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Letter from the Editor

Dear Reader,

The Third Volume of the *Journal of Liberty & Society* will also be my last edition as Editor-in-Chief. My academic projects and SFL's commitments will require a huge amount of efforts and I do not think I will be able to give to the Journal the dedication I gave in last two years. Fortunately, the *Journal of Liberty & Society* will fall in the capable hands of my fellow SFL Executive Board member, Brandon Wasicsko.

I am sure this Volume will meet your expectations in terms of quality and variety that has characterized the *Journal* since is first edition.

In these 3 years, the growth of the *Journal* makes me optimistic about the chance of having a free space for young and aspirant researchers debating liberty from different cultures and perspectives.

Yours,

Carlo Ludovico Cordasco

Shakespeare's Place in Law & Literature

Allen Mendenhall

In an October 2002 article in *The New York Times*, "Next on the Syllabus, Romeo v. Juliet," Adam Liptak investigates the curious if questionable move to install literary texts within law school curricula. Liptak's opening lines betray his skepticism: "The fact [that Kafka was a lawyer] got the discussion started on a recent afternoon in a sunny seminar room at the New York University School of Law, where 17 law students and 2 professors gather every week for a sort of book club, for credit, in a class called Law and Literature."[1] Liptak's likening of the class to a book club, quickly followed by his strategic comma usage setting off the phrase "for credit," implies that, in effect, the course is more about enthusiasm than scholarship. How could the activities of book-clubbers, Liptak seems to suggest, merit course credit in professional school? Liptak implicitly raises an even greater question: Does literature matter to the so-called "real" world? In arguing for the inclusion of humanities courses in law school curricula, law & literature professors have had to answer that question. They have convinced professional school deans and administrators that literature is important and relevant to actual problems. The turn to political criticism among English faculty is also a move to show that literature has some practical bearing beyond entertainment or leisure. As humanities programs gradually lose funding and students while law & literature faculty, courses, conferences, and journals proliferate, it bears asking whether law & literature adherents have done a better job persuading university officials that literature is socially significant.

Nearly every Anglo-American law school offers a course called Law & Literature. Nearly all of these courses assign one or more readings from Shakespeare's *oeuvre*. Why study Shakespeare in law school? That is the question at the heart of these courses. Some law professors answer the question in terms of cultivating moral sensitivity, fine-tuning close-reading skills, or practicing interpretive strategies on literary rather than legal texts. Most of these professors insist on an illuminating nexus between two supposedly autonomous disciplines. The history of how Shakespeare became part of the legal canon is more complicated than these often defensive, syllabus-justifying declarations allow. This article examines the history of Shakespeare studies vis-à-vis legal education. It begins with early law & literature scholarship, which focused on Shakespeare's history or biography—speculating as it did about whether Shakespeare was a lawyer or perchance received legal training—and concludes with recent law & literature scholarship treating Shakespeare as a source of insight for law students and lawyers alike. I submit that early law & literature scholarship on Shakespeare anticipated New Historicist theory and that more recent law & literature work, with its turn to presentism, is in lockstep with Shakespeare studies. In law & literature classrooms, Shakespeare is more fashionable like a hobby than scholarly like a profession; but law & literature scholarship on Shakespeare amounts to high-caliber work based on interdisciplinary research as well as deep engagement with legal and literary texts.

[1] Liptak, Adam, Next on the Syllabus, Romeo and Juliet, The New York Times. October 30, 2002. [Available at http://www.nytimes.com/2002/10/30/nyregion/next-on-the-syllabus-romeo-v-juliet.html].

I wrap up this essay with a note about the direction of the university in general and of the law & literature movement in particular. I admit that my closing argument, as it were, is tendentious. It raises issues usually raised by confrontational academics and suggests remedies for what William M. Chace has called "the decline of the English Department"[2] or what Harold Bloom has called "Groupthink" in "our obsolete academic institutions, whose long suicide since 1967 continues."[3] If Chace and Bloom are right about a decline in academic standards—evidence shows that they are at least right about a decline in numbers of English majors—then the fate of literary studies seems grim. Nevertheless, Chace and Bloom overlook the migration of literature professors into American law schools, a phenomenon yet to receive critical attention. Another aspect of this phenomenon is the migration of students from the humanities to professional schools. I personally have known many students who wished to go on to graduate school in the humanities but quite understandably viewed that route as impractical and went to law school instead. A positive result of this trend is that a substantial body of law students is open to the idea of law & literature and finds luminaries like George Anastaplo or Stanley Fish more interesting than other law professors. My final comments will address the strange exodus of literary scholars into professional schools, which pay more money and arguably provide vaster audiences and readership, more generous funding opportunities, and reduced teaching loads. Perhaps more than other literary disciplines, save for cultural studies, Shakespeare studies has moved into the realm of interdisciplinarity, albeit without large contributions from scholars outside of literature departments. The law & literature field would have perished without the expertise of literature professors; likewise, Shakespeare studies, if it continues down the path of politics and cultural criticism, will perish without the expertise of economists, political scientists, and legal scholars, whose mostly non-Marxist perspectives, when pooled with the perspectives of literature professors, might fill out a space for interesting scholarship and redeem the interdisciplinary label. Information-sharing is especially crucial for literature scholars who, in order to examine the history of Shakespeare in American culture, have turned to practices and methods traditionally reserved for other disciplines. In this respect, Shakespeare studies seem representative of the humanities in general.

It may be possible to overcome disciplinary boundaries while recognizing the importance of disciplinary expertise. Conservative literary critics rightly decry the political trends of current literary theory. But perhaps what they mean to decry is the nature of these particular political trends rather than political trends on the whole. What if, instead of Marxist or quasi-Marxist paradigms, literary critics adopted the thought and theory of free-market economics? Adherents of law & literature unwittingly have carved out an approach to literary studies that jettisons Marxism and quasi-Marxism but that retains civic goals. Law & literature cuts across labels like "conservative" and "liberal." It demonstrates how professional or vocational studies are incomplete without teachings in liberal arts. At a time when anti-traditional, quasi-Marxist ideologies have taken over graduate programs in literature, and when

[2] William M. Chace, The Decline of the English Department, The American Scholar (2009) [available at http://www.theamericanscholar.org/the-decline-of-the-english-department/].
[3] Harold Bloom, Genius ix (New York: Warner Books) (2002).

humanities funding and enrollment are wanting, the burgeoning law & literature courses offer an avenue for restoration of literary study with a civic focus.

The Early Works

If early law & literature work on Shakespeare is any indication, New Historicism is actually quite old. This early work endeavored to explain Shakespeare's sophisticated engagement with the law by examining significant cultural documents (most notably legal documents) that might have influenced Shakespeare. As Cushman Kellogg Davis, the seventh Governor of Minnesota and a longstanding Senator from that state, opined in 1883:

> *We seem to have here something more than a sciolist's temerity of indulgence in the terms of an unfamiliar art. No legal solecisms will be found. The abstrusest elements of the common law are impressed into a disciplined service with every evidence of the right and knowledge of commanding. Over and over again, where such knowledge is unexampled in writers unlearned in the law, Shakespeare appears in perfect possession of it. In the law of real property, its rules of tenure and descents, its entails, its fines and recoveries, and their vouchers and double vouchers; in the procedure of the courts, the methods of bringing suits and of arrests, the nature of actions, the rules of pleading, the law of escapes, and of contempt of court; in the principles of evidence, both technical and philosophical; in the distinction between the temporal and the spiritual tribunals; in the law of attainder and forfeiture; in the requisites of a valid marriage; in the presumption of legitimacy; in the learning of the law of prerogative; in the inalienable character of the crown,—this mastership appears with surprising authority.*[4]

This statement smacks of hopefulness and Bardolotry at once. It seeks to enlist Shakespeare in the ranks of lawyers everywhere while celebrating Shakespeare's apparent ability not just to undertake but master multiple fields (literature and law). Simply put, it seeks to appropriate the ever "appropriable" Shakespeare. Materialist critics are quick to point out that many groups, lawyers or otherwise, have succeeded in appropriating Shakespeare. In so doing these critics ignore the irony that their approach is itself an appropriation. The best starting point for criticism on Shakespeare, one could argue, is an acknowledgement that Shakespearean texts are highly complex and irreducible to cookie-cutter appropriations that seek to enlist Shakespeare in the ranks of contemporary political causes.

Davis was not alone in his belief that Shakespeare was a lawyer or else a person with legal training. Consider the following lines from a September 1858 letter from Lord Chief Justice John Campbell to an attorney named J. Payne Collier: "Were an issue tried before me as Chief Justice at the Warwick assizes, 'whether William Shakespeare, late of Stratford-upon-Avon, gentleman, ever was clerk in an attorney's office in Stratford-upon-Avon aforesaid,' I

[4] Cushman K. Davis, The Law in Shakespeare 4-5 (Washington, D.C.: Washington Law Book Co.) (1883). One might quibble that this passage represents "old historicism" rather than "new historicism" because the latter usually entails the practice of showing that works of literature are products of economic and cultural hegemonies and thus in need of deconstruction along the lines of ideological filiations. See, e.g., R. V. Young, At War with the Word 87 (Wilmington, Delaware: ISI Books) (1999).

should hold that there is evidence to go to the jury in support of the affirmative."[5] Echoing these sentiments, Richard Grant White, a Shakespearean scholar who studied law at New York University, adopts a more sober tone. White argues that Shakespeare displays no more legal knowledge than other Elizabethan literati. His grand and hyperbolic claim is that *all* the Elizabethan literati therefore must have been lawyers: "There are […] considerable grounds for the opinion that Shakespeare had more than a layman's acquaintance with the technical language of the law. For it must be admitted […] that he exhibits a remarkable acquaintance with it. That other playwrights and poets of his day manifest a like familiarity […] precludes us […] from regarding the mere occurrence of law-terms in his works as indications of early training proper to him alone."[6] White takes Bardolotry to a whole new level, shamelessly glorifying the entire legal community. What these various quotations show us is that early law & literature work on Shakespeare was made up of both informed and wishful speculations about Shakespeare's legal background. One might venture to argue that this work anticipated the move to philology that ultimately secured Shakespeare's place in literary education. Although it tended towards overstatement and exaggeration, this work nevertheless considered numerous texts, primary and secondary, and couched its inquiries in terms of empirical and measurable evidence. Little archival research appears to have taken place, however, and the hypotheses of early law & literature Shakespeareans seem to pivot on secondary sources collected and classified by non-legal scholars.

Not all legal scholars believed that Shakespeare was a lawyer; some swiftly dismissed the idea, but instead of dismissing all fancy, these naysayers attributed Shakespeare's legal knowledge to his extraordinary genius:

> *Some of the admirers of our great dramatist may assert that the universality of his genius, the strength, vigour, and magnitude of his intellectual faculties and powers of investigation, enabled him to acquire a more profound knowledge of a greater variety of subjects than ever yet seems to have been possessed by the same individual, and that the legal knowledge he has displayed in the correct use of law terms is not more remarkable than his intimate acquaintance with human nature, and accurate observation of the habits and customs of mankind, or than the knowledge of seamanship, and the correct use of nautical terms he has displayed in the Tempest.*[7]

This quote by William Lowes Rushton, a Shakespearean and a barrister of Gray's Inn, does not treat Shakespeare's familiarity with law as anything less than the workings of a brilliant mind. Shakespeare's legal knowledge, by Rushton's account, is really a reference point for demonstrating Shakespeare's worldly knowledge (i.e., his knowledge about *everything*).

Despite its unchecked enthusiasm, the work of scholars like Davis, Hartrigge, White, and Rushton is far from formulaic. Anticipating objections to his project, Davis is quick to point out

[5] N.B. Jedburgh Hartrigge, Preface, in Shakespeare's Legal Acquirements 9 (John Lord Campbell, ed., New York: D. Appleteon and Co.) (1859).

[6] Richard Grant White, William Shakespeare Attorney at Law and Solicitor in Chancery, 4 Atlantic Monthly 99 (1859).

[7] William Lowes Rushton, Shakespeare as Lawyer 3 (London: Longman Brown Green Longmans and Roberts) (1858).

that isolating Shakespeare's legal lexica into individualized compartments—as if one legal reference had no bearing on another despite the overall prevalence of legal terminology in any given play—is to overlook the aggregate importance of law to Shakespeare's individual plays if not his complete *oeuvre*. "Some of the quotations, taken alone," he submits, "are doubtless of trifling probative force. They are given because, in cumulative testimony, each independent fact is a multiplier."[8] As Davis penned his conjectures, English departments began popping up across America, solidifying literature as a discipline in itself. It was not unusual, then, for a man of letters like Davis to undertake prolonged literary research projects while maintaining a separate career in politics. It would be anachronistic to suggest that these early law & literature scholars thought of themselves as professional academics of either law *or* literature, since neither law *nor* literature had congealed into an institutional disciplinary body in America. Nevertheless, as I have suggested, these scholars employed techniques that were in many respects ahead of their time and that anticipated later theoretical movements not as novel, perhaps, as we suppose.

Unlike the work of contemporary cultural materialists, whom these early scholars anticipate, the work of early law & literature adherents did not seek to recover the lost histories of lower class peoples or to shed light on low-brow activities but instead to demonstrate how statutes, trials, common law precedents and the like might have informed Shakespeare's law-saturated texts. The early Shakespeare law & literature proponents were like New Historicists without openly political agendas, which of course does not foreclose the possibility that they had concealed political agendas. Davis provides numerous examples of New Historicist techniques. He compares the legal proceedings of Mary Stuart with those of Shylock,[9] the drama of the Inns of Court with the drama of the stage,[10] and the diction of Shakespeare's plays with the nomenclature of the common law.[11] Davis's goals are not to show that Shakespeare was an ideological product of his era, so Davis cannot have written pure New Historicism; but his methodology does resemble the New Historicism of the late twentieth century. Davis was not alone in his critical methodology. As early as 1859, Campbell wrote about Shakespeare's "frequent use of law-phrases" and "the strict propriety with which he always applied them."[12] Campbell appears to have sparked the debate over Shakespeare's legal training and qualifications. In 1883, Franklin Fiske Heard, a lawyer, jurist, and Shakespearean scholar, published a book titled *Shakespeare as a Lawyer*,[13] which extends Campbell's analysis. In 1899, responding directly to Campbell, William C. Devecmon, a lawyer from Maryland, authored *In re Shakespeare's 'Legal Acquirements'*,[14] which argued that, contrary to popular opinion, Shakespeare often misapplied legal diction. To bolster his point, Devecmon cites 14 errors ranging from Shakespeare's use of "replication" in *Hamlet* to his use of "indenture" in *Pericles.* In 1911, Edward J. White, a practicing lawyer from Baltimore,

[8] Davis, supra note 4, at 4.
[9] Id. at 17.
[10] Id. at 56.
[11] Id. at 117-285.
[12] Lord Baron John Campbell, Shakespeare's Legal Acquirements Considered 5 (London: John Murray) (1859).
[13] Franklin Fiske Heard, Shakespeare as a Lawyer (Boston: Little, Brown, and Company) (1883).
[14] William C. Devecmon, In re Shakespeare's 'Legal Acquirements': Notes By an Unbeliever Therein (London: Kegan Paul, Trench, Trubner & Co., Ltd.) (1899).

compiled *Commentaries on the Law in Shakespeare*,[15] a beast of a book that spells out explanations for each of Shakespeare's legal designations in all of the plays and eight of the sonnets. "It does not follow," White cautions, "the law of the plays can furnish any basis for the sensationalist to build up a claim of title to the plays in favor of a lawyer, instead of a poet, for the law is merely incidental in the plays, whereas, the poetry is that of the master poet of all time."[16] White rejects a certain kind of romanticism (Shakespeare as lawyer) while embracing another kind (Shakespeare's immortality). In a second edition,[17] picking up where Davis left off, White adds a chapter on the "Bacon-Shakespeare" controversy. Shortly thereafter two books by British lawyer, politician, and Shakespearean scholar, Sir Granville George Greenwood, followed: *Shakespeare's Law and Latin* (1916)[18] and *Shakespeare's Law* (1920).[19] These works built upon Campbell's book and attempted to rebut the works (too many to list) of refuters of the Shakespeare-as-lawyer hypothesis. Supportive of Greenwood's conjectures, Sir Dunbar Plunket Barton, an Anglo-Irish statesman who served for two years as Ireland's Solicitor General, penned *Links Between Shakespeare and the Law*.[20] Later, in 1936, George W. Keeton, a barrister of Gray's Inn and a law professor, published *Shakespeare and His Legal Problems*.[21] Like a New Historicist, Keeton begins his chapters by situating readers in the everyday sites and scenes of Shakespeare's time and only afterwards making sense of the time-travelling experience. In 1967, Keeton expanded his project in *Shakespeare's Legal and Political Background*,[22] the latest of what I call the "early works." I include this text as an early work because it predates James Boyd White's publication of *The Legal Imagination*[23] in 1973, and because it appears late in Keeton's career but addresses topics that Keeton had considered earlier. It is fair to say, at any rate, that these early law & literature scholars were steeped in Anglo-American legal traditions, and that they therefore gleaned inferences and meaning from Shakespeare's works that scholars without legal training may have missed. That does not mean that they always arrived at sound conclusions or made reliable and consistent claims. It does, however, suggest that a person with legal training can tell us a great deal about Shakespeare's texts that a person without legal training might not.

These examples demonstrate the value of a law & literature approach to Shakespeare studies. A New Historicist analysis of Shakespeare's legal references is not possible without a more-than-passing knowledge of law, legal history, or the common law tradition. Even though some of Shakespeare's legal language is inaccessible to American lawyers and law students—whose legal education does not include studies of Gray's Inn or of the differences between solicitors and barristers—many legal terms used by Shakespeare are quickly recognizable even

[15] Edward J. White, Commentaries on the Law in Shakespeare (St. Louis: The F.H. Thomas Law Book Co.) (1911).
[16] Id. at 1.
[17] Edward J. White, Commentaries on the Law in Shakespeare, Vol. II. (St. Louis: The F.H. Thomas Law Book Co.) (1913).
[18] Sir Granville George Greenwood, Shakespeare's Law and Latin (Watts & Co.) (1916).
[19] Sir Granville George Greenwood. Shakespeare's Law. London: Cecil Palmer, 1920.
[20] Sir Dunbar Plunket Barton, Links Between Shakespeare and the Law (Boston: Houghton Mifflin, 1929.)
[21] George W. Keeton, Shakespeare and His Legal Problems (London: A. & C. Black, Ltd., 1930).
[22] George W. Keeton. Shakespeare's Legal and Political Background (London: Barnes & Noble, Inc., 1967.)
[23] James Boyd White. The Legal Imagination. University of Chicago Press, 1985. [Updated edition of the 1973 version.]

to first year American law students. These students, forced to read "old" English cases in contracts and property law courses, will make out many terms or concepts in Shakespeare that a reader without legal training, or a lawyer who has been practicing in one field so long that he no longer is familiar with working paradigms of other fields, might overlook. The concepts of "fee tail" and "fee simple," for instance, may mean nothing to graduate literature students, but for lawyers or law students who work with these concepts everyday, Shakespeare's references to them will seem strikingly relevant. The term "fee tail" refers to an almost obsolete estate that limits inheritability to lineal heirs.[24] This present possessory interest, abolished in most U.S. jurisdictions, passes to a grantee's heirs until those heirs die without issue. By contrast, the term "fee simple" refers to a full and total interest in a particular piece of property. This interest has a potentially infinite duration, and a holder of a fee simple may sell or devise his interest as he pleases. There are various subcategories of fee tail and fee simple that are not worth mentioning here. The point is that although Shakespeare employs the term fee-simple in *Merry Wives of Windsor*; *All's Well That Ends Well*; *Henry VI, Part II*; *Troilus and Cressida*; *Romeo & Juliet*; and *Lover's Complaint* (a poem usually attributed to Shakespeare)—all works published around the turn of the 16th and 17th centuries—the term itself is hardly archaic. A contemporary lawyer cannot draft a will, let alone pass a bar examination, without understanding the word's meaning and application.[25]

A New Historicist could benefit from these early forays that extract legal topoi from Shakespeare and then examine them in light of connections to popular legal culture. So, for instance, a New Historicist might borrow from Davis's notes about "party verdict," a term appearing in *Richard III*. Davis relates this term to the 1631 impeachment of David Ramsay. Ramsay's trial occurred well after the publication (let alone production) of *Richard III*, a First Folio work. It does not follow, however, that the trial cannot shed light on the methods by which impeachment trials were conducted at the time of Shakespeare's writing.[26] A New Historicist might also benefit from Davis's comparison of Act 1, Scene 2, of *Henry V* with Bacon's *Apophthegms*, No. 184, in which Bacon describes French and German codifications of "law salique," a measure excluding females from the throne.[27] Works like Davis's are useful and significant despite their zeal and lofty rhetoric. They tell us as much about Shakespeare's moment and milieu as they do about the scholars' moment and milieu. So many law & literature scholars currently work out of these early paradigms that an exhaustive list would be impossible to compile in this space. There is now a whole dictionary, edited by B.J. and Mary Sokol, devoted to Shakespeare's legal language.[28] Suffice it to say that these early works are worthy of attention in their own right.

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[24] Fee tails serve as a staple plot devices of Victorian novels such as Jane Austin's Sense and Sensibility.
[25] Interestingly enough, Shakespeare himself left the bulk of his will in fee tail to his daughter Susanna. See Samuel Schoenbaum, William Shakespeare: A Compact Documentary Life 292-297 (Oxford: Clarendon Press, 1977).
[26] Davis, supra note 4, at 156-58.
[27] Id. at 184.
[28] B.J. and Mary Sokol, Shakespeare's Legal Language (London and New Brunswick, NJ: The Athlone Press) (2000).

The Later Works (1973 to Present)

It is well-settled that James Boyd White's *The Legal Imagination* (1973)[29] catalyzed the law & literature movement as we know it today. A professor in the Department of English, Department of Classics, and College of Law at the University of Michigan, White brings a unique interdisciplinary perspective to bear on this field that he more or less founded. He remains prolific even in his old age, having published a string of books on a wide variety of topics having to do with legal rhetoric(s) and legal/literary hermeneutics. Since White's landmark *tour de force* in 1973, several legal scholars have followed in his footsteps, venturing into literature (broadly defined to include novels, plays, poems, short stories, essays, etc.) to make sense of legal culture and legal texts. Some of the resulting scholarship has been quite good; some, however, more than slightly wanting. Shortly after White's "overture," the work of literary Ph.D.s like Robert Weisberg (Ph.D., English, 1971, Harvard University; J.D., 1979, Stanford University), Richard H. Weisberg (Ph.D., French and comparative literature, 1970, Cornell University; J.D., 1974, Columbia University), and, among others, Stanley Fish (Ph.D., English, 1962, Yale University) lent credibility to a field seen as dubious by law school deans and territorial literature professors.[30] Today the movement seems to be picking up, not losing, momentum, in part due to the interdisciplinary nature of the project and in part due to the literati heavyweights who have used the movement as an opportunity to enlarge their celebrity status (to say nothing of their salaries).

The vast array of Shakespeare-focused works that flew under the banner of law & literature during the 1970s, 80s, and 90s actually undermined the entire field. Titles like Michael Richmond's "Can Shakespeare Make You a Partner?" (1989)[31] signaled a practical but non-scholastic rationale for lawyers to turn to Shakespeare's texts. Works most commonly addressed during this period include *The Merchant of Venice*, *King Lear*, *Hamlet*, and *Measure for Measure*.[32] In the rush to canonize Shakespeare in this budding genre that sought to include humanities texts in professional schools, even the conspiracy theories of a Supreme Court justice, John Paul Stevens, became authoritative readings.[33] Stevens is not the only Supreme Court justice with an opinion on the Shakespeare authorship debate, as the following chart by the *Wall Street Journal*[34] makes clear:

[29] White, supra note 23.
[30] With apologies for the references to academic pedigree. I am of the mind that the works of a scholar either stand up or do not, pedigree notwithstanding. I mention the various academic degrees simply to show that these scholars have professional training in both law and literature.
[31] Michael L. Richmond, Can Shakespeare Make You a Partner?, 20 St. Mary's Law Journal 885-896 (1989).
[32] I base this observation on the online working bibliography of Professor Daniel J. Solove: http://docs.law.gwu.edu/facweb/dsolove/Law-Humanities/writers.htm.
[33] See, e.g., John Paul Stevens, The Shakespeare Canon of Statutory Construction, 140 University of Pennsylvania Law Review 1373-1387 (1992).
[34] Jess Bravin, Justice Stevens Renders an Opinion on Who Wrote Shakespeare's Plays: It Wasn't the Bard of Avon, He Says; 'Evidence Is Beyond a Reasonable Doubt, The Wall Street Journal, April 18, 2009 [Available here: http://online.wsj.com/article/SB123998633934729551.html].

Shakespeare's Court	
The Supreme Court on the likely author of Shakespeare's plays:	
Active Justices	
Roberts, Chief Justice	No comment.
Stevens	Oxford
Scalia	Oxford
Kennedy	Stratford
Souter	"No idea."
Thomas	No comment.
Ginsburg	"No informed views." *
Breyer	Stratford
Alito	No comment.
*Justice Ginsburg suggests research into alternate candidate, Florio.	
Retired Justices	
O'Connor	Not Stratford
Blackmun*	Oxford
Brennan*	Stratford
*Deceased	

That Supreme Court justices have weighed in on Shakespeare's authorship is more a study in itself and less a constructive contribution to Shakespeare scholarship. Not long after Stevens' law review article, at any rate, some creative attempts to render the Shakespeare as lawyer or other conspiracy theories surfaced. Law professor James Boyle, for instance, penned a novel, *The Shakespeare Chronicles* (2006),[35] dealing with the obsessive search for the "true" author of Shakespeare's works. Boyle, who has published a book with Yale University Press as well as a graphic novel, nevertheless appears to have self-published this book with Lulu.com. I have never met Professor Boyle, but I suspect that he would admit that *The Shakespeare Chronicles*, being fiction, does not represent scholarship at all, even if its production required rigorous scholarly research.

In light of these false starts, it is no wonder Richard Posner famously declares, "The biggest danger in any interdisciplinary field is amateurism [...]. The danger is particularly acute in the case of the lawyer who writes about literature."[36] One of the greatest and most embarrassing ironies of the whole law & literature movement is that Posner's well-known book *Law and Literature*[37] has outsold any other law & literature work despite being highly critical if not downright dismissive of law-in-literature in particular and perhaps even imaginative literature in general. For Posner, a pragmatist, literature is hardly more than therapy or

[35] James Boyle, The Shakespeare Chronicles (Lulu Press, 2006).
[36] Richard Posner, Law and Literature: A Misunderstood Relation 363 (Cambridge, Mass.: Harvard University Press, 1988).
[37] Id.

consolation and has more often than not led humanity down a precarious rather than a moral path (consider art's role in the rise of Nazi Germany). It bears noting in passing that law & literature work on Shakespeare tended, and tends, to be more sensationalist than law & literature work on other authors, so Posner's claim has particular resonance in the Shakespeare context.

With the publication of Ian Ward's *Shakespeare and the Legal Imagination* (1999)[38] and Craig Bernthal's *The Trial of Man* (2003),[39] sound scholarship (as opposed to enthusiastic appropriation) made its way into the Shakespeare law & literature canon. Ward took up concepts and theories far more complicated than those of his predecessors—specifically, methodologies rooted in rhetoric, phenomenology, hermeneutics, and historicism. Ward's book implies that an underlying purpose for cross-pollinating two disciplines is to reinvest community politics with epistemic rhetoric and democratic constitutionalism. Ward attempts to describe a Shakespearean politics by openly championing political ideology while acknowledging the limitations of that approach—namely, that any appropriation of Shakespeare reflects on the interpreter more than Shakespeare. "[W]e cannot," Ward declares, "make Shakespeare a Marxist, unless we are a Marxist; a patriot, unless we are a patriot; or a postmodern deconstructionist, a new historicist and so on, unless we already are persuaded by postmodernism or new historicism or whatever."[40] Accordingly, the "Marxist Shakespeare or the postmodern Shakespeare describes the interpreter, not Shakespeare."[41] Ward does not pretend disinterestedness or otherwise try to mask his tendentiousness but rather delights in his politically charged call for a communitarian constitutionalism extracted from Shakespeare. He turns to presentism, in particular modern constitutional theory, to advocate for a "contemporary political morality" based in and enacted by Shakespearean paradigms.[42] His presentist flair is in keeping with the presentist flair of contemporary Shakespeare studies, except that his presentism eschews references to contemporary popular culture and instead interrogates the philosophy or jurisprudence of figures like Karl Llewellyn, Michel Foucault, Ronald Dworkin, and Robin West. Ward's attention to several notables of the Shakespeare studies movement—Stephan Greenblatt, Michael Bristol, Derek Cohen, and Jonathan Dollimore—props up his scholarship and demonstrates his versatility.

Bernthal, on the other hand, is more interested in the concepts of judgment and justice, particularly as they concern Christian mores and traditions. For Bernthal, judgment is an archetype. Examining the theological foundations of law, Bernthal uncovers rituals and stories informing Shakespeare's trial scenes. Shakespeare's texts are, Bernthal claims, profound responses to the spiritual landscape of Elizabethan and Jacobean England in which religious beliefs poured over and into civil institutions. Shakespeare's allusions and analogies are often biblical, and Christianity seems to frame Shakespeare's notions of sin, guilt, natural law, trials, and verdicts. Bernthal brings to light the theological bases for Shakespeare's legal themes and

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[38] Ian Ward, Shakespeare and the Legal Imagination (London, Edinburgh, Dublin: Butterworths, 1999).
[39] Craig Bernthal, Trial of Man: Christianity and Judgment in the World of Shakespeare (Wilmington, Delaware: ISI Books, 2003).
[40] Ward, supra note 38, at 17.
[41] Id.
[42] Id. at 18-19.

metaphors. He does so with grace and wit and without burdening readers by over-referencing popular legal culture.

Not all recent law & literature work on Shakespeare has come from career academics. Daniel J. Kornstein, a founding partner of the law firm Kornstein, Veisz, Wexler & Poland, LLP, in New York City, recently published *Kill All the Lawyers?*,[43] a book that is enthusiastic but that refuses to succumb to mawkish celebration of Shakespeare's life or legacy, the possible exception being the opening paragraphs about Kornstein's relationship to the New York Shakespeare Festival. Kornstein acknowledges that he practices law "as a profession" but that "when it comes to Shakespeare," he is "only an amateur."[44] He quickly follows, however, with the defensive-seeming statement, "The Bard […] belongs most of all to the educated amateur, and we need more amateurs."[45] Kornstein appears all too conscious of his outsider status. Although not an academic in the popular sense of the term, Kornstein did manage to publish his book with a university press—not necessarily an indication of high-quality scholarship, since even university presses have profit motives—and to attract back-cover blurbs by such renowned literary journals as *Virginia Quarterly Review*, *Times Literary Supplement*, and *Renaissance Quarterly*. His detailed analyses of figures, events, and places like Joseph Papp, John Shakespeare, the Inns of Court, the Alien Statute (*c.f. Merchant of Venice*), oral advocacy, classical republicanism, genre, slander, and civil procedure—all in light of Shakespeare's plays—suggest that his self-derogatory tag of amateurism is excessive humility, possibly even facetiousness. Kornstein appears to know more about Shakespeare than the average literature professor *not* specializing in Shakespeare. That does not, of course, make him an expert; but it does seem to suggest that his self-criticism is tongue-in-cheek if not downright deflective (right off the bat, he has an excuse for any shortcomings).

Like Ward, Kornstein is in lockstep with current Shakespeare studies in its turn to presentism. Rather than investigating contemporary philosophy, however, Kornstein analyzes milestone figures and events from popular legal culture. Although impressively researched, Kornstein's book is burdened with these forced attempts to relate Shakespeare's texts to present day, or near present day, affairs—among them, Oliver Stone's film *JFK*, the Supreme Court decision in *Bowers v. Hardwick*,[46] the 14th Amendment, or the Senate Judiciary Committee. Kornstein does not buttress his attempts with many references to critical theorists or prominent figures of the cultural studies movement. His analyses seem desperate to demonstrate that Shakespeare is relevant to contemporary audiences. His interrogation of *Bowers* vis-à-vis Shakespeare leads to a sweeping conclusion that the "problem of law and morality is complex and divisive," that law "reflects and advances the prevailing moral values of society," and that "laws have a moral dimension, and judges are necessarily influenced by the spirit of the age."[47] Although these statements are probably true, they are also general to the point of counter-productivity. Generality notwithstanding, one might also criticize Kornstein for

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[43] Daniel J. Kornstein, Kill All the Lawyers?: Shakespeare's Legal Appeal (Princeton University Press, 1994).
[44] Id. at xiii-xiv.
[45] Id. at xiv.
[46] 478 U.S. 186 (1986).
[47] Kornstein, supra note 43, at 41.

trying to make Shakespeare sexier to contemporary audiences by relating the Bard to only the most exciting legal phenomena. Shakespeare's contemporary relevance would be better shown by exploring more mundane aspects of law—like fee tail and fee simple—that Shakespeare's texts clearly implicate.

If Kornstein cannot help but view Shakespeare through the lens of an early 21st century American lawyer, we should not indict him for it. After all, his views enable an examination of oft-overlooked aspects of Shakespeare's plays: statutes, trials, rights, duties, taxes, and so on. Kornstein also reveals a compelling synergy between law and literature even as he disclaims any sort of expertise and even as he purports to jettison politicized schema of race, gender, and identity:

> *I hope I—as a lawyer—am not simply projecting or adopting a strained, partial, single-minded interpretation. To be sure, it is a common observation that whoever writes about Shakespeare no doubt writes about him or herself. Lawyers, Marxists, Freudians, feminists, and others often yield to the temptation to put the role of their special interest above all else, and end up sifting through Shakespeare's plays in search of echoes of their own preoccupation. In the process, such readers often ignore a great deal of contrary evidence supporting a different notion of Shakespeare. They make the mistake of seeing both in the plays and in Shakespeare's own attitudes only those elements that accord with their wishes.*[48]

If anything, this quote recalls a phenomenon to which I have already referred: Shakespeare's constant "appropriability." That Kornstein acknowledges this phenomenon suggests that he is aware of the culture wars that so often mark Shakespeare studies. Kornstein's conclusions often seem general, but they are never unfounded. His presentist tactics demonstrate an awareness of contemporary Shakespeare studies while his rejection of race and gender theory reveals his disenchantment with those same contemporary Shakespeare studies.

The "Big" Picture

Lawyers *do* have something significant to offer Shakespeare studies, and law professors, especially those with literary training or a sustained familiarity with Shakespeare, are invaluable resources for literary scholars and can even be literary scholars in their own right. If we heeded the call of the Cade's Rebellion conspirators (*c.f., King Henry VI*) and killed all of the lawyers, we would, I suspect, miss out on some unique points of view. Worse, we might become careless in our scholarship, particularly when situating Shakespeare's plays in contemporary legal contexts.

As a case-in-point, consider Ayanna Thompson's essay "The Blackfaced Bard,"[49] which attends to various sites of audience reception of *Othello* productions performed in blackface. What sets Thompson's essay apart from other, similar essays is its turn to legal texts to investigate the ways in which judges codify, authorize, or manage codes of speech and performance by assessing audience interpolation. Thompson's abrupt transition to legal theory

[48] Id. at xiii.
[49] Ayanna Thompson, The Blackfaced Bard: Returning to Shakespeare or Leaving Him?, 27 Shakespeare Bulletin 437-456 (2009).

on blackface is both interesting and unusual. She seems to acknowledge that her move is problematic. She refers to "[t]hese seemingly disparate points of analysis"[50] and later declares that while "it may seem as if I have taken us far from the debate about blackface performances of *Othello*, I am interested in these recent legal findings because they offer a fascinating discussion about the tension between intention, practice, and reception."[51] Strangely, Thompson's recognition *of* a disjuncture seems to *alleviate* that disjuncture. On the other hand, the disjuncture is there, glaring and obtrusive. Thompson does a nice job—far better than most law students—briefing three cases: *Berger v. Battaglia*, *In re Ellender*, and *Locurto v. Giuliani*.[52] Her point about these cases is that judges weigh communal receptions of blackface more heavily than they weigh performers' intent in donning blackface. More to the point, judges privilege negative media attention over any factoring of authorial intent. The majority of practicing lawyers probably would prefer to see Thompson tease out the balancing test used to weigh certain First Amendment rights, but she glosses over that issue ("While debates about the balancing mechanism used to weigh the plaintiff's First Amendment rights against their ability to perform their public-service positions efficiently is a fascinating area of legal debate, I am more interested in the way this balancing mechanism privileges discussions of reception over intention").[53] Actually, she glosses over several legal issues, jumping from various federal circuit decisions to a Supreme Court decision in just three pages,[54] and from hate speech issues ("group libel" or "fighting words") about which entire books have been written, to related but still very different obscenity cases.[55] She also provides no counter-cases—cases with opposite holdings—which almost always exist and which often split the circuits. At the very least, she could have differentiated between content regulations, which limit the communication of specific ideas, and conduct regulations, which limit such things as the time, place, and manner in which speech is conveyed. Lawyers will no doubt appreciate Thompson's overarching theories, even if she does not adequately untangle the legal specificities on which they rely. She is at her best when arguing that "I do not believe that reception is static when it is 'collectivist,'" and that "[i]ntention, practice, and reception cannot be disentangled" because "they inform and challenge each other."[56] Here she takes on some fairly prominent legal thinkers in a critical way, but her efforts, unfortunately, are abortive and therefore merely beg the question. Had Thompson collaborated with a professor of constitutional law or an expert on the First Amendment, her article would have been extraordinary. As it is, her article leaves much to be desired—it is a perfect example of why interdisciplinary collaboration is valuable to academics, especially academics in disciplines traditionally classified under the rubric of the humanities. In the humanities, collaborative texts, or at least coauthored texts, are more the exception than the rule, unlike in scientific and economic disciplines—the so-called hard sciences—in which collaborative or coauthored texts are standard. I would venture to say that by resisting interdisciplinarity, conservative literary critics have allowed ideologues and fanatics to take over literary studies and to embarrass the literary profession by embracing Marxist and

[50] Id. at 440.
[51] Id. at 446.
[52] Id. at 445.
[53] Id. at 447.
[54] Id. at 446-448.
[55] Id. at 448.
[56] Id. at 449.

other like teachings that are obsolete or not taken seriously in other disciplines. The demise of literary studies may have something to do with this takeover. For who in his right mind would major in a discipline that celebrates teachings that have caused nothing but destruction in their practical application? Rather than avoiding law or economics, perhaps literature professors should avoid *bad* law and *bad* economics.

I can think of no other non-scientific field in which interdisciplinarity has been accomplished so smoothly as in law & literature. Shakespeare studies would benefit from a similar integration and diversification of information. Over time, so much has been written about Shakespeare that his works have become merely pretext for literary scholars to opine about more systemic problems and to negotiate any number of cultural challenges. This article itself uses Shakespeare as an entrance into other, broader issues. For various reasons, conservative literary critics decry this reallocation of time and energy, not least because they view the resulting criticism as belonging to practitioners of separate fields of study. Too often, though, their response is to divorce literature from the cultures and communities that shape it—to treat economics or law as beside the point. Economics and law are not beside the point. They inform literary studies and enable insightful readings of literary texts. What we need is an economic approach to literary criticism that will undo the damage of Marxist theory. Law & literature may be the most promising field for such an approach. Without unfixing the privilege of literature, law & literature scholars demonstrate literature's relevance and importance to society. The success of law & literature should inspire literary theorists to team up with experts from other fields—economics, law, political science—to produce criticism that incorporates knowledge and know-how from multiple perspectives. With the notable exception of Paul Cantor, a Shakespearean who has applied Austrian economic theory to literary texts, and Stephen Cox, who recently co-edited *Literature and the Economics of Liberty*[57] with Cantor, only a few literary scholars work out of non-Marxian economic paradigms. Conversely, few economists view Marxian economics favorably. It would therefore seem that economists would dismiss a great deal of materialist criticism in Shakespeare studies, if only because its analyses pivot on Marxism or quasi-Marxism and ignore the broad spectrum of alternate economic schools. The fact that Marxism remains the dominant mode of economic literary theory suggests that literature professors have become completely out of touch with scholarship in fields like politics, economics, and law. The fact that Marxist critics celebrate ideology critique as if their approaches were above and beyond ideology suggests a tunnel-vision and closed-mindedness that threaten the credibility of literary studies. Posner's argument that literature is irrelevant except as therapy will gain currency if literature professors do not reverse course and reconsider their treatment of economics. Law school deans and administrators would not permit studies that celebrated or employed theories that have lost standing nearly everywhere but in literature departments. That is one reason law & literature is flourishing.

If literature professors are going to treat political activism or economic theory as a starting point for their criticism, they must become apprised of the political economy of

[57] Paul A. Cantor and Stephen Cox, eds., Literature and the Economics of Liberty: Spontaneous Order in Culture (Ludwig Von Mises Institute, 2009).

thinkers beyond Marx, Althusser, Jameson, and the like, whose several ideas—which pervade materialist criticism—have not in practice helped the plight of the poor or disenfranchised in any apparent way. I know of few if any professors doing “Smithian” or “Misesian” or even “Keynesian”[58] interrogations of literary texts, even though these perspectives recall sounder and more consensus-based economic theories. Literature professors must deal with the possibility that literature itself is totally incompatible with the Marxist school of historiography. Reading, producing, and studying literature requires time, money, leisure, and luxury. The genealogy of literature is fraught just as the study of literature is fraught. To realize a utopian Marxian vision might require abandoning literature altogether. Is that the ends towards which materialist criticism aspires?

I would like to conclude by sharing, *in dicta*, my enthusiasm about interdisciplinary scholarship such as that which appears in law & literature journals. This kind of scholarship often rejects the single-author model, perhaps because there are too many journals and books for one person to read them all and to retain more than a superficial understanding of multiple areas of research. The future of the humanities may involve more joint-authorship ventures. The mass proliferation of literacy, knowledge, and texts has made a working familiarity with multiple and differing fields nearly impossible. For better or worse, the age of the Renaissance man is over. One individual cannot produce informed scholarship in several fields without the help of several others. Co-authorship is not a panacea for information overload. It may create new problems. Good writers with distinct voices might have their voices diluted by co-authors. And how is scholar A, a non-expert in field X, going to choose collaborators in field X without working in that field himself? How will scholar A judge the final efforts of his collaborators? These questions suggest that co-authorship is not the solution to various problems afflicting the humanities, although it is an option that could reverse leftist and Marxist trends.

If the aim of scholarship and the university is the pursuit of knowledge, then knowledge should not be stifled by monopolistic claims of ownership over ideas, historical figures, genres, or disciplines. Perhaps the time is ripe for a reevaluation of the university mission. As angst about the putative death of the humanities grows, humanities scholars might ask themselves whether they are writing themselves into extinction by undertaking projects on law, economics, science, and so on, without the cooperation of experts who work in those fields and who have devoted entire lifetimes to those critical paradigms. Likewise, professors of law, economics, science, and so on, should not grow defensive when humanities scholars point out the often fatal limitations of an experimental foray into texts to which humanities scholars have devoted entire lifetimes. We can no longer hide behind the security of disciplinary barriers. We must step outside of our comfort zones. Disciplinary impediments serve to restrain intellectual production by blocking channels of communication and by shutting down access to much-needed resources—most notably, experts in other fields. The future of law & literature in particular and perhaps the humanities in general depends upon the traversing of road blocks, the negotiation of conflicts, and, to once again mix metaphors, the substitution of certain players when other players become tired or winded or are simply out of their element. The

[58] I must emphatically register that I do not endorse Keynesian economics, but I use this example because it is more mainstream than Marxism.

humanities are probably not going to die any time soon. But they might find a new incarnation in professional schools where interdisciplinary and co-authorship are more commonplace, and where Marxism is not taken seriously.

Herbert Hoover: Laissez pas Faire

Matthew Dodson

In his book *The Challenge of Liberty,* Herbert Hoover wrote: "[t]rue Liberalism is found not in striving to spread bureaucracy, but in striving to set bounds to it," (Hoover); this was written rather ironically many years after he had gained the role of Secretary of Commerce in Harding's administration and became a "great bureaucrat." In fact, it is widely known that the "Secretaryship of Commerce rose under Hoover" and its "functions grew rapidly" (Hofstadter 378). This performative contradiction might be permitted if it was the only one that Hoover was guilty of, however, like many politicians, Hoover's words and actions differ almost as a matter of principle. One need only look as far as back George W. Bush to see the inconsistencies inherent in politicians; in his first inaugural address Bush promised to be "fair and fiscally responsible" (Bush) and he may now go down in history as "arguably… the least fiscally responsible [President] in history" (Task). An investigation of Herbert Hoover's true political ideology, because of his many inconsistencies, merits a close study spanning both his political works and his actions in and out of the Oval Office.

The fact that Hoover was not like some presidents (unwilling or unable to write books) allows any investigation into his ideology to proceed rather easily: one need only read what he wrote about such matters to see what he believed in, at least in theory. Chronologically, his first book was *Principles of Mining*, written in 1909. Whilst an instructional manuscript regarding mining may seem unrelated to the political ideology of the man in question, it is perhaps all the more important for not expressly being written for this purpose. Since his writing regarding politically incriminating things is certainly less subdued, *Principles of Mining* may be eschewing Hoover's true beliefs in matters that are irrelevant to the book – political ideologies, for instance – and what is read may be a closer approximation of what Hoover truly thought. One quote in particular merits a second look: "[t]he mining engineer is no longer the technician who concocts reports and blue prints. It is demanded of him that he devise the finance, construct and manage the works which he advises" (*Principles of Mining* 185). This first snapshot of Hoover seems to be far and away from the Hoover that historians so doggedly apply the term "laissez-faire" to. Instead of opposing this unprincipled increase in powers and responsibility, albeit of an engineer, Hoover embraces it. It becomes more plausible, therefore, to infer the increase in the power of the executive is not something that would conceivably bother him. This sole quote from a book on mining is not enough to indict Hoover as *laissez pas faire* ("not hands off") so perhaps this is the exception, not the rule.

Hoover's first book on political philosophy, *American Individualism*, was written in 1922 and describes the particular offshoot of individualism that Hoover claims he subscribes to: namely, 'American Individualism'. American Individualism, also called Progressive Individualism, is a mix of the "values of individualism" which area: "initiative…, the development of hand and intellect…, the high development of thought and spirituality" and a "fixed ideal" of "equality of opportunity". That Hoover believed himself as an American individualist cannot be questioned, as he stated in his book: "I am an American Individualist" (*American Individualism* 8). It seems that historians, particularly Hofstadter, are correct, for surely if one is any individualist, must not one also be *laissez faire*? Yet again, however, historical misconceptions reveal themselves to be just that. In his book, Hoover specifically states that American Individualism has "long since abandoned the laissez faire of the 18th Century" (*American Individualism* 10); this is almost in complete contradiction of Hofstadter who stated in no uncertain terms that Hoover was a "wild-eyed Utopian capitalist" (Hofstadter 383). That he was not laissez-faire is not to say that he supported socialism, in fact he speaks of the "ghastly failure of Russia" and "grim failure of Germany" explicitly, and correctly contrasts the socialist positions of these two countries with the individualism (even if it's individualism with conditions) of the United States. More proof is needed than a simple juxtaposition of socialism and individualism in order to close the case on Hoover's political ideology.

While long and often extremely technical, it stands to reason that the memoirs Herbert Hoover wrote would contain a great amount regarding his political ideology. Powerful and incriminating quotes can be gleaned from them even with only a superficial reading. For instance, in *The Memoirs of Herbert Hoover: Years of Adventure*, he proclaims that "the whole genius of American business, and even governmental administration, prescribed a single responsible executive with boards only in advisory, legislative or judicial functions" (*The Memoirs of Herbert Hoover: Years of Adventure* 240-241). In fact, an active government, especially the executive, is right in line with the Republican Party, which, before FDR, was the "party of government activism" with "strong presidential leadership or an aggressive presidential agenda" (Holcombe). Based on his memoirs, Hoover fits the bill fairly well as a candidate for the Republican Party, and the reckoning of him being *laissez faire* and non-interventionist is still quite popular today, even despite his nomination for the party that historically partnered with the progressive party.

While his works, especially if one judges them by their cover, protest to his classical liberalism, a deeper inspection would reveal many reservations he had; Hoover doubted that individualism could be "maintained as the foundation of a society" and that "individualism run riot…would provide a long category of inequalities, of tyrannies, dominations, and injustices" (*American Individualism* 8-10). This quote reveals an almost Hobbesian view of an unregulated free market or society: without the government to regulate, order, and temper individualism, there would be "survival of the fittest" State of Nature as a result.

The investigation having proceeded through the major works of Herbert Hoover, there appears to be sufficient evidence, on ideological grounds alone, to convict Hoover as not a supporter of the free market. Historians, however, may base their criteria for overarching labels on actions, not merely words; as one would expect Hoover's actions are the primary target of historical criticism. In fact, after Hoover ordered the Bonus Army routed, it was "fixed in the mind of Americans… that Hoover was cold and heartless" (Hartman). Despite conceding that Hoover had enacted some legislative measures that were anything but *laissez faire*, Hofstadter concludes that Hoover's had a "religious faith in the planless worlds of the free market" (Hofstadter 405). Given all the facts of this matter, it is more than safe to say that this conclusion is either uninformed or inspired by some bias against free market policies.

The question of whether or not he did have this belief in the free market many historians, including Hofstadter, assert he has, can ultimately only be decided by his actions.

While his aptitude for planning can be seen as early as his relief efforts in Europe during and following the First World War – "[w]ithout a man of Hoover's daring, declares Leuchtenburg, 'many thousands would have starved to death'" (Hartman) – this activity took place within the context of a war. No country had remained *laissez faire* for the whole of World War I and all had planned economies to some significant degree. His activities during the peacetime following the war would reveal his actual tendencies rather than actions undertaken merely out of necessity. Although it has already been established that Hoover expanded the Secretaryship of Commerce significantly, the various measures he enacted and his attitude in context of his position need to be looked at critically.

After accepting the Cabinet position of Secretary of Commerce, Hoover quickly recognized "the necessity for energetic government action" (Zieger 174). This government action, however, was more advisory and was completely voluntary (for the most part), and this was how Hoover was able to call himself "both a 'planner' and an 'anti-statist'" (Berkowitz and McQuaid 322). Yet, before the first half of the 19th century, this would not have been possible; most American would have been very wary of encroachments by the federal government into economic matters. For the first time, however, "the need to control economic fluctuations was probably the most important issue of domestic economic policy in the United States" (Metcalf 80). Finding himself in a position where he would have a measure of control in some economic matters, Hoover quickly took initiative and began to issue "'edicts that he had no authority to issue or that were forbidden by an act of Congress ... ordered all amateurs off the airwaves; empowered himself to issue licenses; and in contravention of both U.S. and international law ... assigned frequencies'" (Hartman). Although the illegality of these actions was determined through various lawsuits that emerged, the fact that he even tried to perpetrate these actions is revealing in and of itself and, while these actions certainly do indicate a level of power seizing behavior, they do not necessarily show that Hoover denied capitalism and its merits: other actions show these features of his thought much more clearly.

Explicitly denying "the ability of Adam Smith's model of independent competition to meet to meet twentieth century American problems" he showed his desire for government to not only go "beyond emergency relief measures and seek means of preventing unemployment" but also to ensure "'the better control of economic forces'" (Metcalf 61). Is it still plausible to believe that Hoover "had an ideological commitment to private, and local public, responsibility for solving social problems" although he spoke of a "need for 'a national planning of industry and commerce'" (Metcalf 68)?

While he was Secretary of Commerce it was still plausible that Hoover held this "commitment", and indeed it was reflected in his actions. He "rejected genuine federal government direction of economic activity", favored "voluntary trade associations" which he believed would be more responsible than individual firms, and only in a very few "extraordinary circumstances" allowed "private cooperative measures to superimpose collective decisions on individual business" (Metcalf 68-69). Besides his support of trade associations, most of what Hoover did was gather "[b]etter statistical information" and then give these statistics to the trade associations so that their decisions would be better informed and therefore reduce the severity of the business cycle (Metcalf 68). Still, these actions, which seem relatively hands off compared to the system in America today, were some of the first steps toward "the development of and dissemination of theoretical and statistical 'economic literacy'" (Metcalf 71); that it was regarded that the central government needed to step in and educate industry heads about prevailing economic conditions was an important viewpoint for the public to hold in order to allow further encroachments of the public into the private. Limited as he was by his position as Secretary of Commerce it is impossible to say what Hoover may have done given broader powers during this time. It seems, though, even at this time it would not have been *laissez faire*. Hoover's attempts at using federal powers for the sake of "economic stabilization" firmly established "the federal government's responsibility for managing the performance of the economy as a whole" (Metcalf 80).

Because it is primarily Hoover's presidency which most historians are critical of, and, coincidentally, where most of the allegations of his free market dogmatism stem from, this period should be looked at most closely of all. The belief that "Hoover's political philosophy caused him to take a cautious approach to the depression" is one so widely accepted that a challenge to it is almost automatically discredited (*The Americans* 684). Even Nobel Prize winner Paul Krugman falls somewhat into this trap when he stated, "the federal government tried to balance its budget in the face of a severe recession" with reference to Hoover and the Great Depression (Woods). Given the facts of the matter, however, it seems almost irresponsible to allow this misconception to continue; to quote Robert Murphy on this matter, "it would be difficult to render a more misleading account of Hoover's policies without actually lying" (Woods).

Any illusion left of a *laissez faire* Herbert Hoover vanishes as soon as an inquiry into his reaction to the stock market crash of "Black Thursday" and the subsequent depression is made. Hoover immediately called a "series of White House conferences with the leading financiers and industrialists of the country, to induce them to maintain wage rates and expand their investments" (*America's Great Depression* 210). These actions stemmed from a widely held belief that if wages were to drop then purchasing power, and therefore demand, would drop and this would further aggravate the depression. This proto-Keynesian explanation for depressions being caused by lack of demand had come into wide acceptance and many of the businesses which attended the various conferences abided by Hoover's advice, voluntary though it was. Besides Hoover's conferences the Federal Reserve was trying its hand, very much at Hoover's behest, at using cheap credit to stimulate the market: it "added almost $300 million to the reserves of the nation's banks… doubled its holdings of government securities, adding over $150 million to reserves, and it discounted about $200 million more for member banks… The Federal Reserve also promptly and sharply lowered its rediscount rate, from 6 percent at the beginning of the crash to 4.5 percent by mid-November" (*America's Great Depression* 214-215). Following his conferences "Hoover and Mellon also proposed to Congress an increase in the Federal Buildings program of over $400 million, and on December 3 the Department of Commerce established a Division of Public Construction to spur public works planning… [he] granted more subsidies to ship construction through the federal Shipping Board and asked for a further $175 million appropriation for public works" (*America's Great Depression* 216-217).

All of this action was merely the beginning. Continuing into 1930, Hoover signed the infamous Smoot-Hawley tariff, which created the second highest tariffs in American history and "initiated a violent implosion of world trade and prices" (Reynolds). On top of the economically irresponsible tariffs, the Federal Reserve continued to inflate the money supply, which lowered the interest rate "from 4.5 percent in February to 2 percent by the end of the year". On top of this, the "[t]otal government depredations on the private product" of the gross private product increased 2.1% and 2.5% of the net private product (*America's Great Depression* 240-255). Despite 1931 being "The Tragic Year", the most activity in the Hoover Administration can be seen in 1932. Perhaps most frightening was that Hoover "asked for a temporary tax increase" which ended up translating to a raise in the marginal income tax rate from "25% to 63% and [a] quadrupling the lowest tax rate from 1.1% to 4%" (Reynolds). On top of this, the burden of government as a percentage of both private net and gross product was increasing, the Reconstruction Finance Corporation was created and funded lavishly, the Emergency Relief and Construction Act of July 1932 was passed ("the nation's first Federal relief legislation"), the Glass-Steagall Act was passed, The Federal Home Loan Bank Act was passed, bankruptcy law reforms were enacted, and a Securities and Exchange Commission was proposed by Hoover (*America's Great Depression* 285-318).

None of these actions seem to indicate that Herbert Hoover held a *laissez faire* attitude at all; any look into the history of the Great Depression seems to attest against it, in fact. The only reasonable explanation, it seems, for why Hoover is mistakenly given the title of "*laissez faire* liberal" is that his interventions into the lives of Americans and the economy pale in comparison to Franklin Delano Roosevelt's. It does not help the matter in the slightest to have widely known economists like Anna Schwartz and Milton Friedman perpetuating the "myth that Herbert Hoover sat idly back and watched the Depression unfold" which, to the detriment of all "is continuing to drive misguided policies today" because they saw these unprecedented government interventions "failing… to pump enough money into the system" (Woods). It is ironic, then, that Hoover spoke about a "false liberalism" in his book *The Challenge to Liberty* ("Think of a book on such a subject, by such a man!" Albert Jay Nock once exclaimed), because in showing that false liberalism "interprets itself into government dictation, or operation of commerce, industry and agriculture" he has forever doomed himself to be labeled by the term he meant to apply to FDR (Herbert Hoover Denounces the New Deal). Murray Rothbard's conclusion of Herbert Hoover's administration is one which is uniquely concise, insightful, and fitting to finish with: "Hoover did not fail to employ promptly and vigorously his "modern" political principles, or the new "tools" provided him by "modern" economists. And, as a direct consequence, America was brought to her knees as never before. Yet, by an ironic twist of fate, the shambles that Hoover abandoned when he left office was attributed, by Democratic critics, to his devotion to the outworn tenets of laissez-faire" (*America's Great Depression* 207).

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On Liberty, Community Standards, and Porn

Kevin Duewel

Of all the fronts in the debate on individual liberty, pornography is among the most difficult to defend. It has little to offer in terms of social value, moral excellence, or industry. Nonetheless, the liberal tradition requires of us to distinguish between that which is *acceptable* and that which is *permissible,* and this distinction is center to the principle of liberalism – that society functions best when interests refrain from using policy as a means towards their own ends, especially at the expense of other interests. The following essay will defend the liberty of action, turn back the argument of community standards, and conclude by showing how U.S. legal precedent backs this view of liberty, community standards, and pornography.

"No one pretends that actions should be as free as opinions."[1] Plainly stated, this essay does not argue *all* pornography should be categorically permissible under the law. Pornography involving abuse, or that which involves minors not in the position to judge or consent, should be impermissible. This position is not arbitrary. Rather, it gets to a concept deep in the liberal tradition, known as the *harm principle.* John Stuart Mill is often associated with this concept, especially from his writings on it in *On Liberty.* Mill was not the originator of the concept nor was he the first to call it the harm principle. He was, however, the first to articulate the principle uniquely in the context of speech:

> *[O]ne very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control... The principle is, that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action [action, not just speech] of any of their number, is self-protection. The only purpose of which power can be rightly exercised over any member of a civilized community against his will, is to prevent harm to others.*[2]

In making sense of the *harm principle,* Richard Vernon writes that really there are two ways of reading Mill in *On Liberty.*[3] The first reading takes the *harm principle* as a standard for justice – that compulsion of the individual should be prevented in all cases, except for those that cause direct harm to another. The second reading, on the other hand, argues that the principle is a limit only to the capacity of the community to require the individual to do what is in their individual interest – not to the capacity of the community to prevent action or speech that has ramifications on the interests of others.

The first reading takes the classical liberal position in understanding Mill. It recognizes that if the object of individual liberty in the benefit of the individual and community, then the role of the community should be a limited one – namely the protection of one from the harm of another. Mill, though not considered a mainstay of the classical liberal tradition, did write that

1 John Stuart Mill, *The Basic Writings of John Stuart Mill: On Liberty, the Subjection of Women & Utilitarianism* (New York: Modern Library, 2002).
2 Mill, *On Liberty*, 11.
3 Richard Vernon, "John Stuart Mill and Pornography: Beyond the Harm Principle" *Ethics* Vol. 106 (April 1996): 625.

individual liberty should be retained so long as the individual "refrains from molesting others in what concerns them" – the *liberal principle* – and that for the same reason opinion and speech should be free, the carrying of opinions into practice should also be free.[4] That which justifies the freedom of opinion justifies the freedom of action, so long as the opinion or speech does not obstruct others in their pursuits.

The second reading takes the social liberal position on Mill. It accepts the importance of individual liberty to society, but follows the reasoning of *democratic speech*, which can be explained as follows: Political speech – the expression of political views or opinions with political ramifications – is protected as a fundamental part of the democratic process; however, such speech that is clearly not of social value or of political consequence is not protected. Proponents of this reading point out the passage: “those interests [utility in the largest sense, grounded on the permanent interests of man as a progressive being] … authorize the subjection of the individual spontaneity to external control, only in respect to those actions of each, which concern the interests of other people.”[5] The implication they draw is that the liberal respect for mankind does in fact permit interference in the spontaneity of the individual so long as it concerns others

Both readings present legitimate perspectives on the issue, however, when it comes to what Mill intended, the social liberal reading falls short. Firstly, in putting such a premium on the democratic process over rights, it assumes democratic speech overshadows other liberties. Secondly, it interprets Mill as offering “not a negative freedom of expression but a positive freedom to discuss”.[6] On the first count – its premium for democratic processes over rights – Mill does not see the right of the people to grant government, or those among them, the power to assume the interests of the country, even if the government could theoretically represent individually the current interests of every member of the community. Mill writes “that the government is entirely one with the people,” but he denied “the right of the people to exercise such coercion, either by themselves or by their government.”[7] On the second count, one need only to look to the first page of *On Liberty* to see how wrong a “positive liberty to discuss” reading is: “The subject of this Essay is not the so-called Liberty of the Will, so unfortunately opposed to the misnamed doctrine of the Philosophical Necessity; but Civil, or Social Liberty: the nature and limits of the power which can be legitimately exercised over the individual.”[8] As Mill writes, the subject of *On Liberty* is not the Liberty of the Will, or the positive liberty of political speech, but Civil Liberty, and the just limitations government can place on that negative liberty.

Now equipped with the Mill and the *harm principle,* the remainder of this essay will shift back focus to the pornography issue, and then shift to how U.S. legal precedent supports this position. Pornography strikes a nerve in liberal thought – normally quick to the draw, many classical liberals find it one of those difficult issues, especially when “the majority of [the U.S. and U.K.] would prefer (so it seems) substantial censorship if not outright prohibition … and

4 Mill, *On Liberty*, 58.
5 Mill, On Liberty, 13.
6 Vernon, “John Stuart Mill and Pornography”, 625.
7 Mill, *On Liberty*, 18.
8 Mill, *On Liberty*, 3.

[when] this majority includes a considerable number of those who are themselves consumers of whatever pornography"[9].

The proponents of a community standards for "sexually explicit books, magazines, photographs, and films" ask "If we [can] assume that the majority is correct, and the people who publish and consume pornography do the wrong thing" then why should we permit it? Opponents of community standards, those permissive of pornography, object to the assumptions of the community standard advocates. Opponents of the community standard stress that the majority is in fact not always correct, the belief that people prefer community standards, and the assumption that "we do not have any good reason to believe that any of the pornography we are now considering in fact does make a positive and valuable contribution to the free exchange of ideas about human flourishing,"[10] as examples of the fault of the community standard, even if the assumptions above appear level-headed. A liberal will take issue not with whether pornography is just or not, but rather with, as Mill writes, " … the peculiar evil of silencing the expression of an opinion [that] is robbing the human race, posterity as well as the existing generation – those who dissent from the opinion still more than those who hold it."[11] The vice is the social coercion of banning degenerate or explicit material, not in the profiting or enjoyment of it, or at least in the opinion of this paper, and in the opinion of John Stuart Mill. In his words, "Mankind are greater gainers by suffering each other to live as seems good to themselves than by compelling each to live as seems good to the rest"[12] – not greater gainers by coercing dissidents to adhere to commonly held views, even among those who perpetrate the act. One objection levied against this permissive interpretation of negative liberty is that "Mill also speaks of 'free discussion,' 'freedom of opinion,' and 'liberty of the press.' Nowhere does he speak of freedom of expression, and he uses the word 'expression' only in the phrase 'expression of opinion."[13] This however is no matter in reading Mill's *On Liberty.* As I cited above in the classical liberal interpretation of Mill, he includes, of course, the "liberty of action" in the "appropriate region of human liberty". Mill writes that "[the appropriate region of human liberty] compromises, first … absolute freedom of opinion and sentiment on all subjects … secondly, the principle requires liberty of tastes and pursuits … of doing what we like, subject to such consequences as may follow …"[14]

Both the permissive side and the community standard side can be said to derive their weight from the thought of Mill – however, the permissive side adheres more strictly to Mill's principles. It deserves not that community standards are, in fact, best argued in conjunction with the social liberal reading of the *harm principle*. Community standard advocates argue "[that] the harm condition is in itself no help in considering the problem of pornography, because opponents of pornography argue, with some force, that free traffic in obscenity does damage the general cultural environment."[15] Mill wrote that "to justify that, the conduct from

9 Ronald Dworkin, "Is There a Right to Pornography?" *Oxford Journal of Legal Studies* Vol. 1 (Summer 1981: 177.
10 Dworkin, "Is There a Right to Pornography?", 181.
11 Mill, *On Liberty*, 18-19.
12 Mill, *On Liberty*, 14-15.
13 Vernon, "John Stuart Mill and Pornography", 622.
14 Mill, *On Liberty*, 14.
15 Dworkin, "Is There a Right to Pornography?", 178.

which it is desired to deter him must be calculated to produce evil to someone else."[16] Community standard advocates rightly point out this allowance. However, they gravely misread what "calculated to produce evil to someone else" means. Calculation is not stipulation, nor is harm as an ambiguity to an unspecific victim "to someone else" in the context of liberty. Once again, it is the stipulations and assumptions of the opponents of negative liberty that disqualify their opposition. Proponents of the standard repetitively ask to "*suppose* it is discovered that the private consumption of pornography does in fact" cause marked increases in violent crime, or "*suppose* that private consumption has some special and deleterious effect on the general economy"[17] in order to justify the violation of the Harm principle in the *On Liberty* thesis. This reasoning falls on the same lines as the social liberal reading did: "the particular evil" of assumptive judgment in community standards is that "it is robbing … those who dissent from the opinion [the opponents of pornography] still more than those who hold it [the producers and consumers of pornography]."

Having done away with the social liberal reading of *On Liberty,* and having shown that the permissive view of pornography is more consistent than the advocacy of community standards with the classical liberal reading, this paper will be concluded with reasoning from legal precedent to show that legal precedent supports the permissibility of pornography. The evidence for this comes from *Roth v. United States* (1957) and its overturning in *American Booksellers v. Hudnut* (1985) in the 7th Circuit.

Roth v. United States supported, for a time, the social liberal interpretation on the liberty of action, based on the concept of community standard. The ruling in *Roth v. United States* defined pornography as unprotected speech if " … whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."[18] *Roth v. United States* determined political speech to be so expedient to the democratic process that it overrode the protection of that speech "utterly without redeeming social importance". Political speech was deemed so important, and pornography so demeaning, that, in the words of Ronald Dworkin:

Perhaps a society dulled by conformity in matters of sexual practice and expression would become a society in which more liberal attitudes are less likely to find a voice or a hearing in politics. But a society weakened by permissiveness is correspondingly a society less likely to attend the advantages of a public and publicly enforced morality.[19]

Besides being wrong, the assumption that "Someone who appeals to the right of moral independence in order to justify a permissive legal regime of obscenity does not suppose that the community will be better off in the long run,"[20] stipulates that civil liberties, if inconsistent with *assumed* realities, are inconsistent with human liberty. If the basis of liberalism is the conviction that a free community will be better off in the long run, then the basis of democratic speech is that a free community isn't always better off in the long run – a view wholly

16 Mill, *On Liberty*, 12.
17 Dworkin, "Is There a Right to Pornography?", 195.
18 *Roth v. United States*, 354 U.S. 476 (1957), 488-489.
19 Dworkin, "Is There a Right to Pornography?", 189.
20 Dworkin, "Is There a Right to Pornography?", 195.

incompatible with the liberal tradition, but held by adherents of social liberalism nonetheless.

If the Supreme Court ruling in *Roth v. United States* was based on a democratic speech reading, *American Booksellers v. Hudnut* (1985) represents a return to the preferred classical liberal reading. The *American Booksellers v. Hudnut* case concerns itself over an ordinance in Indianapolis that banned any pornography that subordinated the status of women, or differentially harm them. Previously, the court held that this ordinance labeled pornography as something other than 'obscenity', which had previously been ruled by *Roth v. United States*, to not be protected as political speech. The court in *American Booksellers v. Hudnut* recognized that bigotry and hate in some pornography was illicit; however, " … this simply demonstrates the power of pornography as speech."[21] This reasoning for the protection of pornography as political speech held that "truth will prevail...but the Constitution does not make the dominance of truth a necessary condition for the freedom of speech," giving credit from legal precedent to the permissibility of pornography as political speech.

Whether or not this essay has been convincing in showing the precedence of the more permissive classical liberal reading over the social liberal reading on the liberty of action, it should at least have sufficiently presented a basis for understanding the empirical case for permitting presumptively degrading behavior like pornography, even if "without redeeming social importance". While the circulation of "pictures of genitals to the public at large" may not be the most refined of human expression, the beauty of the liberal tradition is that it does permit "different experiments of living", as long as, to borrow from Mill, "mankind are imperfect".

21 *American Booksellers v. Hudnut,* 771 F.2d 323 (7th Cir. 1985), aff'd mem., 475 US 1001.

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Libertarian Theories of Natural Rights from the Need for Government Protection to Anarchism

Stacy Litz

There comes a time when every explorer of political philosophy reaches the vast field of natural rights theory, which is more accurately described as a battlefield more than almost any other theoretic topic. Since its territories are constantly being claimed or re-claimed by new or old ideas, its boundaries are always shifting, and philosophical strongholds are being constructed and deconstructed at a pace faster than almost any other realm of thought. Generally, natural rights are described as being acquired from birth and that no agent should be able to take them away. The view on natural rights that is often used by many libertarians in academia is typically defined as of the "negative" persuasion, meaning they permit or obligate inaction, and require no use of force to achieve. However, members of other schools of thought argue that these rights should at least be protected by some form of governing power. Natural rights tend to include the basis of the principles of freedom, self-ownership, property, and the non-aggression principle, and this theory is held in high regard by philosophers of the libertarian spectrum containing both limited government and anarchist thinkers. This essay aims to define a few different theories on natural rights in the libertarian school of thought, and not necessarily create any debates or defensive arguments for any particular side. From past philosophers such as John Locke to modern day philosophers such as Roderick Long, it is important to keep in mind that natural rights and general rights theories are highly contested by many past and present thinkers, and comparing and contrasting ideas in an open forum is highly advised for further discussion.

To start, generally, theories on natural rights tend to take into account that certain rights are inalienable, above any form of law, typically based on morals and based on the individual. When these rights are compared to those that have become associated with modern and international human rights documents, there is a radical difference. These rights theories may call for positive rights to be enforced, which are rights that permit or oblige action. They tend to require the use of force through government to enforce, and can be seen in areas that require taxation to provide services such as public education, health care, and a military. There are many modern philosophers who discuss the theories of natural rights, but the idea has been around since the Stoics of the 3rd century BC, who determined that no one was a slave by their own nature. These ideas of natural rights began to develop to include self-ownership and use of force, which was furthered by the monk Martin Luther during the Reformation. The theories of natural rights began to flourish during the Age of Enlightenment, when natural law theory questioned the "divine right of kings," that states a monarch's right to rule is derived directly from God, which means it cannot be questioned for injustice, especially by that of the people. Eventually, natural law had become the justification for rebellion against social contract, positive law and government.

John Locke was one of the first to record natural rights theories in his major works and he has become one of the best-known philosophers of this theory. He argued that the natural rights of "life, liberty and property" could not be surrendered in social contract. Social contract theory is the notion that people give up sovereignty to a government in order to receive social order through the rule of law. The ownership of property, according to Locke, was determined by the application of labor and could be interpreted in a broad sense to include human interests and aspirations, or narrowly as a material good, not just land. Also, Locke believed that human nature is determined by reason and tolerance as well as individualism, which stresses seeking one's own self-interest, independence and self-reliance. Locke, however, advocated for a general government or civil society, to protect one's natural rights, which other libertarian philosophers would come to demonize and consider a contradiction regarding natural rights theory.

According to anarchist philosopher Roderick Long's article *Libertarian Anarchism: Responses to Ten Objections*, Locke includes three contradictions to liberty in his theories. First, Locke believed that even though the general population understands natural law, there would be questioning on the fine details, therefore, unless there is a general body of law, society will not be able to function. Secondly, without a government, there would be no enforcing abilities, and individuals are too weak and disorganized on their own. Lastly, Locke did not believe that people could be judges in their own case, so a government is needed as a third party. Long points out that even under government, people subscribe to different interpretations of justice. Government ends up creating laws that are not restrained by market demand. Long predicts that in an anarchy, or no government, there certainly can be a third judge party, people could take turns being judges, rather than with a government where there is only one kind of judge that you may even end up disputing. Finally, he questions who would be the final arbiter if you wished to go on to sue the Supreme Court, as an example. The idea of Locke's property philosophy can be continued to be discussed in great detail by many more libertarian philosophers, for both supportive and criticized means. Locke's theory on property is popular in debates, which consists of the notion that if land is in its original state it is considered unowned until labor is exerted upon it. One cannot simply put up a fence and claim all the land he wants -- some effort must be placed on the land. Murray Rothbard, an individualist anarchist and economist, states,

> *If Columbus lands on a new continent is it legitimate for him to proclaim all the new continent his own, or even that sector 'as far as his eye can see'? Clearly, this would not be the case in the free society that we are postulating. Columbus or Crusoe would have to use the land, to 'cultivate' it in some way . . . . If there is more land than can be used by a limited labor supply, then the unused land must simply remain unowned . . . Any attempt to claim a new resource that someone does not use would have to be considered invasive of the property right of whoever the first user will turn out to be (Man, Economy, State).*

Rothbard explains that one cannot just point out what land they desire and call it their own – and that labor must be used in some way to be considered one's property. Locke's similar views have been coined as "the principle of first appropriation" or "the homestead principle."

Other philosophers have their own opinions on Locke's property, and Benjamin Tucker, an anarchist philosopher, argues, "In the case of land, or any other material, the supply of which is so limited that all cannot hold it in unlimited quantities." Basically, property is only to be considered owned when being used or occupied by a person, similar to that of Rothbard's beliefs. Lysander Spooner, another anarchist philosopher, also points out in his piece *How Is the Right of Property Acquired*, "The only way in which the wealth of nature can be made useful to mankind is by their taking possession of it individually and thus making it private property."

Natural rights have been come to be defined as found within "life, liberty and property," as coined by Locke, which has been worked into the Declaration of Independence of the United States as "life, liberty and pursuit of happiness." The two terms "property" and "pursuit of happiness" in natural rights theory have been anything but interchangeable, especially in legal terms. For example, if a law bans gay marriage, it can be argued that happiness is barred – and also property is completely devalued – both the concepts of self-ownership and wealth in the form of tax incentives for marriage. Happiness, also, is a vague term, and for example, if robbing and murdering makes a person happy, should they be allowed to act in such a manner? But besides America, other countries also have history with natural rights theory. The mottos of other countries, including France' "liberté, égalité, fraternité" (liberty, equality, fraternity), Australia's "life, liberty and prosperity" and Canada's "peace, order and good government" are comparable to the United States' tripartite, but again, the word property is substituted for a word that can be vaguely interpreted and easily corrupted by other positive rights theories.

There are quite a few other examples of philosophies of natural law that have progressed from Locke's ideas as a base ideology. One example can be found written by the before-mentioned philosopher of natural rights, Lysander Spooner, who wrote a Treatise on Natural Law. Spooner argues that natural law is learned by children at very early age, simply by being taught to not hurt anyone or not to steal or deface other's property. He continues with this idea,

> *Men living in contact with each other, and having intercourse together, cannot avoid learning natural law to a very great extent, even if they would. The dealing of men with men, their separate possessions and their individual wants, and the disposition of every man to demand, and insist upon, whatever he believes to be his due, and to resent and resist all invasions of what he believes to be his rights, are continually forcing upon their minds the questions, 'Is this act just? Or is it unjust? Is this thing mine? Or is it his?'*

Spooner believes that humans, while alike in many ways, are still very individual from one another and wish to have some sort of separation along with their own wants and needs, which can be materialized into a theory of natural rights by asking questions of morality and property.

Spooner handles the idea of dealing with positive rights by stating that men have moral duties to fellow man such as feeding the hungry or sheltering the homeless, but each man then has the ability to be his own judge and decide whether or not he can or how far he will enact on them. As mentioned, Spooner believes that men feel the need to question what is just and unjust and typically develop some sense of morality on their own through simple human interactions, which will then spur on such action. If moral needs become so elevated in a certain situation, others may also *compel* an individual to perform, but may not *force* him.

Spooner offers the logic that the only way to protect natural rights and not infringe on those of others is through entirely voluntary associations. Completely contradictory to voluntary associations is that of government, and Spooner compares it to "bands of robbers," who could only obtain what they wanted by creating laws that had the possibility of enslaving fellow men and treating them like property -- a direct violation of his rights theory. Spooner approves of the concept that one must understand there is property in one's own person before obtaining other properties and land, along with that of many other natural rights theorists.

Spooner was not the only philosopher who questioned government's role in natural rights theory. Robert LeFevre, primary theorist of autarchism or self-rule, believed that natural law is above the law of the state and that in order for American society to prosper economically, there is a need for a free market. Tying his beliefs into Spooner's, he supported the idea that government is simply a group of "criminals" that steal property, restrict freedom and endanger lives under a false rationale of protection. From his book, the Philosophy of Ownership, he states, "No man can give away something he does not first own. It is only when his authority and responsibility in ownership are fully seen that he can truly give." LeFevre also makes strong criticisms of the history human rights documents in history concerning equality by stating, "Let me grant that our forebears, while stating a universal declaration of human rights, omitted the black and the Indian from consideration. Blacks and Indians were defined at that time as 'less' than human. Therefore, they were viewed as creatures of which the concept of universal rights did not apply." Natural rights must apply to all human beings and government, by picking and choosing whose natural rights to protect, is creating inequality and taking away certain aspects of one's individual liberty.

Self-ownership, being such a key component of natural rights theory, is discussed even further in the book For a New Liberty by Murray Rothbard. Throughout the book, he discusses the idea of self-ownership as one of the main indicators of natural rights, although he asserts a strict dichotomy that one either has self-ownership or someone else controls your life. Defining self-ownership as the sovereignty of the individual and that each person is the exclusive controller of his own body and life, Rothbard mentions that denying a man the right to own his own person creates a class system. As a basic example, class A will have the right to own class B. Since they are both human beings, this creates obvious difficulty in creating a "subhuman level" of any certain individual. Class A is allowed to exploit and live parasitically at the expense of the latter, but this violates a basic economic requirement for life: production and exchange within a free market. Rothbard also mentions communism as a specific natural rights violation, and holding that the idea of every man having the right to an equal quota of everyone else is absurd. He asks, "If one does not believe in self-ownership, but is allowed to own a part of every other individual, how could they ever make a decision without consulting every other human being?"

Coming from Locke's concept of "life, liberty and property," many argue that these rights must be achieved in that order. First, "life" is defined as an individual, living person, not a fictional character or entity, which causes philosopher Tom Ender to argue that the government often times is given "rights" that include powers that no individual person is allowed to possess, explaining,

> *Most people would not defend the idea that fictional characters or imaginary friends have rights in any normal sense. They do not possess life and cannot possess rights . . . . The State is not an individual reasoning being, nor a moral agent. It is an artificial construct, at most a concept existing in the minds of people in a society. The State commonly refers to a select group of people acting in a special capacity, but not any single person who might possess life and therefore rights.*

Thus, “liberty” and “property” are affected by this -- which is why "life" must come first in the series --- because without life, or self-ownership, there can be no other rights. Considering the state owns most, if not all property, mainly because life and liberty are also controlled, it is hard to determine any sense of these natural rights with the existence of a government. To summarize Ender’s views, because the government is treated as if it is a living entity, certain powers are often abused more often than if they were carried about by the same people, just not under the guise of such a structure. Handing the protection of natural rights over to the government, therefore, can be considered detrimental to the purpose of them only belonging to *living* entities, and can end up causing a conflict in their rationale.

There are many philosophers that argue that if rights exist then they must be legally binding and established in law. This idea can contradict Locke’s belief that government should only protect natural rights by form of justice system and that of potentially revoking government if it ends up trampling on said rights. Strongly contested in philosophical debate against Locke, philosopher Thomas Hobbes’ account of natural rights has been critiqued as confusing *rights* with *abilities*; human beings have the *ability* to seek only their own happiness and follow their nature in the same way as animals, but this does not imply that they have a *right* to do so – for if one infringed on another’s natural rights, Locke’s idea of a justice system would help to prevent such an occurrence from happening, while Hobbes believes that the strong need to act on one’s abilities is so strong that government is required for control. Both Locke and Hobbes advocate for a social contract, so this is where they are similar, but Locke believes that men have rights by nature and government should only exist for protection of these rights, while Hobbes argues that one has conceded their rights to the government in return for their life.

Natural rights theories are often cherished by libertarians and the discipline’s philosophical thinkers, causing the theory to have grown to even encompass many anarchist viewpoints since Locke’s development in the late 1600s. Locke’s views on “life, liberty and property” have been discussed in much further detail with each component being defined as well as the order of these rights being an important factor to their meaning. Whether the concept of natural rights is seen as best being protected by government or not, the concept is still discussed by a wide range of libertarian thinkers and open for debate to this day.

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Democracy and universal suffrage: a necessary evil?

Vincenzo Alfano

Introduction

Today, the concept of democracy seems inextricably linked with that of universal suffrage. But is it true? To let that anyone with a given age has the right to vote is a very good democratic practice, or would prefer to question the criteria for access to this right, perhaps to develop new systems? The current crisis of democracy in the Western world is symptomatic of a detriment of the political consciousness of the people? And yet it is very likely to be admissible and that only from the mass, the large numbers, rises the better choices? In this paper I try to answer these questions, drawing from personal opinions and thoughts, which I hope will inspire questions and curiosity in those who, like me, believes that any system is always perfectible, and that its aim should be to that perfection, without fear of asking uncomfortable questions.

Personally, in fact, I can accept democracy as "the worst form of government except all the others that have been tried", to quote a famous statement by Winston Churchill. But not for that I give up, and I try other ways. Ways that are more satisfying, more fair and keep us away from the horrors that only an angry mob can do.

What is democracy?

Democracy is a fleeting concept, and difficult to define. This word, indeed, hides a variety of levels for opinions, ideas so different from each other. Historically, in the embryo of the representative system that was the Athenian democracy, too often quoted in error, only one charge was out of the urn: the strategist or military magistrate. The other charges were determined by chance, the so-called τό αυτόματον (to automaton, the case), through a sort of heads or tails made with a broad bean[1].

The term democracy is still ambiguous since its birth in the fifth-sixth century BC. In fact, the word δῆμος (demos, people) lent itself to multiple interpretations. For the Greeks it could mean πλῆθος (plethos, or the entire body of citizens), οἱ πολλοί (hoi polloi, that is, an undefined "many"), οἱ πολλονές (hoi pollones, ie, more), or ὄχλος (ochlos, ie the crowd)[2]. However, leaving aside for a moment this semantic problem (which is not so negligible as it is to decide who should exercise the power) as the real power belongs to those who exercise, how can the people not well defined, which is the owner of law, being awarded the right and power to exercise it? We know that the solution found by modern is representative democracy, or a representative transmission of the power.

But there is a big difference between the ancient democracy, and the so-called modern democracy: the first was in fact (at least in part) a direct exercise of power, the second is a way to limit it. The polis and the medieval communes had a short and turbulent life, but their political life resolved into a democracy without a state, in small towns established in a

1 Compare Mario Ajello, *Storie di voto*, Donzelli editore, 2006, page 13.
2 Compare Giovanni Sartori, *La democrazia in trenta lezioni*, Mondadori, 2008, pages 5-6.

community. In Athens lived up to 35,000 people, and amongst them participated in meetings a minimum of 2,000 to a maximum of 5,000 people, according to our estimates. Only some of the decisions were actually taken by acclamation, and in any event, as well as it grown, the polis perished miserably, the intrinsic failure and inability to survive the expansion of space which established it and made it possible. When the term democracy emerged, after it was also vehemently rejected until the nineteenth century (remember a book written by Kant, who in 1795 criticized those who "had begun to confuse the republican constitution with the democratic one" noting that "the form democracy is necessarily a despotism"[3]), is in order to describe a totally different reality: our democracies are liberal-democracies, rich in mediation: the democracy of the ancient mind was a zero sum game, that translates into modern positive-sum decisions[4] . In fact, if direct democracy of Athens were citizens (and as seen on the definition of citizens would be discussed, as that of the ancient Greeks had a long way from today, and not meant at all "the people" as we understand it today) to discuss and decide on at least some of the questions in the modern liberal democracy that is applied to the city, in a system that provides for the state (a concept that arises only in the fifteenth century with Machiavelli, and which has a long and troubled history, reaching affirm itself only in the nineteenth century[5]) and therefore has an area of infinitely greater and infinitely more complex problems, is to choose its representatives, acting on the issues.

In today's West, the word democracy seems to have now acquired the meaning which at least has the advantage of being more precise, of "majority rule". Indeed, in general, majority voting is seen as the means by which the people govern. Whether directly, even if minimally, such as choosing between different alternatives in a referendum, which most often indirectly, by choosing from time to time between the different candidates in an election. Despite this, however, even this simple definition has many problems[6].

However, in conclusion, the non-semantic meaning and the difficulty (or perhaps impossibility?) in the real world to find a "real" democracy, have already been devoted to words and ink, and from very eminent scholars and intellectuals more qualified than me. Anyway, just because it is difficult to define precisely, democracy becomes a difficult concept to evaluate and criticize.

Representative democracy in fact does not qualify as a government of knowledge, but as a government of opinion, based on a common sentiment in the *res publica*. Representative democracy would be enough so that public opinion of the public. But, as noted in *Homo Videns* by Giovanni Sartori, this is not always true, as "the videocracy[7] is manufacturing a massively

3 Compare Immanuel Kant, Zum ewigen Frieden, 1795

4 Compare Giovanni Sartori, *La democrazia in trenta lezioni*, Mondadori, 2008, pages 43-46.

5 Compare Giovanni Sartori, *La democrazia in trenta lezioni*, Mondadori, 2008, page 44.

6 That things are not so simple is shown by the paradox of the 2000 election, in which a country like the United States, which is considered the most democratic in the world, elected to the presidency a candidate like George W. Bush, who had received a number of votes less than his opponent Al Gore.

7 According to Sartori, in our society now reigns sovereign primacy of the image: the visible prevails on intelligible, and the ability to abstract, to understand and therefore to distinguish between true and false is now atrophied. According to the eminent political scientist, this chilling reality has a unique and seemingly unexpected creator: television. It destroys more knowledge than it produces. And destroys even the human symbolic capacity, the process by which humans communicate articulating sounds and signs of "significant", and getting closer to the animal. This is not progress, but just the

hetero-directed review that apparently reinforces, but essentially empty, democracy as a government review"[8]. Or again, as Herstgaard says: "Opinion polls reign. Five hundred Americans are constantly being interviewed to tell us, that is two hundred and fifty million other Americans, what we think."

But at least you could agree that representative democracy aims to elect representatives as those that are most acceptable to the mass of the population. The systems with which the liberal-democracy elects representatives (ie the electoral laws) and the concept of mass of the population (ie the elect), change from place to place, from a system to another and, occasionally, from an age to another.

How does the democratic process work?

The approval of the mass is, as manner of speaking, a *leitmotif* of democracy. But are we really sure that this is the best way to give shape to the executive and the legislative power? We are very confident that a democratic power of the people, by δῆμος (demos, people) and κράτος (cratos, power) is not even preferable an aristocrat best of the best power from άριστος (aristos, the better) and κράτος (cratos, power)?

However, beyond such bold assumptions and the simple rhetorical questions, that democracy is certainly a delicate machine, a complex process that needs to run an infinite number of conditions: active citizenship, freedom of information, awareness of the importance of their vote and trust in institutions, to begin with. And even after free and transparent elections. Nowadays it seems that the major Western powers, where our concept of democracy is widely accepted, it has totally forgotten this lesson. So much so that never in recent years, our democratic system is experiencing an identity crisis, and suffering increasingly heavy bordered by theorists of new systems, that image will return to direct democracy through the power of new technologies, or the advent of technocracy. Anyway, in those states where the crisis is being felt, far from trying to solve it within itself, the democratic system tries to transplant to other countries, like an urn itself was enough to make a democratic state and a legitimate government. Maybe it calms the conscience to believe that our system should be exported, and relieves us from concerns about the perfectibility and that more and more we crawl inside (after all if you need to export it, implicitly means that the better).

Democracy is a long journey, complicated and full of pain and defeats. A system to succeed and to work needs to be heard, and to be desired. It needs people ready to fight to defend it. How can you pretend to take it and plant it in a country with a different culture? Above all, is it really feasible and desirable?

In modern Western democracies, the executive power is held by the body which guides the country toward a government program under which it was elected. It's clear that there is

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opposite. Professor says: "Knowing imaging is not democratic, as many say knowing through images-culture does not spread, it erodes the foundations. Television homogenizes the customs and fashions, but at the same time, it locked up in small villages in conflict. The amount crushing more and more quality. And for a moment if we delude ourselves to be free citizens in a free market, we have perhaps forgotten that we are not TV customers, but companies who buy space advertising".

8 Compare Giovanni Sartori, *Homo Videns*, Editori Laterza, 1997, page 46.

not a best program, and that different ideologies and different ideas are equally valuable and potentially, at least theoretically, right. But simplifying the ability and opportunity to practice a policy of right or left, would be better to choose the best representatives of all ideologies? Among those who can implement a program feasible, viable and to carry forward the country (or at least not send it to hell)? Among the most able candidates?

Similarly, the legislative power is given to the organ in charge of legislating to create laws. Wouldn't it be better in this role were to be elected the best, the more prepared and more able to create more useful policies for the community? It's clear that if these rhetorical questions were posed to anyone, the answer would be positive. But it is equally clear that an objection immediately arises: who does determines who are the bests? Through what criteria?

A brief history of universal suffrage

The principle of universal suffrage is related to the ideas of the general will and political representation brought by Jean-Jacques Rousseau (1712 - 1778) in 1762 in his work *The Social Contract*. Based on these principles, we draw our assumption according to which political representation is standing in its own free will. The citizens in modern democratic states are the basis of the political system and universal suffrage is the elected legislative body of a State in the presidential republics, this is also for the election of the Head of State. The principle of universal male suffrage was introduced for the first time in the United States of America from their independence in 1776, but it was fully applied, however, with various restrictions based on wealth and education, only in 1966 by two judgments of the Court Supreme. It is generally considered the date of 1893, in which New Zealand introduced universal suffrage, and male and female, as the first state in the world. In France in 1792, after the French Revolution, the Government introduced universal suffrage, but only for a short period of time. Only since 1946 in fact universal suffrage will be effective and stable. Europe moved in this direction during the nineteenth century: from a restricted suffrage - for the most part attributed to a portion of the population census or on the basis of education - passed gradually to universal suffrage. And throughout the nineteenth century the issue of universal suffrage will debated by various intellectuals, lined up on opposite sides. Alexis de Tocqueville (1805 - 1859), moderate aristocrat, though elected with a landslide victory (110,704 votes out of 120000) was very critical towards this issue, stating in his memoirs that "there have been more ferocious than those of the revolutionaries of 1848, but I do not think there have been more foolish. They did not know or use of universal suffrage, or do without". The progressive and feminist George Sand (pseudonym of Aurore Lucile Dupin Amantino, 1804 - 1876) instead wrote to Giuseppe Mazzini (1805-1872) in 1848: "We must recognize powerless in the face of this inevitability of a new political order in history: the suffrage Universal". The same Sand wrote in 1869 to Gustave Flaubert (1821 - 1880) about the extended vote to all citizens "is just as stupid of divine law, though a bit 'less odious'". Who, years later, in 1870, replied: "Dear George, respect, fetishism that they all have universal suffrage for me the most sick of papal infallibility. But do you really believe that if instead of being ruled by the French crowd was in the hands of the mandarins would be the point of chaos and doom in which we are? "[9].

9 Compare Mario Ajello, *Storie di voto*, Donzelli editore, 2006, page 29

Finally, it also recalls the situation in the Italian peninsula, only the Grand Duchy of Tuscany in 1848 granted limited suffrage for men and women. The first and only State which granted universal suffrage, then, though limited to the propertied classes. Among the very first to speak, in Italy, there Ippolito Nievo (1831 - 1861), which in a little-known essay, *Political revolution and the national revolution,* of 1859, criticize the distinction between the intellectuals and "the vast majority of the nation's illiterate, the rural populace": for Nievo the Risorgimento is a political revolution that has become a national revolution, establishing a system of representation based on the general universal suffrage[10]. "Without that it will never be neither safe nor sustainable," writes Nievo. Among the supporters of direct universal suffrage, there is Carlo Cattaneo (1801-1869), who supports it, "excluding all the subterfuges that were invented by the forgers of the public vote." However, the same Cattaneo declares himself aware, with great foresight, that "universal suffrage is not a magic wand that can protect people from the momentary mistake." For Cattaneo science have to foster the policy and culture have to form the citizens[11].

The principle of universal suffrage was established, therefore, at least in Europe, in an era very different from today, where the historic cultural supremacy of the aristocracy was rightly questioned by the sale of patents of nobility and the rise of a class cultured medium that, once again rightly, wanted representation and voice on the choices of government.

The application was, inter alia, by no means fast: New Zealand in 1893 as the first country in the world, in Australia in 1902, in Finland in 1906, in Norway in 1913, in Denmark in 1917, Sweden in 1917 as in Russia, following the Russian revolution, the United Kingdom and Ireland in 1918, Germany in 1919, partly in Belgium in 1919, fully only in 1948, Canada in 1920, Turkey in 1923, in Ecuador partially in 1861, fully in 1924 in South Africa in 1930, Spain in 1931, Brazil and Uruguay in 1932, Cuba in 1934, India in 1935, Japan and France (after a brief period in 1792 to Following the revolution) in 1946, Argentina in 1947, Israel in 1948, Indonesia in 1949, in San Marino in 1958 in Switzerland, recognized the right to vote to women until 1971, Portugal has come full universal suffrage only in 1974. And yet, there is no universal suffrage in various countries, including Hong Kong, Lebanon, Brunei, Saudi Arabia, the UAE and, very special case, that I add just for the sake of completeness, Vatican City.

So, what now seems to us an innate right, natural and necessary, and the only way possible - is actually very recent history. And then, as the philosopher Michel de Montaigne Eyquem (1533 - 1592), "nature call our beliefs". Natural rights are changing: for Aristotle, slaves were natural, and women naturally inferior. It is also, incidentally, a system already in crisis, after less than a century of effective implementation in much of the world. Do we really believe that universal suffrage is actually a step forward? an achievement of civilization? Or are we simply desperately attaching a system that does not work just because we feel familiar with it?

Let everyone vote is truly democratic?

The so-called democracy (and I use the word called to underscore the fact that as already widely discussed; it is difficult to arrive to a clear definition of the term) is in crisis. And

10 Compare Umberto Cerroni, *Il pensiero politico italiano*, Newton Compton, 1995, page 63
11 Compare Umberto Cerroni, *Il pensiero politico italiano*, Newton Compton, 1995, page 69

on this matter, I think we need to spend very few words: anyway we means this ambiguous word, indeed, there is no doubt that in the West we are experiencing a crisis of the democratic system. A crisis which, in my humble opinion, is mainly explained by one fact: the lack of awareness among people of the importance of their role in the operation of the system. Democracy is a delicate wheel, which provides for the operation of the sincere and conscious participation of the voters. Without this, it is impossible to talk about democracy if you do not feel belonging to the community, and you are not aware of the importance of their vote, you are not part of the demos, and then accepting the vote of that's everyone goes beyond the concept of democracy. And it's indeed harmful to the system.

And, I wonder, in how many cases today there is this awareness? Where does they feel the need to inform themselves and do well to ponder their choice in the urn? The logics that currently lead to vote are quite different. And I am not thinking only to the exchange vote, although paradoxically unethical in a democratic system could be considered legitimate and easily return to the voter in expanding the concept of "care of their interests." I am thinking especially to the masses instead of neo-teens who vote out of sympathy or approval, to the many disillusioned policy they choose the least bad of a nose, and just to those who believe that "so are all the same" and vote purely by chance. Or even in our country, to people who unfortunately do not have full use of his mental faculties, but which have been permitted to vote. Or finally the enormous masses, worse than all others, think they know. Voters who, in my opinion, now represent the majority percentage of the electorate, or at least dangerously close to half a slice. Fernando Savater writes: "Freedom is deciding, well, do not forget, realize that you're deciding [12]. And how many realize it today?

The original concept of democracy is then meaningless for us so that you come to "impose" the vote in certain foreign countries. Countries in which the model, the Western culture of democracy, has never existed. With catastrophic results, among other things easy to predict. If here, where it was born in the West, the Democratic machine sends dangerous signals of crisis and his wheel does not rotate any more, how can we expect it works where free information and awareness of the importance of voting is a mere illusion? Where centuries of trial and democratic culture have been explained to the masses, living a crisis for a disastrous war, in a few minutes from a stranger, who told everyone how beautiful and important is to put an X on a sheet? Surely democracy is not exportable practice, and most likely the West today exports it to hide their crises, and to feel a clear conscience. On the other hand, if there is need to export it, implicitly means that the democratic system is still the best.

However, for the same reasons that democracy is not exportable, in my opinion you can not expect that it works now even with us. You can not expect that a representative government chosen by people, is invested by the actual voters, who mostly have no real awareness and knowledge of exactly what they're doing. Just as it is happening in the West.

In addition, in my opinion it is absurd to claim that the mass choose the best. In addition to be representative, a government should be efficient and effective, and should work for the implementation of a program. In Italy, today, the confidence of Parliament to the Government

12 Cfr. Fernando Savater, Etica per un figlio, Laterza, Bari, 1992.

(I remember once again that, although there is sometimes forgotten, until proven otherwise, we live in a Parliamentary Republic and the Prime Minister is elected by the people, but as long as he governs he has the confidence of Parliament), has expressed confidence about the program, and not the executive.

But how can the people, disinterested and uninformed, choose the best program? And how could the mass, even if the public were an interested and an informed one, (which, as I said, probably isn't) opt for the very best choice? I will be objected that there is no choice at all. And this is true: politics is largely of visions and ideas, all lawful and no absolute best. But how can we hope that the synthesis of the choice of all out the best? It may be objected that the vote is a right, and that universal suffrage is one of the greatest achievements of modern civilians. In my opinion it is not, or rather, it probably was but now no longer is.

I will also tell you that the public, are generally poorly informed and interested in politics, in an electoral democracy does not decide issues, but chooses those who will decide, thus passing the buck by the electorate to elect, from demos to his representatives[13]. But how can people not informed, or who will be selected to assess the best way to decide the issues? We must however have a responsibility to choose: there is for competent people and trust for advice about which specialist to contact? Maybe we do not go to a doctor that we trust to ask what is the best specialist in the square?

What should I think today is a potentially universal suffrage. That would really be a civil achievement. In fact, virtually every person shall have the right to vote, but to realize this potential the city itself must demonstrate an understanding of what it means to vote. Be careful, this does not mean that we should go to investigate, or even worse, to review the political and ideological ideas of a citizen (in this case in fact you would have at best a dangerous illiberal regime), or that only those who have a certain degree can vote (in which case there might be incurred in the dangerous problem of the culture of authoritarianism, and by the way you invest schools or universities are powers that are not at all suited to manage) or that the city should be responsible for knowing the codes of case law in detail as much as a magistrate. It s simply required that a national voter should have the most basic concepts of civic and political education to enable them to be aware of the outcomes that their vote will help determine. For example, what is the difference between a presidential republic, a parliamentary and federal one? Among the Upper House and Lower House? What are the powers of the Presidency of the Council of Ministers and the Presidency of the Republic? What is the difference between a decree-law and a bill? What is the process of approving a law? What is a Parliamentary Committee? What is the difference between proportional representation method, majority and mixed? What is the difference between a party and a civic list? What is a minimum threshold? What is the difference in assigning a majority of the premium (and what it is, and how to determine) the majority coalition or majority-List? In fact, for example, vote for the list X with a proportional representation method can determine the outcome is completely different from those who would vote for the same list X by a method the majority, and the citizen has a duty to be aware of this, if to have the right to participate in the political life of a country.

13 Compare Giovanni Sartori, *La democrazia in trenta lezioni*, Mondadori, 2008, page 21.

A Theory of The Ultimate Cause of Economic Development: Using Ayn Rand's Ethics to Solve the Development Puzzle

Brandon M. Wasicsko

Introduction

The main goal of the study of economic development is to determine the causes of growth and apply those findings to the attainment of increased levels of economic wellbeing, particularly in underdeveloped areas of the world. The proximate causes of growth—productivity increases due to technology, the accumulation of capital, and improved labor (quantity or quality)—are caused by more fundamental causes. Those more fundamental causes discussed in development literature include incentives, institutions, and culture, among others. But these causes are not given—they stem from even more fundamental causes. What develops is a causal chain with "growth" at one end and each more fundamental cause leading up to it (See Fig. 1.1).

Attempts have been made to improve growth by "increasing capital per worker" or "implementing the right institutions," i.e., by altering some link in the causal chain. But such attempts are analogous to building a house without reference to its foundation. While bricks are necessary and important in the building of a house, they must rest on a concrete slab established on solid ground. Likewise, institutions, technology, and incentives are necessary and important for achieving economic development, but they must rest on a foundation grounded in reality. The best architectural plan cannot be implemented on sand, nor can the institution of private property survive on a faulty foundation. In short, there must be an ultimate cause upon which all other causes rest.

Broadly speaking, the ideas held by individuals in a society serve as the foundation for all else that is to be built from them, including customs, culture, and institutions (Hayek 1971). The fundamental ideas held by individuals in a society serve as the ultimate cause of economic development. The goal of this paper is to present a theory of this ultimate cause, based largely on the approach to and theory of ethics devised by Ayn Rand.[1]

The approach to economic development

In approaching the study of economic development (or economics more generally), it must first be recognized that human beings are the common denominator of institutions, technology, and even the concept of "the economy" itself (Callahan 2002, 12). These things do not exist independent of man. An economy *is* the aggregate of production and exchange engaged in (and abstained from) by individuals. Man devised the institution of private property.

[1] It should be noted that the purpose of this paper is not to elaborate extensively on Ayn Rand's theory of ethics *per se*, but rather to demonstrate why ethics is at the core of economic development (according to Rand's approach to ethics), and to show a parallel between the life of the individual and the economic prosperity of the group. A detailed explanation of Rand's ethic of rational self-interest and its social applications can be found in "The Objectivist Ethics," and "Man's Rights," published in *The Virtue of Selfishness* (1964).

Technology is the application of man's ever-increasing understanding of nature to serve human ends. "Improved economic wellbeing" is a concept only applicable to man.

In any given group, the institutions, incentives, laws, and customs that develop over time are built on a base of aggregated first principles, or underlying ideas, or fundamental premises that each individual in that group holds. The causes of economic growth ultimately stem from these fundamental ideas.

A group, or society, or nation, is only the sum of certain individuals, and economic success of the group, society, or nation is the result of the actions and interactions of those individuals. But actions cannot be taken as a given either. The actions that individuals take are based ultimately on their answers to philosophical questions like, "Who am I?" and "What should I do?" *So, to properly understand what it takes for "an economy" to successfully grow, one must first understand the nature of man (Who am I?) and what is required of him in order to grow (live) successfully (What should I do?).* The ways in which members of a particular society view human nature, man's purpose in the universe, and the actions required to fulfill that purpose ultimately determine the success or failure of that society as a whole.

The economic success of a group of men can best be related to the success of an individual man fulfilling his life. Or rather, the basic ideas that lead to a successful life for an individual are the same basic ideas that will lead to the successful economic life of a group. "Economic development" is to *a group* of men what "life" is to *a* man.

In other words, because a society (or "an economy") is only the sum of particular individuals, there cannot be a separate standard for society's success versus an individual's success. The fundamental principles that make the latter possible must necessarily be the same principles that make the former possible.

The purpose of morality

Ayn Rand defines morality as "a code of values to guide man's choices and actions," (1970, 13). However, Rand's approach to ethics differs from "mainstream philosophy" in that the first question she asks is not, "What should man do?" but rather, "Why does man need a code of values at all?" (13). What is it about man that necessitates a guide to action? Her answer, in short, is that human beings face only one fundamental alternative in their existence—life or death—and that maintaining a state of life does not occur automatically. If one desires life, then one must discover what is required by nature in order to achieve it and develop a set of principles that guides one's actions toward the achievement of that goal. Merely desiring life is not sufficient for achieving it. One must analyze choices, determine which alternative is best, and act to achieve it.

Since man must choose among alternatives and act in order to maintain his life, it follows that there are right choices, wrong choices, and a whole range of possibilities between these two ends of the spectrum. The role of morality is to give man a standard by which to determine right and wrong. It provides him with a framework from which he can choose and act in order to further his life. The standard of value, according to Rand, is "man's life" (25).

That which furthers one's life is the good; that which inhibits it is the bad. The principles that guide an individual's life are, at root, the same principles that ought to guide society.

Social application

Men do not live alone, however. We can gain immense value from the division of labor and exchange. These phenomena are possible only in a social context, i.e., by interacting with other men. But the social context does not change the requirements for man's life. There is no substitute for his mode of survival—he must still survive by applying his mind to the task of survival. The only thing that can prevent a man from thinking and acting in accordance with his own rational judgment is the initiation of force by other men (Rand 1961, 113). Therefore, any group of men who desire interaction with one another must be organized under a system that recognizes the necessity and guarantees the freedom of every individual to engage in the thought and action required by his nature for his survival, which means: force must be removed from interpersonal relationships. What connects the requirements for an individual's life to his relationships with others is the concept of individual rights. Quoting Ayn Rand (1964, 118):

> *Rights are a moral principle defining proper social relationships. Just as a man needs a moral code in order to survive (in order to act, to choose the right goals and to achieve them), so a society (a group of men) needs moral principles in order to organize a social system consonant with man's nature and with the requirements of his survival.*
>
> *If individuals live within a system that does not impede their attainment of life individually, it follows that they will also be free of impediments to economic interactions. A system consonant with man's development is, by consequence, consonant with economic development.*

Connecting social organization and growth

How does a social system organized on the basis of individual rights correspond with the achievement of economic growth? If all economic progress is the result of human action and interaction, then it follows that in a system that upholds the right of individuals to freely engage in thought and action in pursuit of their own goals, there is a greater chance for economic progress to occur.

The extent to which an individual improves his own wellbeing is the extent to which he is successful in life. When members of a society are jointly successful at improving *their* wellbeing through the development of institutions that encourage individual achievement, the division of labor and exchange, what they have achieved is growth, or development. This is not to say that the achievement of life for the individual or development for a society is a static state. Rather, just as life is a continual process of self-sustaining and self-improving action, so too is the process of economic development. Both require continued *and correct* action to be sustained. Failure to act, or acting in contradiction to these ends, would lead to the demise of both.

A proper moral code is to man's success what a proper social system is to a society's development. The root of a social system is the ideas held by each individual within that society. So, fundamentally, a society's degree of success in the attainment of growth is determined by the application of those primary ideas to a theory and practice of social organization. Those ideas that are most consistently aligned with man's nature and the requirements for his life are more likely to lead to pro-growth institutions that a) allow for individual thought, choice, and action in the social context, and b) allow for and encourage benefits due to specialization and trade that can lead to greater levels of economic well-being.[2]

The extent to which an individual recognizes and acts in accordance with a moral code derived from his nature and that of reality determines the extent to which he succeeds at life. The extent to which members of a society successfully recognize and apply the principle of individual rights to their interactions determines the extent to which they succeed at achieving growth through the establishment of institutions that encourage production, specialization and trade. The extent to which institutions are built and maintained in consonance with a society's recognition of individual rights determines the extent to which sustained economic development can occur over time. Just as an individual succeeds at life through consistent adherence to a rational code of ethics, as demanded by his nature, so a society succeeds at achieving greater levels of economic wellbeing by recognizing and enforcing an individual's right to think and act in accordance with his own interests. It is on this foundation alone that long-term economic growth can be sustained.

Approach in current economic development research

In modern development literature, one proposal for improving economic life in less developed countries (LDCs) is to determine what institutions work in the developed world and devise a means by which to implement those institutions in undeveloped areas (North 1991, 97).[3] This, referring to the house example, is an attempt to take certain types of bricks from one house built on concrete and use them to prop up another built on sand. These bricks may have some positive effects in the short run, but the fact that the foundation of the second house is faulty requires the inevitable collapse of any structure built upon it.

Development economists realize that institutions are not "cookie cutter," i.e., that they cannot simply be replicated the same way, in all locations, at all times.[4] Among the reasons cited is "different cultures" in different locations that prevent, say, American institutions from being implemented in, say, Somalia (Harrison 2006). This is true, but the analysis is not thorough enough. What is culture? We will call it "the behaviors and beliefs characteristic of a particular social, ethnic, or age group" (Dictionary.com). How is culture determined? By application of the fundamental ideas held by each individual to the organization of society! It is

[2] Note: Rand's justification for a free society is *not* that it leads to institutions that are pro-growth. The justification for a free society is that such a system is consonant with man's nature and the requirements for his life. It is true that a society so organized will lead to institutions that are pro-growth, but it is *because* these institutions are based on a theory of social organization that is consonant with the principle of individual rights, i.e., with man's nature, that they are successful.
[3] Dr. North: please pardon the simplification.
[4] I do not know of any development economists who advocate for simply "implementing institutions." To say that LDCs need the institution of private property is true and can be validated both a priori and empirically. The purpose of this objection is to say that to establish private property as an institution, a foundational shift in ideas is needed as well as a rejection of the notion of third-party imposition or "implementation" of institutions as neither a moral nor practical means of achieving long-term growth in LDCs.

true that one cannot "take" the institution of private property from some developed country and "implement it" on some less developed country, but the *ultimate cause* of that less developed country's failure is *not* lack of the institution of private property. The backward moral code that guides the thoughts and actions of individuals in LDCs *necessarily* leads to a theory of social organization that does not recognize man's nature or the requirements for his life. The institutions established upon this theory, therefore, do not allow for the successful, long-term development of an economy precisely because they are based on an ethical theory that is not in keeping with man's nature and the requirements for his survival.

The institution of private property *does* incentivize people to produce more, since they know that the products of their labor will not be arbitrarily usurped, but it is *because the concept of 'property' is consonant with man's life* that this is true. If individuals hold views contrary to "my life belongs to me, and I am entitled to the fruits of my own labor," then the manner in which they arrange society will reflect that, and their institutions will develop accordingly. To change the economic course of a nation, what must ultimately change are the inhabitants' ideas on ethics.

As an example of this, look at the United States today. One clear example of the disregard for private property is the increasing scope and use of eminent domain (Leung 2004). What has led to the changing interpretation and expanded use of eminent domain? A lack of *explicitly stated moral principles* justifying an individual's right to his own property in the U.S. Constitution. The lack of explicit recognition, though it was implicitly recognized at the time of its writing, allowed for the definition of words to be "shifted" or "reinterpreted" over time.

This lesson can be applied to all situations that development economists study today. The fundamental moral code that individuals of a particular society hold must be explicitly identified, understood and corrected, in order to correct the less fundamental causes of growth that make possible the proximate causes.

A note on implementation

This is not to say that failure to abide by Rand's theory of ethics in its entirety necessitates economic failure, but rather that the degree to which the members of a group hold and practice ideas consistent with man's nature is the degree to which they succeed. The degree to which they hold and practice ideas that contradict reality is the degree to which they fail.

Take, for example, the founders of the United States. They identified a specific role for government based on certain "inalienable rights." While they did not *explicitly* understand (or state) the derivation of the concept of rights from man's nature, they did implicitly recognize the practical value of these ideas in society. Just as the success of an individual is dependent upon how consistently he accepts and applies these moral principles to his life, so the degree of economic success of any country is dependent on how consistently a group of men understand and apply these same principles to their interactions with one another.

Another important note is that this paper does not advocate for any particular type of social organization. Rather, it lays out the principles upon which any successful society must be based. There may be many particular systems, both currently known and yet to be discovered, that can be built on the principle of individual rights. Determining which of these social systems is appropriate for a certain group of people is beyond the scope of this paper.

Lastly, the specific process by which these ideas can be implemented in LDCs is another task beyond the scope of this paper, but we can take one important note from history. Aristotelian liberalism, an umbrella category in which Rand's ideas can, more or less, be placed, saw its resurgence and further development during the Enlightenment. This intellectual profusion led to the American Revolution, the Industrial Revolution and a new theory of social organization that put primacy on rationality and individualism. What is necessary, both to see economic development take hold in LDCs and to correct the faults in many Western systems is a new Enlightenment, a second revolution of ideas.[5]

Conclusion

In approaching the study of economics from an individual perspective—by identifying human actions and interactions as the substance of an economy—it becomes apparent that understanding the motivations and causes of individual action are at the root of understanding an economy's development. Ayn Rand's view of morality as a guide to individual action allows us to identify ethics as the ultimate determinant of the economic success or failure of a particular society.

In addition to her approach to ethics, Rand's specific theory of morality is one that is derived from man's nature and what is required to sustain and further his life. If individuals' ideas on morality are contrary to nature, a social system organized on those ideas will lead to the development of institutions that are against human flourishing to some degree. The economic success of those individuals organized in such a manner will likewise be inhibited. It follows that, because the success of an economy is really the sum of the successes of individual actors, a moral code that is in keeping with individual success at life on earth will guide those individuals who accept and practice it to organize society in such a way that develops institutions that allow for and encourage the proximate causes of growth. For any group of individuals to see economic growth, they must first identify the fundamental premises on which they operate, and bring them into consonance with a rational code of ethics.

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[5] It is also worthwhile to take notice of the economic success of societies organized on an irrational code of ethics based on collectivism, obedience, and faith, i.e., the Middle Ages, as compared to those organized on the basis of individualism, free will, and reason.

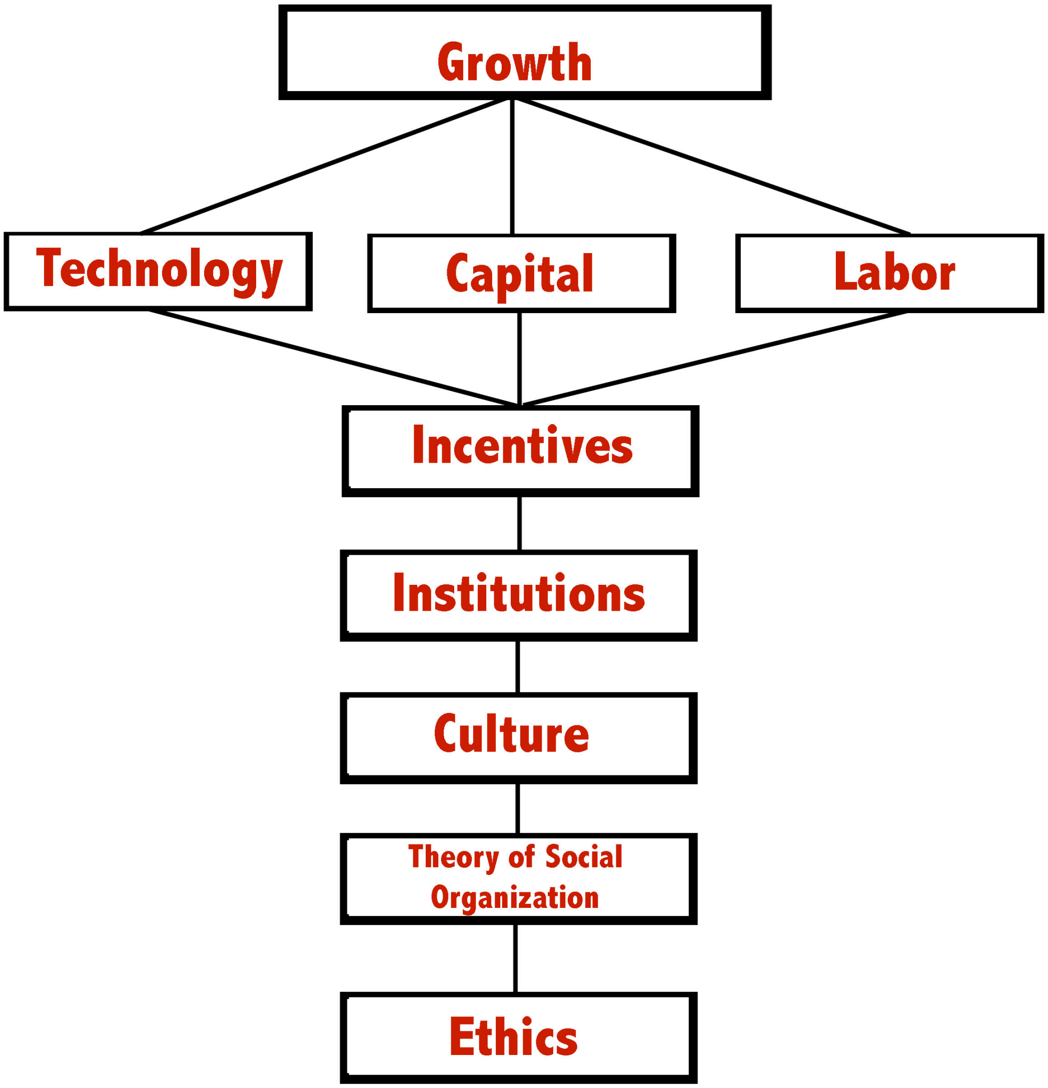

Figure 1.1 The Causal Chain of Economic Development

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The Economic Point of View: An Essay in the History of Economic Thought, by Israel Kirzner. Volume 1 in The Collected Works of Israel Kirzner, edited by Peter J. Boettke and Frédéric Sautet. Indianapolis: Liberty Fund, 2009. Hardcover: ISBN 978-0-86597-733-4, 239 pages.

Adrián Pérez

In the field of economic theory, it is rare to find scholars who dedicate time and energy into investigating the origins and evolution of the concepts they employ every day. As very few academic institutions offer courses in the history of economic thought it is very rare to find a modern economists that are aware of the works of Ricardo, Malthus or Marx .Yet there are a few notable exceptions: scholars that move beyond of what is required for economic analysis and explore the genealogy of the ideas they employ. Among these noble scholars we can count without a doubt the Austrian economist Israel Kirzner whose classic work The Economic Point of View provides a deep and masterful exploration on the origin and evolution behind modern economic theory. Originally published in 1960 and now out in a beautiful Liberty Fund edition edited by Peter Boettke and Frédéric Sautet, this work was Kirzner's doctoral dissertation under the direction of Ludwig von Mises. Despite being fifty years old, the text is not outdated as it touches on timeless problems and conflicts within economics.

The book is divided into seven main chapters, which are further broken down into smaller sub-sections. In each chapter, Kirzner concentrates on a particular aspect of economic theory focusing it from a historical perspective. The first chapter serves both as an introduction to and a defense of the work by exploring the necessity and implications of adopting a definition of what is meant by the word "economics". Once the importance of such enterprise has been demonstrated, Kirzner immediately tackles the historical problems of arriving at a satisfactory definition. Each subsequent chapter revolves around a particular subject: the Classical dichotomy of wealth vs. welfare, the concept of maximization, the idea of homo economicus, the relationship between markets and the rest of social phenomena, and finally the emergence of the praxeological approach of Mises which defined economics as a science of human action are among the key topics addressed in the volume.

Every chapter is a display of erudition in the subject. The reader will be fully immersed in the debates of great economists such as Ricardo, Smith, Malthus, Croce, Bastiat, Robbins and Pareto without ever feeling lost or confused but rather engaged in the debate and informed about the different points of view on the subject. Furthermore, the text is well documented through an extensive use of footnotes, which give further feedback. Employing a clear and concise prose, Kirzner has managed to condense over 200 years of intellectual debate into less than 200 pages without falling into technical jargon or dense wording. Unfortunately, the book's greatest merit might also be its greatest flaw. Kirzner's wording is so smooth that a distracted reader will gloss over a page without realizing he or she has missed the point. Very delicate ideas which would usually be fully explored in a couple of pages find themselves expressed in a single paragraph. In short, this book should only be read with an attentive eye and a serious mind.

It must also be warned that the book is not meant to be an introductory text into economic history. If this work is to be fully understood, the reader should already have a somewhat firm grounding on the subject. Furthermore, it must also be perfectly clear that Kirzner's work revolves around the concepts rather than the actors. Unless the reader has some previous knowledge on the different figures involved, he will have a hard time following the train of thought. This focus also has the unfortunate side effect of neglecting prominent historical figures by placing them into marginal roles unless they had contributed in defining the particular concept Kirzner is focusing on. Marx, for example, is only casually mentioned in a single paragraph while discussing the idea of "wealth" as understood by classical economists. Due to this approach, other important economists such as J.B. Say or Sismondi are only touched upon sporadically if not altogether ignored.

One of the great additions to this volume is the inclusion of the famous Becker-Kirzner debate from the Journal of Political Economy in 1962-63. It provides a nice contrast and complement to the first part of the book. While in the first part Kirzner only plays a passive role as a narrator, the second part portraits Kirzner in the role of an active actor. The debate in itself would be worthy of its own publication. On one hand Gary Becker advances a striking and intriguing proposition. According to his theory, markets will behave "rationally" even if the households and firms composing it behave "irrationally". Using a subtle but convincing analysis employing indifference curves, Becker argues that even if households and firms act irrationally (either being too impulsive or too reluctant to change their behavior in response to price changes), their aggregate behavior will still result in "rational markets": markets who reach equilibrium through negatively sloped demand curves and positively sloped supply curves.

At the risk of oversimplifying, the response Kirzner gives to Becker is that his models simply assume the change in price that both households and firms respond to. This ignores that changes in price are not only a catalyst, but a result of purposeful human action. Therefore, if Kirzner's analysis is correct, a market composed fully of irrational participants will not be able to reach equilibrium which, contrary to Becker's assertion, only results from the activity of rational human individuals. Thus, according Kirzner and in a classic Austrian fashion, Becker's assumptions would of have bypassed the human element present in all social phenomena. Both sides present their arguments in a clear and concise fashion. Regardless if you end up siding with Becker's theory or are convinced by Kirzner's refutation, there is no doubt that the debate in itself provides us with an interesting and insightful display of knowledge from both parts which the reader will surely benefit from.

In conclusion, The Economic Point of View represents a valuable addition to the library of any serious scholar. The inclusion of the introduction by Peter Boettke and the Becker-Kirzner debate, coupled with the improved aesthetic of the new cover make this particular edition worth purchasing even if you owned the previous one. Liberty Fund should be commended for undertaking the task of publishing Kirzner's collected works, which should be of great worth to any economist. In the case of the Economic Point of View, anyone who wishes to deepen their knowledge on the history of economics or explore the differences between the Austrian School and Chicago school will find a close re-reading of this new volume to be an abundant source of knowledge and fresh insights.