Radical Privatization and other Libertarian Conundrums

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A conundrum is a seeming logical contradiction, one which can actually be solved, or resolved. Perhaps the most famous example in theology is the following challenge: can God create a stone so big that even He cannot lift it. Either way, the case for religion loses out, at least at first glance. If God can create such a big stone, all well and good for Him; however, then, as He cannot also lift it, there can be no such thing as a Higher Power. On the other hand, if God is unable to create so heavy an object, then the case for belief in Him is dashed from the very start. For He cannot be truly omnipotent, since here is something He cannot do.

The solution to the conundrum is to realize that the act "create so heavy a stone it cannot be lifted" does not refer to anything in the world, or to anything, for that matter, which could exist in reality. The concept itself is an inner self contradiction. It is as if we are castigating the Supreme Being for being unable to create a square circle. The point is, the phrase "square circle" consists of two terms, each of them meaningful in isolation; but when they are juxtaposed in this manner, they cannot refer to anything coherent. By making this claim, the skeptic is not really pointing to anything which God cannot create. There is no such thing as a square circle. This being the case, it is no failure of God's that he cannot create one. The skeptic is, in effect, only talking gibberish[1].

I. Libertarianism

As I am about to introduce several conundrums aimed at undermining libertarianism, it might not be inappropriate to first briefly review that political economic philosophy.

The basic axiom of libertarianism is the non aggression principle: a man may do whatever he wants with his own body and legitimately owned property, as long as he does not thereby

threaten, or actually invade the person or property of anyone else. Thus, suicide and narcotic drug use are legal in this system, but murder, rape and theft are not. Legitimately owned property begins with the man's body, and radiates out, in effect, to all unowned parts of nature, through homesteading. A man mixes his labor with a forest, cuts down some trees, cultivates, sows and reaps a crop, and thereby becomes the owner of that land. Other sources of legitimate holdings are voluntary trade with other consenting adults, gifts, gambling. As long as wealth is achieved through any of these non invasive processes, it is legitimate.

Libertarianism is limited to political philosophy; it does not include ethics. It takes no view whatsoever as to the morality of pornography, prostitution, homosexuality, gambling, drugs, etc. It states only that, given that these acts take place between consenting adults, they should not be proscribed by law. When prohibited they are victimless crimes, and thus should be legalized.

The libertarian is not a pacifist. He believes that uninvited border crossings against other people and their property are illegitimate, but allows for the use of physical force, only, however, in the case of self defense. But these invasions must be physical, not merely mental or spiritual. Rape, murder, arson, pickpocketing, kidnapping are all, properly, crimes, because they interfere with other people's holdings. Fraud may only be a "white collar" crime, but it is a crime nonetheless. Even though it may not be brutal like assault and battery, but it alienates property from victims against their will. Rape, too, need not always be physically vicious. To a third party, it might be indistinguishable from voluntary sex. But as long as the woman is engaging in the act against her will, it is a crime[2].

In sharp contrast, such things as teasing, imposing psychological harm, libel, slander[3],

blackmail[4], insider trading[5], teasing, (racial, sexual, and other) discrimination[6], do not constitute invasive violence. Hence, even though they may be immoral, they would not be considered illegal.

Even more narrowly, libertarianism may properly be construed solely as a theory of punishment. If someone uses coercion, then it is proper to utilize physical force against him, with the goal of rectifying the injustice, compensating the victim, as much as possible[7].

A side order claim of libertarianism, something not intrinsic to it, is that it will in some sense lead to the "greatest happiness for the greatest number of people." In other words, this philosophy claims a compatibility with utilitarianism.

But not a direct one. Were libertarianism a mere branch of utilitarianism, it would ask of every contemplated action in order to determine its legitimacy, not whether it constitutes an invasion of person or property, but rather whether it will maximize utility[8].

That there is nevertheless an important connection is a pretty reasonable claim. For with invasions or uninvited border crossings ruled out, the only thing left is voluntary interaction. These can be of two sorts: trade or gifts; but both enhance utility.

In the first case, buying, selling, renting, bartering, hiring, both parties must gain utility at least in the ex ante sense, otherwise, why would they agree to take part in the commercial interaction? If I give you $5 for your pen, it must be that I value the writing implement more than the money, and that your preferences are the reverse. We each gain the difference to us between the lower value we give up and the higher one we attain. Now it may be that you really like your pen more than $5, but want to get on my good side and value the money I give you plus my good will more highly than the pen. All we as third parties can know is that there is

something about the trade that promotes your utility, otherwise you would not agree to do it. And likewise for me.

Charity, too, is part and parcel of the free society. It, too, is mutually beneficial. The donor benefits from the improved well being of the recipient, as well as from the satisfaction of helping the less fortunate. And the donee, by accepting this largess, demonstrates that he, too, gains from this interaction.

In sharp contrast, the relation between the government and the people is highly problematic. The state forces the people to pay taxes against their will[9], and refuses to allow us to make other arrangements for our own protection[10]. At best the government is a necessary evil. At worst it is a fraudulent gang of murderers and thieves[11].

II. The Martians

This challenge is an attempt not to frontally attack libertarianism, but only to show it as totally and irredeemably incompatible with utilitarianism.

Here, the "Martians," an all powerful but evil group of beings, beam down a message to an entirely libertarian earth: "Kill innocent person Joe, or we will blow up your entire planet."

But killing an innocent person is the paradigm case of illegitimate behavior under libertarianism. There is (usually) nothing more important to a person than his own life[12]. If murder isn't incompatible with this philosophy, then nothing is. On the other hand, blowing up the entire earth does not appear to be too compatible with utilitarianism. "Justice thought the heavens fall," may make a good libertarian motto, but it is hard to square this with the maximization of human well being.

There is a way out of this conundrum for the libertarian who wants to maintain ties with

utilitarianism. Strictly speaking, one might argue, libertarianism is not incompatible with murder. This is because libertarianism in a theory of punishment, not proper behaviour. The libertarian qua libertarian, then, does not say, "Don't murder." He only says, "If you murder, you should be punished."

Thus, when the Martians beam down their message, it is entirely possible that a utilitarian-libertarian, call him Pete, will kill Joe, and then, after a ticker parade in his honor organized by utilitarians (since he saved the earth and everyone on it from total destruction), will turn himself in for the punishment due to murderers. In this way we can both maintain libertarianism (the murderer is properly punished) and utilitarianism (the planet is saved).

But we speak too soon. For no sooner do the Martians get wind of our intended doings but they beam down a second message: "If you harm a hair on the head of Pete, much less impose upon him the libertarian punishment for murder (of Joe), We Will Kill You All.[13]"

Those Martians are a nasty lot. Not only are do they utter all sort of threats[14], they are actually boding pretty well to cut asunder libertarianism and utilitarianism.

The problem is, the critic bodes too well to attain this goal. Of course, if we endow the Martians with God (well, Devil) like qualities, and set Him forth with the sole mission of severing the connection between libertarianism and utilitarianism, He can do it. But this is not really Kosher. It is eerily far too reminiscent of asking God to square the circle, or create an all too heavy rock. It shows, only, that if we pack enough premises into a syllogism, we can call into question practically anything, up to and including the libertarian claim that its system will benefit mankind.

God, by definition, can do pretty much anything He wants (apart from creating

contradictions in terms, for these are not real things that can be made, or even fail to be made). For example, He can, presumably, make water run uphill, make wood rust and create water out of other elements than hydrogen and oxygen. If He can do all that, it should come as no surprise that he can also eliminate the utilitarian befefits of libertarianism[15].

It is thus difficult not to notice how far removed from reality does the "Martian" critic have to go in order to sunder the philosophies of utilitarianism and libertarianism. A more "realistic" example along these lines is the case where a terrorist has planted a bomb which can blow up the whole city on a moment's notice. Fortunately, the authorities have under their control the young son of the terrorist, of whom he is very fond. So much so that if they threaten to torture or kill the boy, his father will cease and desist from his evil designs. Unfortunately, at least for the lives of the citizens, the authorities happen to be libertarians. If we interpret libertarianism as being incompatible with torturing the boy, its claim to maximize happiness for the greatest number of people is cast into doubt. For then the terrorist will carry out his nefarious deed. On the other hand, given that libertarianism, strictly and narrowly construed, does <u>not</u> forbid killing the innocent, but only requires that such a person be duly punished, its claim to promote utility can still be maintained.

The difference between the terrorist and the Martians is that the latter are assumed to be all knowing, while the former, a "real" person, is not. Thus, we can out maneuver the terrorist, not the aliens. That is, we can play a tape where a child actor screams as if tortured. A person can threaten to kill the boy, and even actually do it, and we need not fear a second "message" from the terrorist that if we punish this killer, he'll blow up the city. We can always promise him we won't, and then do so, later, after he is captured, squaring ourselves with the requirements of

libertarianism[16],[17]. This option is simply not available to us with the Martians.

III. Unanimity[18]

For libertarians, the illegitimacy of the state rests squarely on the fact that "the consent of the governed" is no more than a myth (Spooner, 1867). Well, what if, just suppose, that the scenario depicted in civics classes were correct. That is, that there were a time, during the formation of the country, when the entire populace, all of them, every last person, did sign the constitutional contract. It was a unanimous agreement, binding all to all. And not only that. Let us also presume that this was true of every nation on earth, the totalitarian ones, the democracies, all of them. Further, while we are supposing, let us concede the fact that all of these countries, unified into a completely voluntary World Government, had homesteaded every square inch of the earth's surface. (Look, if we can posit Martians, we can certainly give credence to this scenario, if only for argument's sake.)

Now this world need not be a libertarian one. Indeed, we posit that it is not. All we need do in order to attack libertarian premises is to assume that the World Government was formed, initially, under premises required by the libertarian philosophy. Namely, that it was the voluntary formation of a state. Once in effect, it could take any measures supported by a majority. After all, if libertarianism can support (the legalization of!) voluntary sado-masochism, or "murder parks" (where people may shoot one another, provided only that all of them had agreed to take part in this game, and there are thick walls so that no outsiders are shot), then certainly they may unanimously and voluntarily set up a government which is less than libertarian. As long as it was set up in a manner totally consistent with libertarianism, no adherent of this philosophy can logically object to the results.

Under these circumstances does it not follow that freedom will be reduced by libertarianism? For consider the position of a new world citizen, or, rather, a person of, say, age 21, who is now being considered for citizenship. This person is offered a stark choice indeed: Join us in our mixed economy world (similar, by the way, to what obtains today in reality), or die. Since we, all together, legitimately own the entire world (this ownership was established through the libertarian process of homesteading), he has no right to exist on it without our permission. To do so is to engage in trespass, which is legitimately a crime even under libertarianism.

If newcomers must either embrace the mixed economy (or Marxism, or feminism, or whatever the majority wants), or die, this, to say the very least, doesn't bode too well for libertarianism claim to be compatible with freedom. An unfree society brought about solely in conformity with libertarianism[19] is surely a major flaw in this philosophy.

There are several ways to reply to this challenge.

1. It is rather unrealistic. When as few as five friends get together for dinner and a movie (leaving 5x5=25 different combinations for those two events, if everyone has his choice and each has different preference for both), it is rare that all will be fully satisfied. To think that all of the people in the world at any one time would unanimously agree to be bound by the majority vote of all of them on anything beggars the imagination.

This, it must be confessed, is not much of a response, since this particular critic of libertarianism is certainly prepared to admit as much. His is more of a theoretical than a practical critique of this philosophy.

2. Inalienability.

There are some libertarians who maintain that as the will is inalienable, no one should be forced to uphold any such contract, if he later changes his mind. In effect, to do so is to demand specific performance, and this is akin to slavery (Barnett, 1998).

Says Rothbard (1982, pp. 134-135) in this regard:

"... the only valid transfer of title of ownership in the free society is the case where the property is, in fact and in the nature of man, alienable by man. All physical property owned by a person is alienable, i.e., in natural fact it can be given or transferred to the ownership and control of another party. I can give away or sell to another person my shoes, my house, my car, my money, etc. But there are certain vital things which, in natural fact and in the nature of man, are inalienable, i.e., they cannot in fact be alienated, even voluntarily Specifically, a person cannot alienate his will more particularly his control over his own mind and body. Each man has control over his own mind and body. Each man has control over his own will and person, and he is, if you wish, "stuck" with that inherent and inalienable ownership. Since his will and control over his own person are inalienable, then so also are his rights to control that person and will. That is the ground for the famous position of the Declaration of Independence that man's natural rights are inalienable; that is, they cannot be surrendered, even if the person wishes to do so.

"... Hence, the unenforceability, in libertarian theory, of voluntary slave contracts."

I find this argument not fully persuasive[20]. If contracts can be set aside, the whole foundation of the private property free enterprise libertarian society will tend to crumble. When a man signs a contract he is bound by its provisions. In the adult world, at least, there are no "backsies." All contracts give up something in return for something else. Once they are signed, the thing given up is now the property of the grantee. To nullify the agreement, then, is to steal the latter's property. To do this really would be to contradict libertarianism.

Yes, one may agree with Rothbard that it is impossible to alienate the will. One (logically) cannot force someone else to do something he wishes not to do, and still have it be a voluntary act. But this is a (correct) positive statement, not a normative one. As such, it cannot really contradict libertarian premises, which are normative. All that is demanded by strict contractarians such as myself is not the alienation of the will, but rather that it be legal to

physically force the signer of the contract to live up to its provisions. Thus, I see little hope in saving the day for libertarianism by allowing citizens to renounce their contractual obligations. To do so would be to contradict the basic premise of this philosophy.

Rothbard (ibid.) continues his analysis:

"Suppose that Smith makes the following agreement with the Jones Corporation: that Smith, for the rest of his life, will obey all orders, under whatever conditions, the the Jones Corporation wishes to lay down. Now, in libertarian theory there is nothing to prevent Smith from making this agreement, and from serving the Jones Corporation and from obeying the latter's orders indefinitely. the problem comes when, at some later date, Smith changes his mind and decides to leave. Shall he be held to his former voluntary promise? Our contention -- and one which is fortunately upheld under present law -- is that Smith's promise was not a valid (i.e., not an enforceable) contract. there is no transfer of title in Smith's agreement because Smith's control over his own body and will are inalienable. Since that control cannot be alienated, the agreement was not a valid contract, and therefore should not be enforceable. Smith's agreement was a mere promise, which it might be held he is morally obligated to keep, but which should not be legally obligatory."

The difficulty here is that while it may be readily conceded that a man necessarily has control over his will, this certainly does not apply to his body, as slavery, inprisonment, kidnapping, rape, murder, etc., eloquently attest. The point is, libertarian advocates of contract obligations such as myself do not maintain that the will must be turned over to the (voluntary) slaveowner, only that this should apply to the body. Hence, the courts should determine that when Smith run's away from the justifiable control of the Jones Corporation, he is in effect stealing a valuable piece of property belonging to the latter. Smith can keep his will, and bad cess to him for being a robber (of Jones). What he cannot keep, under libertarian law in my view, is his body. That being the case, it is the obligation of the court to turn over the run away slave Smith back to the proper physical control of Jones.

3. This scenario is incompatible with the nature of physical reality.

A weakness of the critical scenario is that it requires that all land be owned by the political collective. If there are significant, not to say large tracts of space still available, the choice for the man coming of age is not to join or die. He now has the option of moving to an unowned area.

At the time of this writing (1998), there are vast parts of the earth's surface that have not been homesteaded. The high mountains in many countries, the Sahara, and deserts in Australia and other continents, the tundra in Canada, Russia, the Antarctic. And this is to say nothing of the oceans, seas, lakes and rivers of the world, both on the surface and underwater. As well, our homesteading on the land (apart from mineral exploration and mining) has barely even begun to scratch the surface.

It cannot be denied that these lands are now claimed by various countries. However, mere claim is insufficient under the libertarian legal code. For legitimate ownership -- whether of land or water -- the would be owner must mix his labor with it.

The point is, with modern technology, it would be impossible at this time for the political collective to legitimately own the entire globe, surface and subsurface. Therefore, this scenario would fail to overturn libertarianism even had there once been a unanimous agreement for a world government.

Suppose, however, that another few centuries pass; that the economic system adopted by the world government is not so interventionistic so that no progress can occur; that in the year 2525 there will truly be no space on the earth or in it that has not been already (legitimately) homesteaded. Would this critical scenario then suffice to embarrass libertarianism?

Not a bit of it. For then there will be the moon, Mars, Venus, the asteroids, and other

heavenly bodies. Those who turn 21 years of age and are asked to join the world government would still have an option other than death. They could migrate to these other places. (Presumably, interplanetary travel will then be so cheap as to be able to accommodate youngsters whose only savings is based on the type of part time work that many reaching their years of majority will have undertaken.)

The reason the critique fails is that in any even slightly realistic scenario the very technology which will allow for more and more thorough homesteading (thus precluding new adults from setting up shop for themselves) will also enable them to move to further and further away far off destinations.

There is no reason that this process would not continue indefinitely. So that at no epoch would it be true that unanimous agreement to a constitutional contract, a phenomenon consistent with libertarianism, lead to people being forced to join the resultant collective against their will, something inconsistent with this philosophy.

IV. Flagpole sitter[21]

A man is standing at the edge of his balcony on the 45th floor of a high rise apartment building. He teeters over the side and drops to the 25th floor. There, fortunately, he is able to grab hold of a flagpole, jutting out from the building. He would like nothing so much as to be able to inch his way down onto the 25th story balcony, go inside that apartment, leave it for the hall, and take the elevator back up to his own apartment.

Unhappily, the owner of the 25 floor apartment, and of the flagpole to which he is precariously holding, comes out on the deck with a shotgun and demands that he respect private property rights and let go, thus dropping to his death.

Liberty magazine took a poll of its mostly libertarian readers, asking how many of them would comply with this request and drop to their deaths. Very few agreed that they would. The implication drawn from this survey is that libertarianism is a rather weak philosophy, impossible to put into effect under such circumstances, and certainly incompatible with the promotion of utilitarianism.

There are several possible rejoinders to this attack.

1. Internalization of the externalities

Since there is one owner of the building, and he is a profit maximizer, he might well anticipate such a situation[22]. If he did, he would make it a condition of tenancy such that the flagpole owner would have to save the life of the hanger on.

But this is to evade the point of the criticism. Presumably, it could be refashioned in such a way as to obviate this reply.

2. It is an illicit question to ask a libertarian, qua libertarian, if he would continue to hang on to or let go of the flagpole. Remember, libertarian is a very limited political philosophy. Essentially, it asks only one question and gives only one answer. The question: under what conditions is the use of or threat of physical force justified? The answer: only in response or in reaction to the prior use of such force. The only germane question raised by this scenario is what to do with the homeowner if he shoots the flagpole sitter, or, forces him to drop to his death under the threat of the gun.

3. Looked at in this way, the answer is clear. The owner of the flagpole is totally within his rights to defend his property, both the flagpole and his apartment. It might be nice if he allowed the person in this precarious position to scurry back to safety, but he is by no means

required to do so under the libertarian law code.

What, then, of the greatest good for the greatest number? Isn't the insistence on private property rights at variance with that goal? Yes, to be sure, in this one case, on the assumption that the flagpole sitter is entirely innocent and means the property owner no harm. But how can we be sure of that? Suppose the owner is a frail old man, and the flagpole sitter a young strong one. Suppose the latter will victimize the former if allowed access to the apartment. Then, the implications for utilitarianism are not at all so clearly in against the flagpole owner.

The problem with the scenario as stated is that it takes place all from the point of view of the flagpole sitter. When once we look at matters from the prospective of the property owner the anti libertarian conclusion drawn by the critic no longer seems so obvious.

As a matter of general principle, it is pretty that more lives will be saved, and happiness enhanced, by allowing property rights to be upheld than from the opposite alternative. What we have here is rule utilitarianism, not act utilitarianism: act according to a rule such that if followed by all would maximize utility.

If the general rule were that all strangers could always have access to private property, there is little doubt that there would be far more murders and rapes than under the rule of the sanctity of property rights. Nor is it plausible to entertain the rule that except in cases of emergency, property rights must prevail. Who can tell what is an emergency? One person's emergency is another person's carelessness. Who gets to determine whether it is an emergency, or a ruse to penetrate into another's domicile. Under the property rights rule, it is the owner who makes this determination. In the critic's scenario, this would be decided by the person in difficulties. But if so, then anyone could claim any trouble he wished, and we would be back in

the situation where murderers and rapists could venture at will.[23]

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Endnotes

1. The critique of the argument presented in the text, of course, cannot prove that God exists. Only that this particular refutation has failed.

2. Suppose a starving woman agrees to sexual congress only in order to feed herself and her children. Is this coercive, and thus tantamount to rape? If her customer put her in this precarious position in the first place, then and only then is this so. Nt because of the sexual act, but because of the initial theft. If on the other hand this customer was in no way responsible for her plight,

then the trade of sexual services for money is not equivalent to rape. Indeed, the customer is the benefactor to the woman, as he saves her and her children from starvation. She, of course, benefits him as well; this should be no surprise, as all trade is mutually beneficial.

3. Rothbard (1973), Block (1976(1991).

4. Block (1985, 1986, 1997), Rothbard (1962).

5. Manne (1966a, 1966b), McGee and Block (1989)

6. Block and Williams (1981), Block and Walker (1982), Block (1992), Epstein (1992), Levin (1984, 1987, 1997)

7. Rothbard (1982), Barnett and Hagel (1977), King (1980), Kinsella (1997, 1996 spring and fall, 1992)

8. This is problematic on its face since how can any third party ever accurately observe whether utility rises or falls. For a libertarian perspective on utilitarianism, see Rothbard (1982, 1977).

9. They have not given prior assent to this contractually; the brute fact of the matter is that in reality, either no one, or very few, have ever signed a constitution. Nor do we demonstrate our agreement to be bound by a government by continuing to live under its rule. According to the consent theory of the state, we came first, before the government. We don't have to leave if we don't like it; rather, they do.

10. On this see Rothbard (1973, 1982), Hoppe (1989, 1992, 1993), Benson (1989a, 1989b, 1990)

11. See Rothbard (1973, 1982), Spooner (1867).

12. Exceptions sometimes include children, a loved one, or a principle or a philosophy. That is, sometimes people are willing to sacrifice themselves for values they hold higher than even their own life.

13. I owe this addition to the traditional "Martian" critique of libertarianism to Matthew Block.

14. Prohibited by libertarian law

15. One conclusion which can be drawn from this is that the connection between libertarianism and utilitarianism is not an apodictic or necessary one, rather it is contingent and empirical. That is, the claim that libertarianism leads to the greatest happiness for the greatest number is akin to the claim that water runs downhill and that water consists of oxygen and hydrogen. It is not in the same synthetic apriori category as the statements Square circles are impossible, minimum wage legislation leads to unemployment, and free trade benefits mankind. On this see Hoppe (1988, 1991, 1995).

16. Surely we owe no debt of truthfulness to would be mad bombers, at least as libertarians.

17. Of course, if we lie to the mad bomber, and word of this gets out, our options become more truncated with regard to the next terrorist.

18. I owe this example to Patrick English

19. This is very similar to Nozick's (1974) claim that the state can arise out of a totally justified libertarian process. For critiques, see Barnett, 1977; Childs, 1977; Evers, 1977; Rothbard, 1977; Sanders, 1977.

20. See Block (1998, forthcoming)

21. I owe this example to Bill Bradford. See Liberty,

22. One such incident in the entire world is all it would take, appropriately publicized, as it would be

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