brief introduction, the *Cambridge Companion* is divided into four sections. The first is called "Morality." The other three are devoted to "Anarchy," "Justice," and "Utopia," respectively. The "Morality" section begins with Arneson's strong essay entitled "Side Constraints, Lockean Individual Rights, and the Moral Basis of Libertarianism." He argues that while "Nozick hints at several arguments supporting his claim that fundamental enforceable moral requirements binding all of us consist entirely of side constraints with the content of Lockean libertarian rights," Nozick never really shows that this is true (p. 35).

In chapter 2, Michael Otsuka focuses on the role of moral side-constraints in *ASU*. These side-constraints are designed to be in keeping with the Kantian idea of the separateness of persons, and that one should not be sacrificed to any other entity. In this case, Nozick is worried that the rights of individuals might be sacrificed to the state. This is a particularly interesting piece, since Otsuka addresses a criticism I made of Bader's *Robert Nozick*. I noted that Bader doesn't really acknowledge Lomasky's connection between the promotion of a meaningful life and side-constraints. Otsuka doesn't mention Lomasky by name, but he does discuss a strategy like Lomasky's, even though he doesn't find it useful (pp. 49-50).

Fred Feldman follows with an essay on a different topic: the experience machine. This thought-experiment has now become standard in philosophy classes as a robust challenge to utilitarianism. Since, broadly speaking, utilitarians believe that happiness or pleasure is the highest good, any demonstration that in fact happiness or pleasure is not the highest preferred moral goal would work against the theory. On the usual view, we would agree with Nozick that we ought not to plug into the machine, because we value "reality" or "authenticity" more than happiness. However, Feldman challenges this conventional view. He presents an intriguing analysis of possible interpretations of the experience-machine example as a critique of utilitarianism or any form of hedonism, contending that they all fail.

The second section ("Anarchy") begins by featuring Eric Mack's reflections on whether Nozick succeeds in his claim that a state is justified via an invisible-hand process (pp. 89-115). Mack thinks that Nozick fails at this endeavor and on interesting grounds. Mack's complaint is that while Nozick claims to endorse only a minimal state, he inevitably supports a state that is more expansive in its function.

In chapter 5, Gerald Gaus's contribution also focuses on invisible-hand theorizing, but this time examines even more closely the project of explanatory political philosophy that Nozick undertakes (p. 117). Gaus mainly ends up accepting Nozick's position on explanatory political philosophy. He also accepts Nozick's argument for the state, concluding that states are morally legitimate and that they are more efficacious in the preservation of life, liberty, and property rights than would be the case in the state of nature.

Peter Vallentyne leads off the “Justice” section of the book with his essay on Nozick’s theory of justice generally, focusing on the Wilt Chamberlain example (pp. 145-67). Vallentyne not only nicely outlines Nozick’s principles of just acquisition, just transfer, and rectification, but also extends Nozick’s theory by including additional principles of self-ownership and other principles that would presumably protect individuals from injustice. Vallentyne concludes that the Wilt Chamberlain example does not show what it is alleged to demonstrate, namely, that all patterned theories of justice are illegitimate. Vallentyne goes on to contend that the Wilt Chamberlain example gives us little reason to criticize what he calls starting-gate and other theories of distribution that initially have patterns but then use procedural transfer principles.

In chapter 7, Meadowcroft comes to a quite different conclusion from Vallentyne concerning Nozick’s theory of justice. After noting a rare point of agreement between Nozick and Rawls—that both base their critique of utilitarianism on the separateness of persons—Meadowcroft goes to great lengths to defend Nozick’s entitlement theory and to vindicate his famous critique of Rawls’s theory of justice as fairness. Meadowcroft does an especially nice job of describing Nozick’s complaint that Rawls makes tacit assumptions that load the case in his favor with respect to the selection process of contractors in the original position. These assumptions prevent them from selecting entitlement principles and pave the way for them to choose the Liberty and Difference Principles.

David Schmidtz follows Meadowcroft’s essay with a contribution that looks more generally at some of Nozick’s most important contributions to political philosophy (p. 197). Schmidtz’s essay shares with Meadowcroft’s a focus on Rawls’s theory of justice. Schmidtz makes the crucial point (consistent with Vallentyne’s interpretation) that the Wilt Chamberlain example does not work as well as Nozick thought against weak patterned theories. However, Schmidtz thinks that Nozick’s use of the example as a critique of strong patterned theories of distribution remains instructive to this day. Perhaps the highlight of Schmidtz’s essay is his intriguing argument involving moral luck. Schmidtz argues that Nozick was right to question Rawls’s claim that justice must be sensitive to the moral arbitrariness of the genetic and social lotteries. In order to show why, Schmidtz makes a distinction between a benign version of moral arbitrariness that should be considered a sort of randomness and a more virulent version that is more capricious. However, Schmidtz argues that the genetic and social lotteries result in a sort of randomness that should not be corrected by the state (pp. 218-22).

In chapter 9, Barbara Fried makes the case that Nozick’s theory of property rights does not hold up to critical scrutiny. Mainly, she thinks that Nozick’s *ASU* is disjointed. For example, Fried claims that Nozick has a roughly utilitarian argument in the first section of his book, in which he claims that the state is morally justified. However, in his second section on what *sort* of state is justified, he shifts to a Lockean understanding of property rights to

set the rules that allow for only a nightwatchman state. Furthermore, Fried recalls that in the “Utopia” section of *ASU* Nozick resorts to a minimally constraining state where a possibility of exit is ensured. That is, opting out must be possible at the national level even though it doesn’t have to be possible at the local level, despite the fact that there are only a certain number of communities available and there may not be a particular community that is conducive to each individual’s preferences. In Fried’s estimation, this motley assortment of arguments is inconsistent and consequently does not leave us with a coherent theory of property rights (p. 244).

Bader then provides his own strong contribution in chapter 10, at the beginning of the book’s final section on “Utopia.” He provides a detailed description and analysis of Nozick’s model for utopia. As he did in *Robert Nozick*, Bader sets Nozick’s utopia in the context of the overall argument of *ASU*, emphasizing that the meta-utopia is supposed to serve as a distinct argument for the minimal state. Not only is it the case that the minimal state can arise via invisible-hand means and is the only sort of state justified (as all others will overreach and violate the rights of individuals), but it is an inspiring framework for an array of communities that will allow individuals to realize their own conceptions of the good life (p. 255). While Bader does not think it is clear that Nozick succeeds in offering an *independent* argument for the minimal state, he does think that the third section of *ASU* provides support for Nozick’s arguments for such a state in Parts I and II.

In the book’s final contribution, Chandran Kukathas offers a critique of the idea that the minimal state provides a sound framework for utopia. He argues that Part III of *ASU* shows us “neither a plausible account of a utopian community nor the inspiring conception of a minimal state that Nozick promises” (p. 289). I will say more about this chapter below.

While all of the chapters are well constructed by philosophers, political theorists, and experts in jurisprudence, I want to highlight some particularly interesting accounts of Nozick’s work in the *Cambridge Companion* where either conventional wisdom has been innovatively questioned or some relatively unexplored topics are broached. This in no way should signal to the reader that the remainder of the chapters have shortcomings or don’t provide profound and useful insights.

Feldman’s contribution is compelling in challenging the mainstream way of understanding the experience-machine thought-experiment. He addresses interpretations of the experience machine which claim that it damages the positions of ethical hedonism, psychological hedonism, “mental-state” theories of welfare, and utilitarianism. Feldman concludes that the experience machine is not a particularly good criticism of any of these positions. He thinks that part of the problem is that the example (especially when examined in the classroom) is taken out of its original context. Most anthologies only use the short excerpt of the experience-machine example itself without any note of explanation. This allows readers to miss the point of the thought-experiment, according to Feldman. Additionally, he thinks that even those somewhat familiar with *ASU* too easily assume that simply

because Nozick discusses utilitarianism in the vicinity of the experience-machine example, the thought-experiment must be a criticism of the theory (pp. 64-65).

Feldman explains that the experience-machine example is actually located in the midst of a series of digressions, the last of which concerns what Nozick calls a “thicket of questions” concerning the application of utilitarianism to animals and a predecessor of the non-identity problem (p. 62). With respect to the latter topic, the question arises: Is it morally permissible to kill a person if you immediately replace him with another person who is slightly happier? This likely raises issues concerning utilitarianism in human lives, but does it necessarily cause problems for how utilitarianism applies to animals? According to Nozick, the experience machine appears because we need to know whether there is anything that matters to people (and animals) besides their felt experiences. Hence, we are presented with the case of whether one would willingly plug into a reliable machine that could create any set of experiences we might wish for in life. Nozick presumes we would not do so, for we want something more than the *experience* of doing certain things—we actually want *to do* certain things.

Feldman notes that Nozick has plenty of other arguments against utilitarianism that never refer to the experience machine. Also, Feldman argues that the passage itself would not support the interpretation of its being an argument against utilitarianism. Utilitarianism assumes that an act is right only if it indeed maximizes net utility. However, on the face of things, people would not and should not plug in to the machine, as this would not maximize utility. After all, my plugging in might increase *my* hedonic value, but would likely do little to increase the utility of *other* people (p. 66).

Feldman then considers the possibility that the anti-utilitarian argument is really that since people will not plug in, they must value something more than pleasure. This, in turn, shows that hedonism is false. Since utilitarianism relies on hedonism, then if hedonism is false, utilitarianism is also false. This indeed seems like the most standard interpretation of how the experience machine allegedly causes problems for utilitarianism. Feldman responds that this interpretation fails, because (again) there is no textual evidence that Nozick intended this critique and that this critique would only affect hedonistic brands of utilitarianism. Preference utilitarianism, he argues, would not be affected. Feldman recognizes the opportunity to kill two birds with one stone: If the experience machine fails to constitute an argument against hedonism, this would *a fortiori* show that it doesn't make an argument against classical utilitarianism either. He thinks that without certainty about the reliability of the machine, people will not plug in, but this says nothing about valuing goods others than pleasure. Furthermore, even if we had certainty about the machine's reliability, and were fully rational and selfish about our welfare, it would be irrelevant to ask whether such a person would enter the machine, as we are not like this (pp. 70-72).

Feldman makes a strong case, though perhaps he worries a bit too much about what Nozick's intentions were in devising the experience-machine example. After all, what comes out in *Robert Nozick* and in some of the chapters in the *Cambridge Companion* (Bader's, Meadowcroft's, and Gaus's come to mind) is that Nozick's style of argumentation is more exploratory and speculative. That said, no matter what Nozick's intentions were, his arguments *could* be classified as any combination of anti-utilitarian, anti-hedonistic (descriptively or normatively), and anti-welfarist. Additionally, Feldman spends too much time criticizing interpretations of the experience machine on the grounds that people would not enter due to worries that the machine might break down. This seems to miss the point of thought-experiments (a more charitable reading of the passage would likely assume the machine is reliable). We are to assume that the machine is reliable, since the whole point is to isolate the variables to be examined that concern what we prefer or value. This would likely circumvent facile criticisms of the example. Granted, one could criticize the experience machine as being too farfetched and hence a faulty thought-experiment, but nowhere does Feldman note that this is his concern. On the other hand, Feldman is thorough enough in his analysis to argue that *even if* we had knowledge that the machine would not malfunction, the reasons we might not (or should not enter it) do not show that utilitarianism, psychological hedonism, ethical hedonism, or mental-state theories of welfare are false. These criticisms of Feldman's analysis are minor. Overall, he questions the conventional wisdom well, and provides a forceful reminder that commentators (and instructors!) need to be much more mindful of properly setting the context of the examples they analyze and use.

Meadowcroft's contribution is strong in its detail of Nozick's critique of Rawls. But along with that, his work here is unique in the innovative responses he designs to try to defend Nozick from some of his toughest critics. Just as one case in point, Thomas Nagel contends that the only way the Wilt Chamberlain example really works is if we assume that our rights to property are absolute, but points out that under a Rawlsian approach, property rights would not be absolute. Since the example is supposed to be able to accommodate *any* initial distribution and voluntary agreement and still show that there is nothing wrong with Chamberlain's greater holdings given voluntary exchanges, taxing Chamberlain would be justified.

Meadowcroft argues, however, that Nagel's challenge doesn't do much to blunt the force of Nozick's Wilt Chamberlain example. First of all, Nozick does not think that property rights are absolute in all instances, and hence doesn't seem to rely on them. Even if Nagel were right, Meadowcroft thinks that Nozick still shows that "in any conceivable society there will be continuous deviations from any preferred or ideal time-slice/end-state distribution and there is no obvious basis for believing that the new distributions will be unjust" (p. 178). Secondly, even though property rights are not absolute, this does not mean that individuals fail to have *any* entitlement to their holdings. This seems to suggest, argues Meadowcroft, that entitlements still have some role to play in any viable theory of distributive

justice. Moreover, he asserts that even if Nagel were correct in this particular criticism of the Wilt Chamberlain example, there still remains the issue of whether a patterned theory would be worth accepting given the likely constant interference in people's lives necessary to maintain it. This is an intriguing response and one to which defenders of Rawls's theory of justice will have to attend.

Finally, Kukathas's contribution is unique in the way it attempts to demonstrate the implications that Nozick's preference for the minimal state has for his unsuccessful approach to achieving conditions for utopia. According to Kukathas, the sort of utopian vision Nozick wishes to defend is one that is ultimately achievable only outside of the state. So, the cost of Nozick's defense of the minimal state (which Kukathas thinks fails anyway) is that despite his efforts he can't show how individuals get to live their utopian dreams within the restricting confines of the state.

Kukathas systematically questions all of Nozick's arguments in favor of the idea of why we need even a minimal state (which is what Nozick means by a "framework for utopia"). Nozick thinks that others failed in their utopian visions because they employed a design approach to trying to realize a "best possible world." The problem is designing a system that can possibly accommodate the utopian ideals of different people with very different lives. In contrast, Nozick argues that his framework serves as a filter device, allowing people to devise their own communities within the framework of the minimal state. Over time, this would naturally filter out some communities which would not attract enough adherents to survive (pp. 296-98).

Kukathas argues that it is unclear why the minimal state (or framework) works as a filtering device. First of all, other alternatives (presumably anarchist ones) would serve the same result of allowing individuals to experiment in different ways of living. Even if we saw the framework as a sort of free-market economy, this still wouldn't require that a state needs to be involved. Kukathas also questions whether, if Nozick's argument is that the minimal state serves as a framework to serve as a kind of scientific experiment to find the best communities, the state would end up serving as a monitoring agent that judges the best sort of life. While Kukathas makes an intriguing case, this last point seems to be a bit of a red herring. It is unclear that Nozick is really suggesting that the minimal state *disallows* individuals to judge by their own lights what the good life is. Moreover, Kukathas doesn't fully acknowledge the value of a state in serving a protective function. He notes that the minimal state could have a somewhat beneficial role as a filtering device in allowing individuals peaceful emigration to other communities that better suit their preferences (pp. 299-300). But this is not the only condition that calls for the state as a protective apparatus; ethnic and religious hostilities, territorial disputes, and squabbles over resources between communities will likely need adjudication and sometimes require the use of force. Surely, defenders of Nozick could still make a *prima facie* case that the likelihood would be higher that individuals would have the opportunity to realize their own aspirations within that

structure peacefully than with competing protection agencies outside of a state. But beyond these considerations, Kukathas makes a strong case that the utopian vision of Nozick could be at least similarly achieved via an anarchist approach.

4. Conclusion

I would say that Bader and Meadowcroft are correct in the way they sum up the collective judgment on Nozick's work in *ASU* by the contributors to the volume. As they put it:

The contributions to this collection as a whole suggest that Nozick's main legacy consists in a large number of insightful suggestions, ideas, and arguments, as well as a range of powerful criticisms of alternative views. . . . The significant effect of shaping political philosophy over the course of the last thirty-five years is thus to be explained primarily in terms of the way in which *ASU* has challenged mainstream conceptions of justice, in particular by means of the Wilt Chamberlain example, while much of its continuing appeal is due to Nozick's vivid examples and insightful suggestions as well as his playful rhetoric and engaging tone. (p. 11)

In closing, Bader and Meadowcroft have left us with two highly engaging and stimulating books. One would be well served, after having ruminated on Nozick's *ASU*, to delve into Bader's *Robert Nozick*. This would not only allow one to receive an essential summary of Nozick's work, but also to familiarize herself with some criticisms of it. Furthermore, such a reading would also introduce one to some possible rejoinders to those criticisms from Bader. To delve deeper into the analysis of many of Nozick's specific arguments, one could then examine Bader and Meadowcroft's *Cambridge Companion*, which provides much more current, detailed, and pointed investigations of Nozick's assumptions and arguments on a bevy of topics. Regardless of reading strategy, any reader of these reflections on Nozick's work is sure to gain a wealth of knowledge from sustained study of them.

Review Essay: Timothy Sandefur's *The Right to Earn a Living*

David M. Wagner
Regent University School of Law

In constitutional law, the intellectual ferment is on the so-called right. Conservative and libertarian legal scholars are taking new looks at doctrines and cases on which they thought orthodoxies were settled, and discovering long-neglected angles.

Those whose initial passion for identifying the pathologies in modern constitutional law was fueled by *Roe v. Wade* (1973) focused, quite naturally, on the U.S. Supreme Court's and the academy's eagerness to weaken democratic majorities, and to make decisions not authorized by any clear text or identifiable tradition. Thus, for those conservatives, the expression "judicial restraint" took on an untouchably positive sheen, and Justice Oliver Wendell Holmes's paean in his *Lochner v. New York* (1905) dissent to "the right of the people to embody their opinions in law" sounded rather fine.

It is no surprise that author Timothy Sandefur, a litigator with the Pacific Legal Foundation, is part of the growing movement to rehabilitate *Lochner*. We all have our moments. Mine came in a constitutional history seminar at Regent Law School (where I teach) when my students had both *Lochner* and a modern substantive due process case (*Roe* or *Planned Parenthood v. Casey* [1992], I forget which) side by side: one of them pointed to *Lochner* and remarked, "At least this is *law!*"

We were no longer in Kansas. Sandefur never was; that is, it appears he never thought that *Lochner* was anything but a rigorous application of a constitutional jurisprudence with a long history in English and American law. Though phrased in terms of Fourteenth Amendment liberty and freedom of contract (both of which terms are subject to quibbles), the decision actually vindicates what might more concisely be called "the right to earn a living," as Sandefur has entitled his book.¹

He is ambitious. In addition to proving that the right to earn a living has an honorable spot in U.S. constitutional law, Sandefur also wishes to prove that what its commentarial tradition has come (pejoratively) to call "substantive due process" is actually neither more nor less than "due process

¹ Timothy Sandefur, *The Right to Earn a Living: Economic Freedom and the Law* (Washington, DC: Cato Institute, 2010).

of law” itself, and is perfectly respectable. I will argue that he succeeds better at the first than with the second task. Let’s start with the first.

There is no “earn a living” clause in the U.S. Constitution. But to those trying to understand the thought-world of the Framers, this fact may be bracketed while we do some historical recovery. Such recovery involves, first, removing some barnacles. We are heir to several generations of legal and social historians who were apparently unable to conceive of economic liberty as anything but a privilege of the rich, granted by the rich to themselves, for the purpose of more efficiently oppressing the poor.

Sandefur argues convincingly that economic rights do in fact, and were historically intended to, protect above all the interests of those whose economic well-being was not yet made but makeable, namely, the strivers (or as late-eighteenth-century Europeans might have seen it, Americans). Those below that level were cared for by religious institutions and extended families, both of which were stronger before the state displaced so many of their eleemosynary functions. Those whose fortunes were already made—the sole beneficiaries of economic freedom, according to progressive historians from Charles Beard to Robert McCloskey—not only had no need for (further) economic freedom, but were sometimes even inclined to view it with suspicion, as apt to present them with unwanted competitors.

This pro-striver approach found expression in the Declaration of Independence. Famously, Thomas Jefferson changed John Locke’s formula “life, liberty, and property” to “life, liberty, and the pursuit of happiness.” According to Sandefur and the authorities he assembles, this change was not made to downgrade property as such, nor to turn government into a happiness machine tasked with guaranteeing cheerful outcomes for all citizens, but as a preferential option for pursuers of property, such as builders and entrepreneurs.

Let us consider monopolies, as Sandefur does. They were understood at English Common Law as royal charters that excluded competitors, and their deleterious effects on economic freedom were recognized and condemned by Common Law courts as early as 1377 (near the beginning of the reign of Richard II, for those who keep track by William Shakespeare). For unusually risky ventures, such as the East India Company in the seventeenth century, monopoly protection may have had a rationale similar to that of patents to protect an initial investment. However, royally issued (or, in the American context, any government-issued) monopolies were obviously adverse to the interests of later entrants and the public, both of which would benefit from competition. So when English and American courts dissolved monopolies, they were protecting a right to earn a living, whether they called it that or not.

The American antebellum era was rich not only in consensus about economic freedom (except regarding slaves and women) but also in conflicts about how to apply it, illustrating that we deal here not with a dogma that predetermines a wide range of cases but with a principle that determines *some*. Sandefur provides an interesting discussion of *Charles River Bridge v. Warren Bridge* (1837), an early Roger Taney Court case that signaled a post-

John Marshall relaxation of strict interpretation of the Contracts Clause. Angry dissents were uncommon in the 1830s, but Justice Joseph Story, a Marshall loyalist, handed one in this case to his new Chief Justice. Significantly, from the point of view of the “right to earn a living,” both sides had a point. Chief Justice Taney held that the Charles River Bridge’s monopolistic charter from the state (a contract, for Contract Clause purposes) must be narrowly construed, rather than read as granting a perpetual monopoly or a guarantee of future profits, lest future enterprise be inhibited. Justice Story argued, as Marshall had often done, in favor of the sanctity of contracts, including those between the state and private parties: If these were not upheld by courts, what then of economic freedom? Sandefur does not, and we need not, pick a winner here: the fact that both majority and dissent were concerned with economic freedom makes his point.

Also on the table is early Privileges and Immunities jurisprudence. The list of rights in *Corfield v. Coryell* (1823) may be both too long and too qualified to be a case-solver, but viewed from a certain remove, it clearly points to a society that takes for granted the rights necessary to flourish economically.

In turning to substantive due process, it will be helpful to distinguish between that topic in the abstract and its agreed-upon avatar, *Lochner*. First, Sandefur mounts a bold defense of substantive due process itself. Whereas the standard attack on it focuses on the word “process” and distinguishes between that and “substance,” Sandefur seeks a less-defended gate in the castle wall and focuses on the word “law.” Is any and every legislative work-product “law”? No one from the workshop of Thomas Aquinas (such as the present writer) could affirm that. So laws that are not for the “general good” (here, I adopt Sandefur’s terminology), but instead are “arbitrary,” must not be laws at all, even if enacted by proper “processes,” right?

At this point Sandefur has, I think, pulled a bit of a switch regarding the term “process.” Its freight as a term of limitation within the phrase “due process of law” is not that of how the law got passed, but rather that of the legal processes to which the plaintiff is subjected. “Due process of law” is part of a larger clause that conditions government’s power to deprive citizens of “life, liberty, or property.” The union of these three things in one clause compels the highly traditional conclusion that what we are looking at here is a clause that conditions the government’s exercise of its powers concerning *criminal procedure*, with only limited application beyond that area. Government takes a citizen’s life, when it applies capital punishment; his liberty, when it imprisons him; his property, when it fines him. “Due process of law” clearly demands, therefore, that courts review whether the criminal justice processes applied to the defendant are the ones that comport with the traditional “law of the land,” to quote the acknowledged source of the clause in England’s Magna Carta. It is, I would urge, a leap from there to viewing the Due Process Clause (Fifth or Fourteenth Amendment) as a guarantee that all laws (and not just all criminal justice procedures) shall comport with a

Lockean political philosophy, or shall be for the “general good” and not “arbitrary”—all requirements that Sandefur sees in “due process of law.”

Furthermore, hovering over Sandefur’s or anyone’s defense of substantive due process is a judiciary to which will fall the task of distinguishing between laws made “for the general good” and laws that, in contrast, are “arbitrary.” We see every day how judges fail at the lesser task of enforcing proper criminal procedure. What leap of faith justifies entrusting them with applying the “general good”/“arbitrary” distinction to, literally, all laws? (Before the 1930s, an adequate answer might have been “precedent.” Sandefur’s own work shows that this is hopeless now.)

But even if substantive due process must remain suspect, it does not follow that every decision that has been cursed under that name must remain unredeemed and unrevisited. Take *Lochner*, for example. While Justice Rufus Peckham’s opinion for the Court in that case contains a few turns of phrase that have not stood the test of time,² nonetheless, the opinion as a whole lays out a chain of legal reasoning, taking relevant facts about the bakery world into account (contrary to Dean Roscoe Pound’s later critique of the opinion’s supposed fact-free “formalism,” as Sandefur points out), and makes clear why, against a background presumption of a “right to earn a living,” the hours limitations fail constitutional review, even while other parts of the New York Bakeshop Act were so far *within* the ambit of reasonable regulation that they were not even challenged.

One can call it a “right to earn a living” (as the Court did not), “freedom of contract” (as the Court did), “the liberty prong of the Due Process Clause” (which I do not recommend, because it invokes a certain limitlessness that the *Lochner* Court itself would probably not have endorsed), or even Privileges or Immunities (as the Court did not, because of *The Slaughterhouse Cases*, but a case based on *Corfield* could be made out for this). Under any name, the state had curbed that basic right beyond any justification that it put forward, such as the evanescent goal of “equalizing” bargaining power or providing extra “leisure time” to workers who obviously valued the freedom to trade that away for more pay.

Sandefur is especially strong in dissecting the unjustly respected Holmes dissent in *Lochner*. There is, in fact, a reasonable reply to the majority’s opinion, which was made by Justices John Harlan, Edward D. White, and William Day. It says: We upheld a nearly identical law concerning mines and miners just seven years ago in *Holden v. Hardy*. Bakeries may be safer than mines, but is that difference a judicially cognizable one? Is it not a legislative matter? We should affirm New York’s law on the basis of *Holden* (or else overrule *Holden*, though the Harlan dissenters did not urge this).

² Such as: “[A]re we therefore at the mercy of legislative majorities?” (well, majorities of the people put them there, and can get rid of them), and “mere meddling interference” (which is conclusory and petulant, not a legal argument).

But then there was Holmes. First (not so much stressed by Sandefur) he attributes the majority's opinion entirely to Social Darwinist ideology, when nothing of the sort appears in it. Holmes's academically generated prestige has led generations of scholars and students to accept this dishonest sleight of hand as an almanac fact. But Sandefur has an even more trenchant point to make. Holmes also remarks that the U.S. Constitution "was made for people of fundamentally differing views." At first—and second and third, even—this remark slips by the reader as merely affirming that people disagree about things, even important things. But if that's all it means, then it advances nothing with regard to dissenting from *Lochner*. After all, some people like the Constitution, some don't; part of the deal behind the Constitution is that it's those who like it who win. And therefore, the Constitution wins, even if some people don't like it. This follows necessarily from *Federalist # 78* and its adoption by the Court in *Marbury v. Madison* (1803). (Sandefur discusses the Progressive crowd that Holmes ran with who did not, in fact, like the Constitution.)

Sandefur calls Holmes's "fundamentally differing views" dictum "a rejection of the entire corpus of Western political philosophy up to that point" (p. 106). If that seems strong, consider that, in context, it can only mean that some Americans think that economic freedom is a good idea, some think it's a bad idea; some think it's a right that the government must protect, some think it's a grant that the government bestows and can remove—you know, "fundamentally differing." But that wasn't the deal. There may not be perfect agreement today on what the Declaration of Independence means, but it says on its face that the United States is formed around *shared* views ("We hold . . ."). Thus, if you think that human beings are natural serfs who have only the rights that government from time to time is pleased to give them, then the U.S. Constitution that was formed eleven years after the Declaration was simply *not* formed for you. Of course, you can be a citizen under it and claim its protections, but to guide constitutional interpretation based on such repudiated views is to upend the constitutional project, not to carry it out.

Inevitably, some will argue that all of this changed with the "second founding" represented by the Civil War Amendments, one of which, of course, was being applied in *Lochner*. But really, would anyone argue that the outcome of the U.S. Civil War *advanced*, rather than *defeated*, the idea that some human beings are natural serfs? In fact, the connection between "the right to earn a living" and Republican "free labor" ideology, briefly explored by Sandefur, could stand more investigation.

Let me help Sandefur's deconstruction of Holmes for him. On one constitutional issue—free speech—Holmes later moved from legislative deference to stricter judicial review. But even there, his fundamental beliefs were relativist. In an otherwise convincing dissent in *Gitlow v. New York* (1925), a criminal sedition case involving a radical socialist pamphleteer, Holmes tossed in at the end: "If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given

their chance and have their way.”³ Proletarian dictatorship was not, for Holmes, fundamentally off the table for the society that had adopted the Declaration, the original Constitution, and the Bill of Rights. Despite the deference he shows in *Gitlow* to the constitutional decision made by the legislative and executive branches during the Jefferson Administration in disowning the Sedition Act, Holmes’s loyalty is not to the First Amendment as such, but to an abstraction called free speech. Free speech is no more textual, really, than the right to earn a living, except that as to the latter Holmes continued to believe that popular sovereignty trumped it easily, and as to the former he no longer did. Free speech to him was less a principle than a mechanism of relativism, because it was indifferent to its own destruction.

Sandefur is also harshly critical of Judge Robert Bork. This makes it clear that Sandefur’s form of constitutional conservatism breaks with that of the one man who, above all, is identified intellectually, personally, and in terms of political scars with the revival of conservative thinking about the Constitution. I am not sure that the harsh criticism is necessary. That Sandefur disagrees with Bork will be clear to anyone who reads the former’s early chapters, while aware of the latter’s life work. Yes, we have established that the idea of constitutional restraint on government as such (not just the federal government) has respectable roots and was not made up out of whole cloth by the *Lochner* majority; but Bork was hardly the first to argue that the *Lochner* majority applied these principles with too heavy a hand, and in so doing, “legislated from the bench,” to use the hackneyed modern expression. Harlan, White, and Day thought so, too, but they shared more jurisprudential ground with the majority than Holmes did or than Bork does. And indeed, Sandefur accuses Bork of being even more positivist than Holmes, because Bork (in his *The Tempting of America*) holds that “[m]oral outrage is a sufficient ground for prohibitory legislation” (p. 113).⁴

Now, Sandefur may esoterically be arguing about gay rights issues here, because that is what Bork is doing in the passage from *Tempting* that he (Sandefur) cites, which is part of a discussion of *Bowers v. Hardwick* (1986). Bork describes the constitutional theory seminar that he used to team-teach with Alexander Bickel at Yale University in which Bork one day took the position that (to paraphrase) “it ain’t nobody’s business if you do.” Bickel countered with a hypothetical case about a man alone on an offshore island who tortures puppies for his own pleasure. No one on the mainland is affected in any way, but we want to stop him. Is moral outrage a sufficient basis? You may say that this is an issue of “animal rights,” but (Bork now says) that is no different from saying that the political community is morally outraged by maltreatment of animals. It seems to me that Bork is making the point that we

³ *Gitlow v. New York* 268 U.S. 652 (1925), accessed online at: <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=268&invol=652>.

⁴ Robert Bork, *The Tempting of America* (New York: Free Press, 1990), p. 124.

not only *can* legislate morality, but that we can't legislate anything else. All of our laws—emphatically including the constitutional law protecting the right to earn a living—rest on moral foundations, foundations which Sandefur has done a cracking good job of defending earlier in his book. There are legal systems that do not recognize such rights: we call such systems *immoral*, and we are right.

In short, after making such a strong case for a sort of natural rights tradition enmeshed with U.S. constitutional law and supporting a right to earn a living free from legislative intrusion that cannot justify itself upon rational review, it seems strange to find Sandefur turning toward legal positivism and shrinking from the suggestion that morality may support or challenge legislation. In the *Charles River Bridge* case, it was at least a tenable position, from a right-to-earn-a-living point of view, that the Massachusetts legislature acted well in allowing the Warren Bridge proprietors to open a competing bridge that allowed commerce and economic opportunity to flourish. That is a *moral* judgment, and it formed the basis of legislative *action*, not inaction. Morality is not categorically ruled out as a basis for legislative action, but only when the actions sought to be prohibited are themselves protected by the Constitution. Bork and Sandefur disagree over the breadth of that protection. Bork (the mature Bork, anyway, after his schooling by Bickel) would demand to see it in the text of the Constitution; Sandefur would see it not only in texts such as the Contracts Clause, Privileges and/or Immunities, and Due Process of Law, but as pervasive in our institutions. That is fine, but morality in law, as such, is not the problem.

Sandefur is right to note (in critiquing the views of Laurence Tribe and Cass Sunstein, as formerly mouthpieced by Justice David Souter) that a background morality of freedom is implicit in “today’s civil liberties decisions” (p. 117). The citation there is to *Lawrence v. Texas* (2003), and thereby hangs a paradox—one that Sandefur need not address, for that would be a different book, but that someone should address in due course: Why has sexual liberty (the term “civil liberties” is a tad under-expressive, even euphemistic, in this context) flourished amidst a jurisprudence that in most other respects accepts the Progressivist idea that rights come from the state and are granted and withheld by it for social goals? Does a twenty-first-century Court believe in fundamental rights after all, and just *forget* them when it comes to economic rights? That seems unlikely.

But then what *is* going on? I have jokingly speculated to my students that substantive due process may be merely the way the elites of any era impose their values through constitutional law. In the late-nineteenth century, the predominant elite value was to get rich; in the twentieth century, it was to get—well, I hear a buzzer going off, but I think you follow me. Crude, but it explains the leading cases. We have not yet seriously explained why the Court has positioned itself as the bastion of individual civil liberties while forgetting utterly about the right to earn a living.

Sandefur also contributes a useful chapter on the so-called Dormant Commerce Clause. I say so-called because there’s no *clause* there. It could

more accurately be called the Dormant Commerce Doctrine, as it refers to a teaching (and a disputed one at that) on what the Court should do when Congress *could* regulate a given item of interstate commerce, but *hasn't*, and a state *tries* to. When Congress leaves its interstate-commerce regulatory potential “dormant,” does it impliedly leave the keys with the judiciary so as to lock down state laws that might (intentionally or not) “regulate commerce among the several states”? Is Article I’s assignment of the Interstate Commerce Power to Congress an implicit (and judicially enforceable) erasure of all state power in this area? Despite the Tenth Amendment?

Because of these grounds for doubt—and because of the complex and inconsistent nature of the Court’s decisions in this area—Justices Antonin Scalia and Clarence Thomas have gone on the warpath. Justice Thomas is now an outright disbeliever in the Dormant Commerce Doctrine, arguing that Article IV’s Privileges and Immunities give businessmen all of the protection against interstate discrimination the Framers mean them to have. Justice Scalia accepts the existing canon of Dormant Commerce Clause cases on *stare decisis* grounds, but will not extend them.

Not so fast, says Sandefur. The criticisms are well taken, and some Dormant Commerce Clause decisions have unreasonably interfered with states’ efforts to promote their own interests. But even so, the Framers *did* intend the United States to be an economic unity (Sandefur’s rallying of Founding-era sources on this point is impressive), and state-level trade barriers *were* high on their list of perceived evils to be rectified by the Constitution. The Court has pointed that way, too. In *Gibbons v. Ogden*, an 1824 John Marshall opinion that all Commerce Clause disputants want to claim as authority, the Court said that a state law regulating “commerce” (here construed to include navigation) “is doing the very thing which Congress is authorized to do.” Now, in *Gibbons*, Congress had not been “dormant”; it had issued a steamboat license to Thomas Gibbons, overthrowing the state-guaranteed monopoly of the cross-Hudson steamboat trade owned by Aaron Ogden. But because of the breadth of Marshall’s dictum, many observers before Sandefur (including the U.S. Supreme Court) have construed it as carrying forth the Framers’ project of favoring national economic rules, *whether or not* Congress has yet put any rule in place.

I tend to take an interest in cases where I’m pleased with the outcome but think the decision badly reasoned and would have voted the other way. One such case is *Granholm v. Heald* (2005), in which the Court prioritized the Dormant Commerce Doctrine over the Twenty-First Amendment, and struck down (silly) state restrictions on Internet ordering of out-of-state wine. My problem here is that the Dormant Commerce Doctrine is an unwritten inference, and, as such, should not prevail over the Twenty-First Amendment, which, in turn, makes states sovereign over their alcohol policies. Sandefur introduces doubt as to what *reasons* states may have for regulating alcohol under the Twenty-First Amendment. I freely admit that it is the worst-drafted amendment in the Constitution, but ambiguity about permissible state reasons for alcohol regulation is not among its vices; it does not touch the subject at

all. Sadly, it allows states to be as numbskulled as New York and Michigan were being in the *Granholm* cases.

There is even more in Sandefur's book, but enough. His main thrust, and his greatest contribution, is to establish that "the right to earn a living" must be taken more seriously by courts and scholars than it has been for more than the past eighty years. Simple demonization of *Lochner* should give way to serious consideration of its arguments ("At least this is *law!*"), including its background assumptions, which were not what Holmes said they were. The right to earn a living lacks a crystal-clear textual anchor in the Constitution. However, quite apart from the (lamentable) fact that that is scarcely a requirement for constitutional rights at the present time, textualists/originalists such as Justice Scalia often look to a combination of "text and tradition" to fill in texts that, *in situ*, are too brief to be self-interpreting or to evaluate claims made under those texts for which no clear precedent exists. Justice Thomas, for his part, is chomping at the bit to overrule *Slaughterhouse* and rediscover those right-to-earn-a-living "Privileges or Immunities" of the Fourteenth Amendment. Sandefur's book will help him in that endeavor.

Book Reviews

Appiah, Kwame Anthony. *The Honor Code: How Moral Revolutions Happen*. New York: W. W. Norton and Company, 2010.

There is an evident division of labor among philosophers. There are those who busy themselves primarily in the effort to impress one another, engaged in dialogue with their colleagues, advancing arguments and counterarguments designed to further and thwart philosophical ambitions and disputes. Such is the aspired-to-destiny of many philosophers. They work diligently and with dedication at their craft with the hope that their journal articles and academic manuscripts might garner their peers' attention, and better still their respect. The ideal, acknowledged by most and achieved by few, is to be a "player," to have a seat at the table where trends are set for the profession, influencing what others ought to write about if they hope to be published, recognized, and respected by others in the field. Then there is the truly rarefied air occupied by those few philosophers who have achieved an elevated status, having earned the ear of people who do more than read philosophy. This audience, indeed, which is both intelligent and influential, isn't likely to read much philosophy at all save for that written by these very public philosophers. For this reason, the words of these philosophers possess considerable cultural and political weight. Kwame Anthony Appiah is unquestionably a member of this philosophical elite, and his *The Honor Code: How Moral Revolutions Happen* is an exemplary work of public philosophy.

The Honor Code is a decidedly ethical book, aimed at inducing and directing action. Indeed, Appiah intends nothing less than to help incite a moral revolution, "a rapid transformation in moral *behavior*, not just in moral sentiments" (p. xi). As the subtitle of the book suggests, *The Honor Code* is offered as a sort of "how-to" manual by way of historical guide to just such transformations. By exploring the unexpectedly swift eclipse of three practices that had been accepted and endorsed for centuries (in one case for a millennium)—dueling among English gentlemen, footbinding of women in China, and the institution of Atlantic slavery—Appiah hopes we can learn to harness the relevant winds of change to end rapidly the long-standing tradition of "honor killing" of females for bringing shame on their families through inappropriate (primarily sexual) conduct. For example, females who have had sex with those to whom they aren't married (including, notoriously, those who achieve that distinction by being raped), and those who seek to divorce those they do not love, have been murdered, either by or at the direction of their own families. Such are the methods the aggrieved family must take to reclaim

its lost honor. While such honor killings occur in many places around the globe, the phenomenon is particularly acute today in Muslim societies, most especially within elements of the Pakistani population, which, according to the statistics Appiah cites, may have accounted for as many as a quarter of the honor killings committed in the early years of the twenty-first century.¹ Appiah very much wants such killings to stop and has written *The Honor Code* with that end clearly in mind.

The bulk of the book consists of the excavation of different, contextually responsive conceptions of ‘honor’ and what it requires of those who are concerned with it—many care to be worthy of honor, in some sense. It then traces how changes to those conceptions and revisions to those requirements led to the rapid demise of the very practices they once supported. In prose at once erudite and engaging to the point of making the book a page-turner, Appiah takes the reader on a high-minded historical tour. The initial encounter is with the English gentleman, circa the sixteenth through nineteenth centuries, who is willing to take to the field with a peer in a potentially deadly face-off in defense of his honor, that is, his “entitlement to respect” (p. 16). But respect for what? What is the “honor” that is under threat? These questions, Appiah assures us, matter, since there are different kinds of honor and different species of respect. Borrowing from and then building upon a distinction introduced by Stephen Darwall between “appraisal respect” and “recognition respect,”² Appiah aims to stitch together a “basic theory” of honor that could be put to noble use (such as ending honor killings). It is from this distinction that most of Appiah’s philosophically interesting work in *The Honor Code* ultimately flows.

We owe appraisal respect to people who have shown prowess as measured by some standard, be it athletic, military, intellectual, or even moral. We show such respect when we honor someone by awarding him a Nobel Prize, inducting him into a Hall of Fame, or by canonizing him as a moral saint. Appiah reserves the term “esteem” for these expressions of honor.

Recognition respect involves regarding people in ways that recognize salient features about them, features that, in principle, may be of many sorts. We might respect someone for his imposing physical capacities (as when you respect someone’s strength), for his legal power (as when you respect a police officer’s or judge’s authority), or for his social standing (as when you respect the fact that a given man also happens to be a *gentleman*). When this respect for a person in light of certain facts about him prompts a “positive attitude of a

¹ Appiah cites a U.N. report from 2000, which claims that “as many as 5,000 women and girls are murdered each year by relatives” for dishonorable behavior. He also cites an adviser to Pakistan’s (then) prime minister, who claims that in 2003 “as many as 1,261 women” in Pakistan were so murdered (p. 146). For reasons easily imagined, the accuracy of such statistics is open to question.

² Stephen Darwall, “Two Kinds of Respect,” *Ethics* 88, no. 1 (1977), pp. 36-49.

certain sort” (p. 14), an attitude very much like that of esteem, then we have the kind of honor associated with recognition respect. This attitude is essentially practical: having it influences our behavior toward the object of respect. We respond to, and interact with, those we respect for their authority differently from those we respect on account of their willingness to learn. Especially important for Appiah’s project in *The Honor Code*, we recognize persons as deserving honor precisely in virtue of their being persons, for being creatures with “the capacity for creating lives of significance . . . [who] can suffer, love, create . . . [and] need food, shelter, and recognition by others” (p. 129). To recognize these features, and to respond accordingly to them, is to treat people with “dignity.”

Recognition respect, entitled to a person in virtue of certain features or facts about him, is intimately connected to the notion of identity. *I* feel entitled to the respect due to a teacher insofar as *I am* a teacher. *You* feel entitled to respect due to any student in the college because *you are* a student at the college. Again, to be so respected, is to be treated in certain ways, and to respect oneself for certain identifying features is to have self-respect; self-respect often demands that one acts in certain ways. In this sense of identity, we each have many identities: I am a father, a husband, a teacher, and I feel entitled to be respected *as* a father, husband, and teacher. Each of these identities, however, relates me to other people possessing other identities, and importantly identities of particular kinds. *As a father*, I feel entitled to respect from *my children*. *As a teacher*, I feel entitled to respect from *my students* and, importantly, from my colleagues, my college’s administrators, and my students’ parents, in virtue of their identities *as* colleagues, administrators, and parents of my students. I don’t, however, feel that my students owe me respect as a father (certainly not the kind of respect we feel due to *one’s own* father). The constellations of identities by which people are related by entitlements and obligations of respect are honor worlds and the rules of respectful engagement between inhabitants of the same honor world, written down or not, is that world’s “honor code” (p. 20). Ideally, we believe that we are only entitled—*worthy of*—the relevant recognition respect to the extent that we have kept the honor code of the honor world to which that identity belongs. If I behave dishonorably as a teacher, I don’t deserve the respect of my students, or any of the other members of that honor world.

The honor for which the English gentleman was willing to risk his life was an honor he thought he was entitled to from anyone who shared his station within the social hierarchy. English gentlemen, that is to say, inhabited an honor world of their own, and the honor code of that world required the respectful regard of each gentleman by every other. To fail to show that respect was a breach of the code, and in such an event that very same code provided means of redress: the duel. Dueling, however, is a highly questionable practice; one could, and certainly many did, claim it to be immoral. Involving, as it possibly can, the intentional killing of another person, the duel certainly violated Christian standards of morality, to which virtually all English gentlemen professed to subscribe. The practice ran also

afoul of English law, or at least the letter of it. And yet these Christian gentlemen (who, as parliamentarians, were to a certain extent responsible for their country's laws), remained loyal to their code. The gentleman's honor, the sense of respect he felt entitled to in virtue of who he was, evidently mattered more to him than the moral ideals he publicly professed on Sundays or even the laws he was charged with upholding. He regarded himself most highly in virtue of being a gentleman: first and foremost, that was who he was.

The primary lesson Appiah wants to impart here is the motivational power of the sense of honor: honor judgments apparently have greater influence on action than do moral judgments. The lesson is reinforced when Appiah shows how in a matter of decades the centuries-old practice of dueling essentially died out. It wasn't that existing or new moral arguments eventually prevailed; rather, as a result of various social factors and forces that changed the face of English social life, gentlemen came to have different conceptions of honor (p. 47). By the mid-eighteenth century, most gentlemen would no longer dishonor themselves by appearing so "ridiculous" and vulgar as to risk their lives over some social slight (p. 47). This "moral revolution" was induced with little input from "morality."

The lesson is repeated, but importantly expanded, when Appiah invites us to the other side of the world in his second historical sketch. For close to a thousand years, from roughly the ninth through nineteenth centuries, Chinese families (at least those that did not require their women to work the land) were unwilling to invite the shame of not binding their daughters' feet. This painful, disfiguring practice, which left women essentially immobile but nevertheless marriageable (to men who had become enamored of four-inch-long feet) had nothing to do with Confucianism (from which the traditional ethical understanding of China is derived) and survived more than one half-hearted attempt by ruling authorities to root it out (p. 69). It only ceased, and ceased quickly, when the Chinese, led in particular by the "literati" (the Chinese intelligentsia), acknowledged the existence of an honor world to which they belonged *as a nation*.

Identities can be shared, and we can take part in the honor and the shame that attaches to that identity in virtue of the behavior of others. It quickly became apparent to the Chinese literati of the late-nineteenth century that footbinding was not condoned by the honor code that prevailed among Western nations, and that the practice brought shame to every Chinese whether they individually engaged in it or not. The Chinese stopped binding their daughters' feet only when the Chinese became preoccupied with how they were regarded by outsiders. Once they came to respect the practices and judgments of non-Chinese, they soon hungered for that respect to be reciprocated. While many Chinese practices and traditions were found worthy of respect in this new honor world, footbinding was not. A sense of honor permitted Chinese families to induce and essentially ignore the tortured screams of their daughters for a millennium; it took only about thirty years for a newly coveted sense of honor to render the practice unthinkable.

Our sense of honor, the worth we place on our own identities, apparently has greater psychological purchase than a sense of what is morally required. Appiah recognizes this: “Keep reminding people, by all means, that honor killing is immoral, illegal, irrational, irreligious. But even the recognition of these truths, I suspect, will not by itself align what people know with what people do. Honor killing will only perish when it is seen as dishonorable” (p. 172). What our sense of honor demands of us (or others), moreover, needn’t coincide with the demands of morality. These are claims that, after Appiah’s historical analysis, appear exceedingly plausible. They are also claims that beg for more widespread acknowledgement and discussion among moral philosophers writing for other moral philosophers than is apparent in the academic literature. (These ideas would seem especially relevant to debates about “internalism” and “externalism” about moral motivation.) Appiah’s goal, recall, is to change our behavior, not our theories. To this end it is important for him to show that recognition honor and morality *can* coincide. We see they can when we consider the special form of honor we referred to above as “dignity.” That many have come increasingly to believe that this is owed to each person in virtue of her being a person is the definitive moral development of modern, democratic culture. The code of this honor world, the peer world of persons, represents the liberal ideal of a *moral* code. We see how honor in this sense can be marshaled in support of moral ends in Appiah’s discussion of Atlantic slavery.

It was primarily the emerging English “working class” of the late-eighteenth and early-nineteenth centuries who, in the course of demanding that their own dignity be recognized, drove England to abolish first slavery, and then its participation in the slave trade to the Americas. Again, what’s most interesting about Appiah’s retelling of these events is that England’s “humbler classes” weren’t so much moved by the *wrongness* of slavery as they were concerned with what the obvious dishonor thrust upon the slave as a creature fit only for laborious toil said about themselves. This was a life of drudgery, also. And while the working-class Englishman had his “freedom,” what he wanted was the respect of his countrymen. What became apparent to those Englishmen, much to the benefit of countless slaves, was that in order to convince their more privileged compatriots that a life of labor deserved its share of honor, they also had to convince them that a life of labor could no longer be the life of a *slave* (pp. 124-25).

It is precisely this sort of alliance of morally desirable results and honor that Appiah urges us to bring to bear on the problem of honor killing. One step would urge women around the world to pursue a strategy of “symbolic affiliation” (pp. 166-67). Doing so will lead them to find the honor killings of women in other societies as an actual affront to their own honor: If a woman anywhere is denied her dignity, then women everywhere have been dishonored. Another suggestion is for women (and men) inside these societies to impress upon their fellow citizens that the respect they receive from the rest of the world is contingent on how they treat their women (p. 172). The practice of honor killing needs to be made a source of collective shame.

The form of respect that drives the historical revolutions discussed in *The Honor Code*, and which underlies the morally significant notion of dignity is, as we have seen, recognition respect. It is important, however, to appreciate that the esteem associated with appraisal respect is never far from the stage. Esteem is comparative and competitive, and being worthy of it is an achievement; the desire to be appreciated for one's efforts, moreover, is likely irrepressible. Appiah nicely appreciates that this drive to achieve, manifest in our professional lives as well as in many of our pastimes, can seamlessly be directed toward moral achievement. Recognition respect, as we have seen, shapes honor worlds that are regulated by honor codes. Codes, of course, are standards and adherence to them is an achievement, not an assumption. If we could establish a widespread practice of esteeming adherence to honor codes that respect human dignity, the power of our competitive nature could be directed toward uplifting our heretofore dishonored fellows.

The Honor Code is a book for which Appiah should be proud. His efforts on behalf of the dignity of women warrant our esteem—so, too, his efforts as a philosopher. Would that more members of his profession were to see his book as setting a standard by which their own honor as philosophers is to be measured.

Joseph Biehl
Felician College

Livingston, Donald, ed. *Rethinking the American Union for the Twenty-First Century*. Gretna, LA: Pelican Publishing Company, 2012.

A rather taboo topic in American political discourse—secession—is the theme of a fascinating anthology edited by Donald Livingston, professor emeritus of philosophy at Emory University. The contributors are varied in background. Kent Brown is an attorney; Marshall DeRosa a political science professor; Thomas DiLorenzo and Yuri Maltsev economics professors; author Kirkpatrick Sale director of the Middlebury Institute “for the study of separation, secession and self-determination”; and Rob Williams a communications professor.

The contributors, who hail from both sides of the political spectrum, are united in their feeling that the American federal government has become too large, unwieldy, and oppressive. Most of them offer numerous illustrations of this, from the recent attempt to centralize (if not outright nationalize) the country’s health-care system, to the spiraling national debt, to runaway regulatory agencies, to what some of them view as our imperialistic foreign policy.

But while many of them might agree that the federal government has indeed become too domineering, and agree that measures are needed in order to decentralize its powers and shrink its size, the contributors to this collection defend the radical proposition that secession is both legal and proper as a tool for accomplishing this reform. Accordingly, the main focus of these essays is on the legitimacy of and reason for supporting secession by American states. Their arguments center on the themes that there is an optimal size of a polity beyond which it will be ill-governed and that the U.S. Constitution is a contract which can be nullified if one of the parties breaks it.

The contributions vary in quality. Most closely reasoned are those by Livingston, Brown, DiLorenzo, and DeRosa. Since no one skeptical of secession (at least in the American context) appears to have been invited, allow me to put forth several skeptical queries as I review this work.

Livingston’s contributions introduce the core questions, such as the optimal size for a democracy and the constitutional view of secession. On the former score, he repeatedly quotes Aristotle, who held that there is a limit to the size of a democracy “beyond or below which it becomes dysfunctional” (p. 16). But then, Aristotle also condoned slavery and denial of female suffrage, so it is not clear that his authority is definitive.

Sale’s essay—one of the weakest in the book—also cites Aristotle with approval:

It is because, firstly, he [Aristotle] *did* know that there are limits: “Experience shows that a very populous city can rarely, if ever, be well governed; since all cities which have a reputation for good government have a limit of population. We may argue on grounds of reason, and the same result will follow: for law is order, and good law is good order; but a very great multitude cannot be orderly.” And it doesn’t matter if that city is 1 million or 36 million—political entities at such sizes could certainly not be democratic in any sense, could not possibly function with anything approaching efficiency, and could only exist with great inequalities of wealth and material comfort. (p. 167)

Even putting aside the implicit circular reasoning in the latter part of the quotation from Aristotle’s *Politics*, this passage is puzzling. It occurs right after Sale himself notes that the Athens of Aristotle had around 160,000 residents, while present-day Tokyo has 36 million. Is Tokyo not a successfully or efficiently governed city? That hardly seems obviously true. And why would the mere existence of disparities in wealth be a sign of an ill-governed state?

Sale does attempt to argue for the Aristotelian view that there is an optimal number of citizens for a state. He notes, for example, that of the wealthiest countries in terms of GDP per capita, all but one of the top ten is under five million in population. But the point is unconvincing: The U.S. has a large population (310 million, which is over 1,900 times the size of Aristotle’s Athens), yet is in the top ten for GDP per capita, while four of the small countries in the top ten are rich mainly because of their oil (Brunei, Kuwait, Norway, and Qatar) and four of the top ten are authoritarian regimes of various sorts.

This highlights the first major problem with the collection: it only looks at optimal size from the perspective of geography or demography. Much more reasonable would be to do as a number of recent economists have done, namely, search for optimal size of *government* (as measured by percentage of GDP spent). A few years ago, for example, economists at the Institute for Market Economics surveyed economic performance across a large number of states, and concluded that the optimal size of government lies between 17% and 30% of GDP.¹ In addition, Antonio Afonso and Joao Toval Jalles, economists at the European Central Bank, published a sophisticated statistical study of data for 108 countries over forty years that shows that it is the amount of resources consumed by a government and its institutional quality

¹ Dimitar Chobanov and Adriana Mladenova, “What Is the Optimum Size of Government?” Institute for Market Economics, August 2009, accessed online at: http://ime.bg/uploads/335309_OptimalSizeOfGovernment.pdf.

(i.e., respect for political rights and civil liberties) that are the most important factors in economic performance.²

Thus, the economic research seems to indicate that the optimal size of a polity for economic growth lies not in the number of its citizens or the size of its territory, but in the portion of national wealth consumed by its government at all levels. There seems to be no reason *a priori* why a society could not have a population of any size, even tens of billions, and function well, so long as the government (at all levels combined) consumes less than 20% of the GDP, protects the citizens, and promotes their social good within a strong framework of delineated citizen rights and a federalized structure. In short, this research does not support the notions that America's dysfunctions stem from the size of its population or territory or that the secession of various states is a solution to the supposed "size problem." Curiously, neither of the economist contributors to the collection saw fit even to mention this research, preferring instead to discuss political history.

Of course, the reply might be made that there is more to good governance of a polity than that it have a growing economy. Fair enough—though I suspect most people would agree with Sale's implicit view that the economic prosperity of a polity is an important constituent of its flourishing. But again, there is still no evidence that the size of territory or population has anything to do with good governance as measured in any other way. Suppose, for example, someone views good governance as the protection of civil rights for the citizens.³ Why would a state both geographically and demographically huge be any less able to guarantee civil rights than a small one, especially if it has strong constitutional guarantees of rights and limitations on its power?

The essays by Brown and DiLorenzo focus on the legal case for the right of secession. Brown looks at the British common-law tradition, in which "[i]f two parties enter into a contract . . . and one of the parties fails to perform as promised—or breaches the contract—the other party may seek certain remedies that Anglo-American law has historically provided." These remedies include rescission, that is, the annulment of the contract (pp. 34-35). And Brown and DiLorenzo argue that, historically, the signers of the U.S. Constitution generally held that it was just a "compact"—a contract among the states—from which they could withdraw if the terms were not complied with. The idea that upon signing the Constitution, a perpetual or "indissoluble" union (in the words of Daniel Webster) was created, is an idea that would have been inconceivable to the Signers.

However, this line of argument is problematic for several reasons. Let us start with the claim made by several of the contributors that the Founders would not have understood the notion of "irrevocable covenants,"

² Antonio Afonso and Joao Tovar Jalles, "Economic Performance and Government Size," Working Paper Series No. 1399, European Central Bank, November 2011, accessed online at: <http://www.ecb.europa.eu/pub/pdf/scpwps/ecbwp1399.pdf>.

³ This example was suggested to me in private correspondence by Irfan Khawaja.

that is, agreements to which the parties freely consent, but then thereafter lose the right to leave. But there surely *was* a model of such irrevocable binding agreements with which all of the Founders were familiar: marriage. According to the thinking of the time, people freely enter into marriage, but once in it, cannot “secede” even if one of the partners fails to live up to the marriage vows.

Moreover, none of the contributors even mentions the ancient British legal concept of sovereign immunity, a concept with which the Founders were familiar, all of them having read (among others) Thomas Hobbes. If we agree to something and I feel you have breached the contract, we call upon the sovereign (the government) to adjudicate the matter. After all, the truth about which party (if either) is in breach of contract is not something God writes upon the skies for all to see, but is a matter that has to be adjudicated. However, does it make equal sense for me to judge the sovereign’s very power to judge us?

Putting this point another way, if all citizens have the power unilaterally to decide when the country is not doing what we think it should, and to nullify or secede as they see fit, what government could ever survive? Perhaps this is what Lincoln meant when he made the point (a point that Brown derides) that “[i]t is safe to assert that no government proper, ever had a provision in its organic law for its own termination” (p. 55).

Another problem with this anthology is its coy treatment of slavery, a subject mentioned in less than eight of its 270 pages. The reason secession is not considered a viable option in American political life is that it was tried, and resulted in a civil war that killed more Americans than all other American wars combined. And the core of the dispute was slavery. From the natural rights perspective—upon which much of the argumentation in this book seems based—slavery is, next to murder, the ultimate evil. So in essence, the Southern states were seceding to guarantee their rights to deprive many of their residents *their* rights. This is, to say the least, hardly a compelling example of secession as a tool for protecting or achieving liberty.

The South could have first liberated its *four million* slaves before secession, as was discussed at the time. But that course of action was rejected. So it is hard to take seriously the claim that the states of the Confederacy seceded in order to protect the rights of *all* of their citizens from the usurpation of those rights by the federal government. The Confederate advocates claimed they were protecting rights, but the Union forces made the same claim. This is the ultimate problem with secession: it raises issues that can only be resolved by hideous force. As Hobbes well understood, there is no war like civil war for sounding the depths of destruction.

This book would have been far more interesting had it considered these issues.

Gary Jason
California State University, Fullerton

Gerber, Scott Douglas. *A Distinct Judicial Power: The Origins of an Independent Judiciary, 1606-1787*. New York: Oxford University Press, 2011.

Scott Douglas Gerber's "Note on Methodology" makes crystal clear that I am not the reviewer he would have selected for *A Distinct Judicial Power*, his book on the origins of the American judicial branch. Gerber points out that while he is "a lawyer and a political scientist who takes history seriously," he is "not a historian, and historians . . . probably would approach this subject differently than I do" (p. xxi). He is absolutely right. I am an historian and, as he suggests, would approach this subject differently. Nevertheless, the subject is important and this is an interesting and valuable book. I will do my best to be fair to the author and to those readers of *Reason Papers* who are political scientists and philosophers. But I will also indicate how Gerber's approach might be bolstered by a more historical appreciation for the context of the documents he examines and a broader understanding of what constitutes an independent judiciary.

I will first provide an outline of the task Gerber has set himself and his approach to discovering the "origins" of an independent judiciary. His aim is to explain how each of the thirteen colonies treated its respective judiciary and "*when* and *why*" these judiciaries became independent. Through this he hopes to shed light on the federal model laid out in Article III of the U.S. Constitution. The book is divided into three parts. The first examines the intellectual origins of an independent judiciary, a journey in "the history of ideas" (p. 3). Gerber seeks this history in a selection of classical and Renaissance authors with the addition of a short list from the eighteenth century. In an aside, he apparently thinks little of his readers' knowledge of history since he feels it necessary to inform them that "the Renaissance" is "the historical age that followed the medieval period" (p. 15). Gerber begins with Aristotle's famous discussion of the theory of a mixed constitution, followed by Polybius, Marsilius of Padua, and Casparo Contarini. John Fortesque and Charles I provide the English legal "origins." Next come Montesquieu and John Adams's modification of Montesquieu's separation of powers, the Articles of Confederation, and finally the Constitutional Convention debates on the creation of an independent judiciary. Part II, to my mind the most valuable and original part of the book, offers a chronicle of each of the thirteen colonies' development of its judiciary, starting with the Virginia Charter of 1606 and ending with the Constitution in 1787 or, in the case of some states, a slightly later date. The third and final part brings together the theory from the first section and the experiences of the various

colonies in the second in order to assess how that experience worked to mold Article III and the federal court system.

All of this is well and good. However, there are two basic issues that I find troubling in this otherwise admirable book. The first involves the reliance on a handful of sometimes idiosyncratic texts selected by the author as *the* intellectual origins of an independent judiciary. As an historian I find free-floating texts, however interesting and important they may otherwise be, problematic if unlinked to any evidence that they actually were influential in the American case. Moreover, taken out of context they can easily be misunderstood. My second problem is the author's narrow interpretation of an "independent judiciary" as meaning the existence of a separate judicial branch rather than judges who behave independently and impartially.

Let's begin with the particular texts selected as origins. I do not disagree with Gerber's reliance upon texts. What else do we historians have but written records of various sorts? Essays in intellectual, constitutional, and legal history from an earlier era are crucial. If Gerber merely were searching for the origins of the idea of a separate or independent judiciary, Aristotle and Polybius would be fine. His aim, however, is to understand the origins of the American colonial and constitutional idea of the role of the judiciary. There, Aristotle's work and some of the other early texts that feature in *Distinct Judicial Power* played little if any part, nor does Gerber provide any evidence that they did.¹ Fortesque, on the other hand, *is* a fundamental source of English constitutional law and an important one. So too is a text Gerber selects from Charles I: the king's "Answer to the Nineteen Propositions." Unlike his father James I, Charles I was not given to committing to writing his thoughts on the English Constitution or any other subjects. The "Answer" was part of an escalating dispute between Charles I and the Long Parliament that eventually led to the English Civil War, a war the king lost along with his head. Parliament had issued a list of propositions that would severely have limited the discretion and power of the monarch and enhanced its own. Charles's famous response is useful for its endorsement of England's mixed and balanced constitution, although that was a commonplace among writers of the time. Charles's reference to the judicial role of the House of Lords, noted by Gerber as part of the king's allusion to the Lords as a buffer between the common people and the Crown, was a widely accepted conceit. Gerber concedes this, although he still lays great stress on the influence of the king's "Answer" (p. 20). The Lords were a distinctive branch, of course, but not a judicial branch *per se*, although they had a judicial function. Appeals could

¹ Gerber does mention that historian Scott Gordon, in his *Controlling the State: Constitutionalism from Ancient Athens to Today* (Cambridge, MA: Harvard University Press, 1999), denies that Aristotle or any other ancient Greek philosopher contributed anything significant to the modern system of the separation of powers epitomized in the American Constitution. Gordon, however, thinks that Polybius, a Greco-Roman, did serve as a genesis; see Gerber, *Distinct Judicial Power*, p. 8.

be taken there, but the Commons also heard cases and the Crown appointed the judges to the common law courts of Common Pleas and King's Bench. Indeed, Parliament is customarily referred to as "the High Court of Parliament," the highest court in the realm, but definitely not the distinct branch that relates to Gerber's quest.

The real breakthrough in the "Answer" is that for the first time the monarch, or to be more accurate his aides who wrote the "Answer," concede that the king is one of three co-ordinate estates in Parliament—the triumvirate of king, lords, and commons—and not separate from and above that body.² Gerber does refer to two other writers of that era. Sidestepping genuinely influential seventeenth-century political authors such as Sir Edward Coke, John Pym, or Henry Parker, or William Blackstone in the eighteenth century, however, he plucks Charles Dallison and John Sadler from obscurity, arguing that they "merit brief mention for what they had to say about the judiciary's role in this [seventeenth-century English] constitutional schema" (p. 20).³ To my mind, the most serious omission in the list are texts that illustrate the common law tradition of judicial independence stemming not from Charles I or the Glorious Revolution, but from Magna Carta and subsequent acts meant to bolster it. (But I will have more on that below.)

Gerber's analysis of Montesquieu that follows that of Charles I is excellent and avoids the mistakes frequently made in discussions of that writer. The choice to include John Adams's 1776 pamphlet, "Thoughts on Government," written to oppose the English government's decision to pay the salaries of colonial judges, is also well-taken. The argument about the impact of funding judicial salaries, and even more about judicial tenure, whether according to "good behaviour" or "at will," raged in the colonies during the reign of George III. Gerber mentions this briefly, but judicial tenure was an important constitutional issue in England even earlier, when Charles I altered the tenure of judges from "good behaviour" to "at will." The views that Adams expresses were far from novel at the time but certainly important. On the other hand, Adams's defense of separation of powers was discussed and

² While Charles gave his approval for publication of the "Answer" and presumably glanced at the lengthy document, it is unclear whether he actually read it. It does not reflect his views before or after its publication. His aides argued about who penned crucial parts and some of his moderate advisors were unhappy with the concession noted above in the text. The concession also meant that the bishops were eliminated from the House of Lords. See Joyce Lee Malcolm, *The Struggle for Sovereignty: Seventeenth-Century English Political Tracts*, 2 vols. (Indianapolis, IN: Liberty Fund, 1999), vol. 1, pp. 146-47.

³ Political scientist Donald Lutz has made a study of the authors the Founders cited most. Next to Montesquieu came William Blackstone. See Donald Lutz, "The Relative Influence of European Writers on Late-Eighteenth Century American Political Thought," *The American Political Science Review* 78 (March 1984), table 3, p. 194.

copied by the delegates to the Constitutional Convention while their author was on diplomatic assignment abroad.

The section on the debates in the Constitutional Convention is fine as far as it goes, but Gerber postpones until a final part of his book that deals with judicial review James Madison's attempt to include a Council of Revision in the Constitution. This council would have included the president and members of the judiciary to advise the president, and would have been authorized to review legislation for its appropriateness and constitutionality. Madison introduced the subject several times during the Convention debates, but it was defeated repeatedly because it would interfere with the separation of the branches of government by mixing the judiciary with the executive.⁴ A discussion of this debate is important when treating Convention debates not only for the topic of judicial review, but also for the issue of judicial independence and creating a separate branch for the judiciary.

To return to the topic of text selection, in the book's conclusion Gerber has no doubts about his choice of *the* influential texts. Indeed, he is emphatic that the American political theory of an independent judiciary "is the culmination of the work of eight political theorists writing over the span of 22 centuries, with each building on the contributions of the others" (p. 325). Gerber's level of certainty is entirely too strong for this historian.

Part II of the book, which recounts the experience of each of the thirteen colonies, is an excellent scholarly resource. As Gerber notes, many colonies-turned-states had elected judges. Although the delegates to the federal convention did not adopt this practice, that experience surely helped inform their attitudes. It gave the delegates a variety of systems to consider and weigh for the final form of Article III.

More troubling than Gerber's decision to focus on some texts that played little, if any, role in shaping American notions of a separate judiciary, is his inclusion of two very different concepts in his title while pursuing only one in the book. Gerber's main title is *A Distinct Judicial Power*. Somewhere along the way, he equates this distinct judicial power with a separate branch of government, as his choice of texts makes clear. Yet his subtitle refers to the origins of an *independent* judiciary. A separate judicial branch and judicial independence, however, are not synonymous. The English legal system had, until very recently, no separate judicial branch. Its judges were appointed by the Crown, and the Law Lords—which was the highest appeals court—sat in the House of Lords. Despite not being separate, from the passage of Magna Carta onward, judges were expected to be independent in their rulings and English parliaments struggled with a host of expedients to ensure that result. It's worth taking a quick look at some of these expedients. First, legislation going as far back as the fourteenth-century reign of Edward III, required the king's judges to swear to "deny no man common Right by the King's

⁴ See Joyce Lee Malcolm, "Whatever the Judges Say It Is? The Founders and Judicial Review," *The Journal of Law & Politics* 26, no. 1 (Fall 2010), pp. 30-33.

Letters.”⁵ That is, they were to ignore even orders from the king that interfered with the judicial process. Furthermore, if a judge failed to uphold the host of specified rights listed in Magna Carta and subsequent statutes, the judge’s ruling was to be “undone and holden for naught.”⁶ The author of an anonymous 1643 tract writes, “the King can do no wrong, because his juridical power and authority is allwayes to controle his personall miscarriages.”⁷ The task of judges was to keep kings from becoming over-mighty. Judges who took the king’s side in cases where the rights of subjects were being clearly violated were punished by parliament at the first opportunity. Among the first to suffer when the Long Parliament met in 1640 were Charles I’s judges for their series of rulings in the king’s favor that extended royal power. Edward Hyde, an attorney and future royalist, was one of many who found Charles’s politicization of royal judges unprecedented and more alarming than any particular verdict:

[I]t is very observeable that, in the wisdom of former times, when the prerogative went highest . . . never any court of law, very seldom any judge, or lawyer of reputation, was called upon to assist in an act of power, the Crown well knowing the moment of keeping those [the judges] the objects of reverence and veneration with the people. . . .⁸

Judges were expected to act independently and to defend the law and people’s liberties. They were not to be extensions of Crown policy or to alter the law to suit themselves. In 1679, when judges upheld Charles II’s dubious actions and refused to protect individual liberties, the House of Commons initiated impeachment proceedings against Chief Justice of the Court of King’s Bench, Sir William Scroggs.⁹ In an accusation with a modern ring to it, members of the Commons declared the judges guilty of “usurping to themselves legislative power.”¹⁰ Sir Francis Winnington, the solicitor-

⁵ 18 Edward III, 3.c.7.

⁶ Ibid.

⁷ *Touching the Fundamentall Lawes* (London: Thomas Underhill, 1643), p. 11.

⁸ Edward Hyde, Earl of Clarendon, *The History of the Rebellion and Civil Wars in England*, ed. William Dunn Macray, 6 vols. (Oxford: Oxford University Press, 1969 [1888]), vol. 1, p. 88.

⁹ For a discussion of this incident see Malcolm, “Whatever the Judges Say It Is?” p. 9.

¹⁰ Cited in Clay S. Conrad, *Jury Nullification: The Evolution of a Doctrine* (Durham, NC: Carolina Academic Press, 1998), pp. 149-50.

general, asked, “Shall we have law when they [the judges] please to let us, and when they do not, shall we have none?”¹¹

Many judges certainly found it difficult to remain strictly impartial and independent, as indeed some judges do today despite constituting a separate branch. But then as now, the intention was that the law was supreme and the judges were relied upon to uphold the law. The king, as Sir Edward Coke points out in *Prohibitions del Roi*, was “under no man but under God and the Law.”¹² John Pym, one of Charles I’s leading opponents, reminded members of the House of Lords, “Your Honours, your Lives, your Liberties and Estates are all in the keeping of the Law.”¹³ On this subject the future royalist Roger Twysden wholeheartedly agreed, writing that the proper execution of the laws was the “greatest (earthly) blessing of Englishmen.”¹⁴

Englishmen were jealous of judicial independence and upset when Charles I changed the usual tenure so that judges no longer served during good behavior but at the king’s pleasure, bringing them under closer royal control. After the restoration of the monarchy in 1660, royal judges once again served during good behavior. In the American colonies the judges served at the king’s pleasure, much to the dismay of many colonists. Indeed, one of the complaints against George III in the U.S. Declaration of Independence was that “He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.” The emphasis on judicial tenure to help protect judicial independence would shape Article III.

These and other stratagems were designed to keep the judiciary independent. The subject of a separate branch of government for the judiciary did not enter into that discussion about independence. This aspect of the common law tradition informed American opinion, although Convention delegates decided to follow what they took to be Montesquieu’s approach, opting for a separate branch in order to achieve judicial independence.

All of this should be part of the story of the origin of an independent American judiciary. It was certainly part of the common law mentality that the colonists carried with them and that shaped their thinking in crafting the Constitution. It is also part of the story of the concept of a separate branch

¹¹ Ibid.

¹² Malcolm, *Struggle for Sovereignty*, vol. 1, pp. 14-18.

¹³ John Pym, *The Speech or Declaration of John Pym Esquire, After the Recapitulation or Summing Up of the Charge of High-Treason, Against Thomas, Earle of Strafford* (London: John Bartlet, 1641), cited in Malcolm, *Struggle for Sovereignty*, vol. 1, p. xliii.

¹⁴ Sir Roger Twysden, *The Commoners Liberty: or, The Englishman’s Birth Right* (London: R. Royston, 1648), p. 1, cited in Malcolm, *Struggle for Sovereignty*, vol. 1, p. xliii.

for the judiciary, for the history of royal judges and the problems of keeping them both “lions under the throne” yet faithful to the law were well known to the colonists. If Americans turned their back on the English system, it was because they were aware of its shortcomings. Nevertheless, it had given them an education in the importance of an independent judiciary and a variety of methods by which to achieve it.

It is certainly unfair to criticize an author for writing a book different from one that a reviewer would have written. There is much to praise in *Distinct Judicial Power*. Tracing the history of a separate judicial branch as it developed in America is an important task in itself. Bringing together the experience of every one of the thirteen colonies in the development of its judiciary is a boon to us all. However, some discussion of what an independent judiciary really means and whether it must be achieved through a separate branch would have added greatly to the work Gerber has done.

Joyce Lee Malcolm
George Mason University School of Law

Friedman, Jeffrey, ed. *What Caused the Financial Crisis*.
Philadelphia: University of Pennsylvania Press, 2010.

In my graduate and undergraduate courses on money and banking, we spend at least one week of the semester discussing the 2008 financial crisis and the factors that may have caused it. My approach is to supply students with reading materials expressing multiple perspectives on the primary causes of the crisis so they might form their own opinions through debate and discussion. Despite my efforts, Jeffrey Friedman's *What Caused the Financial Crisis* provides a fuller and more informed guide to the events contributing to the crisis than any set of works I have managed to assemble. It includes essays with multiple perspectives on the crisis, each of which is clearly explained and replete with data. This book would be an excellent read for anyone seeking to familiarize themselves with the financial crisis and for experts seeking new information or divergent opinions. As the chapters cover a variety of positions and topics, I will discuss each individually and conclude with some general thoughts and comments.

This volume, edited by Friedman, begins with a chapter by Friedman himself summarizing an array of data regarding the years leading up to and including the crisis. It follows with eleven chapters of essays by academic experts and an afterword by Richard Posner. Friedman's introductory chapter walks the reader through some pre-crisis history and summaries of several of its potential causes. References to the later chapters are given where relevant, but the tone is to lay a factual foundation upon which the competing theories can be judged.

Friedman begins with statistics showing the increased origination and securitization of subprime mortgages, a change he attributes mostly to flawed U.S. housing regulations. The Federal Reserve's interest-rate policy appears to have played a significant role, since subprimes were almost exclusively adjustable-rate mortgages (ARMs). Deregulation of the commercial banking industry may also have contributed to some degree, especially the risk-based capital regulations based on the Basel Accords, which had the devastating effect of encouraging banks to hold large volumes of mortgage-backed securities (MBSs). Indeed, "all banks' MBS exposure seems to have been acquired in pursuit of capital relief" (pp. 26-27). The securities rating agencies further contributed to this problem as they were protected from competition and, therefore, had little incentive to provide legitimate evaluations.

Buried within his mountains of evidence, Friedman unearths the informational and analytical biases to which financiers and officials may be predisposed. Bankers and regulators alike appear to have been ignorant of the individual and systemic riskiness of securitized assets. However, Friedman

notes that ignorance by the regulator often poses a greater danger than that of the banker, since bad regulations necessarily lead to systemic risk. He finds an ideology of “economism,” the faith that economists and regulators put in their ability to prevent risk “based on what academic economists judged to be the best economic theories” (p. 51). This characterization is reminiscent of Friedrich von Hayek’s “scientism,” a term coined to describe overconfidence in the predictive power of social-scientific theories as though they can be applied to the real world as is done in the physical sciences.¹ “Given the regulators’ ideology, it will not do to blame the crisis on capitalism” (p. 53). Additionally, the challenge of operating within a social democracy inhibits effective regulation. Public officials must focus on the issues of the day and have little understanding of the potential long-term side-effects of their actions. The notion that regulators acted in ignorance and with hubris is a consistent theme discussed in several of the later chapters. Friedman ends the chapter by acknowledging the difficulty of operating within a multi-tiered legal structure of unknowable complexity and proposing research on the effect of mark-to-market accounting regulation.

The contributed essays begin with two chapters on “The Crisis in Historical Perspective,” the first being “An Accident Waiting to Happen: Securities Regulation and Financial Deregulation,” by Amar Bhidé. Beginning with the theory and history of securities regulation since the 1930s, Bhidé describes how securities regulation “fosters antagonistic, arms-length relationships between shareholders and managers” (p. 73). This separation aggravates manager/owner relations and inhibits the sharing of information, thereby magnifying principal-agent problems. These problems have been further exacerbated by “defective regulation” of the banking industry. Bhidé criticizes the American free-banking systems of the nineteenth century, which he (mis)characterizes as “inherently unstable” and in need of regulation (p. 85).² According to Bhidé, early regulations such as Federal Deposit Insurance Corporation (FDIC) deposit insurance created stability in the banking system that was eventually undone by increases in asset securitization and deregulation during the late-twentieth and early-twenty-first centuries. It was this combination of increased financial innovation and reduced monitoring

¹ See Friedrich von Hayek, “Scientism and the Study of Society,” *Economica* 9, no. 35 (August 1942), pp. 276-91.

² Despite the common perception that nineteenth-century banking was filled with turmoil, most studies have found that the banking industry was not inherently unstable. The banking crises of that period are generally thought to have been caused by prohibitions on interstate banking rather than by the absence of regulation. See Arthur Rolnick and Warren E. Weber, “Causes of Free Bank Failures: A Re-examination,” *Journal of Monetary Economics* (1984), pp. 267-91. See also George Selgin, William D. Lastrapes, and Lawrence H. White, “Has the Fed Been a Failure?” *Journal of Macroeconomics* (2012), accessed online at: <http://dx.doi.org/10.1016/j.jmacro.2012.02.003>.

that “led to the implosion of the world economy” (p. 106). Ironically, Bhidé does not worry that FDIC deposit insurance creates a separation between depositors and managers (the same effect as separating owners and managers, which he demonizes in regard to securities regulation). Bhidé shares Friedman’s concern that bankers and regulators were prone to overlook obvious risks due to their overconfidence in mathematical models. However, Bhidé contends that regulators “were more concerned than bank executives” about the systemic risks of financial innovation, but eventually “succumbed to the idea” (p. 100).

The next chapter is by Steven Gjerstad and Vernon L. Smith, “Monetary Policy, Credit Extension, and Housing Bubbles, 2008 and 1929.” The authors begin by discussing the experimental evidence of assets bubbles, a phenomenon whose pattern is easily identified but whose root causes are not. They contend that the 2008 housing bubble was sparked by mortgage-tax exemptions instituted in the late 1990s and fueled by the Federal Reserve’s easy monetary policy. Indeed, they provide evidence that “the years 2001-2004 saw the longest sustained expansionary monetary policy in half a century” (p. 114). The increased use of subprime lending and ARMs furthered the dependence on interest rates, thereby ratcheting up the bubble effect. The authors draw interesting parallels between the recent crisis and the market crash of 1929. I was interested to learn that the banking collapse of the early 1930s was, in many respects, caused by the bursting of a real-estate bubble that devalued bank assets and constrained liquidity in the financial system. Although this explanation is consistent with the analysis of Milton Friedman and Anna Schwartz,³ Gjerstad and Smith differ by suggesting that in both 1930 and 2007 the Federal Reserve Bank was unable to stem the financial crisis because the underlying problem was insolvency, not liquidity. The chapter closes with a now-familiar refrain that overconfident regulators, or in this case central bankers, were unable to recognize important risks or implement effective policy.

Joseph E. Stiglitz leads off Part II, “What Went Wrong (and What Didn’t)?” with his essay, “The Anatomy of a Murder: Who Killed the American Economy?” Although Stiglitz believes the causes of the crisis to be many and multifaceted, he argues that “blame should be centrally placed on the banks (and the financial sector more broadly) and the investors” (p. 140). U.S. commercial banks were responsible, according to Stiglitz, for excessive leverage, short-sighted risky behavior, and ignorance of the risks of asset securitization. Stiglitz adds the ratings agencies, whose analyses were unreliable, and mortgage originators, who tended to “prey on innocent and inexperienced borrowers” (p. 142), as accomplices to these crimes. Many of these factors are the same as those discussed in Friedman’s introductory chapter, but come from a different perspective. While Friedman links the

³ Milton Friedman and Anna J. Schwartz, *A Monetary History of the United States, 1867-1960* (Princeton, NJ: Princeton University Press, 1963).

housing-price bubble to government policies, including those of Fannie Mae and Freddie Mac, Stiglitz exonerates policymakers for any wrongdoing. Friedman attributes the banks' risky behavior to poor regulatory incentives. Stiglitz instead blames the "powerful and wealthy" bankers, yet he provides little data in his "search for whom to blame for the global economic crisis" (p. 139). Indeed, the relative weakness of Stiglitz's analysis makes Friedman's point appear even more convincing.

The next chapter is "Monetary Policy, Economic Policy, and the Crisis," by John B. Taylor, in which he argues that "government actions and interventions caused, prolonged, and worsened the 2008 financial crisis" (p. 171). Taylor begins with his theory that through the early 2000s, the Federal Reserve erred by lowering their funds rate to a level below that dictated by the Taylor Rule. Although low interest rates are not themselves indicative of loose monetary policy (since banks might still choose not to lend), Taylor summarizes a 2007 study showing that housing starts were, in fact, linked to low interest rates and that following a Taylor Rule would have minimized the bubble.⁴ International evidence is consistent with this hypothesis, since "housing booms were largest where the deviations from the rule were the greatest" (p. 155). The crisis was worsened by U.S. housing policies, which encouraged securitization and the use of subprime mortgages. It was prolonged by government policies that provided liquidity without addressing the fundamental problem of mortgage insolvency. One counter-theory is that loose money in the United States was caused by a "global savings glut" from abroad. However, Taylor shows that net savings rates were not increasing over the period, since increased investment by foreigners was counteracted by lower domestic savings.

The sixth chapter is "Housing Initiatives and Other Policy Factors," by Peter J. Wallison. He finds that "[t]he crisis had its roots in the U.S. government's efforts to increase home ownership, especially among minority, low-income, and other underserved groups" (p. 172) through the Community Reinvestment Act (CRA), the government-sponsored enterprises (GSEs) Fannie Mae and Freddie Mac, and other tax and regulatory policies. Wallison concedes that CRA loans did not lead to higher default rates, but contends that they caused a reduction in underwriting standards that "spread rapidly to the prime market and subprime markets, where loans were made by lenders other than insured banks" (p. 175). Wallison provides evidence that lending standards declined drastically from 1997 to 2007 due to increased demand from the GSEs who held and securitized more low-quality mortgages.

The impact of GSE mortgage securitizations is explained by Viral V. Acharya and Matthew Richardson in "How Securitization Concentrated Risk

⁴ John B. Taylor, "Housing and Monetary Policy," presented at the "Housing, Finance, and Monetary Policy: A Symposium" conference, Jackson Hole, WY, August 20-September 1, 2007, accessed online at: <http://www.kansascityfed.org/publicat/sympos/2007/pdf/2007.09.04.Taylor.pdf>.

in the Financial Sector.” They begin with the same logic previously discussed by Friedman, namely, that risk-based capital regulations encouraged banks to hold MBSs in place of other assets. In addition, banks created “secured investment vehicles” to purchase their subprime mortgages and asset-backed securities, upon which they issued asset-backed commercial paper (ABCP). By holding ABCP, banks could essentially maintain ownership of their risky MBSs while reducing their regulatory capital. The result was that from 2004 to 2007, “in the top ten publicly traded banks, the magnitude of total assets doubled even though the size of the banks’ *risk-weighted* assets increased by less than 50 percent” (p. 192, emphasis in original). These big bets on the mortgage market turned disastrous when housing prices began to fall and “effectively brought down UBS, Bear Stearns, and Lehman Brothers” (p. 197). Unlike Friedman, however, Acharya and Richardson place responsibility for these bets on profit-seeking bankers who exploited failed capital regulations rather than on the regulations themselves.

Juliusz Jablecki and Mateusz Machaj’s “A Regulated Meltdown: The Basel Rules and Banks’ Leverage” gives a detailed discussion of the perverse incentives in U.S. banking regulation. Similar to prior chapters by Friedman and Acharya and Richardson, Jablecki and Machaj find that the Federal Reserve’s adoption of risk-based capital regulations encouraged banks to acquire MBSs and ABCP. Unlike Friedman, they put greater emphasis on the Basel rules and monetary policy than housing policy as the impetus for excessive subprime lending, stating that “[e]asy money led to low interest rates, which not only contributed to a housing boom, but . . . provided an excellent environment for the development of securitization, and particularly the securitization of subprime mortgages” (pp. 218-19). They also pose an intriguing hypothesis that the liquidity crisis in the banking sector was not a “modern day bank run” in which banks no longer trusted each other. Rather, it was a consequence of the falling values of ABCP which caused banks to move their off-balance-sheet assets back onto their books, an activity requiring that they maintain more of their own liquidity rather than lending it to others.

In “The Credit-Rating Agencies and the Subprime Debacle,” Lawrence J. White explains how the regulation of rating agencies led to the propagation of subprime MBSs. In 1975, the Securities Exchange Commission (SEC) declared that only three firms—Moody’s, Standard and Poor’s, and Fitch—would be classified as “nationally recognized statistical ratings organizations.” The change gave these firms a “de facto oligopoly” and caused them to switch from an “investor pays” to an “issuer pays” business model (p. 231). White identifies four ways in which the rating system contributed to the securitization of subprime mortgages: the rating agencies were trusted and respected in the financial community, many firms such as insurance and pension funds were legally required to rely on their ratings, banks could use these ratings to reduce their Basel capital ratings, and ratings were necessary to create ABCP funds.

Peter J. Wallison argues in “Credit-Default Swaps and the Crisis” that, despite common perceptions, credit-default swaps (CDSs) were not to blame for the credit crunch of 2008. Like any financial security, CDSs intermediate risk by transferring it between parties. Wallison does an excellent job of demystifying the mechanics of CDSs, concluding that “the seller of a CDS is taking on virtually the same risk exposure as a lender” (p. 241). Nor did CDSs create systemic risk any further than giving anti-market advocates more “speculators” to demonize. Wallison finds that “there is little evidence that the failed financial institutions were the victims in their participation in credit-default swaps, or that their failure jeopardized their swap counterparties, and thus, the global financial system” (p. 239).

Part III of the book has two chapters on “Economists, Economics, and the Financial Crisis.” Daren Acemoglu, in “The Crisis of 2008: Lessons for and from Economists,” calls for a balance between markets and regulation. He conjectures that regulators’ efforts to reduce aggregate volatility actually increased our exposure to systemic shocks. For example, regulations suppressed reputational mechanisms, which limited market participants’ ability to police each other. According to Acemoglu, markets failed because policymakers were “lured by ideological notions derived from an Ayn Rand novel,” which “equated free markets with markets unregulated by institutions” (p. 254). He proposes that a regulated market is necessary for economic growth, but provides no new insight into how such a system is achieved. This is particularly ironic considering that, as demonstrated throughout the collection and acknowledged by Acemoglu himself, vague but well-intentioned regulation was the primary cause of the financial crisis. While accusing capitalists of confusing free markets with markets free of institutions, Acemoglu seems to be confusing better institutions with increased financial regulation.

The final chapter, by David Colander et al., is “The Financial Crisis and the Systemic Failure of the Economics Profession.” As in prior chapters, the authors propose that economists failed to recognize, and even contributed to, the financial crisis due to an overreliance on quantitative economic theory. Aspects of this failure include simplistic and unrealistic assumptions, overreliance on mathematical rigor, underreliance on empirical testing, and excessive conceptual reductionism.

Richard Posner provides an afterword that hearkens to Acemoglu’s call for regulated markets. Posner agrees with earlier authors that the crisis was primarily caused by “unsound monetary policy . . . and inadequate (at times inept) regulation of financial intermediation” (p. 279). Yet despite his acknowledgement that the crisis was a failure of government policy and regulation, Posner claims that “the financial crisis was a failure of capitalism (the title of my first book on the crisis), but it was a failure of the regulatory arm of capitalism” (p. 294). Like Acemoglu, he calls for more and better regulation with no concrete prescriptions on how that goal may be reached. Like Acemoglu, Posner is in danger of confusing the prescription with the disease. He decries inept regulation as the problem yet calls for more

regulation as the solution. This solution is no solution at all. Everyone is in favor of fair and reasonable regulation. As Peter Boettke describes in *Living Economics*, “[n]obody in their right mind would argue for unreasonable regulation dominated by interest group politics,” but “[w]hat if . . . that set of regulations is a null set?”⁵ Without more detail, it is impossible to discern whether Posner’s proposed regulations are indeed reasonable. The saying “the devil is in the details” does not imply that one can avoid the devil by omitting the details.

Although all of the chapters provide detailed, data-driven analyses, the collection does have a few shortcomings. Regarding content, one significant limitation is the scant discussion of the “global savings glut” as a potential cause of the crisis. This view is espoused by prominent economists, including Ben Bernanke, Alan Greenspan, and Paul Krugman. In this volume, Stiglitz dismisses it (p. 144) and Taylor provides some evidence against it (p. 154), but a more comprehensive discussion would have complemented the existing chapters. Another problem, common to such collections, is that much of the material is repeated or overlapping. There is also some sense in which the authors are talking past each other. Perhaps it might have been better to have had them read and comment on each other’s works rather than making each contribution completely independent.

In summation, Friedman’s *What Caused the Financial Crisis* gives detailed accounts from several perspectives of the factors most likely to have contributed to the crisis. It is the best compilation of information on the crisis that I have read to date. The only mild warning that I might give to those considering the purchase of this book is that I hear that Friedman’s more recent book, *Engineering the Financial Crisis*, might be even better.⁶ Look for a review of that work in a forthcoming issue of *Reason Papers*.

Thomas L. Hogan
West Texas A&M University

⁵ Peter J. Boettke, *Living Economics* (Oakland, CA: The Independent Institute, 2012), p. 160.

⁶ Jeffrey Friedman and Wladimir Klaus, *Engineering the Financial Crisis* (Philadelphia, PA: University of Pennsylvania Press, 2011).

Allison, John A. *The Financial Crisis and the Free Market Cure*.
New York: McGraw-Hill, 2012.

John A. Allison, who recently retired as CEO of Branch Banking and Trust Company (BB&T) to head the Cato Institute, has written a book that challenges the most common narrative of the financial crisis. That narrative holds that deregulation turned loose the forces of greed in finance, leading to the crisis. In Allison's view, it was misregulation, not deregulation, that caused the crisis. At a deeper level, Allison believes that collective efforts at financial regulation are doomed to fail, and that free markets are the only solution.

Believers in free markets will find this book bracing. Believers in the conventional narrative will find it unacceptable. Anyone who is open-minded or conflicted about the topic probably will find it disappointing. That is, I do not think that Allison anticipates well enough objections and counter-arguments to offer a case that would persuade anyone who does not already agree with his general outlook.

In my view, banking and financial intermediation pose a difficult problem. The challenge is that it is difficult to distinguish a prudent, competent banker, who is managing money responsibly, from a banker who is incompetent or a banker who takes risks irresponsibly, expecting to profit if things go well while expecting others to bear most of the loss if things go poorly. In good times, good bankers and bad bankers may be indistinguishable. Only under stress does it become clear which is which.

How to address this problem? The decentralized, libertarian approach is to leave it to individual savers and investors to try sorting out the good bankers from the bad ones. Eventually, the bad bankers will suffer, and so will their customers. In a Darwinian contest, eventually the good bankers will be more likely to survive.

The more conventional approach is to collectivize the risk in banking and to centralize the problem of distinguishing good banks from bad banks. In the United States, government agencies, such as the Federal Reserve Board and the Federal Deposit Insurance Corporation (FDIC), insulate individual savers from the risks that their banks take. These agencies hire experts to evaluate and regulate banks, under the presumption that these experts will be better than ordinary individuals at sifting through banks, keeping out bad bankers, and ensuring the prudence and competence of those who manage financial intermediaries.

Allison is very good at criticizing the conventional approach. However, his description of the libertarian approach does not confront the obvious challenges involved. In particular, if ordinary individuals must bear the risks of failure to distinguish good bankers from bad bankers, are they not likely to place very little trust in financial intermediaries? Does this not imply

a greatly diminished financial sector, reducing overall investment and growth in society?

If left to themselves, ordinary individuals will want experts to help them find the best banks in which to deposit funds. Experts can enhance their credibility by offering guarantees. Thus, consumers will be attracted to schemes that insure against loss. In other words, consumers will seek out the same sorts of services that government provides with bank regulation and deposit insurance. Perhaps these services will be provided effectively by market institutions. However, Allison fails to offer convincing evidence that this is the case. If there is a successful example of a modern industrialized country with a libertarian financial system, I am not aware of it. This fact does not prove that the libertarian approach is unworkable, but it puts a burden on Allison to go into greater depth to explain what he thinks would emerge to address these problems.

Although Allison's defense of a libertarian financial system is weak, his attack on the conventional approach is powerful. His indictment is fourfold.

- (1) The government officials who are assigned to play the role of experts lack the required competence. This is not merely a problem of particular individuals. It is an inherent systemic flaw.
- (2) The collectivization of risk encourages bad risk-taking. Even prudent bankers have their judgment distorted by the misleading signals that are sent when regulators create a false sense of security.
- (3) The collectivization of financial risk punishes prudent bankers. It enables imprudent bankers to capture market share, and ultimately prudent bankers pay the price through bailouts and regulatory burdens.
- (4) The collectivization of risk pushes politics into the forefront. Bank executives who are skilled at navigating the political process out-compete those who are more skilled at managing risk.

On the first point, Allison indicts government officials for exacerbating the housing boom and the subsequent bust. I think that his argument is well taken.

One reason for financial cycles is that optimism is procyclical. That is, when the economy is doing well, people become more and more confident and take less prudent risks. Those who favor regulation assume implicitly that experts will resist the general mood. As 1950's Federal Reserve Chairman William McChesney Martin puts it, the Federal Reserve's job is to "take away the punch bowl just when the party is getting good."¹

¹ William McChesney Martin, "Address before the New York Group of the Investment

Allison demonstrates that regulators in practice are procyclical. He shows that all of the practices that came to be viewed as dangerous and inappropriate after 2008 were promoted by regulators prior to 2008. These included sub-prime mortgage lending, mortgage securitization, disintermediation (now referred to as “shadow banking”), the role of bond-rating agencies, and high financial leverage (meaning that intermediaries relied too much on borrowed funds and too little on their own capital).

For example, on the rating agencies, many commentators have pointed out that with bond sellers paying for ratings, the agencies have more incentive to please the customer by issuing a high rating than to warn the buyer by issuing a low rating. The rating agencies fall under the jurisdiction of the Securities and Exchange Commission (SEC). Allison writes:

When John Moody founded his now-famous firm in 1909, he charged bond investors for the research and ratings. Tragically, in the early 1970s, the SEC, seeking to expand market access to ratings, forced Moody’s and the other rating firms to fundamentally change. . . . Under the new method, the agencies were paid by issuers—bond sellers, not bond buyers. The SEC was influenced by union and government pension plans that did not want to pay the cost of the ratings. (pp. 83-84)

An example of regulation that turned out to be procyclical was fair-value accounting, also known as mark-to-market accounting. With mark-to-market accounting, a bank must calculate asset values based on the most current market prices for similar securities. When asset values are rising, mark-to-market accounting strengthens the (apparent) capital position of banks, enabling them to lend more aggressively. When asset values are falling, this goes into reverse. In 2008, the reverse was very rapid, because there was a liquidity panic and assets were being sold below their fundamental values, which made the downward part of the cycle especially vicious.

What Allison fails to point out, however, is that mark-to-market accounting, while suffering from the defect of being procyclical, was not introduced arbitrarily. Regulators changed to mark-to-market in the aftermath of the Savings and Loan crisis of the 1970s and 1980s. During that crisis, thrifts were using historical-cost accounting. This means that they carried mortgage assets at book values that were far above market values. This in turn allowed these savings and loan banks to fend off government takeover even though they were insolvent. The result was more bad risk-taking by these institutions and a higher cost for taxpayers to pay off depositors.

Thus, while mark-to-market accounting has problems, there is no alternative that is necessarily better. Allison himself decries specific

Bankers Association of America,” October 19, 1955, accessed online at: http://fraser.stlouisfed.org/docs/historical/martin/martin55_1019.pdf.

accounting rules, and instead champions principles-based accounting. Indeed, each bank has its own unique set of operational challenges, so that no set of rules is going to fit all cases. If all banks were committed to the principle of accurate reporting, then principles-based accounting ought to lead to better results. However, a skeptic could argue that rule-based accounting, while imperfect, at least has the virtue of making comparisons across banks more straightforward. Also, one may question the leeway that principles-based accounting might give to someone whose principles are not especially strong.

The second problem with collectivization of risk is that it creates an economy-wide moral hazard. Allison points out that between 1980 and 2008, the consequences of bad risk-taking were constantly mitigated by government action. In some cases, firms were bailed out. In other cases, the monetary spigot was loosened when problems threatened. As a result, financial executives were taught that caution only served to sacrifice profits. Why worry about the possibility of falling home prices, if you think that the Federal Reserve can and will prevent such an event from happening?

The third problem with collectivization of risk is that it redistributes pain from the imprudent to the prudent. When the government bails out a home buyer who speculates on ever-rising home prices, it does so using tax revenue collected from those who refrained from such speculation. When the government keeps alive a bank that otherwise would have failed, it does so using deposit insurance fees collected from banks that sacrificed short-term profits during the boom for the sake of long-term safety. When the government imposes new regulations in the wake of a catastrophe, the burden on these regulations falls more on the many firms that behaved well than on the few firms that were irresponsible.

Allison is particularly effective at describing regulation in practice as irrational and arbitrary. He writes that “during good economic times, the examiners will say that this regulation or that regulation is not important. However, when times get tough, they will suddenly clamp down on a standard that was not important six months before” (p. 139). With his experience at BB&T, Allison is able to back up his complaints about regulation with numerous real-life examples. This is the one aspect of the book that I can recommend to people who do not already have a free-market perspective. Too often, people carry in their heads an idealized picture of regulation, in which the regulators have an Olympian detachment and wisdom. The day-to-day practice is much uglier and much less often described.

The final flaw with collectivization is that it pushes politics to the forefront. This is particularly problematic in the case of housing finance, where small, subtle regulatory changes cause major structural shifts in the market. Allison spells out one particular example, concerning the accounting treatment of “mortgage servicing rights,” an arcane and seemingly obscure aspect of mortgage lending (pp. 110-14). Intense lobbying by Freddie Mac, Fannie Mae, and their Wall Street allies resulted in treatment that was unfavorable to traditional mortgage lenders and favorable to mortgage securitization.

Had Allison wished, he could have chosen many other examples. The big boom in mortgage securitization was kicked off by the creation of the real estate mortgage investment conduit (REMIC), which depended on a special tax treatment. The political battle over the REMIC and other laws and regulations pertaining to mortgage securities has been well documented in *Liar's Poker*, by Michael Lewis, and *All the Devils Are Here*, by Bethany McLean and Joe Nocera.²

Allison's fourfold criticism of regulation in practice generally hits the mark. Those who believe in regulatory solutions to the fundamental problem of finance are doomed to disappointment. On the other hand, the "free market cure" that Allison proposes will not be persuasive to anyone not already so inclined. He recommends abolishing the Federal Reserve Board and the FDIC altogether, while the conventional approach is to try to "fix" the regulatory system, and above all to "strengthen" it.

My own view is that the problem of finance is nearly intractable. A modern economy needs a way to channel savings from people into risky projects that they cannot evaluate directly. This requires financial intermediation. Financial intermediation, in turn, can be undermined by incompetence and moral hazard. We would like experts to intervene in the process in order to sift out the incompetent and the irresponsible, but there is no generally reliable way to ensure that this happens.

When it comes to the financial crisis of 2008, the conventional view seriously under-estimates the extent to which collectivization of financial risk was the cause of the problem and seriously over-estimates the extent to which strengthening this collectivization represents a long-term solution. I am in complete accord with Allison on that score. However, I do not share his view that there is a free market "cure." At best, there are movements in the direction of the free market that would reduce the costs of regulation without increasing the risks of another meltdown. However, such changes will not be made as long as the conventional history of the crisis—which treats it as resulting from the loss of will to regulate—holds sway. And I do not believe that, in the end, Allison's book will have much of an impact on converting those who hold the conventional view.

Arnold Kling
Independent Scholar

² Michael Lewis, *Liar's Poker: Rising through the Wreckage on Wall Street* (New York: W. W. Norton & Company, 1989); Bethany McLean and Joe Nocera, *All the Devils Are Here: The Hidden History of the Financial Crisis* (New York: Portfolio/Penguin, 2010).

Ibn Warraq. *Virgins? What Virgins? and Other Essays*. Amherst, NY: Prometheus Books, 2010.

Ibn Warraq's new collection *Virgins? What Virgins? and Other Essays* (hereafter, *Virgins*) joins the author's growing body of controversial writings, written for reasons of privacy and security under an Arabic pseudonym. This volume is a collection of eighteen essays on a variety of different but related subjects—classical Islam, Western civilization and its encounter with Islam, the critique (or lack thereof) of Islam by scholars of the subject, and the analysis of contemporary political Islam. In spite of the pseudonym, *Virgins* is probably Ibn Warraq's most personal writing to date; he devotes an entire chapter of the book to his religious and ideological upbringing, during the course of which he transformed himself from an Indian Muslim into an English rationalist. The book, especially the autobiographical material in it, makes for fascinating reading, and will rightly join the genre of apostate or Islam-critical writing that has appeared during the past decade.¹

The essays in *Virgins* are somewhat unevenly written, and ironically, the title essay "Virgins? What Virgins?" is one of the shortest pieces in the book. As in his other works, however, Ibn Warraq focuses here upon the core elements of classical Islam, seeking to place the totalitarian and dominationist ideology of political Islam within the context of its classical roots, and developing the idea that contemporary Islam is bound to maintain itself through domination, persecution, and demonization of the Other via the core elements it inherits from those classical roots. The book substantiates its thesis through an abundance of examples, some of them quite unpalatable to pious readers.

Ibn Warraq is clearly angered by the privileged position that Islam occupies in academia and the mainstream media. He exposes this fact through an insistent emphasis on precisely those elements of Islam that are most assiduously avoided by contemporary scholars (though generally not by older scholars) in the name of political correctness, for which he has unbridled contempt. These controversial elements include the more outlandish features of the Qur'an; the life of Muhammad; the disgusting, misogynistic, ahistorical, or intolerant elements of the *hadith* (tradition) literature; the numerous examples of intolerance toward women, non-Muslims, and others to be found in the legal literature (the basis for the *sharia*); and other taboo subjects.

¹ For example, works by Wafa Sultan, Nonie Darwish, Ayaan Hirsi Ali, and to some extent Irshad Manji, in addition to the numerous essays at Ali Sina's website: <http://www.faithfreedom.org/>.

As a scholar of Islam myself, I find Ibn Warraq's attitude to be very refreshing, and his scholarship for the most part to be accurate and devastating in pinpointing weaknesses in Muslim orthodoxy. His third essay, "Some Aspects of the History of Koran Criticism, 700 CE to 2005 CE," could almost serve as a history of our field, and of its systematic failure to critique the foundational texts of Islam as those of other faiths have been critiqued.² It is an embarrassment for Islamic Studies that no critical text of the Qur'an has been produced.³ However, even were this basic, elemental work done, there would be still a great more to be done in order to counter one of the most fundamental Muslim presuppositions—namely, that the text of the Qur'an has remained absolutely unaltered since the time of the Prophet Muhammad in the seventh century of the Common Era. Ibn Warraq counters this nonsense, which one hears on a regular basis even from educated Muslims who should know better, by demonstrating the prevalence of variant readings of the Qur'anic text.⁴ That the existence of these variants, known as *qira'at*, demonstrates the falsity of the orthodox Muslim position vis-à-vis the Qur'an is obvious, and yet bizarrely rejected even by mainstream scholars.⁵

About half of *Virgins* discusses technical textual issues, including the Qur'an and its variants, as well as translations of problematic sections of the text that are either evaded by contemporary Muslims, or reflexively described as "taken out of context." Although this section of the book is highly interesting to a scholar of Islam, and is fundamental to critical engagement with Muslims, it does not make for easy reading. Midway through the book we get to the title essay, which discusses the question of whether the *hur al-'ayn* ("houris")—the human sex-toys of paradise so graphically described in the classical literature⁶—are in the end women or raisins. The latter interpretive option is the one proposed by Christoph Luxenberg in his book, *The Syro-Aramaic Reading of the Koran: A Contribution to the Decoding of*

² See for a discussion of this failure, F. E. Peters, "The Quest of the Historical Muhammad," *International Journal of Middle Eastern Studies* 23 (1991), pp. 291-315.

³ Such work was begun in 1980, but stalled in 1989 due to lack of funding; see "Codex San'a I: A Qur'anic Manuscript from Mid-1st Century Hijra," accessed online at: <http://www.islamic-awareness.org/Quran/Text/Mss/soth.html>.

⁴ It is further ironic that the existence of either seven or fourteen canonical "readings" of the Qur'an is accepted in Islam, and yet the implications of this fact for the "unaltered" nature of the text are not.

⁵ See Hamza Andreas Tzortis, "Luxenberg & Puin: Origins & Revisions: Responding to Dispatches," accessed online at: <http://www.theinimitablequran.com/respondingtodispachthes.pdf>.

⁶ And even by present-day clerics, such as Omar al-Sweilem; see "Saudi Cleric al-Sweilem Extols Paradise's Black-Eyed Virgins," September 30, 2009, accessed online at: <http://www.youtube.com/watch?v=60kEEkWgzE>.

the Language of the Koran.⁷ There is no doubt about the controversial nature of Luxenberg's claims, which amount to reading parts of the Qur'an as if they were written not in Arabic (as has almost universally been assumed) but in Aramaic (Syriac), the Christian language common throughout Syria-Palestine during the time of Muhammad (and until today among elements of the Maronite Church).

In my opinion, interesting as this reinterpretation of the *houris* may be, it does not have much relevance to *contemporary* Islam, because so few Muslims are even aware of it, and because there is a vast lore built up through fourteen centuries, interpreting the *houris* as the pleasure-women of paradise. Two groups have difficulties with the conventional interpretation of *houris*. The first consists of those Muslim modernists who live in the West, and either experience embarrassment at such sexualized descriptions of paradise or experience the same at the motivational pull exercised by these descriptions on would-be suicide-bombers (a.k.a. "martyrs"). The second consists of those non-Muslim apologists for Islam who wish to oppose the image of the Muslim paradise popularized by Christians in the European Middle Ages. It would of course be very nice if we could, when discovering the "true" or "original" meaning of a word or phrase in a given holy text, have that new meaning instantaneously accepted by believers. The fact remains that religions and their histories are more a matter of what is commonly believed or accepted by their adherents than the original meanings of the words in their Scriptures.

I have stronger objections to Ibn Warraq's seventh essay, "Islam, the Middle East and Fascism," in which he seeks to demonstrate that the ideology inherent in Islam is a totalitarian one with elements in common with fascism. He correctly qualifies this a bit: "It is important to bear in mind the distinction between theory and practice, the distinction between what Muslims ought to do and what they in fact do" (p. 287). He then carefully lays out the difference between the textual sources concerning the religion, rightly dividing them into the Qur'an (Islam₁) and the legal structure of Islam (Islam₂), as distinct from the manner in which, as a matter of history, Muslims have acted upon these sources across fourteen centuries (Islam₃, or Muslim civilization).⁸ I agree with Ibn Warraq that Islam₁ and Islam₂ are a great deal more totalitarian and intolerant than Islam₃. However, it seems to me neither important nor historically accurate to compare Islam with *fascism*, despite the currency of this practice among certain contemporary intellectuals.⁹ The use of "fascism"

⁷ Christoph Luxenberg, *The Syro-Aramaic Reading of the Koran: A Contribution to the Decoding of the Language of the Koran*, trans. Markus Gross (Berlin: Verlag Hans Schiler, 2007 [2000]).

⁸ Cf. the similar but subtly different three-way distinction drawn by Bernard Lewis; see Bernard Lewis, "Islam and Liberal Democracy: A Historical Overview," *Journal of Democracy* 7, no. 2 (1996), p. 54.

⁹ The phrase seems to have been coined in 1990 by Malise Ruthven, but was popularized more recently after 9/11 by the late Christopher Hitchens. See Christopher

amounts to mere demonization of Islam, albeit one which Ibn Warraq tries to substantiate by means of a great many quotations. Despite these efforts, I do not think that the comparison of Islam with fascism facilitates non-Muslims' understanding of Islam, since the elements brought out by the comparison are generically totalitarian, and not particularly useful in real-life dealings with Muslims.

Ibn Warraq is on much stronger ground, in my view, when he attacks apologists for Islam, including many who are or were prominent in the field of Islamic Studies. He divides these into two basic groups: (1) those Christians such as W. Montgomery Watt, who romanticize Islam, and are apparently unwilling to subject it to serious critique, given their ecumenical leanings and their belief in the sacredness of its claims; and (2) those post-modernists such as John Esposito, who are basically cultural relativists and for whom the serious critique of Islam is taboo because Muslims are the Other whom Westerners are forbidden to study in a non-sympathetic or objective manner, à la Edward Said's claims in *Orientalism*.¹⁰ Ibn Warraq rightly notes that the latter group, which is currently much more influential than the former, especially in policy issues, is immune to any self-examination as to their intellectual or political track record. If Esposito spent most of his time prior to September 11, 2001 denying that Muslim radicals had any violent intentions toward the United States, those denials do not seem to have dented his credibility in the scholarly and policy-making worlds in the way that they should have.¹¹

In his last few essays, Ibn Warraq makes a spirited defense of Western rationalism and reason, as contrasted both with postmodern cultural relativism and Islam, emphasizing in particular Western society's role in promoting tolerance and free speech. Ibn Warraq is unabashedly a proponent of Western exceptionalism, and in stark opposition to current academic trends, notes a great many ways in which Europe and the United States have led the

Hitchens, "Of Sin, the Left, and Islamic Fascism," *The Nation*, September 4, 2001, accessed online at: <http://www.thenation.com/article/sin-left-islamic-fascism#>; and Christopher Hitchens, "Defending 'Islamofascism'," *Slate*, October 22, 2007, accessed online at: http://www.slate.com/articles/news_and_politics/fighting_words/2007/10/defending_islamofascism.html. See also Alexander Stille, "The Latest Obscenity Has Seven Letters," *The New York Times*, September 13, 2003, accessed online at: <http://www.nytimes.com/2003/09/13/books/the-latest-obscenity-has-seven-letters.html?pagewanted=all&src=pm>; and William Safire, "Islamofascism," *The New York Times Magazine*, October 1, 2006, accessed online at: http://www.nytimes.com/2006/10/01/magazine/01wwln_safire.html.

¹⁰ Edward Said, *Orientalism* (New York: Pantheon, 1978).

¹¹ Cf. John Esposito, *The Islamic Threat: Myth or Reality?* 3rd ed. (New York: Oxford University Press, 1999).

world in the protection of conscience. It is no wonder, then, that Ibn Warraq's attitude toward the academy is rather ambivalent. Unfortunately, it is unlikely that many of the figures he criticizes in the book will actually read his writings or consider the issues he raises.

Virgins is a great read. I'm inclined to think that the book's lengthy Qur'anic section would best have been placed toward the end of the book, but perhaps Ibn Warraq wanted to make certain that the reader of the later, more political essays knew that they were based on solid scholarship, and that he himself has a good command of the sources (as indeed he does). There are in any case few dull moments in *Virgins*; most readers should find something in it to capture their interest.

David Cook
Rice University

Sanchez, Yoani. *Havana Real: One Woman Fights to Tell the Truth about Cuba Today*. Trans. M. J. Porter. New York: Melville House Publishing, 2011.

As a foreign correspondent back in the 1980s, I realized that Marxist Nicaragua's economy had officially flat-lined on the day that a peasant in the countryside who had helped a colleague with a broken-down car asked to be paid not in the *cordoba*, the country's official currency, but toilet paper. When you can non-metaphorically say that a country's money is not worth wiping your butt with, it's time to face the fiscal facts.

I had a similar economic epiphany about Cuba while reading *Havana Real*, a compilation of posts by renegade blogger Yoani Sanchez about her communist shipwreck of a country. She wrote in 2009 of chatting with a friend named Xiomara who lives in Pinar del Rio, the tobacco-farming province at the far west end of the island.

Four months earlier, Xiomara said, the always-balky distribution lines of Cuba's command economy had reached a new height of glitchiness: shipments of sanitary napkins had ceased to arrive. Though Fidel Castro and his brother Raul have often boasted that they are constructing nothing less than socialism's New Man, they have yet to design New Ladyparts, and Xiomara and her friends were frantically cannibalizing their dwindling supplies of towels and pillowcases to make recyclable feminine pads. "Because of this, we might refuse to go to work," she said (p. 118).

"I imagined a 'Strike of the Period,'" muses Sanchez, "a massive protest marked by the cycle of ovulation . . . There are those who think that the dismissal of officials, or a merger of ministries, is the road to real change. I feel, however, that the triggering spark of transformation could simply be a group of women tired of washing out, every month, rags for their menstrual cycles" (p. 118). If you think blogs offer a useful corrective to the misfocus of the mainstream media in the United States, consider the case of Cuba, where government newspapers (that is, all of them) were enthusiastically reporting that potato harvests had exceeded their quotas at the time Pinar del Rio's women were reinventing the gynecology of the fourteenth century.

Born in 1975, Sanchez began writing her blog Generation Y in 2007. A frustrated philologist (her thesis, *Words Under Pressure: A Study of the Literature of the Dictatorship in Latin America*, pretty much left her unemployable in Cuban academia), she managed to emigrate to Switzerland in 2002 but gave up the expatriate life to return to Havana two years later, bringing with her a set of newly honed computer skills. Because Cuba has no independent newspapers or radio or TV stations, and relentlessly jams the U.S. government's Radio and TV Martí, using cyberspace to attack the Castro brothers' monopoly of information on the island may have seemed an obvious choice—so obvious, unfortunately, that the Castros have taken massive

precautions to make it all but impossible. Cuban officials have for years referred to the Internet as one of the Western world's "mechanisms for global extermination," and the troubles it has caused for their fellow dictators in Libya, Iran, Tunisia, and Egypt have done nothing to moderate their views.

Though Cuba was an early Caribbean leader in computer-networking and hooked itself up to the Internet in 1996, the government has done everything to block access to the Internet for ordinary citizens. Access is available only through government Internet centers and tourist hotels from which ordinary Cubans are banned. The occasional dissident who fakes his or her way in will still find the experience prohibitively expensive (more than \$1 an hour in a country where the average monthly salary is about \$20) and frustratingly slow, since hookups are mostly dial-up.

Nonetheless, Sanchez did just that, posing as a German tourist to write her blog items from tourist hotels, or texting them to friends to be posted from outside the country. (Cuba's antiquated cell phones can text, but do not hook directly up to the Internet.) She quickly gained an international following, with hundreds of volunteers translating her blog into at least fifteen languages. She was soon winning international journalism awards, getting shout-outs from President Barack Obama, and making *Time* magazine's list of the one hundred most influential people in the world.

Generation Y¹ takes its name from the demographic cohort of Cubans born during the 1970s, by which time Castro had reduced the island to an arid economic, cultural, and political moonscape. With almost everything in short supply, Cubans amused and asserted themselves by making up names for new babies beginning with the letter Y, little-used and slightly exotic in Spanish, such as Yoandri, Yusimi, Yunieski. (Creative resistance and aesthetics do not always go hand-in-hand, as Sanchez ruefully admits, contemplating the popularity of the name Yesdasi—a combination of the English, Russian, and Spanish words for "yes" [p. 185].)

It is sometimes poetically suggested, usually by members of Generation Y itself, that they were the first to be born without delusions about Cuban communism. That's an exaggeration. Most of the 125,000 refugees who bolted from the island during the Mariel boatlift in 1980 were young Cubans who already saw their lives at a dead end. And they were hardly the first. The mass murder of illusions began almost immediately after Fidel Castro took power, and the number of Cubans who fled to the United States indicates that there was no doubt in their minds about whose finger was on the trigger.

What *is* true, however, is that Generation Y was the first raised without any hope—in the wake of the Bay of Pigs and the Cuban missile crisis—that the gringo cavalry up north would ride to its rescue. And it was just reaching adolescence as the rest of the communist world imploded in 1989, leaving Cuba to stand alone without massive Soviet subsidies for the first time.

¹ The English version can be accessed online at: www.desdecuba.com/generationy/.

Castro referred to what followed as a “special period.” In her masterful introduction to the book, M. J. Porter, who translated *Havana Real*, offers a less euphemistic description: “[A] time of terrible scarcity—when a word, *alumbión*, was coined for the unusual situation of electricity being on; when fried grapefruit rinds took the place of meat in the national diet; when, it was rumored, melted condoms sometimes stood in for the cheese on a concoction that was anything but ‘pizza’” (p. ix).

Cuba is in somewhat better economic shape today, mainly because the Castros have firmly attached it to the teat of Venezuela, where narcisso-Marxist Hugo Chavez has opened the spigots to aid estimated as high as \$5 billion a year, comprising about 15 percent of Cuba’s entire economy. Even so, economic desolation colors nearly every page of *Havana Real*. Sometimes ironically, sometimes wearily, and sometimes with simmering rage, Sanchez describes daily life in a country where a shopper lucky enough to find a pineapple in the market and wealthy enough to buy it must also be prudent enough to conceal it in a bag on the way home, “to hide this queen of the fruits, this obscene symbol of status, from the jealous glances of others” (p. 7).

It is a country so drab and miserable that sometimes it seems it must be a Kafkaesque fantasy or a dystopian film. “What I see on television bears so little resemblance to my life that I have come to think that my life isn’t real,” writes Sanchez. She continues, “. . . that the sad faces on the street are actors who deserve Oscars; that the hundreds of problems I navigate just to feed myself, get transportation, and simply exist are only lines in a dramatic script; that the truth, so adamant are they about it, must be what they tell me on the National Television News” (p. 9). This is magical realism, Cuban style.

Havana Real is, in its own way, a more damning indictment of communist society than were the horrifying accounts of Soviet labor camps in Aleksandr Solzhenitsyn’s *The Gulag Archipelago* and *One Day in the Life of Ivan Denisovich*, or *Against All Hope*, Armando Valladares’s Cuban prison diaries. The atrocity stories in those books were dismissible by the Ostrich Left as regrettable but understandable security excesses, like the American prison camps in Guantanamo Bay: After all, they must have done *something* to be locked up, right?

But the only prison in *Havana Real* is Cuba itself. This is how people live—ordinary people whose only crime is having had the bad luck to be born into a totalitarian suzerainty so suffocatingly potent that children, asked what they want to do when they grow up, reply simply: “Leave.”

Sanchez, who describes her first blog post as “halfway between a scream and a question” (p. 1), often reminds me of a sort of inverted Winston Smith, the doomed little bureaucrat of George Orwell’s *Nineteen Eighty-Four*. Smith rebelled against the totalitarian state of Oceania in the only way he could, by keeping a secret diary in which he scrawled, over and over, “I hate Big Brother!” Sanchez’s resistance to the Castro brothers, too, mostly takes the form of acts that are heartbreakingly futile: her refusal, for instance, to walk the threadbare aisles of Havana’s markets with her shopping bag open.

“I keep it folded in my pocket, so I don’t look like I’ve been devoured by the machinery of the waiting line, the search for food, the gossip about whether the chicken has arrived at the market,” she writes. “*In the end, I have the same obsession with getting food, but I try not to show it too much*” (p. 6).

The comparison is not perfect. Where Winston Smith blasphemed Big Brother in secret, Sanchez’s defiance of the Castro brothers has been startlingly public. In her first three years, her 500 blog posts drew one million reader comments; across its linguistic platforms, Generation Y gets fourteen million hits a month.

Yet sometimes the parallels to Smith are stunningly literal. Sanchez recounts in wonder Raul Castro’s first big speech after taking over for his brother. It was delivered on July 26, 2007, a date that for the Cuban Revolution is the equivalent of the Fourth of July in the United States: the anniversary of the 1954 attack on a military barracks that marked the beginning of Castro’s five-year armed struggle to depose the dictatorship of Fulgencio Batista.

As most of the country watched on television, anxious for clues about whether and how Raul might diverge from his brother’s path, Raul made a promise that was little noticed by the international news media but stunning to his countrymen: milk, enough so that every Cuban could drink a glass whenever he wanted. The promise might seem puny and pathetic to the rest of the world—that a government in power for more than half a century was offering the presence of milk in the markets as a utopian landmark—but to Cubans it was grandiose beyond belief. “To me, someone who grew up on a gulp of orange-peel tea, the news seemed incredible,” writes Sanchez. “I believed we would put a man on the moon, take first place among all nations in the upcoming Olympics, or discover a vaccine for AIDS before we would put the forgotten morning *cafe con leche*, coffee with milk, within reach of every person on this island” (p. 11).

Sanchez’s estimation of the likelihood of the promise’s fulfillment was evidently shared by cooler heads in the Cuban government. The line about the milk did not appear in the official government newspaper *Granma*, either in print or online. And when the speech was rebroadcast on television, it had skillfully been edited away. Winston Smith, whose job was rewriting old newspaper clippings and retouching photos every time the government shifted policy, casting all evidence of the past down a “memory hole” to an incinerator, would surely have smiled in recognition.

Smith might also have been amused at one of the reasons milk is in such short supply through official channels: Farmers give newborn female cattle names like Brave Bull and Stud Ox, reporting them as male to agricultural apparatchiks, so they won’t be required to sell their milk at the government’s low-ball prices. The epidemic of cattle transgenderism is considerably less horrifying than a related phenomenon that Sanchez calls “cow suicide”—strapping the heads of the animals to railroad tracks, then reporting them killed in accidents to evade the official ban on slaughtering beef for consumption (pp. 39-40).

Sanchez's modern-day Cuban cowboy stories are reminders of why communist economies don't break down more completely than they do: the black-market production and distribution channels created by canny peasants to evade state restrictions. In the crumbling cities, even something as basic as water must often be obtained through the black markets. As water mains fail, the residents of have-not neighborhoods must buy from the haves.

Some of that illicit meat and milk will ultimately find its way into covert Havana shops, as will much of the awesome amount of state property liberated each year by government employees. Sanchez realized the ubiquity of black-market transactions when one of her friends used them as an excuse to quit the Communist Party and its endless, droning meetings. He told his party comrades he was too ashamed to face them anymore because he was buying black-market groceries every single day:

"But Ricardo, what are you talking about?" [asked another party member, his eyes welling with revolutionary sympathy]. "Most of us here buy on the black market."

"[T]hen I'm leaving," [snapped Ricardo, in his best I-wouldn't-join-a-club-that-would-have-me Woody Allen voice.] ". . . because I don't want to belong to a party of hypocrites." (p. 133)

The story is funny, but its underpinnings are not. The Havana gossip mill hums every day with stories of massive new corruption, scandals in which entire warehouses full of goods disappear, stolen not by the grunts who sweep the floors but the commissars who run them. The few foreign products finding their way into Cuba as the result of joint production deals with the government are disappearing as the foreign investors walk away in disgust at the corruption. "The State has been looted by the State itself," Sanchez broods. "We are a country in the midst of a liquidation sale, while many wearing the olive-green uniform take the opportunity to make off with what little we have left" (p. 199).

Unlike some of the so-called independent Cuban bloggers who believe that the country's problems are not systemic but merely an excess of bureaucracy and a few undemocratic individuals in high places, nothing that can't be cured by a little dose of good-government socialist reform, Sanchez recognizes that the island's Marxist economics is inextricably intertwined with its political totalitarianism. That's why, she observes, Cuba's sporadic economic liberalizations never last long before they're rolled back.

In 1994, she recalls, a loosening of restrictions on the small private restaurants known as *paladars* (the word is actually Portuguese, enviously lifted from a fictional restaurant chain in a popular Brazilian *telenovela*) briefly let a thousand culinary flowers bloom: "A stroll along the streets of Central Havana confirmed that the previous scarcity hadn't been born of an incapacity to produce, but rather from ironclad State controls on private ingenuity," Sanchez writes (p. 34). But officials quickly slammed the lid on the opening when they discovered that successful *paladar* owners not only

threatened economic orthodoxy (creating restaurant chains, planning the launch of a gastronomic magazine, and generally turning into Mini-Me Donald Trumps), but also developed bourgeois desires, including better cars and trips to Paris. For their customers, it was back to the regular menu, which Sanchez glumly recounts after returning empty-handed from another trip to the market: Rice with a beef bouillon cube. Rice with a hot dog. Rice with a bacon bouillon cube. “[O]r the delicacy of ‘rice with a chicken-and-tomato bouillon cube.’ This last one has a color between pink and orange that is most amusing” (p. 76).

Her irony may soon change to genuine nostalgia. Whether through application of science-fiction-movie medical technology or horror-movie necromancy, the Castro brothers—both in their 80s—show appalling signs of immortality. Not so with their patron saint Hugo Chavez, who if he survives his country’s October presidential election is unlikely to have similar luck with the cancer for which he has already undergone three surgeries. Regardless of which way Chavez leaves Venezuela’s presidential palace, his successor is unlikely to continue the gargantuan flow of aid to Cuba. Merely cutting off the supply of flea-market-priced oil—two-thirds of Cuba’s supply comes from Chavez—will turn the island into an economic zombie. Don’t be surprised if Sanchez’s next book is a collection of condom recipes.

Glenn Garvin
The Miami Herald

Afterwords

America the Philosophical: Carlin Romano on Ayn Rand

Stephen Hicks
Rockford College

Over the years I've enjoyed and learned from many of Carlin Romano's articles in *The Chronicle of Higher Education*. He can do good philosophical reporting. So I picked up his latest book, *America the Philosophical*, and I was disappointed.¹ Romano's thesis is that the United States is a nation of vigorous philosophical activity and—contrary to the critics who portray it as an intellectual wasteland of complacency and platitudes—a culture that takes philosophy seriously. It's a great topic, and I agree with Romano's thesis. First impressions matter, however, and the first section of *America the Philosophical* I read was the eight pages on philosopher-novelist Ayn Rand, a case study in how not to write about other philosophers (pp. 359-66).

Here's how to write a book about other philosophers:

- (1) Present their positions.
- (2) At least *sketch* the arguments for the positions they take.
- (3) Criticize those positions when necessary by making counter-arguments.

Here's how *not* to write about other philosophers:

- (4) Ignore the academic literature about the philosopher and use only critical remarks gleaned from amateurs or non-philosopher professionals.
- (5) Focus more on gossip about the philosopher's person rather than the person's philosophy.
- (6) Identify the philosopher's views in passing with those of contemporary politicians whom you despise.

¹ Carlin Romano, *America the Philosophical* (New York: Alfred A. Knopf, 2012).

On (1): Of the perhaps sixty major issues a philosopher can take a position on to define his or her worldview, Romano mentions perhaps four of Rand's positions. Easily more than 95% of Romano's Rand is about her biography and some indicators of her cultural impact. Why she has had that impact, though, is left a mystery since we don't learn about the positions that have driven it.

On (2): Romano does not present a single argument of Rand's in eight pages of discussion about her.

On (3): Since he presents none of Rand's arguments, Romano naturally makes no counter-arguments against them, though his disdain for Rand is clear. Once, he cites Ludwig Wittgenstein in questioning Rand's claim that words should be used with clear meanings.

On (4): Romano mentions works about Rand written by a journalist, an English professor, a political scientist, and a pair of high-school teachers, but none of the many books published on Rand by professional philosophers, for example, Tara Smith, Allan Gotthelf, Leonard Peikoff, Tibor Machan, Douglas Rasmussen, Douglas Den Uyl, David Kelley, and Harry Binswanger.²

On (5): Romano has read some of the colorful biographies of Rand, and he quotes many of the insults traded by her admirers and detractors. What philosophical issues drove the disagreements that led to the insults? Who knows?

On (6): Rand was an atheist and hostile to social conservative politics, but Romano blithely identifies her views with those of a recent theistic social conservative president. Rand opposed central banking and government monopolies, but Romano sees no disconnection between such opposition and the policies of a recent chief central banker and money monopolist.

Rand's work is one of my areas of scholarly expertise, so I sometimes use other authors' presentations of her views as a bellwether of their objectivity. Mess up there, and I'm disinclined to read further (many books, little time, etc.).

² See, e.g., Allan Gotthelf and James G. Lennox, eds., *Metaethics, Egoism, and Virtue: Studies in Ayn Rand's Normative Theory* (Pittsburgh, PA: University of Pittsburgh Press, 2010); Tara Smith, *Ayn Rand's Normative Ethics: The Virtuous Egoist* (New York: Cambridge University Press, 2006); Robert Mayhew, ed., *Essays on Ayn Rand's Atlas Shrugged* (Lexington, KY: Lexington Books, 2009); David Kelley, *The Contested Legacy of Ayn Rand* (New Brunswick, NJ: Transaction Publishers, 2000); Tibor Machan, *Ayn Rand* (New York: Peter Lang Publishing, 2000); Allan Gotthelf, *On Ayn Rand* (Belmont, CA: Wadsworth Philosophers Series, 2000); Douglas Den Uyl, *The Fountainhead* (Toronto: Twayne, 1999); Leonard Peikoff, *Objectivism: The Philosophy of Ayn Rand* (New York: Meridian, 1993); Harry Binswanger, *The Biological Basis of Teleological Concepts* (Irvine, CA: Ayn Rand Institute Press, 1990); and Douglas Rasmussen and Douglas Den Uyl, eds., *The Philosophic Thought of Ayn Rand* (Champaign, IL: University of Illinois Press, 1984).

But maybe the author has good stuff to say about other philosophers. Romano's short sections on Charles Sanders Pierce and Cornel West are better, since he actually states their views and arguments. He devotes much sympathetic space to Susan Sontag, and his extended discussion of Richard Rorty is the best part of the book.

So why doesn't he do likewise for Rand? Yes, Rand is unorthodox. Yes, she is radical, often hard to categorize, provocative, sometimes outrageous, and controversial. But so are the other influential philosophers in history. That goes with the territory, and a competent professional philosopher should be able to handle it.³

³ This article is a revised version of an entry that first appeared on Stephen Hicks's blog as "Carlin Romano's *America the Philosophical*," August 22, 2012, accessed online at: <http://www.stephenhicks.org/2012/08/22/carlin-romanos-america-the-philosophical/>.

Letters from Lahore:
Osama bin Laden, “Internal Sovereignty,” and the
“Black Coat Movement”

Khalil Ahmad
Alternate Solutions Institute

Translated from Urdu by Aysha Mahmood
University of Michigan

“Letters from Lahore” is a selection of three short blog posts by Khalil Ahmad, Executive Director of the Alternate Solutions Institute, a libertarian think-tank based in Lahore, Pakistan.¹ All three posts, dating to May 2011, respond in some way to the assassination by U.S. Navy Seals—code-named “Operation Neptune Spear”—of al-Qaeda leader Osama bin Laden in Abbottabad, Pakistan (May 2, 2011). We translate and reprint them here, with editorial revisions for clarity and style, as examples of a distinctive and original response to the assassination and its aftermath, instructively different both from the predominant American response, as well as from the predominant Pakistani one.

The predominant American response to the assassination of Osama bin Laden expressed unapologetic gratification at his death, essentially untroubled by worries about the alleged violation of Pakistani sovereignty involved in the U.S. operation. The predominant Pakistani response expressed outrage at the United States for its supposed violation of Pakistan’s sovereignty, untroubled by worries about the significance of Osama bin Laden’s presence in a suburb of the Pakistani capital. Ahmad’s posts, by

¹ All three posts were originally published at the website of the Alternate Solutions Institute (Lahore, Pakistan), and are reprinted here by permission of the author, Dr. Khalil Ahmad. The May 4 and May 14 posts were originally written in Urdu, and translated for *Reason Papers* by Aysha Mahmood, with editorial revisions by Khalil Ahmad and Irfan Khawaja. The post of May 10 was originally written in English, and edited for publication in *Reason Papers* by Irfan Khawaja. All introductory and footnote material was written, translated, and transliterated by Irfan Khawaja. Thanks to Aftab Khawaja, Tom G. Palmer, and Steve Miller for helpful advice.

contrast, reflect the difficult predicament of the Pakistani libertarian, forced by public sentiment and personal conviction to reconcile both sets of concerns. How, on the one hand, does the loyal citizen of a country like Pakistan respond to a violation of its sovereignty by a superpower like the U.S.? How, on the other hand, does a libertarian committed to individual rights respond to nationalist sentiments that put questions of national sovereignty over questions of substantive justice? Ahmad's responses to these questions are a paradigm of reason and courage.

Consider his May 3, 2011 post responding to widespread Pakistani outrage about the sovereignty-violation involved in the bin Laden assassination the day before. The post begins by taking for granted the obvious facts—half-acknowledged and half-denied by the Obama Administration's convoluted legalisms²—that Operation Neptune Spear *was* an assassination and that it *did* violate Pakistan's sovereignty: the operation crossed Pakistani airspace and onto Pakistani soil with the explicit aim of killing Osama bin Laden, and (barring some extraordinary revelation) did so without the consent or knowledge of the Pakistani government. Coming from an administration that had gotten itself elected in opposition to the foreign policy of the Bush Administration—that is, by contrast with Bush's supposed unilateralism, disrespect for international law, and elastic conception of “self-defense”—Operation Neptune Spear offered plenty of material for accusations of opportunism and hypocrisy. But Ahmad focuses instead on a subtler and normatively more important set of issues: What does “sovereignty” mean, and what value can it have, in a country that lacks civilian control over government policy? If the U.S. Navy Seals violated Pakistan's sovereignty on May 2, 2011, could it not be said in a different sense that Pakistan's military violates Pakistan's sovereignty every day that it flouts civilian supremacy over its actions? In addressing these questions, a further unspoken question seems to slip in, so to speak, under the radar: Under what conditions would Americans accede to an assassination by another power on *American* soil?³

The May 10 post addresses the preceding issues more explicitly. We typically think of “sovereignty” as denoting the state's supreme, monopolistic authority to govern and control a certain geographic area.⁴ “Internal

² See Harold Hongju Koh, “The Lawfulness of the U.S. Operation Against Osama bin Laden,” *Opinio Juris*, May 19, 2011, accessed online at: <http://opiniojuris.org/2011/05/19/the-lawfulness-of-the-us-operation-against-osama-bin-laden/>.

³ Cf. the 1976 murder of former Chilean minister Orlando Letelier, on which see Christopher Hitchens, *The Trial of Henry Kissinger* (New York: Verso, 2002), pp. 68-76.

⁴ For discussion, see Dan Philpott, “Sovereignty,” *Stanford Encyclopedia of Philosophy*, accessed online at: <http://plato.stanford.edu/entries/sovereignty/>.

sovereignty” has, in turn, typically been understood to mean state authority over those who reside within the state’s territory. But Ahmad invokes another, less discussed, in fact neologistic understanding of internal sovereignty: If each individual under state sovereignty has strong rights in the Lockean or classical-liberal sense, then each individual rights-holder is “sovereign” over his or her own life. Understood in this way, state sovereignty has no value or legitimate purpose unless it protects individual sovereignty. And the primary threat to the sovereignty of individual Pakistanis comes not from American drones but from al-Qaeda and the Pakistani Taliban, a fact about which, as Ahmad aptly puts it, all “nationalist chatter of ‘sovereignty’ rings hollow.”

Finally, Ahmad’s May 14 post offers a unique perspective on the so-called “black coat” or lawyers’ movement so uncritically lionized by the American media in late 2007 and throughout 2008. Hailed at the time as “perhaps the most consequential outpouring of liberal, democratic energy in the Islamic world,”⁵ it has now conveniently been forgotten by the intellectuals who so breathlessly brought it to prominence.⁶ Ahmad offers a useful and relatively early corrective to that romanticization, prefiguring the growing disillusionment in Pakistan today with the frankly theocratic and terrorist-positive sympathies of the black-coated heroes of 2007.⁷

⁵ James Traub, “The Lawyers’ Crusade,” *The New York Times Magazine*, June 1, 2008, accessed online at: <http://www.nytimes.com/2008/06/01/magazine/01PAKISTAN-t.html?pagewanted=print>.

⁶ For fairly typical romanticizations of the movement, both reportorial and editorial, see, e.g., Jane Perlez, “Pakistani Lawyers Angered as Hope for Change Faded,” *The New York Times*, November 7, 2007, accessed online at: <http://www.nytimes.com/2007/11/07/world/asia/07lawyers.html>; Amitabh Pal, “Pakistan Lawyers’ Movement Counters Lies About Muslims,” *The Progressive*, November 12, 2007, accessed online at: http://www.progressive.org/mp_pal111207; and Toby Berkman, “Notes: The Pakistan Lawyers’ Movement and the Popular Currency of Judicial Power,” *Harvard Law Review* 123, no. 7 (2010), pp. 1705-26, accessed online at: http://www.harvardlawreview.org/issues/123/may10/Note_7078.php.

⁷ For examples of the more recent disillusionment with the movement, see Saroop Ijaz, “No Time for Celebration,” *The Express Tribune*, October 8, 2011, accessed online at: <http://tribune.com.pk/story/269743/no-time-for-celebration/>; Saroop Ijaz, “Where Are They, Now?” *The Express Tribune*, October 15, 2011, accessed online at: <http://tribune.com.pk/story/274684/where-are-they-now/>; and Amina Jilani, “Black Coats and Blacker Faces,” *The Express Tribune*, February 17, 2012, accessed online at: <http://tribune.com.pk/story/337881/black-coats-and-blacker-faces/?print=true>. Unfortunately, some of this writing makes ironic use of the inadvertently racist phrase “black faces”; most Pakistani writers are probably unaware of the connotations of that phrase in American English, but its use may reflect some residual cultural biases in favor of fair skin as well.

May 3, 2011: The Assassination of Osama bin Laden

It is not the first time that the questions that are presently circulating in and out of Pakistan have been raised. “What of our sovereignty?” “How did we allow it to be violated with impunity?” These same questions have arisen before, but never perhaps with such intensity or such irony.

I don’t intend in this post to ask or answer the usual questions about our sovereignty. For my purposes it’s only necessary to raise the following dilemma. If Pakistan’s security establishment was *unaware* of Osama bin Laden’s presence in Pakistan but genuinely seeking to find him, then what sort of seeking was it that, as the old ghazal has it, “what was sought was lost with the seeker”? But if the security establishment was *aware* of his presence, then what sort of self-conscious ignorance have they cultivated—one they can neither effectively conceal nor come clean about? Every question contains the seeds of its own answer, as the saying goes. So it has been in the past, and so it will be in the future. The questions that remain, then, concern the reasons for the offense and the identity of the offenders. *Why* did our government do as it did, and *who* was responsible?

My answer is this: If the ruling power in Pakistan had been the people’s representative civilian government, whatever came to pass on May 2, 2011 would never have played out as it did. In other words, if the rule of law and of the constitution existed in Pakistan, if Pakistan’s defense and foreign policies were firmly in the hands of a civil government, none of this would have happened. To a large extent, the events of May 2, 2011 raise the same issues as the Kargil operation twelve years ago⁸: if our defense and foreign policies had been in civilian hands, neither Kargil nor the events of May 2 would have happened.

What Pakistan needs above all is civilian supremacy over its affairs, the sovereignty of a civilian government limited by a constitution and representative of its citizens. It needs a government that keeps its defense and foreign affairs under its control, not one that merely appropriates ministries and plunders resources. Frankly, I have no complaint to make against our security establishment: I have nothing to say to them at all. My concern is instead with the current government; *they* are the ones who need to be questioned. Do *they* have the answers to the questions that are being raised inside and outside of Pakistan? They are the ones obliged to give answers, as

⁸ The Kargil operation (May-July 1999) was a military incursion, by the Pakistani Army, across the Indian line of control at Kargil Ridge in the Indian state of Jammu and Kashmir. Spearheaded by then-General and Chief of the Army Staff Pervez Musharraf, the conflict momentarily threatened nuclear war between India and Pakistan until Indian forces prevailed in conventional combat. For further discussion, see Owen Bennett-Jones, *Pakistan: Eye of the Storm*, 2nd ed. (New Haven, CT: Yale University Press, 2003), pp. 87-104.

control of the law and constitution was and remains in their hands. Whatever has happened, responsibility falls on *them*—not on anyone else.⁹

May 10, 2011: What about Internal Sovereignty?

The so-called nationalists maintain that American drone attacks are damaging the sovereignty of Pakistan. These nationalists include both rightists such as Jamaat-e-Islami and Jamiat-e-Ulema-e-Islam (F), and left-leaning elements as well.¹⁰ The criticisms they make are frankly puzzling. Such people, whether right- or left-wing, must know that Pakistan is a declared ally of the United States in the war against terror, in which case it is of no significance *whose* drones are being used to fight terrorism and *whose* territory they are targeting, as long as they are targeting terrorists. In any case, both Bob Woodward's book *Obama's Wars* and the recent Wikileaks revelations establish Pakistan's tacit *approval* of the drone attacks.¹¹ How can drone attacks approved by the Government of Pakistan violate the sovereignty of Pakistan?

⁹ Pakistan's government condemned the violation of Pakistan's sovereignty involved in Operation Neptune Spear, but claimed to welcome its result. See President Asif Ali Zardari, "Pakistan Did Its Part," *The Washington Post*, May 2, 2011, accessed online at: http://www.washingtonpost.com/opinions/pakistan-did-its-part/2011/05/02/AFHxmybF_story.html; see also Prime Minister Yousaf Raza Gilani's reaction in "Reactions: Bin Laden's Death," *al-Jazeera*, May 2, 2011, accessed online at: <http://www.aljazeera.com/news/asia/2011/05/20115241936984209.html>.

¹⁰ Jamaat-e-Islami and Jamiat-e-Ulema-e-Islam (F) are Islamist political parties in Pakistan. The "F" designation in the latter case refers to the faction of the party led by Maulana Fazlur Rahman (as opposed to the "S" designation for the faction led by Maulana Sami ul-Haq). For Jamaat-e-Islami Pakistan, see: <http://jamaat.org/beta/site/index>; for Jamiat-e-Ulema (F), see: <http://www.abdallahshah.com/JHI-F.html>.

¹¹ See Bob Woodward, *Obama's Wars* (New York: Simon and Schuster, 2011), pp. 5, 26, 87, 106-7, and 116-17. The Wikileaks material has come in Pakistan to be known as the "Pakistan Papers," and since May 2011 has involved a formal "memorandum of agreement" between Wikileaks founder Julian Assange and *Dawn*, Pakistan's leading English-language newspaper, based in Karachi. According to the agreement, *Dawn* has "exclusive first use in Pakistan of all the secret US diplomatic cables related to political and other developments in the country." For the Wikileaks-*Dawn* arrangement, see "Announcement," *Dawn*, May 20, 2011, accessed online at: <http://dawn.com/2011/05/20/announcement-2-2/>. On apparent Pakistani consent to drone operations, see "Pakistani Leadership 'Okayed' Drone Strikes," *Dawn*, December 1, 2010, accessed online at: <http://dawn.com/2010/12/01/pakistani-leadership-okayed-drone-attacks-wikileaks/>.

The nationalists respond that the present Pakistani government is a U.S.-backed puppet regime. But the truth is that many if not most of these supposedly pro-sovereignty nationalists sympathize with the Taliban—a group openly at war with the sovereignty of Pakistan. Such nationalists apparently lack any conception of *internal sovereignty*, fixated as they are on guarding the external sovereignty of Pakistan from drone attacks which present no comparable danger to its internal security.

Is a country merely a piece of land whose sovereignty consists only in its territoriality? Perhaps that was so under ancient principalities. But today, sovereignty is a function of legality and constitutionality. When a new country emerges, its first aim is to attain constitutional legitimacy, not just to acquire larger and larger bits of legally disorganized territory.

In today's world, territorial sovereignty is just one element of what might be called real or substantive sovereignty. This latter sort of sovereignty is an internal phenomenon which gives a tract of land and a population of individual persons inhabiting that tract an identity and the status of a country. Internally this sovereignty is a collection of sovereign *individuals* whose life, liberty, and property are guaranteed by the country's legal and constitutional arrangements. And externally this sovereignty expresses the same legal and constitutional arrangements, so that the boundaries of the country are the boundaries at which it can effectively protect the individual sovereignty—the *rights*—of its inhabitants.

Thus, sovereignty requires safeguarding the physical borders of a country from external invaders not as an end-in-itself but as a means to protecting the rights of the sovereign individuals who live inside those borders. Likewise, sovereignty requires the protection of the life, liberty, and property of individuals from internal invaders as much as from external ones—be they the Taliban, or any other individual, group, force, party, or institution. That sums up my argument: ultimately, real sovereignty derives from sovereign individuals who bind themselves into a legal and constitutional arrangement that protects them. When that arrangement fails to protect them, sovereignty reverts back to the people.

Furthermore, any such legal and constitutional arrangement creates various institutions to take care of the functions of the sovereignty of a country. In our case, the parliament, provincial assemblies, the courts, the election commission, auditor general, the armed forces, etc., are brought to life but to serve the same purpose. These institutions derive their existence and mandate from legal and constitutional arrangements the sole objective of which is to help create an environment in which individual citizens are free to live as they wish and where their life, liberty, and property are safe from invaders like the Taliban.

As against this, the nationalist chatter of “sovereignty” rings hollow. Our nationalists fail to see that the presence in Pakistan of the Taliban and its allies challenges the very writ of the government and undermines the sovereignty of the country more thoroughly than the American drone operations. Is not challenging the writ of the government a serious crime? Is

not taking up arms against the state a capital offense? Aren't the Taliban waging an open and declared war against the state of Pakistan—in other words, against the institution that protects the sovereign *individuals* of Pakistan? Aren't they inflicting unbearable losses on the life, liberty, and property of the citizens of Pakistan? Isn't the sovereignty of Pakistan at stake at the hands of these internal invaders in a more obvious way than the American operation against Osama bin Laden and his allies?¹²

The hollow nationalism of pseudo-sovereignty amounts to supporting the Taliban, a declared enemy of Pakistan—an enemy of its legal and constitutional sovereignty, and above all, of its sovereign individuals. Our so-called nationalists never seem to raise their voices in favor of the sovereignty of Pakistan's individual citizens. They rarely show concern about threats to the internal sovereignty of this country from those within who would subvert it. Indeed, the point is not merely that their campaign for sovereignty aims to mislead, but that they are *abetting* the invasion of Pakistan, by abetting those who would violate the rights of its people, gut the rule of law, and undermine its government.

Pakistan's nationalists claim to focus on the “collateral damage” to life and property done by American drone attacks, but they are blind to damage of far greater magnitude done by the Taliban.¹³ By their logic, if some

¹² For further discussion of the Taliban threat to Pakistan, see Ahmed Rashid, *Descent into Chaos: The U.S. and the Failure of Nation Building in Pakistan, Afghanistan, and Central Asia* (New York: Viking, 2008), chap. 18; Irfan Husain, *Fatal Faultlines: Pakistan, Islam, and the West* (Rockville, MD: Arc Manor Publishers, 2011), esp. chap. 6; Farhat Taj, *Taliban and Anti-Taliban* (Newcastle on Tyne, UK: Cambridge Scholars Publishing, 2011); and Hassan Abbas, “A Profile of Tehrik-i-Taliban Pakistan,” *CTC Sentinel* 1, no. 2 (January 2008), accessed online at: <http://belfercenter.ksg.harvard.edu/files/CTC%20Sentinel%20-%20Profile%20of%20Tehrik-i-Taliban%20Pakistan.pdf>. As I write in early October 2012, controversy over the assassination attempt by the Taliban on Malala Yousafzai, a fifteen-year-old education activist, has taken on global proportions. See Declan Walsh, “Taliban Gun Down Girl Who Spoke Up for Rights,” *The New York Times*, October 9, 2012, accessed online at: <http://www.nytimes.com/2012/10/10/world/asia/teen-school-activist-malala-yousafzai-survives-hit-by-pakistani-taliban.html? r=0>.

¹³ For further discussion of Taliban versus allied casualties, see Alissa J. Rubin, “Record Number of Afghan Civilians Died in 2011, Mostly in Insurgent Attacks, UN Says,” *The New York Times*, February 4, 2012, accessed online at: <http://www.nytimes.com/2012/02/04/world/asia/afghanistan-civilian-deaths-hit-record-un-says.html>. For more detailed discussion and data, see the United Nations Report, *Afghanistan: Annual Report 2011, Protection of Civilians in Armed Conflict*, accessed online at: http://graphics8.nytimes.com/packages/pdf/world/20120204_afghan_civilians_deaths.pdf. See also Robert P. Barnidge, Jr., “A Qualified Defense of American Drone Attacks in Northwest Pakistan Under International Humanitarian Law,” *Boston University International Law Journal* 30, no. 2, accessed online at: <http://www.bu.edu/law/central/jd/organizations/journals/international/volume30n2/doc>

criminals take a family hostage inside their home, and the police come to the family's rescue, it is the police which is to be blamed for the unintended loss of innocent life put in danger by the criminals; the criminals themselves are not to be criticized. Nationalism of this sort simply defies commonsense.

Let these nationalists exalt the criminals. And let the responsibility for that praise be on their heads. It is for the sovereign individuals of Pakistan to realize what such nationalism really means and what it has in store for their sovereignty and Pakistan's as well.

May 14, 2011: Osama bin Laden's Lawyers

The matter is as odd as it is fascinating: last rites have been read for Osama bin Laden in some cities of Pakistan. If you take a look at the photos, you don't see ordinary men wearing everyday garb, but well-dressed men in suits, boots, and ties. It is clear that the photos were taken in Lahore and Rawalpindi. In fact, in Lahore even the name of the Lahore High Court Bar was invoked in Osama's honor.¹⁴

It is hard to know how to respond to this except to ask some obvious questions. What sort of law, one wonders, did these lawyers study and how did they reach a reading of it that required praise for Osama bin Laden? How did the Bar allow lawyers of this type to obtain licenses to practice law? Were the Bar Courts asleep? Were they thinking at all? These are, after all, the same sorts of lawyers who showered Mumtaz Qadri, the murderer of Punjab Governor Salman Taseer, with flowers.¹⁵ One might have thought that the

[uments/article_barnidge.pdf](#); Pir Zubair Shah, "My Drone War," *Foreign Policy* (March/April 2012), accessed online at: http://www.foreignpolicy.com/articles/2012/02/27/my_drone_war; and Saroop Ijaz, "Game of Drones," *The Express Tribune*, October 6, 2012, accessed online at: <http://tribune.com.pk/story/447920/game-of-drones/>. As I write in early October 2012, the Pakistani politician Imran Khan is leading a Pakistani/American coalition of activists to protest drone strikes. See Salman Masood, "Americans Join Pakistan Convoy to Protest Drone Strikes," *The New York Times*, October 6, 2012, accessed online at: <http://www.nytimes.com/2012/10/07/world/asia/americans-join-pakistan-convoy-to-protest-drone-strikes.html>. For criticism of Imran Khan, see Irfan Husain, "The Drone Debate," *Dawn*, October 13, 2012, accessed online at: <http://dawn.com/2012/10/13/the-drone-debate-3/>.

¹⁴ See (in Urdu, with photo) "Lahore High Court Bar Meh Osama ki Ghaibana Namaz-e-Janaza; Saenkdo Kala, Shahreon Ki Shirkat" ("Osama's Funeral Rites 'in Absentia' at the Lahore High Court: Hundreds in Black, City-Dwellers Join In") (<http://pakteahouse.net/wp-content/uploads/2011/05/a451.jpg>), quoted in "Lawyers of Lahore High Court Offer 'Namaz-e-Janaza' of OBL," Pak Tea House, May 14, 2011, accessed online at: <http://pakteahouse.net/2011/05/14/lawyers-of-lahore-high-court-offer-namaz-e-janaza-of-obl/>.

¹⁵ The Governor of the Punjab province of Pakistan, Salman Taseer, was murdered on

lawyers of the Lahore Bar Court had taken an oath to strengthen the rule of law, not to celebrate murder. But something drastic seems to have happened to this oath and to those who took it, something so drastic as to raise questions about the legitimacy of the respect for oaths which they claim to have sworn. Will the Bar or the courts ever hold these lawyers accountable for the violation of their oath? Can the rule of law operate under judicial officials who celebrate the extremes of lawlessness, or can we hope that their licenses will somehow be revoked?

No, it appears that the laws of Pakistan will remain helpless. Those who took an oath to uphold the rule of law will continue to flout their oath with impunity, and the law itself will continue to be manipulated in this way by those who take themselves to belong to the “higher orders”—to Pakistan’s elite. Unfortunately, in Pakistan, the behavior of Osama’s posthumous celebratory lawyers is not just a game of loose and absurd talk, but a sad and frightening reality. This incoherent mindset—the simultaneous celebration of constitutionalism, legality, theocracy, terrorism, and murder—has seeped into our very outlook in this country. So it is that Pakistan has managed to become that rarest of phenomena—a living (and dying) “contradiction in terms.”

January 4, 2011 by his bodyguard Mumtaz Qadri for what Qadri saw as Taseer’s impiety in questioning Pakistan’s blasphemy laws. Taseer’s assassination followed that of former Prime Minister Benazir Bhutto by Islamist militants (December 27, 2007), and was followed in turn by the assassination by the Taliban of Shahbaz Bhatti, the Federal Minister for Minority Affairs (March 2, 2011), as well as the kidnapping by the Taliban of Salman Taseer’s son, Shahbaz. On Salman Taseer, see Carlotta Gall, “Assassination Deepens Divide in Pakistan,” *The New York Times*, January 5, 2011, accessed online at: <http://www.nytimes.com/2011/01/06/world/asia/06pakistan.html>. See also Aatish Taseer, “The Killer of My Father, Salman Taseer, Was Showered with Rose Petals by Fanatics,” *The Telegraph*, January 8, 2011, accessed online at: <http://www.telegraph.co.uk/news/worldnews/asia/pakistan/8248162/The-killer-of-my-father-Salman-Taseer-was-showered-with-rose-petals-by-fanatics.-How-could-they-do-this.html>.

