

# *Neutrality and Liberty*

Proceduralist or neutralist liberalism aims to enforce rules that govern how individuals pursue their goals, without endorsing any particular set of goals. It gives priority in political theory and practice to “the Right,” or the rules of association, over “the Good,” or any substantive end.<sup>1</sup> While the term ‘neutrality’ is contemporary in its meaning, the metaphor is as old as John Locke’s notion of the political community as an “umpire . . . indifferent and the same to all parties,” which served to support the religious toleration Locke famously proposed. Contemporary neutralism purifies Locke’s qualified toleration and extends its range of application to morality in general. The current motivation for adopting neutrality is twofold. Ethically, by avoiding the establishment of partisan notions of the Good, a neutralist political theory saves itself unending controversy. Most importantly, neutrality serves to minimize public coercion of individuals or minorities and hence maximize liberty. This liberty is conceived “voluntaristically” and “negatively”; liberty is exhibited by an individual subject’s occasional choices whenever there is an absence of interference.<sup>2</sup> The moral and legal limit on such liberty is enforced only when the acts in question threaten to harm others.<sup>3</sup>

Now, one may say that this conception of neutralism is a red herring, that no political theory can be strictly neutral, so that labeling the relevant proceduralist thinkers “neutralists” is holding them to an impossible standard. But this would be an inconsequential terminological joust. Those theories called “neutralist” are effectively, not utterly, neutral; they seek to be as neutral as possible regarding the kinds of value-questions most at issue in real-world politics. That is the only meaning “neutral” can or need have in practice.

I will argue that proceduralist liberalism is mistaken and pernicious; mistaken because it cannot withstand philosophical scrutiny, pernicious

because at this moment in history it contributes to persistent problems in liberal society and helps to block their resolution. Not that it is *utterly* mistaken. It is true that any liberal republican polity is committed to procedures and laws that must hold over a pluralistic society whose members affirm diverse conceptions of the Good. Nor is neutralism *entirely* pernicious. I have no doubt it is much better to live in a neutralist polity than in most non-neutralist polities. In point of historical fact, the neutralist view has always had a particular place within the culture of liberal society, balanced and limited by other views and traditions. Proceduralism has served good cause, in part by being saved from the embarrassment of its consistent application. As a result, political societies which allow neutralism to hold sway at some levels of social life at some times can well be better polities than those that never do. But a more adequate conception of liberalism's commitments would be better still.

Before proceeding, some history is in order. While the biography of liberalism is too rich for anything like an adequate presentation here, we need to know something about what liberalism has been if we are to put neutralism and its problems in context.

Early liberalism, or to use J. G. Merquior's term, "proto-liberalism" congealed from the late seventeenth through the eighteenth century around a dominant theme: the reaction against "arbitrary power," meaning primarily but not exclusively arbitrary governmental power.<sup>4</sup> From Locke's *Second Treatise on Government* (1689) to Montesquieu's *The Spirit of the Laws* (1748), the concern of proto-liberals was to limit the inhumane or anti-civil use of such power. This issued in three practical aims: strengthening some form of popular sovereignty; establishing constitutional and legal limits on power, such as divided government; and promoting religious tolerance, to eliminate or reduce one of the primary pretexts for the inhumane use of power. Also, already in Montesquieu we see the historical self-consciousness of this attempt, the belief that such changes constitute *progress*, that despotism is primitive while a free, law-governed society is more advanced. Thus, what I will later call the three canonical values promoted by twentieth century liberalism – liberty, self-rule, and progress – were already present in proto-liberalism in at least a vague form.

Over the one hundred years following *The Spirit of the Laws* a more differentiated notion was worked out, which prepared the ground for the mature liberalism of the mid-nineteenth century. Proto-liberalism came to accumulate a more articulated notion of what a society that is free, humane, and lawful must look like. This political and intellectual process took place simultaneously with massive social changes, especially the emergence of modern commercial and later industrial society. The mature libera-

liberalism of the nineteenth century was a political theory for a kind of society which existed only in fragments in the eighteenth century. A series of distinctive elements congealed about the fundamental aim of limiting and humanizing power, in particular, commitments to civil and especially economic liberty, private liberty, collective self-rule, and equality. These elements are part of a family with freedom, toleration, and lawful power; no liberalism can dispense with any one of these. But each can be variously interpreted, the collection of values differently prioritized, not to mention understood through additional institutional or philosophical factors that historically have been crucial for the most prominent forms of liberalism.

Certainly it comes as no surprise that liberalism values liberty. But the prominent concern of eighteenth-century proto-Liberals was with government interference in civil society in general, rather than with the “subjective rights” or privacy of individuals. In early liberalism, religious toleration was the one sphere of privacy that was prominently recognized – and even that toleration was limited by today’s standards. The *political*, as opposed to civil or private, rights of the individual were another site of concern, continuous with the republican strand in liberalism. As J. G. A. Pocock has shown, liberalism’s concern for non-political liberty competed not only against a feudal-royalist tradition, but against an alternative notion of republican liberty, copied over from Aristotle by the Italian Renaissance, which read freedom in aristocratic, martial, public terms, or as Isaiah Berlin would later put it, as *freedom to act politically*, rather than as *freedom from political interference*. The later developed after the former. Only in the later nineteenth or arguably the twentieth century did the view that an individual’s occasional choices were not to be interfered with become the leading edge of liberalism.

But the ground of that eventual liberal commitment was already being laid in the economic sphere in the eighteenth century. Starting with Daniel Defoe’s 1704 pamphlet, which insisted that charity harms the poor, through Bernard Mandeville’s 1729 slogan of “private vices, publick benefits,” and in the Scottish figures of Adam Ferguson, David Hume and above all Adam Smith and his 1776 *Wealth of Nations*,<sup>5</sup> the revolutionary notion of a commercial society was being pounded out.<sup>6</sup> It would reach its mature theoretical conception in the nineteenth century with David Ricardo.<sup>7</sup> Most obvious in the eighteenth century was the novel view that commerce and private interest could be the centerpiece of society. But this brought with it a series of equally revolutionary ideas.

What did a commercial society mean? Certainly it meant that self-interest and even avarice were beneficial. This sent moral philosophers to ask, Can there be a Good society based in material self-interest? Mandeville

and the Scots gave the revolutionary affirmative answer. This carried with it the egalitarian consequence that the working and investing classes – those concerned to acquire property, as opposed to those either born with it (the aristocracy) or disbarred from it (the clergy) – are no longer contemptible. This spelled the supersession not only of royalism and aristocracy, but of the moral nobility and martial or heroic virtues of the republican ideal as well. It implied that the goodness of the social whole was not equal to, constituted by, the goodness of its leading (e.g. aristocratic) parts, but rather was a result of the interaction among non-virtuous parts. It meant further that *the ideal society is not the ideal society*, that the best society is one in which human vices were not suppressed but impersonally restrained in a way that led to their own self-discipline towards the common good. The pursuit of true ideality in human society is actually a danger. And it introduced a notion that has a right to be considered *the* mark of modern life, an idea that would still wait two more centuries to be named: the idea of spontaneous or emergent order. The order, even the *good* order, of society need not be the result of design. Thus the eighteenth century turned ideality on its head long before Marx did so to Hegel. The idea of spontaneous order was the proto-Darwinian shock of the eighteenth century. We will return to it later.

The dawning commercial society was thought by many to offer the prospect of international as well as domestic peace. The same virtue has been claimed for liberal democracy. Hence, from Kant's "Perpetual Peace" to the present, liberalism has been connected with the notion of a pacified world where status is measured in money and not force.<sup>8</sup> This should not be taken to mean a world without international conflict or domestic competition. But the understanding has been that commercial agonistics are nevertheless agonistics without what Judith Shklar called the greatest vice, cruelty, or on the international scale, war.<sup>9</sup>

As Habermas has nicely recounted, the concept of a public sphere, a space for private citizens to voice their opinions, was essential to the development of modern liberal republican society.<sup>10</sup> It grew up in the eighteenth century with the rise of the popular press, and a variety of social organizations that served to make what Guizot called "public opinion" a force in the political life of the state. It was not merely the case that citizens were now "free" to write and speak, but that one of the major institutions of society was an on-going public conversation, not in the hands of state, Church, or aristocracy. For us today, a liberal society without such an institution is difficult to imagine.

Based on an inheritance from Herder, in the nineteenth-century German Romanticism had its special impact on the development of liberalism, espe-

cially in the work of Wilhelm Von Humboldt. The republican concept of public self-rule was transformed into a concept of the formation and development, the *Bildung*, both of the individual person – for von Humboldt – and of a people or nation – for nationalists like Fichte. John Stuart Mill became the English spokesman for the individualist version. For Mill self-development, while requiring some form of education, was mostly to be furthered by limiting state and community power, whereas in the German case self-development tended to serve as an argument for enhanced state power. Both contributed to the development of an *expressive* individualism, a concern for the individual's right to express him or herself. By the twentieth century, this tendency merged with the rights-based tradition of liberalism, itself narrowed to a concern for subjective or individual rights, resulting in a liberalism increasingly focused on the individual and the conditions required for each individual to pursue its idiosyncratic and "authentic" destiny.

Progress always had some place in liberalism and proto-liberalism, back to Montesquieu, but it was nineteenth century English Utilitarianism that made progress a central liberal notion. Social happiness was to be maximized, educationally, politically, and technologically. Utilitarianism has always read liberalism through progress. Bentham in particular – and, in a different direction, Comte and Marx – expanded the Enlightenment critique of superstition to the belief in a need for scientific social policy. It was easy enough to connect such policy with the economic progress brought by the market, although a permanent conflict was thereby institutionalized between government social planning and the economic liberty of market forces. This, of course, constitutes the most enduring practical dilemma of the liberal tradition.

Now, certainly it is true that equality and liberty, both intrinsic to liberalism, conflict at some point. The excesses of the French Revolution confirmed the Terror of Rousseau's *le volonté générale* for many. Yet it is also true in practice that one simply cannot have a liberal society without some measure of equality. Liberals agree that equality before the law is essential. But the liberal flirtation with equality goes deeper. Lawfulness itself implies the avoidance of bias in the workings of power, hence equality of individuals and orders – even if in the eighteenth century individuals continued to be understood as intrinsically connected to Estate, class, social role, and natural law. As time went on, the aim of equality was regarded as intrinsic to the limitation on power in a progressively more social, and not merely political or governmental, sense. If the King's arbitrary power is to be limited, why not also the aristocracy's arbitrary power over the bourgeoisie and the peasantry, and then the bourgeoisie's power over workers?

It was utilitarianism and progressivism that formed the fertile field in which the pressures toward equality produced a major change in liberalism in the late nineteenth and early twentieth centuries: the development of egalitarian liberalism. Now, the recognition of the need for poor relief, especially given the dislocation brought by the transition to a market economy, was not new.<sup>11</sup> But it was in the late nineteenth and early twentieth centuries that a line of liberal “progressive” thought arose in which liberals *qua liberals* argued for the necessity of what we today call the welfare state. Through T. H. Green, Hobhouse, and Dewey the betterment of society, understood in a liberal and egalitarian fashion as the betterment of the lives of all individuals, came to the fore, despite its potential conflicts with the liberal concern to limit state power. State power must be used positively to promote individual liberty against the class now standing in the way of popular liberty, the bourgeoisie. Later, under the pressure of a world economic depression, this nascent egalitarian liberalism found its Ricardo in John Maynard Keynes.

But between the world wars this emphasis on equality within the liberal family of commitments produced a reaction. The critique of state power in general and social planning in particular was proposed most famously by Austrian economic thinkers, especially Ludwig von Mises and Friedrich von Hayek, the latter carrying the now oppositionist faith in markets to London and then Chicago. While economic, the libertarian philosophy seemed necessarily deontological, in contrast to the apparently utilitarian framework of progressivist, egalitarian liberalism. The result was the division of the liberal tradition into those opposing state power, and those who saw state power as the weapon promoting the interests of most individuals against powerful economic interests. After the victory of the liberal democracies in 1945, and the unprecedented prosperity of the next two decades, Keynesian liberalism was supreme, if continually in tension with its loyal commercial opposition. Libertarianism seemed to be forced into early retirement during this period of the supremacy of the liberal-democratic-welfare state.

This state received its distinctive theoretical expression only as it began to show wear and tear. In the 1970s and John Rawls’ attempt to find a “natural rights” basis for both individual or civil liberty and the welfare state, deontology returned with a vengeance but now on the egalitarian side. Ronald Dworkin, Bruce Ackerman, Thomas Nagel, and others, completed the egalitarian liberal exodus from utility. By this time liberty was conceived, by egalitarian and libertarian alike, as purely a property of individuals; it was understood negatively in civic affairs, as sheer absence of state interference, but positively, by egalitarians, in the context of economics, that is, as requiring material and social conditions. Neutrality became

the prime criterion for promoting liberty and limiting state and political power, completing the removal of religious and cultural perfectionism from both the dominant egalitarian liberal view and its theoretical opponent, libertarianism. It was only in the 1980s that a confluence of events – a popular political turn to the right, a growing awareness of the costs and limits of a liberal welfare state, and an inevitable theoretical reaction against the ahistorical form of “high” liberal theory epitomized by the deontological liberals – led to a two-pronged reaction against proceduralist egalitarianism. On the one hand, libertarianism showed that its seeming retirement was merely a temporary leave of absence, and became a major contender. On the other hand, non-proceduralist, perfectionist, and even communitarian versions of liberalism called for a less individualistic form of theory and society.

Thus we stand, roughly speaking. What I hope this historical sketch makes clear is that the following critique is less against liberalism *per se* than what liberalism has become, the contemporary notions I will criticize being in many cases versions of traditional liberal doctrines which, in earlier and less clear, less abstract, less differentiated form, were also less objectionable. It is characteristically conservative to note that progress is not always, well, *progress*. For, forgetting the manifold environmental and social costs of economic and technological development, progress often means the progressive articulation and purification of a phenomenon that might have been better left vague and entwined with the background that birthed it. It is arguable that the more liberalism has purified itself, the more problematic it has become. There is something to be learned from the fact that during the crucial period of 1770–1820, some of the greatest conservatives – I am thinking of Burke and Hume – and some of the greatest proto-liberals – for example, Smith and Constant – were not very far apart. They were part of the same conversation, not, like today, members of warring camps that refuse to learn from one another. Perhaps the earlier thinkers had less soteriological hopes for their politics; proto-liberals could imagine that turning politics into religion would make its conflicts intractable.

## Libertarianism

Libertarianism is the current name for the kind of liberalism that holds liberty to be the ultimate political value, demanding minimal government in order to permit its maximization. It is, one might say, the purest liberalism, the form of liberalism that treats society as a voluntary association for the protection of individual liberty, advocating only equality before the law and a solely negative conception of liberty. Historically it remembers Locke

with fondness, and embraces the individualism of Mill's *On Liberty*, but in its clarified contemporary form it is really the invention of Friedrich von Hayek. Libertarian economists and social commentators tend to justify their view on a utilitarian basis, namely, that social wealth, even that of the lowest classes, benefits from *laissez-faire*. In what follows, I will ignore such teleological and practical arguments and consider only the philosophical or more precisely deontological argument for libertarianism – that it alone respects individual rights or liberty. For my purposes, Robert Nozick's still incomparable 1974 formulation of libertarianism will serve as exemplar.<sup>12</sup> *Anarchy, State, and Utopia* does not exhaust philosophical libertarianism, but it does epitomize it (despite the fact that Nozick later admitted that his book was "seriously inadequate").<sup>13</sup>

Popular images to the contrary notwithstanding, libertarianism is not a dismal, but a happy doctrine. It enlivens political discussion and clarifies arguments. It takes a simple, clean principle to clear the intellectual palate, and this has been the most salutary intellectual function of libertarianism in the past two decades. It is not immoral, evil, or elitist. On the contrary, it is highly principled, strictly moral, and egalitarian, its sole aim being to reduce coercion to a minimum. Neither is libertarianism stupid. On the contrary, it is especially appealing to smart people concerned with ideas and principles, for whom intellectual consistency is at a premium. When government coercion is proposed on apparently moral grounds to redress unfair or tragic plights, the correct response of the libertarian is the simple ethical maxim I was taught by the non-libertarian nuns of my childhood: two wrongs cannot make a right. The deplorable condition of the poor may not be corrected by the evil of coercing others. Egalitarians may judge this refusal immoral or amoral, but its inspiration and justification is in fact just *differently* moral.

Libertarianism's only problem is that it is absurd. It is too principled to be consistently or generally applied to a human society. Libertarianism is the only living modern political philosophy of which I am aware that believes all normative claims about political arrangements can be derived from a single principle, which need not be compromised or balanced with any other concerns. That principle is individual liberty, or put more operationally, individual rights, which may not be limited or harmed without the consent of the holder except to protect the analogous liberty or rights of others. If, like Ronald Dworkin, one argues that equality is an equally prominent liberal value, libertarians point out that this can only mean that all are to be treated equally by law and government in order to preserve their equal liberty. While libertarians do legitimate government coercion in the name of security, strictly speaking this does not mean that they are willing to

balance liberty against security, for their concept of security is merely the protection of the liberty of individuals. So liberty is their unquestionably supreme norm. By itself this supremacy of liberty is merely wrong, not absurd; what is absurd is to believe that a normative account of the *polis* can be nothing more than the application of *any* single principle.

Imagine that the invaders are coming over the last hill, intent on carnage, domination, and the obliteration of our liberties. Suppose the only way the majority of remaining citizens can protect the last piece of our territory is to set up defenses on the hilltop property of some citizen overlooking the approaching army. But that citizen denies access to the property, even though he or she stands to lose it permanently if the invaders win. He or she refuses to listen to "reason." Suppose fellow citizens respond, "We would like, under normal conditions, to defend your property rights. But now the existence of our society is at stake, and we need your property, if only temporarily. If we are all alive tomorrow, then we will discuss compensation. We are a bit pressed for time right now. So stand aside!" Is this unjust? Nobody but the property owner in question and libertarians could think so; that is, no one thinks property rights are so absolute that they are to be defended even at the expense of the existence of society, especially given that, with the collapse of the society will probably come the collapse of any ability to defend those property rights.

To respond that many libertarians make exceptions in emergency situations is both correct and reveals the inadequacy of libertarian principle. *For the whole point of libertarian theory is to deny that there can be exceptions.* If libertarianism says only, "Most of the time, under normal conditions, we ought to try to preserve property rights," then only communists would disagree. Outside of crisis situations, the sole limit on the inviolability of property rights recognized by libertarians is the case of monopoly: libertarians deny my right to enter into an exchange which grants me the power to determine the price of a commodity, since this eliminates the liberty of others not to buy from me.<sup>14</sup> Nozick traces this point back to Locke himself.<sup>15</sup> The libertarian claims that this is not an exception to the principle of liberty, though, but rather a condition for it. Fair enough. However, if the libertarian is going to start noting the various conditions that must hold for free exchange to take place, the list of such conditions threatens to become very substantial and very non-libertarian.

There are at least four exceptions to the inviolability of free exchange and property, representing cases in which such rights violate what I will later describe as the necessary conditions of civil association. They are: social survival; scale; goods that cannot be exchanged; and the communal provision of needs.

First, as noted, social survival has to be a more fundamental value than property rights for any society. It must be because continued existence is the first value of any living thing. Society is a living thing, not in the sense of having the kind of unity ascribable to an organism, but as a collection of living things it is itself a living plurality. It is unreasonable to expect anything different. It is also the case, as noted by everybody, that the securing of property rights in a society itself presupposes continued social existence. So the occasional limitation or violation of property rights is the necessary privilege of any society.

Second, scale matters. My home and General Motors cannot, without an impressive leap of abstraction, be drawn under a single category, "private property." This point was made by Hannah Arendt and Michael Walzer among others.<sup>16</sup> Truly private property – of which my home is an example – is indeed a necessary and virtually inviolable conception for civil society, and it is an ancient one. That each family must have a place, with its cherished and necessary physical objects, is a prerequisite for a reasonable human existence. But the vast holdings of a large corporation are no one's domicile and cannot be regarded as "private" in the same sense; they are quite literally *no one's*, that is, they belong to no one – or to everyone, an anonymous network of stockholders, which is the same thing – and those who operate them need have no special identification or connection with their historical missions, their technology, even their region of the market. They no more belong to anyone than does the Registry of Motor Vehicles. Put more broadly, modern capitalism is not about the privacy of property; it is about the *fungibility* of property, the ability to turn labor and resources into more labor and resources. As Arendt pointed out, property in the ancient sense is quasi-permanent, whereas capital is fluid and dynamic. This is not to say that capital ought to be generally under public control, but that it is entirely reasonable to hold truly private property as relatively inviolable while denying such inviolability to the holdings of large corporations.

A further exception is that, as Walzer argues, no one believes that everything on God's Earth may be regarded as property open to free exchange. It is, he insists, an ancient principle that, "The morality of the bazaar belongs in the bazaar. The market is a zone of the city, not the whole of the city."<sup>17</sup> A good example, which Walzer employs, is the Civil War practice of permitting conscripted individuals in the North to buy their way out of the draft, by paying a fee which was regarded by government as more important to the war effort than their actual service. Why, Walzer asks, do we today intuitively regard this as corrupt and unjust? Because it is the invasion of a sphere of public obligation by wealth with its inherent inequali-

ties. Whether or not I may have a Mercedes can rightly depend on how much money I have; whether or not I am required to fight and possibly die for my country ought not. Some things cannot be bought and sold; what those things are varies from culture to culture.

Lastly, and a claim I cannot justify until later, membership in a political society requires that each citizen have available to him or her the resources necessary to dignity, in so far as this is socially possible. That is, what Walzer calls communal provision or welfare is justified by the concept of *membership*, and this means taking some of Peter's property, normally in the form of taxes, to give to Paul. That my neighbor's children may die of a curable illness for want of a few thousand dollars, while I build a swimming pool in my backyard for the same amount, means that my neighbor and I cannot regard each other as *members of the same society*, that I feel no more obligation to or connection with my neighbor than if he lived on the far side of the Earth. Such redistribution, of course, the libertarian rejects.<sup>18</sup> I cannot defend it yet; I only mention it here as the final and most controversial limitation on property rights.

As noted, libertarians do admit that some good is to be redistributed by political society, namely, security, or more precisely, protection of liberties or rights. In Nozick's book this admission takes the form of his insistence that the minimal state must protect the rights of individuals residing within its jurisdiction even if they are unable to pay the taxes that support this effort. Why is this so? Why ought anything, including security, be redistributed? Nozick gives an answer famously troubling to his libertarian principles, that a moral "principle of compensation" requires that "independents" must be compensated for group restriction of their risky activities by extending protective services to them. This, I suggest, *ad hoc* device is nevertheless rightly motivated. Principles aside, libertarian and non-libertarian alike would find it intolerable that a group of citizens and police stand by and watch a non-tax-paying resident of the region being raped and butchered by a paying member. In other words, libertarians, being sensible and decent folk in everyday life, cannot tolerate the literal and rigorous application of their own principles.

The libertarian conception of liberty is necessarily negative. Libertarians are bound to reject the positive modifications of liberty that egalitarian liberals sometimes employ. They must stick with the view that I have liberty if I am free from interference. As famously distinguished by Isaiah Berlin and before him Benjamin Constant, any positive conception of liberty (e.g. self-determination) threatens to permit communal coercion of the individual in the name of a "higher" freedom. I will criticize the notion of negative liberty later; for the moment what can be said is that negative liberty is an

inadequate account of liberty. Libertarianism is wedded to a strict interpretation of freedom as negative liberty, and as such, fails to achieve a sensible notion of its own ultimate value.

On a different score, libertarianism has no conception of the *public* at all. That is, it recognizes only two spheres of action and concern that are relevant to political order: the private, meaning individual, sphere – which in effect includes all of society, conceived as a voluntary association of individuals – and the governmental organization of individuals that has a monopoly on the legitimate use of coercion. Of course this does not mean that libertarians in practice fail to recognize a public realm; it means that they fail to recognize a publicity that is irreducible to privacy. The public in libertarianism is merely a species of private contract, the product of voluntary exchanges, however complex. Related to this, there is no room for *politics* in libertarianism. (Oddly enough, it shares this lack with its ideological opposite, Marxism.) Libertarianism is the attempt to reconceive all human relations on the model of the contract. This is not only undesirable, it is so inconceivable, ahistorical, and abstract as to make one admire its sheer speculative chutzpah. *Anarchy, State, and Utopia* ought to be read, not with egalitarian indignation, but with the same stupefied awe as we may read the metaphysics of Spinoza.

Now, does the rejection of libertarianism, the purest form of proceduralist liberalism, mean that there are no categorical constraints on the organic interest of the society in preserving itself against the non-conforming individual or the burgeoning marketplace? No it does not. But the constraint “Nothing may be done to harm me or any of my rights without my consent under even the worst of circumstances” is too much of a constraint. Nor does the inadequacy of libertarianism mean by itself that socialism, or the welfare state, or any other form of limitation on individual liberty or the free market is thereby justified. The libertarian purification of liberalism has its place in the seminar room, where it serves intellectual clarification, and in politics, where it serves to push against egalitarian institutions. For the present study it serves the further purpose of illustrating what a purified liberalism would mean. But beyond these purposes, it has no application. The phrase “libertarian society” is an oxymoron.

### **Individuals, Contracts, and Rights**

The dominant modern liberal conception of liberty exists not in a vacuum, but as part of a network or family of related notions. Of these, none is more important as background than *individualism*. This is no surprise. The liber-

alism that has developed since the second half of the nineteenth century, and become dominant since World War II, regards the individual's liberty, life, uniqueness, self-expressiveness, and will, all as among the highest, if not the highest, values in political and ethical life. By no means is liberal society consistent in its application of this rhetoric. But contemporary America is to a large extent, rhetorically and socially, the triumph of this individualism. It would be difficult to find a viable or stable society in human history which more completely grants individuals a role in determining the course of their lives, which denies the hold of family, community, tradition, and state power on individuals, and which celebrates individualism more than does contemporary America.<sup>19</sup>

Minimally, individualism demands that whatever is of ultimate value be a human individual or a trait of an individual, rather than an irreducible trait of a collective. Since human individuals are the kind of things that themselves *value things*, this means that human individuals are to be treated as legitimate judges of what is best for themselves. Now, certainly liberals believe in and value society. They can, if they wish, valorize community; egalitarian liberals do so in the form of economic solidarity. But as liberals they must nevertheless conceive society or community as an aggregate of individuals, whose solidarity is the product of individual choice.

This valorization of individuality is indeed a distinguishing feature of modern Western culture and society. This does not mean that individuality is a modern Western invention. Burkhardt himself argued in his classic analysis of the Italian renaissance that individualism had been seen before in ancient Greece and medieval Islam.<sup>20</sup> What characterized modern Western individualism was the prevalence of such individuals, who did not view themselves or the world as given by tradition, whose life was endowed with meaning by chosen projects rather than by analogy with traditional models. Burkhardt claimed that among the prominent Italians of the fourteenth century "not one of them was afraid of singularity, of being and seeming unlike his neighbors."<sup>21</sup> Along with this went a value on both subjectivity or interiority and objectivism or the cold-eyed evaluation of reality – the two are related – and as well cosmopolitanism. The ideal became *l'uomo universale*, who was simultaneously *l'uomo singolare* or *l'uomo unico*: only the unique and singular individual can rise to the state of being universal. Such a person won the ultimate worldly prize, glory, hence a secular immortality. J. G. A. Pocock argues that this view formed a key philosophical justification of republicanism, which spread from Renaissance Italy, in a modified form, to England.<sup>22</sup> Modern republicanism ascribed to the temporal and local activities of the self a universal significance. The measure of a person was not the embodiment of universal and timeless models

*per se*, but how the individual met the times, responded to the needs of the day.

But while it is one thing to honor individuality, it is quite another to make individualism the highest good. The latter view has the effect of, as many critics of liberalism have noted, normatively de-socializing the individual, of making the individual an end-in-itself. Help in this critique comes from an unexpected quarter. John Dewey, a liberal, if a non-proceduralist one, made the crucial distinction between what he regarded as a dangerous and a positive individualism. For Dewey an individualism which makes the individual logically, temporally, or morally prior to society is absurd. "Individuals who are not bound together in associations, whether domestic, economic, religious, political, artistic, or educational," he wrote, "are monstrosities."<sup>23</sup> Whereas an "assured and integrated individuality is the product of definite social relationships and publicly acknowledged functions."<sup>24</sup> Human individuals there are, but they are socially constituted, their own aims and values being almost always social. The idea of a pre- or non-social moral value is impossible. Individuality is not an escape from or independence of society; it is distinctiveness of sensitivity, selection, and contribution to society. Individuality is a distinctive way of being social.

So, individualism, as opposed to individuality, is objectionable at two levels. First, it makes no sense as an ultimate norm, a principle to believe in and guide conduct, either personal or social. No society is free to hold the individual, and not itself, most dear; if it claims to be doing so, it is lying. Society intrinsically requires authority, conformity, and compulsion, each in different measures and in different circumstances. Individuality cannot be a moral norm, just as it makes no sense to assert that *particularity qua particularity* is an ideal or even a value, let alone a moral one. In a moral sense individualism is empty, since it asserts the ultimate value of a *source* of valuing, without saying *what* ought to be valued. Asked for moral advice, the consistent believer in individualism can only say: "Choose. That's my advice." This cannot be our ultimate moral principle, that for the sake of which we live together in society.

Second, individuality cannot be normatively prior to other social values, since it is dependent on them. It is, as we shall see, the strongest suit of conservatives and communitarians to insist that individuality is socially constructed and maintained. If that is so, then even those who value it highly must equally value the maintenance of the social networks that construct it, even if particular individualities threaten those networks. In other words, concern for individuality must recognize the need to temper individuality where it threatens the conditions of its existence. But *individualism*, which makes individuality the highest value, insists on its trump and refuses the

restriction of individuality except for violations of the harm principle (which it understands merely as violations of another individuality).

Liberal individualism has a characteristic account of legitimate human relations, that they must rest on the free choice of individuals, hence on *contract*. Contractualism is individualism's dominant social theory. This does not mean that liberals model *all* personal and intimate relations on contractual relations (although some seem to). It means that one must start somewhere, one must accept a vague conception of human relations at the outset of one's political theory, and for this purpose the contract between independent adults has been privileged, with other modes of relation seen as modifications or special cases. It is so not only for libertarians; egalitarian liberals too regard the contract as a model of freedom. And this is only consistent, for the contract model is simply the social face of liberal individualism, the model of the kind of relation free individuals are supposed to have.

Now it is true that a contract between independent persons is *a* model – not *the* model – of free human interaction. Certainly a society without a large place for such contracts cannot be a free society in any meaningful sense. But most of our most important relationships are most of the time not of that sort, and some are never of that sort, e.g. parent–child, sibling–sibling, friendship, religious fellowship, patriotic attachment to the *civitas*. Others may at one time be contractual, then quickly become some other sort of relationship, for example, a long-term business partnership. Yet others have a contractual aspect which yet cannot account for the ongoing nature of the relationship, for example, marriage. We will return to contract in discussing human dependency. For the moment we can say that what is objectionable here is not contracts but the overweening importance of the contract model in the liberal tradition, its employment as the exemplar of normative human relations.

As individualism receives its social expression in contracts, it receives its political norm in *rights*. “Natural rights” is the name for the principled, pre-conventional, deontological basis of political individualism in the modern West. It is the claim that certain entitlements on the part of individuals, at the very least the entitlement to be free from certain kinds of interference or harm, are normatively pre-civil, that is, morally binding independent of and logically prior to social convention. In contemporary liberal theory, rights have lost their “naturalness” in the seventeenth-century sense, but it remains that case the liberals refuse to accept abridgments of rights, except by other rights. Liberals build rights into the moral self. Thus the transformation of a political issue into a debate over rights makes the issue particularly intimate for us, at least in a civic and political sense. To violate

a right is then to violate a *person*, to deny someone their identity. This makes issues particularly intractable: for who would be willing to give up their self?

What is most troubling about such rights is not their assertion or their connotations but their use as ultimate deontic trumps, making even minor violations of rights illegitimate no matter what the context, as when one hears civil libertarians say that *any* restriction on the *most* despised form of speech threatens *all* freedom of speech. The best way to advance any political program is then to connect it with claimed rights. Sometimes our public debates seem to imply that, were something not to concern putative rights and their alleged violation, it would fall outside legitimate political and governmental concern altogether. As a result, many liberals take an account of *rights* to be an adequate account of *right*, at least within the political sphere. This fundamentally personal and yet juridical response to politics, whereby the goal of any debate is to enact a law that stipulates some entitlement whose violation is a violation of some person's moral core, makes political discussion less, not more, productive.

On the grounds of holism, both the holistic understanding of the dependency of individual on society and the holistic rejection of abstract principles, the liberal interpretation of natural rights as individual entitlements that trump all other considerations must be rejected. This rejection need not extend to the very notion of rights *per se*, that is, as entitlements that are presupposed to be binding, nor even to the adjectival prefix "natural" *if* that means that the tradition in question regards such rights as having a supra-conventional validity. For one can accept these points without claiming individual rights as deontic trumps which may never be abridged and which form the ultimate justification for political life. However one respects individual rights, they are merely values which must be balanced with other values, not adequate norms for social life. What is objectionable is not rights, but the philosophy of rights that makes statements of such rights ultimate and adequate as the basis for politics. Even with the political sphere, the philosophy of rights does not exhaust the philosophy of right.

### **Liberty and Harm**

As mentioned, among liberals, libertarians hew most closely to a "negative" conception of liberty. We can trace that conception back to Benjamin Constant. Constant distinguished the liberty of the ancient republics from the liberty of modern republics: the former was public and political, the latter is private and often commercial.<sup>25</sup> Constant made this distinction to support the crucial point that *anachronism can be a crime*. The Jacobins of the French

Revolution had attempted to impose an ancient concept of liberty on a modern commercial society, where it has no place, resulting in bloody tyranny. The modern version of liberty has its limitations, but it is nevertheless appropriate to its age. We can be free, but only as moderns, not ancients. Later in the nineteenth century, John Stuart Mill gave canonical form to the negative notion of liberty by formulating the “harm principle” as the legitimate limit to liberty in a free society.

In his famous essay, “Two Concepts of Liberty,” Isaiah Berlin took up this distinction to argue that negative liberty, or “freedom from,” simple non-interference, is the true source of modern liberalism, whereas positive freedom, “freedom to” or self-determination, characteristic of democratic majoritarianism, is the dangerous source of totalitarianism.<sup>26</sup> Self-determination can justify collective coercion of the individual in the name of what society recognizes as the “true” or “higher” self, against the individual’s false, lower, socially unrecognized desires. If, as in Rousseau, my truest self is in fact identified with the general will or best interest of my community, then Rousseau’s chilling admonition that recalcitrants be “forced to be free” makes perfect sense. It is in order to avoid this proto-totalitarian conclusion, suggestive of the Auschwitz slogan *Arbeit Macht Frei* (“Work makes [one] free”), that Berlin famously affirmed that only negative liberty is compatible with liberalism.

There are a variety of ways to object to negative liberty. Charles Taylor has rightly pointed out the incapacity of a purely negative conception of liberty to account for what he calls “strong evaluation,” the human agent’s interpretive evaluation of its own desires as to their coherence with the self.<sup>27</sup> Gerald Dworkin shows that Mill’s own notion of liberty is by no means entirely negative. He argues that there can be, on Mill’s account, freedom-enhancing coercion, particularly where the paternalistic authority and the individual coerced affirm the same ends but the later has demonstrably false notions as to how to achieve those ends.<sup>28</sup> But my current point is yet simpler: on logical grounds the concept of negative liberty is not and could not ever be an adequate description of liberty.

To be sure, we want a notion of liberty which at the very least captures that quality we attribute to someone whose shackles have just been removed; and in the same spirit we want to avoid the murkiness of the case in which a person, failing to pursue self-interest while facing no obstacles we can see, nevertheless claims to be an unfree victim due compensation, rather than a weakling or a malingerer. And of course, as Constant and Berlin sought, we want to avoid totalitarian coercion operating under the cover of enhancing citizens’ “higher” or “moral” liberty.” Negative and positive liberty are inspired by the time-honored models of privacy and

political participation. In “private” matters, especially within the household I experience freedom *from* interference or scrutiny, while in the public debate among fellow citizens over what we ought to do, I exercise freedom *to* participate and contribute.

Now, Berlin was aware that this dualism is a highly selective opposition of abstractions; there are many other circumstances and venues for liberty that do not conform to these two models. Their distinction, as abstractions, is justified as long as this is kept in mind. What is not justified is the use of such abstractions *as exclusive norms*, e.g. in the claim that the *only* legitimate kind of liberty is positive, or, in Berlin’s case, negative. This makes little sense. Even in Berlin’s account the horrific consequences of positive liberty depend on a subsequent identification of the true self with the general will, an identification external to the notion of “freedom to,” and one which we who wish not to share Rousseauian company need not make.

Simply, pure absence of obstacle is not what anyone means by freedom. On logical or metaphysical grounds alone *simple privation cannot be our whole account of what any norm is*. A purely negative concept of liberty makes liberty a property of an agent, which property is nothing other than the absence of something external to the agent, like the predicates “alone” or “bald.” Is “free” really comparable to these? Anthropologically, no one would regard an individual as free if that individual, while facing no external obstacles to liberty, yet lacked all power or capacity to do. Certainly external obstacles prevent freedom, but so does absence of power, here meant in the most basic sense. A creature without energy, or will, or life, or existence cannot be free. Some element or dimension of potency, power, positive capacity, and hence self-determination is irremovable from our notion of liberty. The problem will be, not ridding our political structure of one or the other concept of liberty, but how to balance these two conceptions, negative and positive, each of which is necessary to an adequate account.

The negative conception of liberty is usually accompanied by a notion of the subject of liberty, that aspect of the person to which “free” is applied. Voluntarism is the view according to which the subject of freedom is individual will, understood operationally as the occasional choices of the individual. Thus it is *choices* that are to be protected from coercion, hence as such all choices of all individuals are to be protected equally (although in applying liberal principle certainly the polity and the courts have distinguished important from trivial choices).

I will suggest that this voluntarism is a recent misinterpretation of what the liberal republican tradition values about freedom. That is, liberal advocates have misunderstood, or at least misstated, their own advocacy. While a fuller discussion of liberty must wait until chapter 5, what can be said

now is that liberal society need not sanctify occasional choice; what it must value is the uniqueness of individual judgment as it contributes to what it can reasonably regard as a valued existence. That is, liberalism places an ultimate value on liberty understood as the individual's self-determination of a meaningful or valuable life. It can then regard some kinds of choices, which cannot reasonably be understood as such, as not immune to prohibition or discouragement.<sup>29</sup>

Liberalism never suggested, of course, that liberty was to be utterly unlimited. In order to maximize liberty it proposed a minimal limit on freedom, already mentioned, namely the famous "harm" principle. As formulated by Mill, the harm principle is an attempt to say when government or society can intervene in the voluntarist liberty of an individual, namely, only for the purpose of society's own "self-protection."<sup>30</sup> Only threats to harm others legitimate interference. Hence "self-regarding conduct," which affects no one else, can never be interfered with legitimately. Paternalism, or limiting my freedom for my own sake, is never permissible, as least with competent adults. This principle or some reformulation of it is largely shared by egalitarian and libertarian liberals.

What is wrong with the harm principle? Putting aside Gerald Dworkin's aforementioned clarification, nothing; it is, as Charles Peirce said of claims like "nature is orderly," virtually an unavoidable criterion, in the present case valid for anyone who values liberty as a natural limit to public interference in the private sphere. It is enough for current purposes to say that without something like it there can be no liberty. Indeed, it can be argued that this principle is not at all modern, at least in some spheres of life, i.e. in daily domestic and economic life, as opposed to matters of interest to religion and state. It is difficult to find large human societies that have not defined *some* private realm to be at least partly immune to interference, the absence of unwanted effects on others outside the household being one of the marks of privacy (however widely "effects" are then understood). This is to say that most societies have accepted some distinction between the private and public realms.

But as Peirce further pointed out regarding the belief in nature's orderliness, the harm principle is unquestionably valid only as long as it is left entirely *vague*. Any specification of it, particularly of what is to count as "other-regarding" and as harmful, generates trouble. All but the most trivial examples or applications are actually or potentially controversial. What our typical applications of the principle reveal is that, whenever we regard the harm principle as workable, we trade on a background moral account of rights and duties. Without such a background, the principle is inapplicable. We do a disservice to the harm principle if we expect from it an adequate

account of human liberty. It can give no such thing. It is merely a conceptual line dividing the concepts of public and private. Its normative use presupposes a common cultural understanding of what constitutes harm, justice, and legitimate authority.

Mill was not unaware of this problem. He declares that I may not be permitted to “harm” others, where harm means “definite injury to definite individuals,” and indeed, means the violation of a social duty (perfect or imperfect), and not merely “constructive” injury. But what Mill fails to recognize is that these criteria cannot make any sense without an implicit moral and anthropological theory that allows him to distinguish among all possible forms of harm those that are to be sanctioned. After all, I am harmed if someone defeats me on the basketball court, if my intended falls in love with another, if society does not give me the fame and riches I so desperately want, etc. – indeed, the latter two forms may cause me far greater injury than any theft of property. But no one thinks these can or should be sanctioned. Mill was forced to distinguish, among all the harms I suffer from others’ actions, those I have a *right to expect not to suffer*.<sup>31</sup>

Mill makes a perfectly reasonable response to expansive claims of subtle forms of other-regarding harm when he says that if given too much sway they will eliminate liberty altogether. If, to use his example, we accept the argument that my refusal to obey religious dietary laws harms others, and not merely myself, then such an argument can be made for virtually anything I do, and liberty vanishes. We may say that if two males having sex in a private room unobserved by others can be claimed to harm society, then the notion of private freedom effectively vanishes, the Supreme Court in *Bowers v. Hardwick* to the contrary notwithstanding.<sup>32</sup> But we need not change the example much to generate problems that are harder to ignore. So we may say that individual liberty would indeed disappear if the community sought to prevent me from masturbating in my home with the shades drawn. But as soon as there are other people in the home, like my children, masturbating at the dinner table takes on a different moral aura, even for liberals.<sup>33</sup> The existence of dependants and the sheer presence of others qualify my liberty.

My point is that there is no way to forge a rule of public liberty that is not *cultural*, that does not presuppose both a common morality, itself culturally inherited, and for every test case, a common set of cultural interpretations of the situation, social roles, and practices involved. Mill’s harm principle, applied to a traditional society, will not generate chaos and *anomie*; it will generate nothing. It will simply be interpreted in a way that conforms to that culture. Mill would deny that many traditional regulations are plausible interpretations of harm, but he must in the end rest his denial

on modern secular, scientific, cultural principles themselves *extrinsic* to the harm principle. As Mill says elsewhere, there is no principle of morality (or politics) which will lead to salutary results if combined with idiocy. Well, absence of cultural literacy, of awareness of local practices and norms, is idiocy.

This brings into play an historical problem. Modern societies are characterized by increasing social, economic, and cultural interdependence. There are fewer and fewer areas of life for which no plausible argument can be made that my liberty threatens others, for the simple reason that increasing interdependence is a mark of modernity. In a world in which bad Malaysian real estate loans and the savings rates of Japanese workers affect a Michigan laborer, where second-hand smoke is claimed to be a harm to others, where my personal habits impact insurance payments by my employer and other consumers of my brand of insurance, in which any public behavior is observable by crowded fellow urbanites and, if transmitted into private homes via television, the entire polity, the sphere of uncontroversially self-regarding conduct progressively shrinks.

The best case for the harm principle can be stated simply. Modern government is at least potentially the most coercive force on Earth. The worst cases of government coercion are indeed among the most abhorrent phenomena imaginable, from the various totalitarian slaughters (e.g. Central Europe, the Soviet Union, Uganda, Cambodia, China, the Balkans, etc.) to the treatment of dissidents by Fascist, Communist and authoritarian regimes. Writing in the vein of what might be called a Hobbesian liberalism, Judith Shklar argued, and Richard Rorty echoed, that cruelty is the *summum malum* which liberalism serves to avoid.<sup>34</sup> Cruelty, one might say, is the worst case of, and is made possible by, coercion.

But while cruelty may be *summum malum*, is coercion? This would be difficult to argue. Genocide, torture, political imprisonment and unjust execution, may well be the worst things in the world. But to lasso all forms of public control with these evils is an impressive rope trick. Fines for publishing pornography are not the Gulag. Here the proceduralist civil libertarian resorts to the well-worn "slippery slope," a mantra of liberal public debate, insisting that *any* limitation whatsoever of individual liberty threatens *all* individual liberty. "The purpose of the First Amendment," we hear repeatedly, "is to protect hated speech. Speech that is not hated needs no protection." That is, the principal of freedom of speech is interpreted to mean that the worst possible offense must be given the greatest possible protection. This is an abstraction of the highest order: no context, no consideration of degree, no weighing of positive and negative considerations, only a rule so absolute that it renders inconsiderable all other rules. The merest limit on

the worst kind of speech allegedly means freedom of speech *is not*. It is this kind of commitment that gives philosophical foundationalism in general, and doctrinaire liberalism in particular, a bad name. It is precisely the same spirit that animates the claim that no intrusion into property rights can ever be tolerated, that no offense to the Lord can ever be tolerated, etc.

“But what about the slippery slope,” we hear again. Well, life is a slippery slope; we have no choice but to try to stand where we think best, despite the poor footing. Even though we all know where the slope ultimately leads.

### **Spontaneous Order**

As we saw, the notion that large parts of social order, even intricate and beneficent or virtuous order, can result from an aggregation of uncoordinated actions comes from the eighteenth century.<sup>35</sup> The stronger claim, which Mandeville and the Scots – most importantly Hume and Smith – also made, was that such order is the *norm* in human society, and consequently the attempt to design usually produces undesirable or evil effects. In the twentieth century libertarians have made this notion a focal study; they can be credited with isolating and naming, if not inventing, the concept. While usually attributed to Friedrich von Hayek and his 1960 book *The Constitution of Liberty*, the term “spontaneous order” was the simultaneous product of Hayek and Michael Polanyi in the 1940s.<sup>36</sup> Both of their accounts, Polanyi’s being the lesser known, are illuminating.

For Polanyi spontaneous order is emergent, unplanned order, opposed to “corporate order,” the order of central planning. While his concern was with academic and economic liberty, Polanyi drew the concept from physical phenomena, e.g. the equilibrium achieved by the water in a tipping jug. Spontaneous order is the order attained by elements of a system where outside forces have only a negligible effect on the events in question, leaving the determination of the achieved state to the mutual constraints of the elements, given only indiscriminately acting background conditions (e.g. gravity). His point is that a singular agency *could not* determine such a result, or only with far greater use of energy (i.e. if a person were charged to arrange the water molecules in a jug to be level). There is nothing inherently superior about spontaneous order; planned and unplanned order have their “respective proper occasions.” Polanyi takes to task even “free-traders” for considering central planning immoral but plausible, including Hayek. Economic planning for a society is simply “impossible in the same sense in which it is impossible for a cat to swim the Atlantic.”<sup>37</sup> His argument hangs on the claim that the functioning socialist governments of the world in his

day were not in fact centrally-planned; their “plans” were mere aggregates of the spontaneous decisions of agencies within the system in response to their particular environments. The only true example of central planning, he argues, was in the Soviet Union in 1919–21, and it starved five million people. Later, in what the Soviets called their central “plans,” the reasons for each point of the plan were in fact local, spontaneous reasons, which did not appear in the state “plan.” This was, Polanyi analogizes, like someone observing a hundred chess games who picks one of the players in each game as a member of his or her “team,” asks each what the next planned move is, and announces, “Our team plans to move 45 pawns, 20 bishops, etc.”

Hayek points out several distinguishing characteristics of spontaneous orders. He notes, like Polanyi, that while spontaneous orders are not inherently complex, “unlike deliberate human arrangements, they may achieve any degree of complexity,” thus a level of complexity that no human mind could manage. Further, they are purposeless, that is, the system does not exert a pressure on elements to contribute to an end. His analysis is sympathetic to the traditionalist conservative rejection of principle; Hayek notes his complicity with Oakeshott.<sup>38</sup> His rejection of planning and principle, and his insistence on “particular” or “circumstantial” knowledge is moving in the same direction as Oakeshott’s conception of practical knowledge (as we will see later). In his attack on theoretical reason Hayek even quotes Whitehead’s remark that “thinking about what we are doing” is usually a hindrance to civilization.<sup>39</sup> None of this means, for Hayek, that the elements of a spontaneous order are anarchic, that they are not rule-governed. Rather they must be governed by certain kinds of rules, purposeless rules that apply indiscriminately to all elements.

This said, it is very difficult to nail down the precise meaning of spontaneous order in its socio-political application. For present purposes, all we need do is clarify the concept with an eye toward the phenomena we are most concerned with. Leaving aside socially uncontrollable, i.e. “natural” constraints, we can distinguish five categories of social constraints on the individual. They are constraints on my action imposed by: (1) enforceable commands, e.g. by government or someone with physical power over me; (2) collective agreement in which I participate, although the outcome of which I may disagree with; (3) the threat of punitive costs intentionally imposed by social equals; (4) the constitution of my self by socio-cultural inheritance; and, (5) the free, self-interested actions of “equals,” that is, of other actors without special, socially sanctioned power over me. Those who endorse spontaneous order most completely in the twentieth century, e.g. libertarians, regard the first of these as the great and obvious threat to

freedom, and usually amalgamate the second, political agreement, to it, since when I disagree with a democratic majority, governmental force is imposed on me.<sup>40</sup> The most free, the most minimal form of constraint (either minimal in sheer quantitative terms, or in permitting the most important forms of freedom) for libertarians would then be a society in which only the fifth constraint, the unintended consequences of the action of free equals, was operative. What requires clarification is the place of constraints three and four.

Let us start with the “ideal” condition, number five. We must admit that the free acts of others constrain me in all sorts of situations: e.g. if someone buys the house I want, I am not free to obtain it. Libertarians accept that this is the inevitable condition of free equals living together and hence no reduction of liberty. But note two important qualifications. Obviously, the others must be “equals” in at least the minimal sense that the “spontaneous” decision of the King to behead me can’t count as furthering spontaneous order. Although an individual, the King’s authority must be excluded. This is intuitive enough. It raises thorny problems, though, about just which self-interested actions by social actors fall outside the realm of spontaneous order by seeking some “supra-social” form of power over the outcome of interaction. That is, free people acting under only constraint five might freely try to employ constraints one or two as a move *within* their constraint-five game. So, if a corporation files a lawsuit to inhibit a competitor, we have to decide if that lawsuit represents a “non-spontaneous” attempt to enlist the power of government or law to undermine the social game, or rather a clever “spontaneous” strategy within that game. There has thus to be a presumption of certain rules of the social game, such that when actors seek to go around those rules, even out of spontaneous self-interest, that is *not* a case of free or spontaneous order.

Second, the other actors in a maximally free, constraint-five game must be purely self-interested, so that blocking me from my goals is either an unintended consequence or a secondary effect of pursuing their goals. They cannot be motivated by what Rawls, in describing his “original position,” called “envy,” the desire of an agent to harm me regardless of whether the agent is benefited or not.<sup>41</sup> A society of mutual adjustment would not be very free if large numbers of its members were motivated primarily to exclude me regardless of their self-interest. That would be a case of the free actors of constraint five-society freely employing constraint three. This is not unusual in reality; citizens boycotting a place of business or shunning a caustic neighbor are examples. Mill himself recognized that a society in which government and law are tolerant but fellow citizens are not is *not* a

free society. The difference between such punishment and the first form, that is, direct coercion by threat of violence, is really a matter of degree. What is called “coercion” by libertarians is, after all, only the threat of punishment of a particularly severe form (e.g. jail) by an inescapable agent (e.g. the state). Milder punishments by social equals can be just as effective. Consequently, for an order to be spontaneous in the “pure” sense of only employing constraint five, I must be blocked from my aims only *de facto*, by the choices of others which are not primarily aimed at me. But coercively preventing such group punishment is *itself* arguably a threat to freedom! For in an order operating only with constraint five, social members must presumably be “free” to punish me, otherwise *they* have inadequate freedom. In other words, a “maximally” free, constraint-five system must both *exclude and include* constraint three. And in fact, any society in which even some members share conceptions of the good, hence operate collectively to punish recalcitrants, must muck up the libertarian system.

The flip side of this problem is given by constraint four, the preemptive constitution of the self by tradition, which builds constraints *into the actor*. Deviance is not merely deterred by the prospect of punishment; the ubiquity of social norms and the dearth of opportunity or variety insures that there will be very few deviants. This holds whether the rules that are inculcated attach to persons by virtue of birth (“status”) or by virtue of a chosen occupation (“contract”).<sup>42</sup> Highly traditional societies are characterized by remarkable homogeneity, yet their order is to a great degree “spontaneous” in the sense of avoiding constraints one and two, but clearly not in the sense intended by Polanyi and Hayek. This is true, however, of all societies in so far as they have traditions, that is, inherited arrangements, for if there are such arrangements, selves will be constructed to conform to them.

The point is, while the ideal sought by the advocates of spontaneous order is tolerably clear in theory, in practice it would have to exclude forms of social constraint that have little to do with government or law. What this means to the conservative is that spontaneous order, if it is to be embraced, must be understood as a matter of degree (just as, we will see, freedom itself must be), operating within forms of non-governmental constraint. The libertarian, the believer in a “market society,” the absolute free marketeer, is engaged in a leap of abstraction that ignores the complexity of the constraints on human action. If spontaneous order meant only the absence of a single ruling authority or center that plans a system’s outcomes, then modern civil society is unambiguously and in principle spontaneously ordered. But if it means something closer to our idealized notion of a free market, then while it is true to say that modern civil society *has* some such

markets, it is entirely wrong to say that society itself is or could be a market or “spontaneous” order. As we will see later, the relation of civil society to spontaneous order is a complex one.

### Notes

- 1 The terminology is inspired by Kant, but was employed first by W. D. Ross. See Ross’s 1930 book, *The Right and the Good* (Oxford: Clarendon Press, 1967).
- 2 Michael Sandel uses “voluntarist” in this sense, to critical purpose, in his *Democracy’s Discontent: America in Search of a Public Philosophy* (Cambridge, MA: Harvard University Press, 1996).
- 3 In theory, the exception to a proceduralist endorsement of a negative view of liberty is whatever is conceptually required for egalitarian liberals to justify government action to restrict the economic liberties of some in order to provide welfare for others. Egalitarians can try to surmount this problem by other means and so remain faithful to negative liberty. We will explore Berlin’s distinction of negative and positive liberty presently.
- 4 See José Guilherme Merquior’s *Liberalism Old and New* (Boston: Twayne, 1991).
- 5 Daniel Defoe, *Giveing Almss No Charity and Employing the Poor a Grievance to the Nation* (reprint; New York: Johnson Reprint, 1970); Bernard Mandeville, *The Fable of the Bees, or Private Vices, Publick Benefits* (Indianapolis: Liberty Fund, 1988); Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, two volumes, Glasgow edition (Indianapolis: Liberty Fund, 1981).
- 6 Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (Boston: Beacon, 1957), p. 113.
- 7 David Ricardo, *The Principles of Political Economy and Taxation* (New York: Dutton, 1973). Originally published in 1817.
- 8 Immanuel Kant, “To Perpetual Peace: A Philosophical Sketch,” (1795) in *Perpetual Peace and Other Essays*, trans. Ted Humphrey (Indianapolis: Hackett, 1983).
- 9 See Judith Shklar, *Ordinary Vices* (Cambridge, MA: Harvard University Press, 1984).
- 10 Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society*, trans. Thomas Burger, with Frederick Lawrence (Cambridge, MA: MIT, 1989).
- 11 Karl Polanyi, *The Great Transformation*.
- 12 This is a bit unfair, for today there are in fact a family of related views, or libertarian fellow-travelers, who do not fit all of this characterization, e.g. the individualist consent theory of John Simmons, the positive or “project-pursuing” view of Loren Lomasky, the “Aristotelian” libertarianism of Douglas Den Uyl and Douglas Rasmussen, not to mention the objectivism of Ayn Rand. See A. John Simmons, *Moral Principles and Political Obligations* (Princeton:

- Princeton University Press, 1979); Loren Lomasky, *Persons, Rights, and the Moral Community* (Oxford: Oxford University Press, 1987); Douglas Rasmussen and Douglas Den Uyl, *Liberty and Nature: An Aristotelian Defense of Liberal Order* (LaSalle: Open Court, 1991); Ayn Rand, *The Virtue of Selfishness: A New Concept of Egoism* (New York: Penguin, 1961). There are a variety of ways of making the libertarian argument; see for example, Tibor Machan, *Individuals and their Rights* (LaSalle: Open Court, 1989) and Eric Mack, "Agent-Relativity of Value, Deontic Restraints, and Self-Ownership," in R. G. Frey and Christopher Morris, eds., *Value Welfare, and Morality* (Cambridge: Cambridge University Press, 1993).
- 13 Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974). In his *The Examined Life* (New York: Touchstone, 1989), pp. 286–7, Nozick accepts that government performs a legitimate "expressive function," that politics plays an important "symbolic" function in encouraging, expressing, and discouraging ways of life. He leaves it unexplained how much of his earlier view would be invalidated by this new recognition. But we may say that it would have to be an awful lot.
  - 14 The exception is the case of "technical monopolies," monopolies that inevitably arise in a market due to its special character, like utilities. Milton Friedman argued that such are to be operated by democratic government rather than private capital.
  - 15 He calls it the "Lockean proviso." See Nozick, *Anarchy, State, and Utopia*, pp. 174–82.
  - 16 See Hannah Arendt, *The Human Condition* (Chicago: University of Chicago Press, 1958), pp. 58–73, and Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality*, pp. 122 and 303.
  - 17 Walzer, *Spheres of Justice: A Defense of Pluralism and Equality*, p. 109.
  - 18 There are exceptions to the libertarian rejection of redistribution; Milton Friedman himself accepted the "negative income tax" scheme in Chapter Twelve of *Capitalism and Freedom* (Chicago: University of Chicago, 1962).
  - 19 Even if some complain that ours is a sham individuality, or one more than balanced by increasing conformity, bureaucratization, etc.
  - 20 Jacob Burkhardt, *The Civilization of the Renaissance in Italy*, trans. S. G. C. Middlemore (New York: Harper, 1958), esp. volume I, part II. Reference is on p. 143.
  - 21 *Ibid.*, p. 144.
  - 22 See J. G. A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton: Princeton University Press, 1975).
  - 23 John Dewey, *Individualism Old and New* (London: Allen and Unwin, 1931), p. 82
  - 24 *Ibid.*, p. 53
  - 25 Benjamin Constant, "The Liberties of the Ancients Compared with that of the Moderns," in *Political Writings* (Cambridge: Cambridge University Press, 1988).

- 26 Isaiah Berlin, "Two Concepts of Liberty," in *Four Essays on Liberty* (Oxford: Oxford University, 1969).
- 27 Charles Taylor, "What's Wrong with Negative Liberty," *Philosophy and the Human Sciences* (Cambridge: Cambridge University, 1985), pp. 211–29.
- 28 Gerald Dworkin, "Paternalism," in *Morality and Law*, ed. Richard Wasserstrom (Belmont, CA: Wadsworth, 1971).
- 29 Of course, what an individual can "reasonably" regard as a meaningful existence, if it is to be socially judged, makes society the arbiter of meaningfulness, hence potentially coercive. I will discuss this further in chapter 5.
- 30 John Stuart Mill, *On Liberty* (New York: Penguin, 1974), section one.
- 31 The only version of the harm principle that might seem to escape this needed background is the admonition against paternalism, the reason being that it concerns the motivation of the interference. In practice, however, almost any interference can be couched in terms that avoid explicit paternalism.
- 32 In which the Court upheld the right of the state of Georgia to prohibit homosexual acts in private.
- 33 Indeed, his concern for children led Mill in his final chapter to permit what is, even by today's standards, very intrusive state action: "The laws which . . . forbid marriage unless the parties can show that they have the means of supporting a family do not exceed the legitimate powers of the State . . ."
- 34 See Shklar, *Ordinary Vices*, and Richard Rorty, *Contingency, Irony, and Solidarity* (Cambridge: Cambridge University Press, 1989).
- 35 See Ronald Hamowy's, *The Scottish Enlightenment and the Theory of Spontaneous Order* (Carbondale: Southern Illinois University, 1987). See also F. A. Hayek, "The Results of Human Action but not of Human Design," in his *Studies in Philosophy, Politics, and Economics* (Chicago: University of Chicago Press, 1967).
- 36 Polanyi had used Köhler's term "dynamic order" for the phenomenon of unplanned order in a 1941 essay, applying it to intellectual and scientific advances. Hayek then published a now famous essay in 1945 which insisted on the essential place of knowledge "of particular circumstances of time and place" in economic and social life, a kind of knowledge unavailable to scientific planners (F. A. Hayek, "The Use of Knowledge in Society," in *The Libertarian Reader: Classic and Contemporary Writings from Lao-Tzu to Milton Friedman*, ed. by David Boaz [New York: Free Press, 1997]). In 1946 Polanyi dubbed this "polycentric order," but in a lecture two years later he employed "spontaneous order" for the first time (see Michael Polanyi, *The Logic of Liberty: Reflections and Rejoinders* [Chicago: University of Chicago Press, 1951], p. 154). "Spontaneous order" was then taken up by Hayek in his 1960 book, which refers to Polanyi's discussion (F. A. Hayek, *The Constitution of Liberty* [Chicago: University of Chicago, 1960], p. 160). Hayek's most complete elaboration of the notion came still later in his distinction of "made" and "grown" orders (F. A. Hayek, *Rules and Order*, volume one of *Law, Legislation, and Liberty* [Chicago: University of Chicago, 1973], p. 35).
- 37 Michael Polanyi, *The Logic of Liberty*, p. 126.

- 38 F. A. Hayek, *The Mirage of Social Justice*, volume two of *Law, Legislation, and Liberty* (Chicago: University of Chicago, 1976), p. 15.
- 39 F. A. Hayek, "The Use of Knowledge in Society," p. 223.
- 40 We should note that libertarians are free to admit that where there must be coercion, e.g. government, a democratic or consensual government is more free than a non-democratic one. While government is coercive, democratic government contains at least an element of freedom. So there ought to be minimal government, but what government there is should be democratic.
- 41 John Rawls, *A Theory of Justice*, revised edition (Cambridge, MA: Harvard University Press, 1999), p. 124.
- 42 Henry Summer Maine famously argued that the move from premodern to modern social arrangements is a transition from relations based on status to those based in contract. See his *Ancient Law: Its Connection with the Early History of Society and its Relation to Modern Ideas* (Gloucester: Peter Smith, 1970), p. 165