

PART II

Libertarianism

CHAPTER THREE

The Moral Foundations of Modern Libertarianism

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ALTHOUGH THE CLASSICAL liberal political philosophy that emphasizes individual liberty is centuries old, the modern American variant, known as “libertarianism,” can be traced to the early 1960s. The story has been told before,¹ but I trace the modern libertarian intellectual movement to the split between Ayn Rand and Murray Rothbard. Rand had popularized the centrality of liberty as defined by property rights and as grounded in an Aristotelian version of natural law. Rothbard, an economist, further developed these elements while emphasizing the role of Austrian economics in explaining how liberty and the free market operate. Significantly, Rothbard also adopted an anarchist stance toward monopolistic government. Although none of the component parts of Rothbardianism were entirely original, it is fair to say that his distinctive combination of Austrian economics, Aristotelian natural law ethics, Lockean natural rights, noninterventionist foreign policy, and individualist anarchism made up a distinctive

1. See Jerome Tuccille, *It Usually Begins with Ayn Rand* (New York: Stein & Day, 1971).

package that captured the imagination of a cadre of young intellectuals in the 1960s and 1970s, who went on to become influential in their own right in the 1980s and 1990s.

Rothbard shared another and less attractive quality of Rand's that would prove historically significant: his insistence on complete ideological purity. Most who entered his orbit in the 1970s were independent thinkers; otherwise, they would not have escaped the dominant statist orthodoxy of their schooling. Yet their very independence eventually put them at odds with Rothbardian orthodoxy. Almost every intellectual who entered his orbit was eventually spun off, or self-emancipated, for some deviation or another. For this reason, the circle around Rothbard was always small, and what should have been his intellectual legacy was stunted and obscured.

In a similar vein, Rothbard was also jealous of any competition for the hearts and minds of libertarians. In this regard, the principal objects of his ire, and that of some in his intellectual circle, were Milton Friedman and Friedrich Hayek. Friedman not only held a prestigious academic appointment at the University of Chicago, in contrast with Rothbard's position at Brooklyn Polytechnic, but he also achieved national prominence with his regular column in *Newsweek* magazine. Rothbardians strongly criticized the "utilitarianism" of Friedman's defense of liberty and his willingness to offer government programs, such as school vouchers and the negative income tax, that compromised with, rather than opposed outright, statism. Friedman's embrace of "neoclassical" economics, rather than Austrianism, was another object of severe criticism.

As a pioneer of Austrian economics, Hayek was obviously on stronger methodological grounds than Friedman, though Hayek rejected the strict praxiological methodology of his and Rothbard's teacher, Ludwig von Mises, whose approach stressed the role of deduction from axiomatic first principles of economics.² If anything,

2. See Ludwig von Mises, *Human Action: A Treatise on Economics* (New Haven,

Hayek was, for most of his career, much less ideologically libertarian in his policy proscriptions than even Friedman. And Hayek never warmed to the concept of natural rights, which he associated with “French” rationalism. Given Rothbard’s professional insecurity, Hayek’s positions at the London School of Economics and then at the Committee on Social Thought at the University of Chicago were not a plus. Mises himself, of course, was neither a natural rights adherent nor a radical libertarian, but he did labor in obscurity as an academic—obtaining only a business school appointment—a disgraceful treatment with which his protégé Rothbard could strongly identify.

I relate this story with no desire to deprecate the memory of Murray Rothbard. Few thinkers had as much influence on my intellectual development as did he. Beginning with his writings when I was in college, especially *For a New Liberty*,³ and continuing with our personal association throughout law school, I came to internalize the Rothbardian paradigm and, to a large extent, still work within it.⁴ In one way or another, most current intellectual leaders of the modern libertarian movement originated in the Rothbardian camp. But the story is worth retelling because it helps explain a feature of modern libertarianism that has been on the wane for some time as Rothbard’s influence declined during his lifetime and after his death: the radical disjuncture between rights and consequences. In the Rothbardian approach, rights were to be defended on purely “moral” grounds—employing a Randian form of Aristotelianism.⁵ The idea that adher-

CT: Yale University Press, 1949). For Rothbard’s expansion of this methodology, see Murray N. Rothbard, *Man, Economy, and State: A Treatise on Economic Principles* (2 volumes). (Princeton, NJ: D. Van Nostrand, 1962).

3. See Murray N. Rothbard, *For a New Liberty: The Libertarian Manifesto* (New York: Macmillan, 1973). A revised edition was published in paperback by Colliers in 1978.

4. I discuss the development of my interest in libertarianism at somewhat greater length in Randy E. Barnett, *The Structure of Liberty: Justice and the Rule of Law* (Oxford: Clarendon Press, 1978), vii–x.

5. See Murray N. Rothbard, *The Ethics of Liberty* (Atlantic Highlands, NJ: Humanities Press, 1982).

ence to properly defined moral rights yielded superior social consequences was treated like a happy coincidence, though one that was quickly emphasized in nearly every discussion of libertarian public policy. Any “utilitarian” thinker, such as Friedman or Hayek, no matter how libertarian his conclusions, was to be treated with skepticism. Friedman and Hayek’s own policy compromises with statism evidenced how utilitarians were not to be trusted as true libertarians.

Even before his death in 1995, however, Rothbard’s insistence on complete agreement from his admirers, and his willingness to shuck any deviationists, undermined the radical disjunction between his approach and that of consequentialists. One by one, as his most brilliant adherents left the fold, they rediscovered the relationship between rights and consequences long known to classical natural rights thinkers, who predated the modern philosophical divide between Kantian moralists on the one hand and Benthamite utilitarians on the other. Before long, former Rothbardians incorporated into their methods the insights of Hayek and developed an appreciation for the libertarian commitment of Friedman as well, though admittedly both men became much more radically libertarian as they aged and, therefore, easier for radical libertarians to embrace.

Perhaps the person most responsible for moving to a new synthesis of Rothbardian radical libertarianism with consequentialism was a former fair-haired Rothbardian named George H. Smith. Although Smith authored few works in political theory—his most influential publications concerned atheism, another aspect of Rothbardian thought about which agreement was *not* demanded⁶—in a few essays and many lectures and other oral presentations, he reconnected modern libertarianism with its classical liberal roots. After immersing himself in the writings of classical natural rights theorists, Smith developed, and conveyed to others in his lectures, a renewed appre-

6. George H. Smith, *Atheism: The Case Against God* (Buffalo, NY: Prometheus Books, 1980).

ciation for the classical liberal reconciliation of moral rights with that of consequentialism.

Whether due to Smith's influence, libertarians no longer argue, as they once did in the 1970s, about whether libertarianism must be grounded on moral rights or on consequences. Libertarians no longer act as though they must choose between these two moral views; in this chapter, I explain why they need not.

Transcending Rights and Consequences

Libertarians need not choose between moral rights and consequences because theirs is a *political*, not a moral, philosophy—one that can be shown to be compatible with various moral theories, which, as we shall see, is one source of libertarianism's appeal. Moral theories based on either moral rights or on consequentialism purport to be "comprehensive," insofar as they apply to all moral questions to the exclusion of all other moral theories. Although the acceptance of one of these moral theories entails the rejection of all others, libertarian moral rights philosophers such as Eric Mack, Loren Lomasky, Tibor Machan, Douglas Rasmussen, and Douglas Den Uyl on the one hand, and utilitarians such as David Friedman on the other, can embrace libertarian political theory with equal fervor. How can this be?

As George Smith rediscovered, before Bentham and Kant, classical natural rights "liberals" employed a mixture of moral rights and consequentialist arguments in defense of the political protection of certain natural rights. Within modern libertarian political theory, moral rights and consequentialism can each be viewed as a method of analyzing how humans ought to behave. Because the use of any method of analysis, including the application of moral theories, is fallible, political theorists should be sensitive both to where moral rights and consequentialist analysis reach the same results and to where they differ.

First, if both methods tend to reach the same results in entirely

different ways, then each method can provide an analytic check on the other. Because any of our analytic methods may err or be used to deceive, we can use one method to confirm the results that appear to be supported by the other. Analogously, after adding a column of figures from top to bottom, we sometimes double-check the sum by adding the figures again from bottom to top or by using a calculator. Just as we rely upon institutional rivalries between branches of government to protect against error and deception, we may also rely upon “conceptual rivalries” between different methods of normative inquiry. One way that moral rights and consequentialist modes of analysis may be functionally compatible within a political theory, therefore, is by providing a conceptual “checks and balances” mechanism by which errors in our normative analysis may be detected and prevented.

Second, only if we rely upon multiple modes of analysis can we assess the degree of confidence that we should have in a conclusion recommended by any single mode of analysis. Because we know that no evaluative method is infallible, the more valid methods that point in the same direction, the more confident we may be that this is the direction in which to move. Conversely, a divergence of results between two valid methods suggests problems that may exist at the level of application of a method or deep inside the method itself. Divergent results from competing methodologies recommend not only that we proceed cautiously but also that we carefully reconsider our methods and their application so we can discover, if possible, the source of the divergence. A second way, then, that an analysis of both moral rights and consequences may be functionally compatible is that when we rely on competing modes of analysis, *convergence of results begets confidence* and *divergence of results stimulates discovery*.⁷ This is

7. See Randy E. Barnett, “The Virtues of Redundancy in Legal Thought,” *Cleveland-State Law Review* 38 (1990): 153–68.

especially true when multiple methods each capture some feature of the world that most everyone thinks is salient.

The Salience of Moral Rights and Consequentialist Analyses

A moral rights analysis, by which I mean rights derived either from teleological or deontological methods, is salient because it takes seriously the individual. Moral rights that are properly defined protect the highly valued “private” sphere. Put another way, moral rights analysis views the actions of individuals (and the associations to which they consensually belong) from the perspective of the individual. The specialized evaluative techniques this analysis employs are conducive to elaborating this individualist perspective. Because we all are individuals, the idea of moral rights has wide appeal. We have a natural interest in the protection of our rights, and our empathy causes us to be concerned about the protection of the rights of others.

In contrast, consequentialist analysis is salient because it takes seriously the wide-reaching and highly dispersed effects that the actions of individuals and their associations may often have on others. Consequentialist analysis can be seen as protecting a “public” sphere. Although consequentialist analysis is often couched in terms of how “society” views the consequences of individual actions, this anthropomorphic metaphor can be avoided by saying that consequentialist analysis views the actions of individuals from the perspective of the other persons with whom those individuals live in society. Because we are all affected by the actions of others, the consequentialist perspective also has wide appeal. We are concerned about the consequences to us of other persons’ actions, and our empathy causes us also to be concerned about the consequences of such actions for others.

In other words, both moral rights and consequentialism are not only foundational moral theories, but they are also useful heuristics—

ways of thinking and solving problems, quickly, efficiently, and making the most of what we already know—within a political theory. Even so, at some point, both of these perspectives lose their salience. Moral rights analysis becomes unappealing when it advocates the protection of moral rights “though heavens may fall.” Most people care about the domain of discretionary actions that rights protect, but they also care about the falling of the heavens. Consequentialist analysis becomes unappealing when it sacrifices the domain of action protected by moral rights in the interest of a completely impersonal standard of value—“utils,” wealth maximization, and so on. Most people do not want to sacrifice their liberty to act, even if such sacrifices significantly benefit others.

The creative tension between moral rights and consequentialist analysis reflects a tension that is central to the classical liberal core of the modern libertarian project. On the one hand, in contrast with more elitist approaches, liberalism seeks to protect the dignity of the common person, meaning all persons qua human beings. On the other hand, liberalism has always acknowledged the need to prevent the actions of some from adversely affecting the interests of others. Nor has individualist-flavored liberalism ever denied the importance of the community in which individuals reside. Liberalism always sits betwixt and between these two great concerns, a position that has led some critics of liberalism to complain of its internal dialectic, inherent tensions, or fundamental contradictions.

It would be mistaken to conclude that this undeniable tension between individual and community, between self and others, is a contradiction in a logical sense. Aristotle, no stranger to logic (albeit Aristotelian), held that virtue consists in seeking the mean between two extremes. This does not represent a middle-of-the-road position but rather the quality of suitableness. In this sense, liberalism is like Aristotelian virtue ethics—it attempts to supply a conceptual and institutional structure that is exquisitely poised between the individual and others.

The types of political actions that pass muster from the points of view of both moral rights and consequences—or neither—are “easy cases” in which we can be quite confident in our judgment. The types of political actions about which moral rights and expediency provide conflicting assessments, however, are “hard cases” that call upon us to reconsider our analysis or to further refine our analytic techniques. Until such time as a conflict between modes of analysis is resolved, we must tread cautiously; and the fact that caution is required is itself worth knowing.

And, yet, the fact that we must act politically in the face of conflicting modes of analysis or heuristics suggests that the “compatibilist” picture I have painted to this point is incomplete. How is it that we are not frozen in our tracks until conflicts between moral rights and consequentialist perspectives are resolved? There is yet another mechanism of choice that functions alongside analyses of rights and consequences. This mechanism is not fully appreciated by many Libertarians, whether Rothbardians or utilitarians like Friedman; rather, it is revealed by a more Hayekian evolutionary approach.

The Missing Link: Legal Evolution and the Rule of Law

The rhetoric of philosophers and economists would lead one to think that a comprehensive analysis of moral rights or a comprehensive analysis of consequences would eventually discover the full panoply of norms upon which law should be based. But neither mode of analysis can accomplish such a feat. Instead, both rights theorists and consequentialists get their starting points from conventional practice. In the Anglo-American legal system, the conventions of practice have typically been generated by the spontaneously evolving process known as the common law. As Lon Fuller put it:

It can be said that law is the oldest and richest of the social sciences. . . . Economists who have exhausted the resources of their own science turn to the law for insight into the nature of the institutional

arrangements essential for a free economy. Philosophers find in the law a discipline lacking in their own sometimes errant studies—the discipline, namely, that comes of accepting the responsibility for rendering decisions by which men can shape their lives.⁸

That philosophical and economic analyses are typically used to subject established conventional legal principles to critical scrutiny is of methodological significance. It suggests that, even taken together, moral rights and consequentialist analyses cannot explain the *discovery* of legal norms that would satisfy their critical demands. It further suggests that moral rights and consequentialist analyses are simply a part of how legal norms are discovered. Something more is required.

Although this is not how philosophers and economists usually view their own disciplines, moral rights and consequentialism can be viewed as highly useful ways of evaluating the inherited, traditional, or received wisdom. Judges must decide cases even in the absence of an ironclad moral rights or consequentialist analysis. Indeed, for most of our legal history, there was little such systematic rational analysis available at all. Yet, somehow, common-law processes managed to develop doctrines that pass muster by moral rights and consequentialist standards. What made this possible?

Unlike either modern philosophy or economics, legal decision making is casuistic.⁹ The need to resolve a multitude of real disputes or cases, each with its own peculiar facts, is the engine that drives legal evolution forward. This engine produces a body of reported outcomes of countless cases in which contending parties have laid *claims of right* both to some resource (including the resource that would be used to satisfy a monetary damage award) and to the reasons given by judges for these outcomes (as well as dissenting and con-

8. See Lon L. Fuller, *Anatomy of the Law* (New York: Praeger, 1968), 84–108 (presenting ten distinctive characteristics of the common-law process).

9. For a sympathetic explication of case-by-case, or “casuistic,” reasoning, see Albert R. Jonsen and Stephen Toulmin, *The Abuse of Casuistry* (Berkeley: University of California Press, 1988).

curing judicial opinions). From this diverse body of case law emerge dominant conventions—sometimes called the “majority rule”—as well as other rival conventions that may be called the “minority rule.”

Once discovered by legal institutions, these evolved conventional rules that govern claims of right may then be subjected to critical reason in the form of a mixture of moral rights and consequentialist analysis. Yet, for the traditional conventions produced by the adjudicative process to provide more than a random starting point for a critical analysis based on moral rights and consequences, it is not enough that cases simply be resolved. The *way* in which disputed claims of right are resolved determines whether the results reached by a legal system can evolve into promising conventional standards of right conduct, which can then be subjected to and, in the main, survive the normative scrutiny of critical reason based on moral rights and consequentialist analysis. Only if the processes that resolve disputes do so in certain ways can we take the views we receive from these processes as a form of wisdom. Similarly, the way that legislation is enacted either supports or undermines the likelihood that such legislation is substantively justified.

The form that enables dispute-resolution processes to produce “judgments” that are knowledgeable enough to withstand critical scrutiny on the basis of moral rights or consequences can be summarized under the rubric of “the rule of law.” I discuss elsewhere, at some length, the procedural elements that help ensure decisions that will pass the scrutiny of rights and consequentialist analysis.¹⁰ Lon Fuller provided the best summary of these formal constraints,¹¹ which he called the “internal morality of law” and understood to be

A procedural version of natural law, though to avoid misunder-

10. See Barnett, *The Structure of Liberty*, 84–131.

11. See Lon L. Fuller, *The Morality of Law*, rev. ed. (New Haven, CT: Yale University Press, 1969), 38–39 (listing eight formal characteristics of legality); Lon L. Fuller, “The Forms and Limits of Adjudication,” 92 *Harvard Law Review* 93 (1978): 353 (discussing the formal requirements of adjudication).

standing the word “procedural” should be assigned a special and expanded sense so that it would include, for example, a substantive accord between official action and enacted law. The term “procedural” is, however, broadly appropriate as indicating that we are concerned, not with the substantive aims of legal rules, but with the ways in which a system of rules for governing human conduct must be constructed and administered if it is to be efficacious and at the same time remain what it purports to be.¹²

Decisions made according to the formal standards provided by the rule of law may produce an elaborate set of decisions, consisting both of results (the facts of the case plus who won) and of articulated rationales for the results. When a sufficiently elaborate set of decisions (results and rationales) has developed, it becomes possible to subject this set of practices to systematic rational appraisal, including the appraisal provided by what Fuller termed the “external morality of law.”¹³

Some might respond that if both moral rights and consequentialist modes of analysis are useful ways of improving past practices that have evolved as part of a process governed by the rule of law, what then is the criterion or criteria by which we decide that something is or is not an “improvement”? Unless we know the standard by which improvement is to be measured, how can we say that either method improves current practices? Unless we know the ends of the legal system, how can we know they are being served? To answer the question of ends, goes this response, requires a choice between the normative standard of justice based on moral rights or the normative standard of utility based on the maximization of beneficial consequences. In making this choice, we cannot escape the essential incompatibility of rights and consequences as moral theories. Ultimately, one approach must either be subordinate to or subsume the other.

Although some idea of improvement is indeed needed to appre-

12. Fuller, *The Morality of Law*, 96–97.

13. *Ibid.*, 96.

ciate the roles played by moral rights, consequentialist analysis, and the rule of law, this conception of improvement need not be based exclusively on any one of these three perspectives. Rather than comprehensive evaluative theories, all three approaches can be recast within a political theory as problem-solving devices. Viewed in this light, all of these modes of analysis are themselves means, not ends. To provide the requisite idea of improvement, one must identify not so much an ultimate standard of value but rather the ultimate *problem* that needs legal coercion to solve. We can then see how an evolutionary common-law decision-making process and modes of critical analysis, such as those provided by moral rights and consequentialist methods, all contribute to solving the relevant problem. Moreover, other processes and methods of rational analysis, such as rational bargaining analysis or game theory, may also be useful.

The Ends of Justice: Providing the Conditions of Social Order

According to classical liberals, the fundamental problem facing every society may be summarized as follows: given that the actions of each person in society are likely to have effects on others, on what conditions is it possible for persons to live and pursue happiness in society with other persons? "Social order" is the term traditionally used to describe the state of affairs that permits every person to live and pursue happiness in society with others. F. A. Hayek offered the following definition of the general concept of "order":

[A] state of affairs in which a multiplicity of elements of various kinds are so related to each other that we may learn from our acquaintance with some spacial or temporal part of the whole to form correct expectations concerning the rest, or at least expectations which have a good chance of proving correct.¹⁴

14. F. A. Hayek, *Law, Legislation and Liberty*, vol. 1 (Chicago: University of Chicago Press, 1973), 36.

Unfortunately, this term has come to be associated with ordering schemes imposed from above by totalitarian regimes. As Hayek noted, “[t]he term ‘order’ has, of course, a long history in the social sciences, . . . but in recent times it has generally been avoided, largely because of the ambiguity of its meaning and its frequent association with authoritarian views. We cannot do without it, however”¹⁵ For this reason, perhaps the term “coordination” better captures the problem of achieving what Hayek called an “order of actions.”¹⁶ Whatever the terminology, some way must be found to permit persons to act so that their actions do not obstruct the actions of others.

This rendition of the fundamental problem of human society contains a number of classical liberal or libertarian presuppositions. I view libertarianism as a subset of classical liberalism, and on these following five points all or most classical liberals agree. First, libertarians recognize the existence and value of individual persons. Second, libertarians place value on the ability of all persons to live and pursue happiness. Third, libertarians use the phrase “pursuit of happiness” because they believe that only the protection of actions, rather than a guaranty of results, can potentially be afforded to everyone and that, in any event, no identifiable set of results would provide happiness for everyone. Fourth, libertarians recognize that people live in society with others and that the actions of one may have both positive and negative effects on others. Fifth, libertarians maintain that it is possible to find conditions, or ground rules, that would provide all, or nearly all, persons living in society the opportunity to pursue happiness without depriving others of the same opportunity.

Of course, although they are widely shared, each of these presuppositions is and has always been, controversial. For this reason, classical liberalism is, and has always been, controversial, just as libertarianism is today. Where controversy arises over any of these

15. *Ibid.*, 35.

16. See *ibid.*, 98–101 (discussing the role played by legal institutions in maintaining “an ongoing order of actions”).

presuppositions, it must be thrashed out in the appropriate forum. Given these presuppositions, however, the next step is to ask how to solve the problem of achieving coordination. In the next section, I suggest how “natural rights” address this problem.

The Imperative of Certain Natural Rights

The term “natural rights” means many things to many people, and I shall not try to compare my conception with that of others. For present purposes, it is enough to identify two significant features of natural rights thinking. First, writers in the classical natural rights tradition attempted to address, in a realistic manner, the problem of social order. Sometimes they referred to this as the “common good,” referring not to some public good that transcends the persons living in society with others but to those basic requirements that all such persons share. Second, they addressed this problem with a mixture of what we would today consider moral rights and consequentialist analyses, from which they concluded that laws and political systems should be assessed against certain principles that they described as natural rights.

Let me briefly summarize the liberal approach to natural rights that I have identified and defended at length elsewhere.¹⁷ When living in society with others, humans need to act. Their actions require the use of physical resources, including their bodies; however, because of scarcity, their actions unavoidably affect others. Given that nearly all human action affects others in some way, how are actions to be regulated so that individuals may act in pursuit of their own happiness, without impeding the similar pursuit by others?

To answer this, a natural rights approach attempts to establish an appropriate time and place for the actions of different persons by examining certain features of the world that are common to all, at

17. See Barnett, *The Structure of Liberty*.

least under circumstances we would consider to be normal. Abstracting from normal circumstances gives rise to comparatively abstract principles that presumptively govern the use of resources, unless it can be shown that extraordinary circumstances exist to support the creation of an exception—itsself defeasible—to the rule.¹⁸ The contours of this scheme of defeasible principles and exceptions define, in general terms, the natural rights of all persons—rights that are not themselves individually defeasible.

The basic rights produced at this stage are quite abstract. For persons to live and pursue happiness in society with others, persons need to act at their own discretion. This is made possible by recognizing a sphere of jurisdiction over physical resources—including their own bodies—that provides them with discretionary control, or “liberty,” over these resources. Put another way, persons need to be at liberty to act freely within the realm of their jurisdictions, and these jurisdictions have both temporal and spatial boundaries.

The term for this bounded jurisdiction is the “right of property,”¹⁹ with property given its older meaning of “proprietaryship.” One was said to have property in an object or in one’s body.²⁰ Property, in this sense, refers not to an object but to a right to control physical resources—a right that cannot normally be displaced without either the consent or wrongful conduct of the right-holder. Some of these property rights are alienable and others are inalienable. Persons need to be able to consensually transfer their alienable rights or jurisdiction to others. The term for this is the “right of freedom of contract.”²¹

18. The historical practice of using presumptive precepts within different stages of analysis and the virtues of this technique are discussed in Richard A Epstein, “Pleading and Presumptions,” *University of Chicago Law Review* 40 (1973): 556; see also George Fletcher, “The Right and the Reasonable,” *Harvard Law Review* 98 (1985): 949 (distinguishing between “flat” and “structured” modes of legal analysis).

19. I, following Hayek, refer to this as “the right of several property.”

20. See, for example, John Locke, “An Essay Concerning the True Origin, Extent and End of Civil Government,” in *Two Treatises of Civil Government*, ch. V, § 27 (London 1690) (“every man has a property in his own person”).

21. The “right of freedom of contract” has two dimensions: freedom *to* contract

In addition, persons need to bring previously unowned physical resources into a state of proprietorship (the “right of first possession”), use force to defend their rights (the “right of self-defense”), and receive compensation for any interferences with the use and enjoyment of the resources that they own (the “right of restitution”). In addition, some libertarians think there is also a natural “right to punish” rights violators.

Thus, these fundamental inalienable rights of classical liberalism that lie at the very core of libertarianism are the rights of Several Property, Freedom of Contract, First Possession, Self-Defense, and Restitution. In the abstract, all these rights are inalienable: persons always retain the right to perform the types of acts that these rights sanction. However, while the right to one’s person is inalienable, particular physical items that are brought into a state of ownership may be alienated by consent, and even an inalienable right may be forfeited by wrongdoing.

Abstract natural rights are like a cheat sheet for a multiple-choice exam. Although they can often distinguish right action from wrong, they do not provide all the reasons that some actions should be thought right and others wrong; therefore, they are often unpersuasive unless bolstered by more explicitly consequentialist analysis. Nonetheless, such a cheat sheet can obviate the need for costly and potentially tragic “social experiments” that may be recommended by faulty consequentialist analyses.²² Even when such experiments are destructive, there is often no efficient way to terminate them. Perhaps more than others, libertarians contend that it is far better to use an abstract natural rights analysis to look before one leaps. But if seriously adverse consequences were ever shown to result from adhering to the out-

(the right to transfer rights by consent) and freedom *from* contract (the right to be free from transfers without the right-holder’s consent).

22. I make this methodological argument in the context of drug prohibition in Randy E. Barnett, “Bad Trip: Drug Prohibition and the Weakness of Public Policy,” *Yale Law Journal* 103 (1994): 2593–629.

comes recommended by a natural rights analysis, that analysis would have to be reexamined and perhaps revised.

Lastly, to perform their function of enabling social order, natural rights—which are nothing more than concepts or constructs—must be implemented by effective institutions that are capable of protecting and enforcing these rights. Such institutions must themselves be subject to substantive and procedural “constitutional” constraints to ensure that the very institutions whose mission it is to protect rights do not end up violating them.²³

The Right and the Good

Natural rights allow persons and associations the jurisdiction to decide how certain physical resources—including their own bodies—should be used. Such jurisdiction is bounded, and the boundaries must be enforced by institutions governed by the rule of law. These institutions, in turn, produce the cases and decisions that lead to important refinements of our understanding of the basic precepts of justice. Legal evolution requires a constant rotation among these modes of analysis—the rule of law and justice based on both moral rights and consequentialist analyses—as well as others. Viewed in static terms, this process may appear circular. Viewed as an evolutionary process, however, it more nearly resembles a propeller, the rotation of which enables a ship to move forward in the water.

Determining the content of the rights that define justice does not, however, exhaust the whole issue of how persons ought to behave. Although natural rights purport to be universal, based as they are in abstractions that apply in all places and at all times, these rights are not comprehensive. Identifying the bounded rights that people have to control physical resources does not specify how people should exercise their rights. For example, should one be an egoist exercising one's

23. See Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (Princeton, NJ: Princeton University Press, 2004), ch. 1–3.

rights solely to benefit oneself, an altruist exercising one's rights solely to benefit others, or somewhere in between?

Classical natural rights theorists sometimes distinguished between "perfect" and "imperfect" rights and duties. Perfect rights referred to those rights that create an enforceable duty in others, as in "I have a perfect right to this land." Imperfect rights identify duties toward oneself and others that do not justify the use of coercion. The natural rights analysis described above addresses only the question of enforceability. The matter of unenforceable individual duties must be addressed by the broader inquiry known as natural law ethics.²⁴ Lon Fuller made a similar distinction between the "morality of aspiration" (what I am calling "the good," which is addressed by natural law ethics) and the "morality of duty" (what I am calling "justice," which is addressed by natural rights):

The morality of aspiration . . . is the morality of the Good Life, of excellence, of the fullest realization of human powers. . . . Where the morality of aspiration starts at the top of human achievement, the morality of duty starts at the bottom. It lays down the basic rules without which an ordered society is impossible, or without which an ordered society directed toward certain specific goals must fail of its mark. . . . It does not condemn men for failing to embrace opportunities for the fullest realization of their powers. Instead, it condemns them for failing to respect the basic requirements of social living.²⁵

Much needless controversy about natural rights is generated by the idea that an adequate rights theory must address not only the problem of unjust conduct that justifies legal enforcement but also the problem of good, virtuous, or ethical conduct. The general issue of good conduct far exceeds the domain of natural rights, with one significant exception: although a natural rights analysis seeks to permit

24. See Randy E. Barnett, "A Law Professor's Guide to Natural Law and Natural Right," *Harvard Journal of Law and Public Policy* 20 (1997): 655–81.

25. Fuller, *The Morality of Law*, 5–6.

the pursuit of differing conceptions of the good life, it does prevent, at least indirectly, certain conceptions of the good from being achieved. In this sense, though a natural rights approach is universal with respect to just conduct but not comprehensive with respect to good conduct, it still excludes some conceptions of the good. It is particularly incompatible with any comprehensive theory of the good that requires overriding the requirements of justice defined by natural rights.

A natural rights approach solves the problem of social order by placing certain restrictions on the means one may use to pursue happiness. Consequently and unavoidably, those who believe that their pursuit of happiness requires them to use the very means that are proscribed cannot be permitted to do so. For example, those who find gratification in having unconsensual sexual intercourse with others may not pursue this course of action because it runs afoul of the principles of justice that make possible the pursuit of happiness of each person living in society with others. Of course, such conduct is not only unjust but also ethically despicable. That an action is ethically despicable, however, is neither necessary nor sufficient to justify its legal prohibition.

In addition to restricting “bad” conduct that is also unjust, a natural rights approach sometimes prohibits coercively mandating “good” conduct. Earlier I described the legal enterprise—with its rivalrous components of the rule of law and natural rights based on both a moral rights and a consequentialist analysis—as the means by which we solve the problem of social order. But social order is not the only problem facing persons living in society with others. What about the provision of food, water, shelter, and other material needs, not to mention spiritual needs, of life? Does not the legal enterprise also have an important role to play in the provision, or at least the distribution, of all these goods?

Although I address this question at greater length elsewhere,²⁶

26. See Barnett, *The Structure of Liberty*, 303–28.

some basic methodological observations can be made here. First, one ought not use the mechanisms that enable social order to exist to address other pressing problems if doing so seriously undermines the ability of these mechanisms to continue to address the problem of social order. The attainment of social order is a prerequisite for effectively addressing the other problems of social life. A society in complete or near chaos cannot address any social problem effectively, however serious that problem may be. This is like stealing from a building's foundation to add more floors to the top. A very well-designed building can tolerate a bit of this type of activity without collapsing, but a *policy* of taking from the foundation to build a higher building increases the risk of collapse from the very first taking and ensures that a catastrophe will occur at some point if continued.

Second, if establishing and preserving social order actually prevents the effective pursuit of these other vital goals, we would seriously question the priority placed on social order. To the contrary, however, the achievement of social order based on libertarian precepts of justice and the rule of law makes it possible for other institutions to pursue other goals without violating the constraints imposed by these precepts of justice. Indeed, a consequentialist analysis would reveal such institutions to be far more capable of addressing these other problems than any known alternative, especially institutions that override natural rights.

The natural rights method I have described, with its consequentialist component, allows the theoretical possibility that, in extreme and abnormal instances, exceptions are justified. I am skeptical that any exception to the regime of justice and the rule of law is necessary or prudent, but on this issue, reasonable people in the classical liberal tradition have and will continue to differ. Indeed, libertarians can be distinguished from their classical liberal fellow travelers by the former's deep skepticism about making exceptions. Although I believe this skepticism is warranted, it is based as much on past experience with the consequences of recognizing exceptions—especially the ina-

bility to confine exceptions to the exceptional—as it is on any first principles about natural rights, each of which have various exceptions already built in.

Finally, while a commitment to moral “neutrality” per se is not a tenet of libertarianism, a libertarian natural rights approach is operationally neutral among the many alternative ways to pursue happiness that are consistent with the basic requirements of social order. Because libertarianism prohibits conduct that violates natural rights, it will unavoidably, but only incidentally, prohibit some actions that are individually bad and will bar using force to require some acts that may well be good. Persons who wish to pursue happiness by violating the rights of others may be condemned for acting badly or immorally (that is, contrary to the good), but they may be forcibly coerced only because they are acting unjustly (that is, contrary to natural rights). Persons who wish to see their comprehensive moral vision implemented may do so, but only by “just” means that do not violate the side constraints on action identified by libertarian natural rights.

Conclusion:

How Libertarianism Differs From Conservatism

In contrast with the moralism of traditional conservative or neoconservative approaches, libertarians often sound legalistic. The analysis presented here helps explain why. Libertarian political theory transcends different conflicting approaches to morality. Unlike moral or religious theorists, libertarians, qua libertarians, are not seeking a universal and comprehensive answer to the question of how persons ought to behave. Rather, Libertarians seek a universal answer to the question of when the use of force is justified. Libertarians, qua libertarians, do not deny that a more ambitious comprehensive morality exists; they merely deny the political claim that immorality, standing alone, is an adequate justification for the use of force by one person against another. In contrast, many conservatives assume, usually

implicitly, that force is justified whenever human conduct is found to be bad or immoral. Libertarianism is much more modest, but for good reason. Libertarians seek a political theory that could be accepted by persons of diverse approaches to morality living together and interacting in what Hayek called the Great Society.

Any political theory that would enforce all moral norms would immediately confront radically different views of morality held by others in the same civil society. Enforcing morality would require the attainment of political power by those with one moral approach and the forcible suppression of any who disagree. Naturally, many of those who dissent will resist. In this way, a war of all against all is likely to result as each proponent of a comprehensive moral view seeks to attain a coercive monopoly of power over others and to avoid others attaining a monopoly of power over them. The situation is exacerbated when the source of morality comes solely from a religious faith, which is not shared by all, rather than also from reason.

A libertarian natural rights approach undertakes to identify, largely successfully, a law that is common to all: prohibiting murder, rape, theft, and so on. Whatever their moral differences, few purveyors of a comprehensive moral vision, whether religiously based or not, or even most criminals for that matter, disagree about the injustice of these types of acts. These people simply grant themselves an exemption from these principles when pursuing what they regard as higher moral or religious ends.

Traditionalist or social conservatives, neoconservatives, and those on the Left who seek to impose by force their conception of the good neglect the *problem of power*—an exacerbated instance of the twin social problems of knowledge and interest.²⁷ Once the use of power is legitimated on any ground, its use must somehow be limited to this ground and not be extended beyond. Using power raises the cost of erroneous judgment by imposing greater burdens on those who are

27. See Barnett, *The Structure of Liberty*, pt. III.

mistakenly victimized; once created, the instruments of power can be captured to serve the interests of those who wield it rather than to serve the end of justice. And, as we have just seen, once the use of force is accepted as a legitimate means for imposing on dissenters a comprehensive morality, then each group has the incentive to capture the institutions employing powers of coercion to wield these institutions against those who hold different moral views and to keep these institutions from being captured and used by others against them.

For all these reasons, libertarians contend that we must place conceptual and institutional limits or constraints on the exercise of power, including the power to do good or to demand moral or virtuous conduct. For comprehensive moralists of the Right or Left, using force to impose their morality on others might be their first choice among social arrangements. Having another's comprehensive morality imposed upon the moralists by force is their last choice. The libertarian minimalist approach of enforcing only the natural rights that define justice should be everyone's second choice—a compromise, as it were, that makes civil society possible. And therein lies its imperative.